

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

IN THE COMPETITION
APPEAL TRIBUNAL

Case No. 1299/1/3/18

Victoria House,
Bloomsbury Place,
London WC1A 2EB

21 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

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

HEARING – DAY 9

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.

Friday, 21 June 2019

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

(10.28 am)

THE CHAIRMAN: Good morning.

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

THE CHAIRMAN: Mr Turner, I think you are on, aren't you?

MR TURNER: Yes, sir, we call Mr Wells.

MR NICHOLAS MARK WELLS (sworn)

THE CHAIRMAN: Mr Wells, please take a seat and make
yourself as comfortable as circumstances allow.

Examination-in-chief by MR TURNER

MR TURNER: Could Mr Wells please be handed bundle WH, the
Whistl bundle, and for everybody else it's either there,
Mr Wells' statement, or in bundle C2.

If you would turn in it to tab B, do you see at
tab B --

A. Sorry, tab B ... yes.

Q. Do you see the first page, a document marked
"Confidential first witness statement of Nicholas Mark
Wells"?

A. I do.

Q. In the first paragraph it says:

"I am chief executive of Whistl ..."

Yes?

A. Indeed.

1 Q. Is this your witness statement?

2 A. It is.

3 Q. If you turn to the final page, please, do you see a page
4 headed "Statement of truth"?

5 A. I do.

6 Q. What is the date underneath that?

7 A. 23 January 2019.

8 Q. Is that your signature?

9 A. It is.

10 Q. Mr Wells, is there anything that you wish to correct in
11 your evidence for this tribunal?

12 A. Yes, please. There are just a couple of minor changes,
13 if I may. Firstly, point 5, where it says, second line:
14 "I have read a copy of the Ofcom Decision dated
15 26 October ..."

16 That should say "published". The decision actually
17 was 14 August.

18 If we can now go to number 20, second line:
19 "We always knew that we could bring the volume from"
20 if I may add "most of" "our small and medium-sized
21 customers into our end-to-end, because" and then add
22 "generally" "our contracts ..."

23 Then paragraph 39, second sentence, "their
24 proposals", if I can add "in response".

25 Q. I'm sorry, could you say where that is again, please,

1 Mr Wells?

2 A. Paragraph 39, the second line.

3 Q. Yes.

4 A. "Their proposals" and if we could say "in response to
5 Whistl's strongly reasoned", instead of "pushed" "push".

6 Then finally, paragraph, if I may, 46, first line:

7 "LDC were formally selected by PostNL in July 2014",
8 that should read "July 2013".

9 MR TURNER: Thank you, Mr Wells. If you wait there,

10 Royal Mail's counsel may have some questions for you.

11 Cross-examination by MR BEARD

12 MR BEARD: Good morning, Mr Wells.

13 A. Good morning.

14 Q. Sorry, please, I don't know if you have a cup as well.

15 A. I do, thank you.

16 Q. So you were in court yesterday, I believe, is that
17 correct?

18 A. I was, yes.

19 Q. So you will have heard that I asked various questions of
20 Mr Polglass. I'm obviously not going to just repeat
21 questions on topics that I asked Mr Polglass. The
22 points have been put to witnesses, but I do have some
23 questions for you.

24 Now, just as a matter of background, TNT entered the
25 UK market in 2006; that's correct, isn't it?

1 A. That's when we signed our access agreement.

2 Q. And you -- I'm sorry, please go ahead.

3 A. Sorry, yes, we signed our access agreement in 2004.

4 Q. Right.

5 A. So TNT was inaugurated probably in 2001 and then we
6 became Whistl later.

7 Q. Then you rolled out your access service from around
8 2006; is that broadly right?

9 A. We carried out some very early pilots, that's correct,
10 and then that continued into trials.

11 Q. And it developed relatively successfully over the
12 following five years?

13 A. It did, yes.

14 Q. You were quite soon looking at the possibility of
15 developing end-to-end and you ran a pilot end-to-end
16 delivery service in Liverpool in 2008; that's right,
17 isn't it?

18 A. That's correct, yes.

19 Q. And then in and around 2010 you commissioned a report
20 from Boston Consulting Group about end-to-end delivery,
21 is that right?

22 A. That was part of our planning process, that's correct.

23 Q. Just for the tribunal's notes, that's found in the
24 Whistl bundle 1, I'm not going to go to it, at tab B1.
25 It's an exhibit to your witness statement, Mr Wells.

1 That business plan in turn fed into the production
2 of Whistl's own business plan in August 2011; is that
3 broadly right?

4 A. That seems right.

5 Q. I can take you to it, but there is reference to the
6 Boston Consulting Group in some of the slides in that
7 document.

8 If we go to your witness statement at paragraph 27,
9 before you even put out that first Whistl business case,
10 if you look at the final sentence, you went to see
11 Postcomm in April 2011 and told them about your plans,
12 and you understood from them that they would be
13 supportive; that's the position. That's correct, isn't
14 it?

15 A. We certainly went to Postcomm, yes.

16 Q. And you did that before you even put together your first
17 Whistl business plan that we see in August 2011?

18 A. Yes. I wouldn't -- I can't remember exactly, but the
19 Boston Consulting was a validation of previous
20 assessments on end-to-end and how we might enter the
21 market.

22 Q. When you went to see Postcomm, who did you see at
23 Postcomm, do you recall?

24 A. I don't, I'm sorry, no.

25 Q. You don't have any notes of that meeting?

1 A. We may have, but I can't recollect. The chairman of
2 Postcomm I believe at the time was Nigel Stapleton.

3 Q. So it may well have been him?

4 A. It may have been him, it might have been a guy called
5 Tim Brown.

6 Q. Thank you. In any event, you got the comfort from
7 Postcomm with the meeting in April 2011 and you put
8 together your business plan in August 2011, and then in
9 the interim Postcomm had become Ofcom, because of the
10 changes through the Postal Services Act; that's right,
11 isn't it?

12 A. It is.

13 Q. So directly after you had produced the business plan in
14 August 2011, in September 2011 -- and you refer to this
15 in your witness statement at paragraph 28 -- you went
16 back to Ofcom to discuss that business plan; is that
17 right?

18 A. That's right, yes.

19 Q. Yes. If we just pick up the document, I think, that you
20 presented to Ofcom at that meeting, it's in Whistl
21 bundle at B3.

22 A. I have it.

23 Q. Yes. So I just want to check, this is the presentation,
24 isn't it, that you were giving to Ofcom in
25 September 2011 about your business plan that you put

- 1 together in August 2011; that's right, isn't it?
- 2 A. It certainly says that.
- 3 Q. I assume that you are not disagreeing with what it
- 4 actually says?
- 5 A. No, no.
- 6 Q. No. That sets out some of -- a number of your points
- 7 about how you want to run your project. If we go on to
- 8 slide 10, which is external numbering 343.
- 9 A. Yes.
- 10 Q. You are talking about risks, and here you are talking
- 11 about risks related to changes in zonal structure. So
- 12 that's changes by Royal Mail of the zones for delivery
- 13 of mail; is that right?
- 14 A. That's right.
- 15 Q. Yes, so that's the concern that you are highlighting
- 16 there, and then you also talk about, over the page,
- 17 changes in zonal structure and prices, and then the next
- 18 risk, over the page on slide 12, is volume lower than
- 19 expected; is that right?
- 20 A. That's right, yes.
- 21 Q. So those were the key risks you were identifying at that
- 22 time?
- 23 A. That's right. They were among many risks and
- 24 opportunities perhaps that we will have explored.
- 25 Q. In paragraph 28 of your witness statement, you talk

1 about always being "open and transparent with Ofcom
2 about our plans". You went to see them regularly,
3 I take it?

4 A. We would always want to engage with the regulator at the
5 time in a regulated market when we were looking to roll
6 out end-to-end.

7 Q. Of course, but you went to see them regularly?

8 A. We would have seen them on a -- I don't know exactly the
9 timetable, but as needs must.

10 Q. As needs must, but I think it had previously been
11 thought that you might see them quarterly, but actually
12 you saw them more frequently than that, or was quarterly
13 about how often you saw them?

14 A. I can't honestly recollect. Of course we were trying to
15 build a good healthy relationship with the regulator, as
16 you would as the major challenger to Royal Mail at the
17 time.

18 Q. So these meetings that you had with Ofcom, generally who
19 were they with at that time?

20 A. It would be with a mixture of people, and would depend
21 on the subject matter, but would almost certainly, from
22 our side, include on occasions myself, our legal
23 director, other analysts. It would, from their side,
24 include Ed Richards at a policy level, Chris Rowsell,
25 amongst others, from memory.

1 Q. What was Chris Rowsell's role, do you recall?

2 A. I don't.

3 Q. In these meetings, do you recall the Ofcom team --

4 presumably they didn't just come with Ed Richards or

5 Chris Rowsell, they came with others; were notes taken

6 of those meetings, so far as you recall?

7 A. There would have been minutes, I guess.

8 Q. Do you still have those minutes?

9 A. I'm not sure, to be honest.

10 Q. Would they have been agreed with Ofcom? Was it a formal

11 process, the minute taking?

12 A. Probably, probably not, I can't honestly remember. We

13 are talking sort of seven years ago now.

14 Q. You haven't exhibited any of those notes, so when you

15 were preparing your witness statement you didn't look at

16 any of those?

17 A. I don't know whether any of those minutes, to be honest,

18 have been exhibited. I haven't gone through the whole

19 deck.

20 Q. Okay. But anyway, you say in your statement, and you

21 have just quite fairly said, that liaison with Ofcom was

22 important. Indeed in paragraph 27 I think you say:

23 "We would never have gone ahead with end-to-end

24 delivery without the support of the regulator."

25 That was the position?

1 A. It was extremely important for Whistl to get commitment
2 from Ofcom, and we had a responsibility to share,
3 a statutory responsibility to share with Ofcom our
4 end-to-end plans, which of course we did at every stage
5 of our development.

6 Q. I'm only putting back to you what's in your witness
7 statement: you would never have gone ahead with E2E
8 delivery without the support of the regulator, so I take
9 it you had the support of the regulator?

10 A. Well, we had comfort that they were behind the
11 development of our end-to-end plans.

12 Q. So they supported that endeavour?

13 A. We got reasonable assurances that they were supportive
14 of our end-to-end plans, Mr Beard, and obviously we took
15 them through our plan and our roll-out because that was
16 their responsibility.

17 Q. Now, around the same time as Postcomm became Ofcom
18 through the changing of the Postal Services Act, Ofcom
19 indicated to Royal Mail that it would be afforded
20 greater commercial freedom in the market; you knew about
21 that?

22 A. Yes, indeed.

23 Q. Yes, and you also knew that in December 2012 Royal Mail
24 took up the, I suppose, challenge of dealing with those
25 commercial freedoms and opportunities and it launched

1 a consultation on potential access reforms; do you
2 recall that?

3 A. I do.

4 Q. Yes. I asked Mr Polglass some questions on that
5 yesterday, so I'm not going to go to the document
6 itself. Following on from that, you actually met with
7 Royal Mail on 6 December 2012 to discuss their proposed
8 reforms. Do you remember that?

9 A. I had several meetings with Royal Mail. I can't exactly
10 remember the --

11 Q. No, sorry, I'm not asking you to remember a precise
12 date. That's understood. We have a bundle of documents
13 that are in bundles that you don't at the moment have
14 but the rest of us do, and it includes one or two other
15 documents. I'm just going to hand that up to you and
16 give copies to the rest of the court, just because the
17 note of this meeting is in there. (Handed). I'll give
18 the references to the main bundles as I'm going through,
19 it's just for convenience.

20 THE CHAIRMAN: We have quite enough bundles, thank you.

21 MR BEARD: There are one or two additional documents in this
22 one, so I will have it passed up to you; I'm sorry.
23 (Handed).

24 For the tribunal and those that are working on the
25 main bundles, it's RM7A at tab 33, or if you prefer, it

1 is in this bundle at tab 7, Mr Wells.

2 You will see at the top of the page "Royal Mail
3 meeting with TNT 6 December 2012"?

4 A. Mm.

5 Q. As I say, this was not a test on remembering exact
6 dates, but if you then look at the attendees, it's
7 Stephen Agar and another individual from Royal Mail.
8 Then from TNT it's yourself and two other persons,
9 I think the third of whom or the second of whom is
10 content to have their name mentioned, but I'm not sure.
11 I'm grateful. It's Mr Russell.

12 A. Mm.

13 Q. This is a note of the discussions between you and
14 Royal Mail at the meeting. Seeing this, does this jog
15 your memory of the meeting? Do you want to have a quick
16 look through?

17 A. Yes. Not particularly, but do carry on.

18 Q. Let's go to one or two pieces, because I'm not going to
19 ask questions on the entirety of it.

20 If we just turn over to page 2, picking it up five
21 paragraphs from the bottom, it says:

22 "NW [that's you] stated that TNT were happy with the
23 status quo but understood that Royal Mail wanted to vary
24 and terminate the agreements."

25 So the status quo was the access agreement you

1 currently had with Royal Mail; is that right?

2 A. I'm guessing that's what it refers to, but I'm not so
3 sure.

4 Q. When they talk about wanting to vary and terminate the
5 agreements, do you recall whether that would make sense,
6 referring to those previous access agreements at this
7 time in this context?

8 A. Potentially.

9 Q. Then the next comment is from SA, which is Stephen Agar,
10 and he responded that:

11 "... any unilateral change made by Royal Mail was
12 very difficult."

13 So this is any unilateral change to the contracts,
14 and I think here we're talking about access contracts.
15 Then it goes on:

16 "What Royal Mail would propose was that, if it
17 sought to make a change to the terms and conditions
18 which raised a concern by customers as to whether it was
19 fair and reasonable, a customer could raise a complaint
20 with Ofcom to investigate a possible dispute."

21 Then he says:

22 "In these circumstances Royal Mail would pause the
23 notice period for the proposal to allow the dispute to
24 be considered by Ofcom. Once disputes are considered
25 and then resolved, the notice period would continue. If

1 there is no complaint made during the notice period, the
2 change would take effect."

3 So what Mr Agar was saying here was, "We've got
4 these commercial freedoms, but there are real
5 difficulties with us making unilateral changes, we
6 recognise that, in a regulated market" as you referred
7 to, "so what we're proposing to do is that we put
8 forward a proposal for a change or give notice for
9 a change, but if people complain we just pause the
10 notice period". Do you recall him saying that?

11 A. Well, that's what it says here, yes.

12 Q. Yes. I'm asking you if you recall him saying that at
13 this meeting? I'm not asking you about the precise
14 date, but do you recall that?

15 A. No, I don't recall that precise conversation, no.

16 Q. But do you recall that information being conveyed to you
17 by Royal Mail in 2012?

18 A. Well, not specifically, no. I recall what happened very
19 shortly after this, Mr Beard, in terms of their
20 proposals.

21 Q. Yes, I'm just asking about this. I'm going to come on
22 to what happens with the proposals, it's fine, Mr Wells.
23 But do you not remember being told this at the time?

24 A. It didn't particularly register, no.

25 Q. It didn't register with you? The fact that Royal Mail

1 were telling you that in this new world of commercial
2 change, if they were to make any changes to the
3 contracts that are critical to your business, I think
4 you said in your witness statements --

5 A. That's true.

6 Q. -- you would be able to essentially stop any changes
7 going ahead; you don't remember that?

8 A. Well, of course this is quite a complex area, and if
9 Royal Mail made any changes -- and of course there was
10 a possibility that Royal Mail would make changes --
11 clearly we would have a response to those changes.

12 Q. But, Mr Wells, it may be a complex area, but this is
13 a very, very simple proposition. This is a safeguard
14 for you, isn't it, in relation to any of these changes?

15 A. I wouldn't call this a safeguard.

16 Q. You wouldn't call this a safeguard, no?

17 A. I wouldn't, no.

18 Q. Okay, but it's nonetheless very significant to you,
19 isn't it, because it gives you a mechanism to ensure
20 that any change where notice is given, you can
21 essentially stop that notice period by bringing
22 a complaint to Ofcom; that's what's being said here?

23 A. It says that they can stop the notices, but it doesn't
24 actually say that they guarantee to withdraw them.

25 Q. Yes, I understand that, and I understand that's now your

1 case, Mr Wells, that that's significant. But the
2 position I'm asking you about is: I'm surprised, I have
3 to say, that at a time when a series of proposals were
4 being put forward to which you very strenuously
5 objected, you're told in a meeting that the structure
6 would change such that you could make complaints and
7 stop further changes occurring whilst they were
8 considered, and you don't remember that?

9 A. But the option to make complaints of course has always
10 been there --

11 Q. Yes, but this is very different, isn't it, Mr Wells?
12 This is baked into the contractual structure?

13 A. But it doesn't withstand the fact that it doesn't give
14 us guarantees that we can influence the outcome. And
15 I'm not trying to be evasive, I just don't recall this
16 specific example. I'm sorry.

17 Q. Could we just go to bundle C4B at tab 94, please. Just
18 go on to little page 21, paragraph 69, the final
19 sentence there:

20 "In signing up to the new standard terms and
21 conditions, TNT Post placed considerable reliance on the
22 fact that any changes that we considered anticompetitive
23 would be abandoned or suspended in the event that
24 a dispute was accepted or a regulatory or competition
25 complaint was investigated."

1 Now, that is a reference to that suspension clause,
2 and it is TNT saying that they rely on it as
3 a safeguard, isn't it?

4 A. Can we put that into context with "TNT placed
5 considerable reliance on the fact that any changes that
6 we considered anticompetitive"? And that is quite
7 important, I would say, that if we considered that this
8 was stopping our ambitions to roll out end-to-end, and
9 it was an abuse of dominance or anticompetitive or
10 whatever the legal position is, of course we would get
11 comfort from the fact that there was some level of
12 potential redress.

13 Q. That's not the question I asked you, Mr Wells. That is
14 a description of a safeguard that you are placing
15 considerable reliance on, isn't it?

16 A. I'm sorry, you'll have to ask me --

17 Q. You are saying here, TNT is saying that it places
18 considerable reliance on the fact that there is -- and
19 I interpolate -- a clause in the contract that means
20 that "any changes we considered anticompetitive would be
21 abandoned or suspended in the event that a dispute was
22 accepted or a regulatory or competition complaint was
23 investigated".

24 So it's not just competition, it's regulation, and
25 it is there saying that you placed considerable reliance

1 on the fact that that clause existed, and I am saying
2 that it's obviously a sensible characterisation of that
3 clause as a safeguard, and you seem deeply reluctant to
4 accept that characterisation, Mr Wells.

5 A. No, I don't think I am reluctant, and I'll repeat,
6 I think that in the event of an issue stopping our
7 end-to-end, the fact that we had certain regulatory or
8 competition fallbacks gave us some level of comfort in
9 a regulated environment.

10 Q. But, Mr Wells, this isn't just some competition or
11 regulatory fallback of a general sort. This is a change
12 to the contractual scheme. And here you are saying you
13 placed considerable reliance on it, and I'm going to use
14 the word "safeguard". Yet when I put that note to you,
15 you said you couldn't even remember whether you had been
16 told that at that meeting, around that time. But now
17 you are saying "considerable reliance" placed on it.

18 A. No, I think I was referencing I couldn't remember that
19 particular meeting with Mr Agar.

20 Q. Well, the transcript will show, I think, that I asked
21 you not just about the meeting but whether you
22 remembered it at that time.

23 Are you suggesting, Mr Wells, that in December 2012
24 you were not aware that Royal Mail had proposed
25 including a clause in the access contracts that would

1 have the effect of suspending any controversial changes
2 to the access contract where a complaint is made to
3 Ofcom?

4 A. Sorry, can you repeat that?

5 Q. Yes. Are you saying that in December 2012 you were not
6 aware that Royal Mail had proposed including a clause in
7 access contracts that would have the effect of
8 suspending any controversial changes to those access
9 contracts where a complaint was made to Ofcom?

10 A. If a complaint was accepted by Ofcom, then --

11 Q. No, Mr Wells, if a complaint was made to Ofcom.

12 A. It would suspend the clause. Are you asking me if
13 that's the question?

14 Q. No, because you are answering a slightly different
15 question. I'm asking you whether you knew in
16 December 2012 that Royal Mail had proposed including
17 a clause in the access contracts that would have the
18 effect of suspending any controversial changes to the
19 access contract where a complaint was made to Ofcom?

20 A. Yes.

21 Q. Yes?

22 A. Well, I'm -- I thought it would -- had to be accepted by
23 Ofcom, I have to say.

24 Q. That was a later modification, Mr Wells.

25 A. Okay.

1 Q. That was why I was asking you about the details of the
2 meeting.

3 A. Right.

4 Q. So you're saying you didn't know that?

5 A. Yeah. I'm sorry, I can't recall.

6 Q. Let's move on, then. You touched on earlier the results
7 of Royal Mail's consultation, and they were announced in
8 January 2013. I think you were quite pleased about the
9 results of the consultation in January 2013. If we go
10 to -- yes, we can close bundle RM7A. If we could go to
11 RM2C, or for you, Mr Wells, it's just at C4A, tab 9.
12 Bundle C4A. Bundle C4, just so you know, is a kind of
13 chronological bundle of general documents. C4A, tab 9,
14 that is a document the tribunal has seen before. I just
15 want to check, this is what you were talking about
16 earlier when you were talking about the results of the
17 consultation; am I correct?

18 A. I'm looking at "Reform of access contracts".

19 Q. Yes. Although it doesn't have a date on, that document
20 is actually dated, I think it's all agreed, 21 January
21 2013.

22 A. Okay.

23 Q. But I just wanted to check that that was what you -- you
24 referred to the results of that consultation, and I just
25 wanted to check this was what you were referring to?

- 1 A. Yes, that's correct.
- 2 Q. That's right. As we know, in that document Royal Mail
3 indicated that it wasn't going to pursue the elements of
4 proposals that you strongly objected to which involved
5 requiring commitments in order to have a national
6 pricing plan.
- 7 A. That's correct.
- 8 Q. Yes, but it also, I think it was agreed with Mr Polglass
9 yesterday, indicated that Royal Mail was still
10 considering whether or not it would propose changes that
11 required commitments; do you recall that, Mr Wells?
- 12 A. I do.
- 13 Q. And you knew that at the time?
- 14 A. I did.
- 15 Q. Yes. So at that time you knew there was a clear
16 possibility of Royal Mail making a range of possible
17 pricing changes; correct?
- 18 A. We knew that there was a possibility, because it was
19 mentioned in their IPO prospectus, amongst other
20 communications, that there was a chance that they would
21 come back with revised proposals following this 2012.
- 22 Q. Yes. You are ahead of me, Mr Wells. I'm only in
23 January 2013. The IPO is September. We will come to
24 that in just one second. But in January 2013 you knew
25 that too, didn't you?

- 1 A. It's referenced in here.
- 2 Q. It is, but I'm asking you: did you know?
- 3 A. Erm --
- 4 Q. I can take you to the bits, if that's helpful.
- 5 A. Yes, we did know.
- 6 Q. Yes, you did. And you continued on with your business
7 plan at that stage, and I think in particular in
8 July 2013 you rolled out into southwest London; is that
9 right?
- 10 A. In 13 we did a number of roll-outs of SSCs. By the end
11 of 13, it might help, I think, we were in five SSCs.
- 12 Q. By the end of 13. During the early part of 13, even
13 though you knew that there were these possible price
14 changes including in particular the introduction of
15 a price differential between the national plans, you
16 kept your roll-out going?
- 17 A. As I said, we knew that there was always a chance that
18 Royal Mail may well come back with a proposal to change
19 the price plans. That's correct. It's also correct
20 that we continued, during 2013, with our end-to-end
21 plans and we rolled out, out of the 83 SSCs in the UK,
22 we had rolled out to five of those standard selection
23 codes.
- 24 Q. In fact, during 2013 there had been quite a significant
25 slowing down in your roll-out as compared to the planned

1 roll-out. We explored this with Mr Polglass. I think
2 the reason you give in your witness statement is that
3 you felt in 2012/2013 there was a need for external
4 investment apart from investment from PostNL; that's
5 correct, isn't it?

6 A. May I expand on the invest --

7 Q. Of course, but could you answer the question first and
8 then expand?

9 A. It wasn't necessarily us that decided that. PostNL had
10 split from the TNT Express group, and they were
11 effectively the quoted company and our parent company in
12 Holland. They required external funding, and they
13 decided to look for a co-investor. That process was led
14 by myself and the management team in TNT Post/Whistl.
15 So I apologise for the long-winded answer, but I think
16 it required some clarification, that we were looking for
17 an investor during that time and that, without
18 investment, was the reason and the only reason that we
19 slowed down the roll-out.

20 Q. Well, I'm not going to explore all of the possible
21 reasons for the slowdown of the roll-out, because I've
22 explored those with Mr Polglass, but I'm just going to
23 your 34. You say -- in paragraph 34 in your witness
24 statement, you say:

25 "The need for external investment meant that we

1 slowed down the planned roll-out for 2012 and 2013 ..."

2 This is just the last sentence on page 248. Do you
3 have it, Mr Wells?

4 A. Yes, I do.

5 Q. Yes:

6 "... and amended our plans so that the major
7 roll-out years would be 2014 to 2016."

8 You say there that PostNL needed -- wasn't going to
9 fund it. Is it right that PostNL had just been through
10 a failed merger process at that time?

11 A. No, that's totally incorrect.

12 Q. No?

13 A. They had been through a de-merger with TNT Express and
14 PostNL. One was a parcels business and one was
15 effectively the equivalent of the Dutch Post Office,
16 PostNL. Sorry, may I?

17 Q. Of course, go on.

18 A. They were looking to retrench their activities into the
19 Benelux, and they were therefore -- and they also had
20 quite a lot of debt on their balance sheet, and their
21 priorities was to repay the debt and within three years
22 create a dividend policy again for their shareholders,
23 which meant that they didn't have available funding for
24 their international operations, which included the UK.
25 They were very supportive of end-to-end, but couldn't

1 fund it, hence that's the rationale for exploring, as we
2 did, some investment funding through private equity.

3 Q. Just to be absolutely clear, you are not here today,
4 Mr Wells, giving evidence on behalf of PostNL, are you?

5 A. Absolutely not.

6 Q. No. So there was a slowing down, a sort of pause in the
7 plan to some extent, or a delay in the planning, planned
8 roll-out in 2012/2013 because of the position of PostNL.
9 Then, as you have already anticipated, Royal Mail
10 published its IPO prospectus in September 2013 and I'm
11 not going to go to it, you have already referred to the
12 fact that it reiterated that it might well seek to put
13 in place a price differential, but I think, as you have
14 already agreed, that was reiterating what you already
15 knew, that there was a risk that Royal Mail might well
16 announce a price differential change in future. That's
17 correct, isn't it?

18 A. There was always a possibility that Royal Mail may try
19 to introduce a price differential.

20 Q. The reason you qualify that answer as you do is because
21 you never thought it would ever be implemented, did you?

22 A. We never knew.

23 Q. When you say "try", implicit in that is your expectation
24 that it wouldn't occur; isn't that right?

25 A. Well, you can never guarantee, obviously, the actions of

1 an incumbent, but it's not unreasonable, I think, that
2 if this was illegal, then it wouldn't be implemented or,
3 if it was, would be redressed quickly.

4 Q. So in essence the business planning that you undertook
5 then and subsequently didn't include any sensitivity for
6 the application of a price differential, did it?

7 A. No, the business planning didn't include a price
8 differential.

9 Q. That essentially represented what you thought the
10 chances were of that price differential being
11 implemented, didn't it?

12 A. Well, it's difficult to put an impact on something that
13 you don't know about.

14 Q. Is that right, Mr Wells? Isn't that what businessmen do
15 all the time? They try and assess the impacts of things
16 that they don't know about and they make assessments
17 about them?

18 A. We did make an assessment, we included in our risk
19 analysis, we flagged it to potential investors. This
20 went through a whole process of due diligence, you have
21 seen the reports from PwC, there was regulatory due
22 diligence performed by GK, and we felt that, whilst it
23 was a risk, it was an acceptable risk, Mr Beard.

24 Q. I quite understand that in the planning, which was some
25 of the documents I took Mr Polglass to, there were

1 references to the risk of price changes and price
2 differential specifically. I asked you about
3 sensitivities in business plans, and you quite fairly
4 said they were never included.

5 I just want to pick up another point you just raised
6 there. You said "regulatory due diligence [was]
7 performed by GK". Who are GK, please?

8 A. They're a consultancy firm.

9 Q. What did regulatory due diligence mean?

10 A. That meant, I guess, assessing the market and the
11 regulatory dynamics and the role of the regulator and
12 the issues surrounding any possible risks or
13 opportunities.

14 Q. When you say risks or opportunities, you mean risks or
15 opportunities in relation to the actions of the
16 regulator?

17 A. No, not -- no, not the regulator, just the market.

18 Q. But you said it was regulatory due diligence, Mr Wells?

19 A. That's correct.

20 Q. So is it due diligence as to what is expected the
21 regulator will do and can do in the market?

22 A. No.

23 Q. So you say "regulatory dynamics and the role of the
24 regulator"; is that different from assessing what you
25 expect the regulator to do in the market?

- 1 A. I think it is, it's broader.
- 2 Q. It's broader, but it includes that?
- 3 A. It would include the role of the regulator and their
4 responsibilities in a regulated environment.
- 5 Q. Did you see that report, Mr Wells?
- 6 A. I did.
- 7 Q. And do you have a copy of it, Mr Wells?
- 8 A. Not on me.
- 9 Q. No, but do you have a copy of it?
- 10 A. Oh, there will be probably one back in the office
11 somewhere deep in our archives.
- 12 Q. Right, I see. Okay. Thank you, Mr Wells.
13 Unfortunately we haven't seen it.
- 14 Now, you have already touched on the fact that
15 Whistl -- and you brought in corporate finance people,
16 HMT, I touched on this with Mr Polglass yesterday, to
17 pull together a detailed investment memorandum and
18 business plan that was put out as effectively a pitch
19 for investors; that's correct, isn't it?
- 20 A. It is correct, yes.
- 21 Q. Yes. It was essentially on the basis of that pitch and
22 the due diligence you say that LDC did that they decided
23 that they would make you an offer to invest in the
24 business; that's correct, isn't it?
- 25 A. That's correct.

1 Q. Yes. I think they were formally selected by PostNL in
2 July 2013. Actually that's one of the corrections you
3 made, wasn't it, earlier? Because I think in your
4 statement you said 2014 but you meant 2013?

5 A. That's correct.

6 Q. Right. You say in your witness statement at
7 paragraph 46 that RBS was chosen as well?

8 A. Mm.

9 Q. That was to provide working capital finance, so you had
10 a facility engaged with RBS?

11 A. That's correct.

12 Q. Just explain to me the relationship between RBS and LDC.
13 Could you call on the RBS facility whether or not LDC
14 invested?

15 A. The RBS facility was a working capital facility based
16 upon the collateral of our trade debtors.

17 Q. Right.

18 A. So that gave us a facility of about 90 million available
19 funding for working capital.

20 Q. So you had 90 million available from RBS, whether or not
21 LDC invested?

22 A. That's not for investment, though. This is just to
23 manage our working capital position.

24 Q. I see.

25 A. So the investment that came in that we needed for CAPEX

- 1 and investment came in from LDC.
- 2 Q. Right. Yes. Let's take it in stages. RBS, when they
3 were selected, did you have some kind of presentation
4 exercise with RBS to discuss with them how they would
5 provide this facility?
- 6 A. We went through a process of talking to several banks,
7 and -- including HSBC, RBS, PNC, and we chose actually
8 our incumbent bank because they provided the best terms.
- 9 Q. That's usually a good basis on which to choose, yes.
10 But did you produce slide decks or presentations for
11 those exercises, so far as you recall?
- 12 A. We did, and some of the output of those, including
13 working capital positions and things like end of month
14 balance, intra-month peaking, are all included in our
15 scenarios.
- 16 Q. So the underlying material you then put into your latest
17 scenarios for the business plans; is that right?
- 18 A. Yes. You may recall in the deck there are things like
19 debt graphs in there, and that is all about the banking
20 facility and providing the banking facility and making
21 sure that we kept to our covenants. It was absolutely
22 critical during this time. Managing our cash position
23 was also critical. So of course we did a lot of
24 sensitivities, a lot of analysis, so we didn't, for
25 example, break our headroom covenants. A lot of that

1 data is in these packs.

2 Q. That's all in those packs; thank you. Do you still have
3 those packs, do you know, back at the office? I'm not
4 saying with you here.

5 A. Some of these packs will be in your -- in some of these
6 documents here.

7 Q. Right. Well, we'll come back to that, maybe, Mr Wells,
8 in due course.

9 Just going back to your witness statement at
10 paragraph 48:

11 "With that in mind, I arranged and attended the
12 meeting with Ofcom ..."

13 Sorry, I should probably just go from 47, this was
14 the due diligence you are referring to being undertaken
15 by LDC between July and October 2013, and then you say:

16 "With that in mind, I arranged and attended the
17 meeting with Ofcom with ..." a person from PostNL,
18 that's correct, I'm just not referring to his name, but
19 he is; that's right, isn't it?

20 A. I'm sure he wouldn't mind.

21 Q. I will keep it anonymous. Nothing turns on it,
22 Mr Wells.

23 "... from PostNL and [another person] from LDC in
24 early 2013."

25 You say here:

1 "LDC asked Ofcom a lot of direct questions about our
2 plan."

3 So this was a meeting in early 2013. Do you
4 remember when it was? Because in the paragraph above
5 you talked about July to October 2013 being the LDC due
6 diligence. Is it perhaps not very early in 2013, just
7 in terms of dates?

8 A. Well, I believe that the information memorandum was
9 produced in April, so I would ... yeah, I would say
10 you're probably right, it's probably more mid-2013, and
11 I do apologise.

12 Q. No, no, nothing turns on that. I just wanted to be
13 clear. So it's likely to be during that period of due
14 diligence that you refer to in the preceding paragraph
15 that that meeting occurred, is it? Sorry, top of 47,
16 you talk about due diligence July to October 2013.

17 A. Yes --

18 Q. That's the only reason I'm asking. It's a guess,
19 Mr Wells.

20 A. We could come back to you and probably find out the
21 exact date --

22 Q. You could find out --

23 A. -- if that's really important.

24 THE CHAIRMAN: Sorry, can I just be clear. You said at the
25 beginning, Mr Wells, that LDC were formally selected in

1 July 2013.

2 A. Yes.

3 THE CHAIRMAN: So I suppose they would hardly have been
4 conducting due diligence, which is presumably your
5 point.

6 MR BEARD: That was really my underlying question. I didn't
7 want to put it particularly unfairly, I was just
8 asking --

9 THE CHAIRMAN: I'm just trying to understand.

10 MR BEARD: Yes, no, I was assuming it's probably going to be
11 late July, August, September on that basis, but I'm not
12 sure anything particularly turns on the exact date.

13 What I'm interested in is: who was there from Ofcom,
14 Mr Wells?

15 A. I think it may well have been the chief executive of
16 Ofcom, and a couple of other people.

17 Q. So who was the chief executive at that time?

18 A. Ed Richards.

19 Q. Right. And a couple of other people; would it be
20 Mr Rowsell that you --

21 A. I can't honestly remember.

22 Q. No, understood. Do you have notes of that meeting at
23 all? Because you haven't exhibited them to the
24 statement.

25 A. Right. I'm not -- I'm not sure.

- 1 Q. But you might do? Someone --
- 2 A. I really don't know whether any notes were taken. It
3 was more of a general discussion that LDC wanted and
4 PostNL wanted, rather than hear all this through the
5 management team as well.
- 6 Q. No, understood, I can understand why the meeting
7 occurred. On the Ofcom side, do you think that they
8 took any notes at that meeting? You don't remember?
- 9 A. No.
- 10 Q. No. You certainly weren't provided with any minutes or
11 notes of that meeting by Ofcom so far as you recall?
- 12 A. I don't remember. Do bear in mind that this was six
13 years ago.
- 14 Q. I understand, I understand, but I've got to ask because
15 I'm trying to work out what's going on here.
- 16 So in any event, you carry on in paragraph 48 that
17 after that meeting, the final line:
- 18 "Following that meeting, LDC's advisers concluded
19 that regulatory risk, including the risk of Ofcom
20 allowing a price differential, was low."
- 21 So the message you got out of that meeting and that
22 LDC's advisers took away, you say, was that the risk of
23 allowing a price differential was low; that's correct?
24 That's what you say at the --
- 25 A. Yes.

1 Q. Yes. So just there:

2 "... LDC's advisers concluded that the regulatory

3 risk ..."

4 In your statement at the top of 48 you refer to the

5 meeting being Ofcom, PostNL and LDC and you, obviously?

6 A. Mm.

7 Q. That's correct?

8 A. That's correct.

9 Q. So who were LDC's advisers that you're referring to

10 there?

11 A. I actually don't know. I am -- maybe it is the --

12 potentially some of the due diligence providers.

13 Q. Right.

14 A. Which might be PwC.

15 Q. Yes. Well, you actually refer there, the footnote 29

16 there is to a paragraph in the decision which, you are

17 quite right, is to quotes from PwC. But PwC weren't at

18 that meeting.

19 A. No, that's correct, they weren't.

20 Q. So presumably there was a separate meeting with PwC and

21 Ofcom where they talked, as you understood it?

22 A. I don't know whether PwC had a separate dialogue with

23 Ofcom. They may have had a phone call. I didn't attend

24 a meeting with PwC and Ofcom. I only recall this

25 meeting with LDC, to be clear, and PostNL and me.

1 MR BEARD: I understand.

2 It's slightly earlier, but I'm about to move on to
3 another topic. Is it sensible to take a pause now or
4 shall I press on? I don't know how long this will be,
5 it might be 20 minutes.

6 THE CHAIRMAN: We are going to finish at 1 o'clock.

7 MR BEARD: Yes, we are going to finish at 1 o'clock.

8 Unfortunately I'm not sure we're going to finish
9 Mr Wells' evidence today. I know it's timetabled for
10 Monday. I was hoping, taking a blue pencil to notes
11 yesterday after Mr Polglass, I would be able to get it
12 down within the morning. I don't think that's going to
13 happen. So yes.

14 THE CHAIRMAN: I think we might pause now.

15 MR BEARD: I'm grateful.

16 (11.27 am)

17 (A short break)

18 (11.37 am)

19 THE CHAIRMAN: I bowed but answer bow came there none. I'm
20 sure there is a good reason.

21 MR BEARD: Yes.

22 Before I move on, Mr Wells, can I just ask something
23 in relation to a point you were making earlier. You
24 talked about, I'm not going to refer to it as a beauty
25 parade, but the discussions for investment with various

1 possible investors, including LDC. I think you say in
2 your witness statement there were at least three and it
3 was narrowed down to two, and you chose LDC or PostNL
4 chose LDC in the end.

5 Was there a term sheet or agreed set of terms on
6 which LDC were going to provide the investment pool
7 together?

8 A. For sure.

9 Q. Was there anything in writing setting out what LDC
10 expected in terms of relevant terms and conditions of
11 its investment at that time?

12 A. There would have been a lot of terms and conditions
13 attached to that. Of course there was a term sheet, but
14 there was also sales and purchase agreements and the
15 normal transactional documents that you associated with
16 this type of deal structure.

17 Q. Yes. Well, obviously private equity usually has
18 investment committees and so on that these things have
19 to be cleared through, doesn't it?

20 A. Always, yes.

21 Q. Let's move on. These are topics that to some extent
22 I touched on with Mr Polglass, so I will try and move
23 through relatively quickly.

24 In your witness statement at paragraph 51, you say:

25 "We first became aware that Royal Mail had

1 reinvigorated its plans for a price differential through
2 rumours in the marketplace in late November 2013."

3 When you say reinvigorate, you mean you knew about
4 it from the previous year and what had gone on with the
5 IPO and this was rumours in the market about it actually
6 coming to pass; is that right?

7 A. Not -- no, if I can perhaps clarify that point. The
8 rumours actually came from our customers as a result of
9 our major competitor in the downstream access market,
10 UK Mail, approaching our customers offering them cheaper
11 rates and saying that there was likely to be two price
12 plans, the NPP1 price plan, which they were on, and the
13 APP2 price plan, which Whistl were on, and that we would
14 be disadvantaged with the new price differential, and
15 they were the rumours that were in the market. And
16 unfortunately we found out about these rumours from our
17 customers approaching us and saying "Is this true?"

18 Q. I'm not going to take you to those documents, we went to
19 one or two of them with Mr Polglass yesterday, you may
20 remember some of the questioning.

21 A. Indeed.

22 Q. I was actually just focusing on this term
23 "reinvigorated" that you used here. It's a very
24 evocative term, Mr Wells. The proposals back in 2012
25 had involved volume commitments and forecast

- 1 commitments; you remember that?
- 2 A. Indeed.
- 3 Q. And this wasn't a reinvigoration of those proposals as
4 a whole, was it?
- 5 A. It was a separate proposal.
- 6 Q. Yes, it was a separate proposal but a price differential
7 that you knew Royal Mail was thinking about introducing?
- 8 A. What we -- just for clarity, what we heard by way of
9 rumours was that there was going to be a price
10 differential between the two plans.
- 11 Q. Yes. Royal Mail confirmed to the market -- and I took
12 Mr Polglass to this yesterday, and I'm happy to take you
13 to it too -- that you or rather your commercial director
14 wrote to Royal Mail on the back of these rumours and
15 said "Is this going to happen?" Or "please confirm it's
16 not going to happen" I think more optimistically. And
17 Mr Agar wrote back saying "Actually it is going to
18 happen", about which you were not happy. In addition,
19 Royal Mail put out a notice to the market to similar
20 effect saying that it was going to happen. Is that
21 right?
- 22 A. All those sequence of events are correct.
- 23 Q. Thank you. You say in your statement at paragraph 70 --
24 I'm looking at the wrong witness statement, I apologise.
25 Could we go to C4B at 94. I apologise, Mr Wells, for

1 giving you the wrong witness statement reference.

2 Tab 94. So this is your witness statement attached to
3 the initial complaint. Just pick it up at paragraph 70,
4 if I may.

5 You say in paragraph 70 the first inkling that you
6 had that they might be planning to introduce a price
7 differential was in late 2013. I'm not going to get
8 into the semantics of the term "inkling". But as we
9 have already agreed, you knew very well that Royal Mail
10 were thinking about introducing a price differential all
11 the way through 2013, didn't you?

12 A. We didn't know that throughout -- that's not true. We
13 didn't know until we got information from our customers
14 in November.

15 Q. You didn't get confirmation, but you had more than
16 an inkling, didn't you, Mr Wells? This is slightly
17 overegging it at the very least, isn't it, Mr Wells?

18 A. It was on our risk analyses that there was a possibility
19 that they would re-introduce some form of differential.

20 Q. You thought it was actually relatively likely that they
21 would introduce some form of differential, but you
22 considered it a low risk because you didn't think it
23 would ever get implemented, didn't you, Mr Wells?

24 A. We could never be sure that it wouldn't be implemented.
25 We hoped that it wouldn't, and if it was illegal and

1 breaking competition law, of course we hoped that the
2 law and the regulator would be behind us.

3 Q. But you thought it was relatively high risk that it
4 would be put forward but low risk that it would be
5 implemented, didn't you?

6 A. Well, I'm going to restate what I've just said, I think,
7 Mr Beard.

8 Q. You then, in 70, at the final sentence on the page, you
9 say it was only following pressure from TNT Post that
10 Royal Mail then did confirm its position. So you are
11 saying you are forcing this forward; is that right?

12 A. I think that that's pretty straightforward. This is the
13 letter that Goddard sent asking for confirmation that
14 these rumours were untrue, and I believe it was the
15 letter that came back from Royal Mail saying that they
16 were in fact intending to introduce these, the level of
17 which we did not know at that stage.

18 Q. No, you didn't know that; indeed, no one knew that at
19 that stage, because it hadn't been set out. That's
20 correct, isn't it?

21 A. That's correct.

22 Q. Can we just go back to your witness statement, your main
23 witness statement, not this one. I'm sorry to be
24 confusing in my references a moment ago. Paragraph 53,
25 you say halfway -- just picking it up halfway down, feel

1 free to read it all, but:

2 "It was immediately obvious to me that this could
3 cause ..." so the announcement could cause -- I'll read
4 it all:

5 "The effect of the price differential announced by
6 Royal Mail would be that the price plan [as referred to
7 as APP2] ... would be more expensive than the price plan
8 used by our competitors ..."

9 So you are there essentially saying a price
10 differential would be created.

11 "It was immediately obvious to me that this could
12 cause a problem for the LDC deal, which was supposed to
13 be finalised in the next few days. Royal Mail's timing
14 could not have been worse for us and I was convinced
15 that they were trying deliberately to stop our E2E
16 roll-out. They knew that we were looking for private
17 equity investment. I'm sure that they also knew about
18 our roll-out plans for 2014. I made a presentation at
19 the IEA conference in 2013 which showed Whistl's planned
20 roll-out, and it is very likely this would have got back
21 to Royal Mail. The industry is a bit of a village like
22 that."

23 Well, they didn't know anything about your private
24 equity discussions, did they, Mr Wells?

25 A. I would be very surprised if they did not know about

1 those private equity discussions. There were plenty of
2 sources that would have given them that information.

3 Q. Well. And then:

4 "I'm sure that they also knew about our roll-out
5 plans", and you refer to this conference in
6 September 2013. So this was around the time that the
7 IPO document was put out; is that right?

8 A. Yes.

9 Q. The IPO document where Royal Mail had signalled that it
10 was considering the price differential being introduced?

11 A. Mm.

12 Q. So they had done that at that time. We know that the
13 fact that it was being mentioned there and that we're
14 talking about notice in January meant that there must
15 have been fairly substantial planning and consideration
16 of these issues, you would assume; correct, Mr Wells?

17 A. Sorry, you will need to break that down.

18 Q. Of course, sorry, it was a long question.

19 We know in fact that there was planning and
20 consideration of these issues well before even the
21 indication in the IPO, and that wouldn't surprise you,
22 would it, Mr Wells?

23 A. In terms of the price differential?

24 Q. Yes, in terms of the price differential.

25 A. No, there was always a likelihood that they might

- 1 re-introduce it.
- 2 Q. Yes.
- 3 A. Agreed.
- 4 Q. We know, I think Mr Polglass confirmed this yesterday,
5 that price changes put forward by Royal Mail for access
6 contracts were generally done at the beginning of April
7 each year?
- 8 A. That's correct.
- 9 Q. So just doing the maths counting backwards, if you were
10 going to put forward a change and comply with the notice
11 periods, you needed to do that in early January in order
12 for that change to occur in April; that's correct as
13 well?
- 14 A. Correct.
- 15 Q. In fact, planning for January price change notices would
16 have to have occurred fairly far in advance, wouldn't
17 it, Mr Wells?
- 18 A. It would need some advance notice, agreed. I don't know
19 the length.
- 20 Q. Well, we've heard evidence in relation to these matters,
21 and you may not have been in court, that there was
22 planning and consideration of these issues back in June
23 and July 2013. You wouldn't know of that, because it
24 would be internal to Royal Mail, apart from this case.
- 25 A. Can I just make the --

1 Q. Sorry, can I just deal with this. So the planning would
2 have started in June and July, and so if the planning
3 and consideration of this price differential was in June
4 and July, it couldn't possibly be informed at that time
5 by your September conference, could it?

6 A. I think that this requires some level of context. It
7 was widely known about our plans. When we went out to
8 all our clients, we had to explain to our clients what
9 our strategy was, what our roll-out plans were, what our
10 coverage was likely to be, and our intention was to roll
11 out to 33 SSCs and 42% of the country. All of that was
12 included in the IM. I think it's inconceivable that
13 Royal Mail, as soon as that IM came out, would not have
14 got hold of it.

15 Q. That's not the point I'm asking you about. You say "I'm
16 sure they knew about our roll-out plans for 2014" and
17 then you link that to the fact that you made
18 a presentation in September 2013, and you are there
19 insinuating that because that had been spelled out by
20 you in a September conference, Royal Mail were
21 essentially going after you in relation to the price
22 differential, and that is just plainly not true, because
23 they had started their planning earlier than that?

24 A. I'm sorry, I disagree. I think if you are linking the
25 IEA conference then I understand your point, but that

1 was just one of many, many opportunities for Royal Mail
2 to gain access to our plans and to understand our
3 roll-out.

4 Q. Mr Wells, I'm not linking the IEA conference, I had
5 never heard of the IEA conference that we're talking
6 about. It's in your witness statement, you linked it,
7 Mr Wells, and I am saying that is not plausible linkage,
8 is it?

9 A. Mr Beard, if I had my time again, I would write in here
10 "I made a presentation at the IEA, which was one of many
11 opportunities for Royal Mail to find out about our
12 plans".

13 Q. I understand, but the idea that they were specifically
14 targeting you because they knew about your roll-out
15 plans that you had spelled out at the IEA conference,
16 that's just not right, is it?

17 A. Well, they would have found out about the IEA plans,
18 about the plans from the IEA, and if you are saying that
19 they made their price differential earlier, then I agree
20 with you, but I don't think -- as I've explained,
21 I think there would have been many other opportunities.

22 Q. I understand your position, Mr Wells.

23 THE CHAIRMAN: Could I maybe ask the witness, if I may be
24 permitted --

25 MR BEARD: Sorry, at any time, of course.

1 THE CHAIRMAN: -- what he means by the industry being a bit
2 like a village? Living in a village myself, I'm
3 intrigued.

4 A. Of course, sir. I think what that means is that in this
5 industry there are a few competitors and suppliers, and
6 of course people know or make it their intention to find
7 out what the other company is planning and doing, by
8 keeping your ears to the ground, but most importantly by
9 talking to your clients. Our clients have options of
10 who to use in this market, whether that's Royal Mail,
11 UK Mail, Whistl, and every good business needs
12 an insight into the market, and the best insight I find
13 is by listening to your customers.

14 THE CHAIRMAN: So it's the spread of information by the
15 villagers, as it were, rather than you and your
16 competitors getting together for a chat about it?

17 A. Yes, sorry, there is absolutely no inference here of
18 collusion, this is just information in an open area that
19 we would glean.

20 THE CHAIRMAN: So if you order an extra litre of milk, they
21 want to know who you are having for the weekend?

22 A. Sort of.

23 THE CHAIRMAN: Sort of.

24 MR BEARD: Suddenly images of St Mary Mead are being
25 conjured up.

1 Anyway, let's move on. You found out in
2 December 2013, as we have just been exploring,
3 Royal Mail's intention to put forward a change notice
4 for the access contracts, and you were confident it
5 would be suspended.

6 Let's just look at your immediate reactions to
7 Royal Mail confirming that position. One of the first
8 things you did was arrange for your legal director to
9 contact Chris Rowsell to explain the situation. This is
10 Mr Rowsell at Ofcom. You refer to that in paragraph 54
11 of your statement.

12 A. Indeed.

13 Q. I'll come to that just in one second. You also agreed
14 that you would call Stuart McIntosh, the competition
15 group director at Ofcom. Did you do that?

16 A. I did.

17 Q. And did you have a long conversation with him?

18 A. I did.

19 Q. It was just a telephone call, was it?

20 A. It was.

21 Q. Was that on 6 December, so the day the announcements
22 would be made? This may be a rather too specific
23 question about this.

24 A. No. Was that a Friday?

25 Q. I think yes. I think it was.

1 A. In which case, it was a telephone call on that Friday.

2 Q. Yes, thank you.

3 Then, as I say, you also refer here to Mr Russell
4 contacting Mr Rowsell. Could we go to bundle C4A,
5 tab 49, please. It's right at the back of C4A, I think.
6 Do you have it? It's a string of emails that's headed
7 "Ian Strawhorne". Then it's actually the bottom email
8 that I want to start with. In fact, just picking it up,
9 the middle email is from you to people at PostNL, and it
10 actually refers to the fact of your call with
11 Stuart McIntosh and confirms that you got the timing
12 right I'd forgotten about.

13 If we go down to Angus Russell, the email from
14 Angus Russell to you:

15 "As promised, here is a summary of my call with
16 Chris Rowsell this morning. As you know, they have to
17 be terribly cautious about what they say so this is my
18 best interpretation. I am encouraged by what I heard",
19 saying Ofcom can't take action until details are known.
20 Ofcom can give guidance on their powers, and so on.

21 If you go down to "Substance", it talks about
22 a range of actions being possible including competition
23 cases or regulatory cases and competition cases taking
24 time. Then "Substance", again Ofcom can't comment
25 without the detail. Some form of pricing reaction was

1 fully expected.

2 So that's what Ofcom were saying there, they fully
3 expected this. Then:

4 "I said that PwC had reported that Ofcom was not
5 supportive of differential pricing. Chris did not
6 disagree with that analysis (often, the lack of reaction
7 is the closest we can get to a confirmation so I took
8 this as positive."

9 So Ofcom are being positive about objecting to
10 differential pricing of any sort, and that's how you
11 read that, I take it?

12 A. Mm.

13 Q. The other bit I just wanted to pick up here, in light of
14 our exchanges earlier:

15 "I said that PwC had reported that Ofcom was not
16 supportive of differential pricing."

17 That suggests that PwC had specifically spoken to
18 Ofcom about these issues, doesn't it?

19 A. Well, I think previously did I not say they had a phone
20 call?

21 Q. I think you indicated you thought that was the case,
22 yes. I'm just confirming that.

23 "Further encouragement was that Chris mentioned
24 their decision on zonal pricing in 2012."

25 Then there is a description of Royal Mail treating

1 national pricing more favourably than zonal pricing.

2 Ofcom had made it clear -- he says:

3 "... Ofcom had made it absolutely clear that
4 national and zonal based prices need to remain
5 aligned ..."

6 So did you take it from this that what was being
7 said was that Ofcom had made it clear that there
8 couldn't be any variation between national and zonal
9 based prices, they have to have the same weighted
10 average?

11 A. If you are asking me to comment on, under "Substance",
12 the last two --

13 Q. Yes.

14 A. -- what I think that means is that NPP1 and APP2 were --
15 should be aligned.

16 Q. And that Ofcom had made that absolutely clear, was what
17 you took from this, that Mr Russell was telling you that
18 Ofcom had indicated to him that they had to be
19 absolutely aligned; is that your understanding?

20 A. That would appear to be a reflection of the
21 conversation.

22 Q. Right. Then we've got some politics:

23 "Now the other side of privatisation (before which
24 some said Ofcom treated Royal Mail too kindly) ..."

25 So it's not really clear who that 'some' is,

1 perhaps, and it's talking about some incentives and the
2 Chancellor of the Exchequer and Royal Mail's health.

3 Then:

4 "Meeting on 9 December."

5 So this bit of the account, is this -- if you want
6 to read through it -- is it Mr Russell reporting what
7 was said or talking about a forthcoming meeting on
8 9 December that's been planned with Ofcom? Do you
9 remember?

10 A. We had a prescheduled meeting with Ofcom on 9 December.

11 Q. Right.

12 A. And I'm just trying to read this quickly. I think what
13 Angus, Mr Russell, is explaining is what we potentially
14 need to do at that meeting in terms of outlining our
15 real concern about the actions of Royal Mail.

16 Q. So this is the plan, then, for the --

17 A. It's an agenda.

18 Q. I'm sorry, that's a better term, yes, an agenda for the
19 9 December meeting.

20 So that was all fairly heartening, so far as you
21 were concerned, at that point?

22 A. I wouldn't describe my feelings at the time as
23 heartening. I would describe them as devastating.

24 Q. That email report was heartening?

25 A. It was one part of a very long process that we knew we

1 would have to probably go through.

2 Q. And you had known you were probably going to have to go
3 through that sort of process for a very long time,
4 hadn't you, Mr Wells?

5 A. We knew that there was a likelihood that they might try
6 something, and as we've restated, we felt that we -- if
7 it was the wrong side of the law, action would be taken.

8 Q. Now, you didn't want to use the word "heartening", but
9 if you go across the page it says:

10 "After deciphering the call, I conclude that it was
11 as encouraging as we could realistically hope for at
12 this stage. As you know, if we have a no-hoper, Chris
13 Rowsell would quickly let us know. He did quite the
14 opposite and even confirmed that they are already
15 putting a team together."

16 This is before they even know what the value of the
17 price differential might be.

18 "They are already putting a team together. Indeed,
19 his willingness to take a long call during the weekend
20 also indicates their understanding of the importance to
21 us and the need for us to be able to provide as much
22 assurance as they're able to give to potential
23 investors."

24 So this is a call on Saturday the 7th so this was
25 a call that Mr Russell had with Ofcom over that weekend?

1 A. That's true, it's a call, yeah.

2 Q. Yes, and it's as encouraging as you could possibly hope
3 for?

4 A. Yeah, I think I need to put this into context, perhaps,
5 that I think we were devastated by this news and that we
6 needed to jump into action because the timing couldn't
7 have been worse.

8 Q. It was news you had been expecting, anticipating for
9 over a year, wasn't it?

10 A. No.

11 Q. Well, I suggest it was, given the material we have been
12 through. But I'm not going to ask you any further
13 questions about that particular email.

14 If we could go on to the next tab, which is actually
15 in the following bundle, which is C4B, so we can shut up
16 C4A for the minute, thanks, Mr Wells.

17 A. Sorry, what tab, Mr Beard?

18 Q. 50, so it should be the first one in C4B, Mr Wells.

19 A. Yeah.

20 Q. This is another email from Mr Russell. I think just to
21 be clear, the name on the top left I'm not sure is
22 material to the email chain, I think that's an Ofcom
23 official's name, so I think it's just to do with how the
24 document was held and disclosed. I'll confirm that, but
25 I don't think there is any suggestion --

1 MR HOLMES: We can confirm that's the case.

2 MR BEARD: I'm grateful, thank you. Just so there is no
3 confusion.

4 So it's an email from Mr Russell to inter alia
5 you --

6 A. 8 December, yes?

7 Q. 8 December, yes.

8 A. Mm.

9 Q. First of all apologising for being a little swearsy on
10 Friday. Then:

11 "What has happened is that Royal Mail has (as
12 expected) announced to the market that it intends to
13 charge less to those who use it on an exclusive basis
14 (like UK Mail) than those who dare to compete ..."

15 So essentially Mr Russell is characterising this as
16 a discount for exclusivity there, but he's referring to
17 the price differential, isn't he?

18 A. Are you referring to paragraph 3?

19 Q. Well, I was just confirming, because he doesn't speak of
20 it there in terms of it being a price differential.

21 A. Paragraph 3:

22 "Even a small differential ... could turn the
23 business ... into ... loss-making ..."

24 Q. Yes, and he is saying "Their timing is no doubt
25 deliberate", so he is echoing your sense that this was

1 all specific.

2 "We have spoken to Ofcom on Friday night and, again,
3 on Saturday morning and are seeing them first thing
4 tomorrow."

5 So that's the prescheduled meeting, the agenda that
6 we've seen.

7 "... unless they manage to get RM to back down
8 informally, we are likely to be launching a formal
9 complaint once the full terms are published on
10 7 January."

11 So what's being said there is that your planned
12 reaction to any announcement of this sort, which would
13 be to complain and take advantage of the contractual
14 terms on suspension, were being geared up; that's
15 correct, isn't it?

16 A. Yes.

17 Q. Yes:

18 "In other words, right in the middle of 'exchange to
19 completion' MAC territory."

20 MAC territory?

21 A. So because of this event we took advice, so this, just
22 for clarity, this is from Mr Russell to management
23 lawyers, which was Olswang, and Angus was checking about
24 disclosure. What this is talking about is including
25 a price differential clause as a material adverse event.

1 Q. I don't think it is, Mr Wells. He's just saying it's
2 right in the middle of exchange to completion material
3 adverse effect territory. He's not talking about
4 including a specific clause. You already had a material
5 adverse effect clause in your draft contract, didn't
6 you?

7 A. There were, but it didn't include pricing.

8 Q. No, but he's not saying here anything to do with
9 pricing, he is saying it's right in the middle of
10 exchange to completion MAC territory. So he is talking
11 about the existing clause, not some modification of it,
12 isn't he?

13 A. I don't believe he is.

14 Q. You don't believe he is, you think he is talking about
15 a modified clause?

16 A. I think that Angus is checking what we need to do by way
17 of disclosure to LDC.

18 Q. Yes, and it was only after disclosure to LDC that there
19 was any discussion of the modification of the MAC
20 clause, wasn't there, Mr Wells?

21 A. To restate, I think that we had got the news from
22 Royal Mail, we understood there could be a devastating
23 impact and uncertainty that this would create in our
24 business, and I believe that, whether it's in this memo
25 or not, but I happen to know the sequence of events that

1 happened because it was really quite important, and that
2 was that we consulted our lawyers with regard to
3 including a material advent -- a MAC clause into the
4 contract.

5 Q. Yes. But this is -- that I'm not going to dispute. I'm
6 going to come on to look at that in a second. But
7 that's not what this sentence is to do with. Let's just
8 move on:

9 "We have a call with [someone from PostNL] ... to
10 decide how -- as we must -- to break the news to LDC."
11 So this is the position in relation to disclosure. "The
12 plan is to do this once we have been to Ofcom but they
13 will be unable to give us a clear answer."

14 That's because of what we'd seen already, that you
15 didn't have precise terms; that's correct, isn't it?

16 A. Well, this was a number of various things which were all
17 sort of happening concurrently. We had got the nuclear
18 reaction from Royal Mail, we were trying to juggle
19 various investors. We had PostNL, we had LDC, and we
20 had management.

21 Q. Yes. So nuclear reaction on 6 December and you have got
22 your team running hard 7th, 8th, 9th to deal with this?

23 A. We were also getting some legal advice from our friends
24 at Monckton about the legalities of this.

25 MR BEARD: I couldn't ever advise you to do that, Mr Wells.

1 THE CHAIRMAN: I was going to say not everybody at Monckton
2 is your friend. Mr Bates clearly is.

3 MR BEARD: He's redacted!

4 THE CHAIRMAN: I'm assuming he is not going to object.

5 MR BEARD: You never know.

6 THE CHAIRMAN: I'll take the responsibility for that one.

7 MR BEARD: "In May we highlighted this in the Investment
8 Memorandum as the top regulatory risk with a moderate to
9 high risk of this occurring in 2014 and it was
10 specifically asked of Ofcom by PwC and GK in their due
11 diligence interview."

12 So this is again specifically referring not only to
13 a meeting involving PwC but also those other consultants
14 you referred to earlier, GK, with Ofcom. They reported
15 the regulator has indicated there is unlikely to be
16 a divergence of price plans. So what you had been told
17 previously, or rather it appears what PwC and GK had
18 been told previously by Ofcom, is there is not going to
19 be a divergence of price plans; is that correct?

20 A. That's correct, yeah.

21 Q. "As we cannot now agree with that opinion, we will
22 certainly need to disclose that to the Investors against
23 the management warranty.

24 "Our hope is that signing should continue and we
25 should rely on the MAC clause if RM does decide to 'go

1 to war' on 7 January."

2 So Mr Russell's position was: carry on and we can
3 rely on the MAC clause if Royal Mail does decide, as he
4 puts it, to go to war, or, perhaps as Royal Mail would
5 put it, issue a contract change notice.

6 What he is suggesting there is that the MAC clause
7 could bite on that notice, isn't he, so that it will act
8 as a sort of suspension of or pause in the process of
9 dealing with the investment; that's correct, isn't it?

10 A. That's correct, yes.

11 Q. Yes, and if you could go to the cross-examination
12 bundle, tab 1, and for this I think the tribunal will
13 also need to go to the cross-examination bundle because
14 it's a case file document but not one that is in the
15 bundles we have.

16 So I think this is an email again from Mr Russell,
17 but it's on the evening of 6 December. This may well be
18 the missive that you were actually thinking of,
19 Mr Wells, when we were having that exchange about the
20 particular sentence in the email I've just taken you to.
21 It says:

22 "Just in case there is any question about how open
23 we have been on this, relevant places in the investment
24 memorandum are:

25 "Page 60.

1 "Further change in pricing metrics to make NPP1 --
2 a plan that TNT cannot access -- cheaper than NPP2.

3 "Possible ... this may happen in April 2014
4 repricing ...

5 "At page 80 we said the risk of this was 'moderate
6 to high'."

7 So what Mr Russell is there saying is "Look, we had
8 alerted LDC to the fact of that risk a long time ago,
9 that Royal Mail would come forward with this proposal".
10 Then it says:

11 "In the PwC DD report [so due diligence report],
12 they state at page 79 that 'in future Royal Mail could
13 try [to] make alterations to the plans in order to
14 protect the profitability of the group and complete the
15 universal service obligation: a change in the pricing
16 metrics to make NPP1 cheaper ...' and conclude that
17 'while changes would be subject to review, the regulator
18 has indicated that there is unlikely to be an increase
19 in the number of zones or a divergence of the price
20 plans."

21 So this is Mr Russell referring to what was in the
22 PwC due diligence report, of which we have a draft in
23 the bundles. Then he concludes:

24 "I am thinking that, given how long we have expected
25 this move [so this reinforces the fact that this was

1 long expected across the year], it should not operate to
2 slow down the transaction."

3 So he is saying here: we've expected this all along,
4 this shouldn't slow things down. That's his view, isn't
5 it?

6 A. He is saying we were potentially expecting it, that it
7 was flagged in some of the reports, yes.

8 Q. Then he goes on:

9 "If the investors are concerned, PostNL could
10 consider including a specific completion condition that
11 there is a satisfactory resolution to any proposed price
12 plan 1 beneficial pricing."

13 So what he is suggesting there is a modification to
14 the MAC clause that existed in your agreement with LDC
15 to say: well, we've got to have satisfactory resolution
16 of price differential issues before the deal's
17 completed; that's what he is suggesting there, isn't it?

18 A. He is saying that we need to include in our transaction
19 a MAC clause that will include the price differential.

20 Q. Yes.

21 A. And by the way management was totally supportive of
22 including that clause in there.

23 Q. Yes. So 6 December, this is before you have notified
24 LDC, you are saying "Let's put in a MAC clause, that
25 makes perfect sense, it means that the deal can go

- 1 ahead". That's what's being said here, isn't it?
- 2 A. There was also EU clearance requirements at the end of
3 January.
- 4 Q. Yes, that's a separate condition, I completely
5 understand, I'm really not going to deal with all prior
6 conditions for completeness. But that's what's being
7 said here, isn't it?
- 8 A. I can ... well, I can tell you my recollection of what
9 was happening here.
- 10 Q. Do you mind just answering the question? What's being
11 said here by you is "Let's put in a MAC clause that
12 deals with" --
- 13 A. Not by me.
- 14 Q. Not by you. I'm sorry, when I talk about "you" I'm
15 talking about Whistl here, and it's by Mr Russell,
16 "Let's put in a MAC clause in our transaction that will
17 specifically cover the price differential", isn't he?
- 18 A. That's what Mr Russell is suggesting.
- 19 Q. And that's before LDC were informed about any of this,
20 isn't it?
- 21 A. Whether LDC had been informed informally or not, I can't
22 recollect.
- 23 Q. You are suggesting that the agonising about whether or
24 not you should inform them in the other email that we
25 have just been going through, that was probably

- 1 irrelevant?
- 2 A. I think there is a protocol about this. We would
- 3 have -- we had various interested parties, and this was
- 4 a massive impact on our business case, and clearly we
- 5 needed to protect that through the MAC clause.
- 6 Q. Yes, and so you, Whistl, were suggesting a specific MAC
- 7 clause should be put into the contract at that time in
- 8 order for the deal to continue, delayed but broadly on
- 9 track, weren't you?
- 10 A. The advice from our lawyers was that we should include
- 11 and disclose a MAC clause.
- 12 Q. Let's move on to the 9 December meeting itself, if
- 13 I may. It's in the C4B bundle that you were in
- 14 previously. Thank you. I want to just go to a slide
- 15 deck at tab 55. You see the cover page for it. It
- 16 says:
- 17 "Riverside House 09.12.2013."
- 18 Riverside House is Ofcom's home, is it?
- 19 A. It is.
- 20 Q. So this is a slide deck that presumably you, with
- 21 others, had prepared for presentation to Ofcom; is that
- 22 right?
- 23 A. I think this was a slide deck that Mr Russell knocked
- 24 out over the weekend.
- 25 Q. Yes, creditable PowerPoint abilities.

1 If we just go through to slide 13, it's headed
2 "Effect of differential pricing", so this is a slide
3 that is explaining, from your point of view, what the
4 effect of differential pricing was, so the price
5 differential that you understood was going to be subject
6 to a contract change notice some time in January; that's
7 correct, isn't it?

8 A. It is.

9 Q. Yes. It says:

10 "Excludes zonal contract holders from the upstream
11 and downstream markets.

12 "Lose delivery competition as external efficiency
13 pressure on largest cost element ...

14 "Unduly prefers those who use 'all reasonable
15 endeavours' to meet profile ...

16 "TNT Post not able (or permitted) to use National
17 contract if doing own deliveries.

18 "Suspected collusion between Royal Mail and UK Mail.
19 UKCN notice of 2 December encourages use of competition
20 law powers.

21 "Need urgent action to dissuade Royal Mail from
22 following through with its proposal and to withdraw its
23 statement of intent and to give UK Mail leniency
24 option."

25 Then the final bullet:

1 "Accepted complaint/dispute suspends price change
2 under access contract. Potentially stops access price
3 rise across the board."

4 Here you are setting out a series of your general
5 arguments of objection and why it is that Ofcom should
6 act, and making all sorts of allegations of collusion,
7 about which you don't have evidence. But it is critical
8 at the end that you accept that if they accept
9 a complaint or dispute, that will suspend the price
10 change, and that was key for your position, wasn't it?

11 A. It was key for our position, of course that didn't
12 withdraw it, but the suspension would have made -- would
13 have stopped an immediate decrement of our profitability
14 from being on a disadvantageous price plan.

15 Q. To be clear, the third bullet from the bottom:

16 "UKCN notice of 2 December encourages use of
17 competition law powers."

18 Do you recall what that refers to?

19 A. No.

20 Q. No. I think it probably refers to a UK Competition
21 Network notice of 2 December which was issued -- the UK
22 Competition Network is a network of regulators,
23 Mr Wells, and it refers to using competition powers,
24 because there had been changes in the law during the
25 year which suggested that if regulators didn't use their

1 competition law powers, it was possible that the
2 Secretary of State would take them away.

3 Do you recall raising that issue with Ofcom?

4 A. No.

5 Q. No, okay. If we could just go on to slide 16, you have
6 got references to the investment timetable, and you were
7 highlighting this, I think, because you wanted Ofcom to
8 get on with things; is that a correct understanding?

9 A. Indeed.

10 Q. Yes.

11 A. Timing was important.

12 Q. Yes. It says you flagged the regulatory risks in the
13 original investment memorandum, and then:

14 "Significant reliance placed on PwC and GK strategy
15 due diligence. Their conclusion from interviews [so it
16 sounds like there may have been multiple interviews with
17 Ofcom] was that: 'while changes would be subject to
18 review, the regulator has indicated that there is
19 unlikely to be an increase in the number of zones or
20 divergence of the price plans.'

21 So it's what we have seen previously that had been
22 stated by Mr Russell, he had put it in their plan. Then
23 you have got more details on the process, and you also
24 refer there to the EU merger filing, need for disclosure
25 and so on.

1 So what you were saying there was, given all the
2 previous relationship you had had with Ofcom, you were
3 saying to them "Now is the time to step in and do
4 something quickly". That's correct, isn't it?

5 A. We needed some action. What this was attacking
6 end-to-end, it was destabilising our customer base, it
7 was putting us at a pricing disadvantage, and we were
8 doing everything in our power to keep the plan on track,
9 to keep the investment on track, because if the
10 investment didn't continue, our end-to-end opportunity
11 was scuppered. So of course we were using the
12 regulator, competition advice, everything that we -- as
13 you would expect from a management team, to look at to
14 repel what we believed to be an abuse of the incumbent.

15 Q. You came away from this meeting where you were, as you
16 say, trying to use the regulator to help, you say in
17 your witness statement at paragraph 55 that you came
18 away from that rather optimistic about the position;
19 that's correct, isn't it?

20 A. Where do I say that, sorry?

21 Q. I am paraphrasing. Please do go to paragraph 55.

22 (Pause)

23 A. So where does it say --

24 Q. No, I'm sorry, it starts at 55; you go on, you talk in
25 56 about some numbers, and then in 57 you say:

1 "We showed our analysis to Ofcom to demonstrate that
2 the price differential would prevent us from going ahead
3 with our E2E plans. Although Ofcom obviously gave us no
4 guarantees about what they would do, I walked out of the
5 Ofcom meeting encouraged that Ofcom had understood the
6 issues and reassured that they were likely to support
7 our position."

8 And it was that that I somewhat briefly summarised
9 as optimistic. Is that fair?

10 A. Again, I think context is everything here. I wouldn't
11 describe my thoughts at the time as optimistic. As
12 I said, we were devastated at this position, we were
13 doing everything in our power to address what was
14 a severe attack on both end-to-end and our core
15 business, and without our core business we had no
16 end-to-end, and that's what the pricing differential
17 attacked.

18 Q. You have used the term "devastated" on a number of
19 occasions. Normally when people use the term
20 "devastated", it's because something is shocking and
21 surprising, Mr Wells. But you seem to be suggesting
22 that you are shocked and surprised when we have seen
23 repeatedly that you expected that this was what was
24 going to happen on the part of Royal Mail, didn't you?

25 A. It was the timing that was so awful, that was stopping

1 the investment, Mr Beard.

2 Q. But, Mr Wells, we've agreed that if there were going to
3 be changes made for 2014, the relevant contract change
4 notices would have to go out in January, wouldn't they?

5 A. We agreed that they would have to go in January. We
6 also talked, didn't we, about finding out this through
7 our customer base?

8 Q. Yes, indeed you did. But when you talk about the
9 timing, you expected that the price differential or
10 a price differential of some sort -- you didn't know the
11 precise value, I completely understand -- was going to
12 be put forward by Royal Mail, and you knew that if that
13 price differential was going to apply in relation to the
14 2014 access contracts, the notice to change the
15 contracts would have to be given in January; you agreed
16 with that.

17 So that was the timing. You knew what timing would
18 apply in relation to those changes, didn't you? The
19 fact it coincided with how you had planned your
20 investment process is beside the point in this regard.
21 You may have been disappointed, but you were not
22 shocked, were you?

23 A. I think we have to disagree on that.

24 Q. Well, Mr Polglass yesterday said it wasn't a shock.
25 Anyway, let's move on.

1 Paragraph 57, you're talking about that meeting. Do
2 you recall who was at that meeting on 9 December?

3 A. Myself and Angus Russell.

4 Q. And from Ofcom?

5 A. Erm ... yeah, I can't recall, I'm sorry.

6 Q. Would Mr Rowsell likely have been there?

7 A. Potentially. McIntosh potentially.

8 Q. You obviously had done a slide deck for the meeting, so
9 I assume you didn't have separate notes of what was said
10 by Ofcom at that meeting?

11 A. I can't recall.

12 Q. Right. If we could go back to bundle C4B, please,
13 tab 52. So this is an email from Angus Russell to two
14 individuals who we've seen previously, the one on the
15 left -- sorry, Mr Wells, please find the document.

16 A. Yes.

17 Q. Yes. Dated 9 December, and it's from Angus Russell
18 to -- and it's two individuals. On the left we know is
19 an individual at LDC; on the right an individual at
20 PostNL. In broad terms, and I'm summarising this, this
21 is a letter from -- the email from Angus Russell
22 carrying through what we saw discussed in the email of
23 the day before in relation to notification of LDC and
24 PostNL as to what's going on -- has gone on, and what it
25 was that Whistl had been doing and your -- some of your

1 thinking in relation to it.

2 Do you recall this email?

3 A. I'm sort of digesting it now.

4 Q. Let's go through it.

5 A. Yeah.

6 Q. "I will not presume to draft to [X]'s quality", X being
7 a lawyer, I believe, "so I have tried to summarise what
8 could happen if there were a pricing differential
9 between the price plans."

10 So it's "if there were".

11 "I will then leave it to you, the investors, to
12 decide what to do. Unfortunately, none of the standard
13 processes takes less than 20 weeks. If an access
14 dispute or complaint is accepted, the price changes are
15 suspended, under the terms of the access agreement.
16 Given the presence of this suspension clause in the
17 Royal Mail access agreement, it is, in my opinion,
18 unlikely that Ofcom would [he suggests] grant 'interim
19 measures'/take 'urgent action'.

20 "Most likely we would bring a combination of access
21 dispute, regulatory complaint and competition law
22 complaint."

23 So it's exploring the three routes that had been
24 previously discussed, and then there is more detail
25 about those routes at the bottom of the page, and there

1 is a discussion there about what would happen if Ofcom
2 refuses to accept a complaint, rules against or permits
3 differential pricing, and that's just set out there.
4 But this is the notification to LDC, isn't it?

5 A. Yes.

6 Q. You had a meeting with LDC on 9 December, the same day?

7 A. I did.

8 Q. Was the individual from LDC that's mentioned on that
9 email present at that meeting?

10 A. I believe he was.

11 Q. The next document I want to go on to is in the same
12 bundle, C4B, at 66. So this is another email from
13 Mr Russell to you, 12 December:

14 "I have just had a call with Chris Rowsell (Ofcom).
15 Royal Mail have taken them through their plans. Chris
16 wouldn't confirm anything so, reading between the lines:

17 "Royal Mail will publish a price differential in
18 January [but, of course, this could be suspended under
19 the contract and/or following the filing of a
20 dispute/complaint]."

21 That's in square brackets, so I take that to be
22 Mr Russell's comment rather than a report of what
23 Mr Rowsell said. Did you read it in the same way?

24 A. Yes.

25 Q. Yes.

1 "Royal Mail will need to discuss with all access
2 customers how moving to NPP1 could be possible in
3 practice if they claim it is an option."

4 So if Royal Mail are saying "You could be on NPP1",
5 they will have to talk to people about it, that's what's
6 being said, yes?

7 A. Mm.

8 Q. "Royal Mail needs to share their plans with all access
9 customers not just NPP1 ..."

10 Then we move on:

11 "From a MAC perspective, it looks like LDC's ability
12 to walk/talk on publication of prices will be too early
13 a trigger. The more relevant date is at the end of any
14 access dispute process (20 weeks ...) and not just on
15 publication. This, though, delays the investment but
16 would we expect LDC to invest/RBS to lend when an access
17 dispute/complaint was pending?"

18 So he is posing that question and saying probably it
19 doesn't matter, it wouldn't make any difference; is that
20 what he is saying there?

21 A. I think what he is saying was that this would defer and
22 delay the investment because of the pending dispute.

23 Q. Yes, he is certainly suggesting that, and he is
24 suggesting that if you have a MAC clause triggered, that
25 doesn't add anything because LDC and RBS would want to

1 wait anyway. Is that what he is saying there?

2 A. I'm not sure.

3 Q. Okay. What is then said is, towards the end of that,
4 that you want to ensure that you persuade LDC that they
5 will "hold their nerve and either complete OR at least
6 hang around until the end of the regulatory process has
7 run its course. This will give them an idea of what
8 lies ahead."

9 So he is saying "We need to talk to LDC; if we can
10 persuade them not to pull out soon, then we should be
11 able to persuade them to hang around until the end of
12 this regulatory process"; that's right, isn't it?

13 A. That's right, and for context again, LDC, unusually for
14 private equity, hung around for 15 months.

15 Q. Yes -- sorry, I cut across you. Please finish.

16 A. So they didn't in effect withdraw, or collectively the
17 investors and management didn't withdraw our end-to-end
18 ambitions until April 2015, and along the way LDC had
19 various opportunities to exit the investment. They
20 liked the investment, they liked the opportunity, and
21 they liked the business plan, and the management team,
22 so they stood by us and stood by this for 15 months.
23 But there was still no certainty and at some stage we
24 had to make a very tough decision. And this is really
25 part of that process.

1 Q. We will come on to the evidence as to LDC's position in
2 due course, and obviously you don't give evidence on
3 behalf of LDC. But just to be clear, you are quite
4 right that they didn't decide to end the investment
5 until 2015.

6 THE CHAIRMAN: But we're right, aren't we, that they never
7 actually lent you any money?

8 A. They did not.

9 THE CHAIRMAN: No. Sorry, invested any money.

10 A. They never invested, no, that's quite correct, sir.

11 THE CHAIRMAN: Hung around but didn't invest?

12 A. Exactly, because we obviously ended up exiting
13 end-to-end.

14 MR BEARD: Let's go to the same bundle, tab 72. Sorry, C4B,
15 tab 72.

16 Now, you told Ofcom you were going to complain, that
17 was the outcome of these exchanges you had had with
18 Ofcom; that's correct, isn't it?

19 A. It is, yes.

20 Q. And then on 17 December you actually had a meeting with
21 Royal Mail, and this is a note of that meeting. Do you
22 remember that meeting?

23 A. I do indeed.

24 Q. Yes. During this meeting, you made it abundantly clear
25 you were going to complain to Ofcom, didn't you?

- 1 A. We did.
- 2 Q. Yes. Then, and I probably don't need to go through the
3 details of that, you further actually wrote to the chief
4 executive of Royal Mail making it very clear that you
5 were going to complain, and that was on 8 January;
6 that's correct, isn't it?
- 7 A. I recall a letter that I sent to the chief executive,
8 Moya Greene, outlining the impact that this decision
9 would have on our business plan, that the likelihood
10 would be that it would stop investment, potentially
11 foreclose end-to-end, and we also pointed out that it
12 was anticompetitive.
- 13 Q. You asserted that that was the case. So prior to the
14 CCNs being announced on 10 January, you knew you were
15 going to complain, Ofcom knew you were going to
16 complain, Royal Mail knew you were going to complain;
17 that's correct, isn't it?
- 18 A. Yes.
- 19 Q. And everyone knew that if Ofcom accepted the complaint
20 the price differential would be suspended before it ever
21 came into effect, didn't they?
- 22 A. The assumption was that it would be suspended.
- 23 Q. Yes.
- 24 A. But of course there is no guarantees here.
- 25 Q. No, no guarantees, but the assumption is that it would

1 be suspended and the assumption was also that in the end
2 you took the view that it would be unlawful?

3 A. Well, that was the advice we were being given at the
4 time.

5 Q. I see. During this period, you nonetheless went ahead
6 and announced the joint venture between LDC/PostNL in
7 relation to E2E; that's correct, isn't it?

8 A. That's correct.

9 Q. That was on 16 December?

10 A. That's correct.

11 Q. Just for your notes, I'm not going to go to the document
12 given the statement by the witness, it's C4B, tab 69.

13 As we know, Royal Mail did put forward the contract
14 change notices on 10 January, so notice period such that
15 changes to the contract would occur in April unless the
16 terms of the contract enabling suspension of that period
17 applied. It came as no surprise to you at all, and you
18 were confident that you would be able to get them
19 suspended.

20 Now could we go to C4B, tab 90.

21 THE CHAIRMAN: Mr Beard, I think you should give the witness
22 a chance to say whether he agrees with that or not.

23 MR BEARD: I'm very happy to.

24 Do you agree?

25 A. Sorry, can you repeat the ...

1 THE CHAIRMAN: I don't think he heard what you were saying.

2 MR BEARD: I'm so sorry. I'll break it up.

3 Royal Mail put forward the contract changes on
4 10 January, so the notice period that such changes to
5 the contract would occur in April unless the terms of
6 the contract enabling suspension applied; that's
7 correct, isn't it?

8 A. Yeah, I believe that's correct.

9 Q. And that came as no surprise to you, and you were
10 confident you would be able to get them suspended?

11 A. We, as I said before, we hoped that we would get them
12 suspended.

13 Q. Well.

14 Let's go on to C4B, tab 90. This is a slide deck
15 from TNT Post, "Impact of price plan proposal Royal Mail
16 14.01.2014".

17 If you just go to slide 16.

18 A. "Next steps"?

19 Q. Yes, this is your plan for running the complaint and
20 lobbying in relation to it at that time. Is that
21 correct?

22 A. (Pause). This looks like a series of actions that we
23 needed to take.

24 Q. Yes. A plan?

25 A. Indeed.

1 Q. You will see there that there's reference to a meeting
2 with Ofcom on 20 January, or week commencing 20 January,
3 to discuss letter and forthcoming complaint.

4 If we could just go now to the cross-examination
5 bundle at tab 2, and we don't appear to have any notes
6 of the meeting on 20 January from Whistl or Ofcom, but
7 we do have the rare thing here of a document from LDC.
8 Clearly you had updated LDC in relation to this meeting.
9 This email is 21 January. Apparently you had met Ofcom
10 yesterday, so the 20th, you had never seen so many
11 people in the room.

12 A. A bit of poetic licence, probably.

13 THE CHAIRMAN: I hope so. I'm sure we can better that.

14 MR BEARD: They brought 15 people. Do you know whether one
15 of them took a note?

16 A. I don't recall, no.

17 Q. You don't recall. You haven't seen any note of that
18 meeting from them?

19 A. I wouldn't remember.

20 Q. No. So TNT presented the plan and impact.

21 "Conclusion -- there won't be any competition in the
22 UK to Royal Mail if they don't act."

23 So that's your statement.

24 "Stressed they needed clarity for both management
25 and the investors.

1 "Ofcom said any decision should set out a form of
2 what can and cannot be done by Royal Mail."

3 Now, that presumably was something that you wanted,
4 because you say you wanted a clear direction in relation
5 to what Royal Mail could and couldn't do; that's
6 correct?

7 A. Yes, you're referring here to what bullet?

8 Q. Sorry, it's the sixth bullet.

9 A. Yes.

10 Q. If you go down, Tower lawyers, Frontier, "went better
11 than expected".

12 "TNT informed Ofcom they would file their formal
13 complaint on Monday. Mid February applies as the
14 deadline for them to take the case.

15 "Probably inconceivable they will not but they kept
16 their cards close to chests.

17 "Went to plan in his view."

18 So essentially you had come away from that meeting
19 on the 20th with a very clear indication that when you
20 complained they would take the complaint and the
21 contract changes notices would be suspended; that's
22 correct, isn't it?

23 A. That's correct. That probably doesn't -- sort of
24 simplifies the fact that we -- if the implication is
25 here everything was going swimmingly well, that's

1 certainly not the case. We were having to make
2 decisions on our business plan at that time, whether we
3 should continue the roll-out, whether there was
4 an opportunity to continue the roll-out of Harrow and
5 Liverpool, where the investment would come from --

6 Q. That's fine, Mr Wells, I'm going to come back to this.

7 A. Okay.

8 Q. There will be an opportunity to talk about these issues.

9 Now, in line with that, Whistl put in its complaint
10 on 28 January, and in a presentation you gave you
11 expressly stated that you expected the CCNs to be
12 suspended, didn't you?

13 If we go to tab 97 in this bundle, slide 5.

14 A. Is this the --

15 Q. I'm sorry, I didn't mean to skip too fast. It's
16 a TNT Post UK presentation, your name is on the front of
17 it.

18 A. LEO.

19 Q. 31 January, LEO?

20 A. LEO, yes.

21 Q. That's latest estimate; yes?

22 A. It is.

23 Q. If we just go through to slide 5, which is headed
24 "Regulatory budget assumption: no price differential or
25 surcharges assumed in BAU plan", and the BAU plan is

1 your business plan; that's correct, isn't it? I'm just
2 looking at the heading for the moment, Mr Wells, on side
3 5.

4 A. Yes, yeah. Business as usual.

5 Q. Yes. Then there are two issues there, VAT distortion,
6 and then changes to DSA pricing, so you have got two
7 major issues that you are identifying here that are
8 relevant to the business plan, you're saying, except
9 that changes to DSA pricing, you don't include any
10 variation for possible price differential in your
11 business plan. You then go on to describe the position
12 in this paragraph:

13 "Royal Mail has announced new access terms from
14 31 March 2014 which would, if implemented, prevent
15 profitable roll-out of E2E services in more than one
16 additional SSC. A formal complaint has been filed ...
17 Suspension of the implementation of the terms is
18 expected under the terms of the access contract."

19 So this is you saying clearly to PostNL your
20 expectation is that they would be suspended, given your
21 close contacts with Ofcom. That's correct, isn't it?

22 A. That's what it's -- appears to be indicating, yes.

23 Q. Yes. This is your slides, Mr Wells.

24 A. Sure.

25 Q. So that's you saying that, isn't it?

1 A. Yeah.

2 Q. Yes.

3 A. It is of course a long time ago, so I'm digesting these
4 and agreeing with you.

5 Q. Thank you.

6 "If Royal Mail refuses to honour those provisions,
7 separate regulatory or legal steps will be taken to seek
8 to prevent the charges from coming into effect until
9 Ofcom has concluded its investigation. Ofcom processes
10 would make a decision most likely in mid-August but this
11 is not a binding, statutory timetable."

12 So you think they will be suspended and you think
13 there will be a decision by August; that's what you're
14 saying at the end of January, correct?

15 A. That's correct.

16 Q. Then true enough, Ofcom did announce that they had
17 accepted your complaint on 21 February, and they were
18 going to open an investigation, and then Royal Mail
19 promptly confirmed that the change notices and the
20 period of notice under them had been suspended entirely;
21 that's correct, isn't it?

22 A. Mm.

23 MR BEARD: Thank you.

24 I'm conscious of the time. I'm about to move on to
25 another topic.

1 THE CHAIRMAN: Yes, I think that would be a good time to
2 stop.

3 Housekeeping

4 THE CHAIRMAN: As regards Monday, first of all this means
5 that Mr Wells will have to remain in isolation from his
6 legal team over the weekend?

7 MR BEARD: Unfortunately, yes, that is the case.

8 THE CHAIRMAN: I'm sorry about that, but those are the rules
9 of the game. I think this may not help, but it would
10 suit us if we started at 2 o'clock on Monday, on the
11 assumption you are not going to take a whole day and nor
12 is Mr Turner, is that right?

13 MR TURNER: That's right.

14 THE CHAIRMAN: I don't know whether that's inconvenient to
15 you but it is convenient to us.

16 MR BEARD: That's fine for us, and I will try and make sure
17 that -- I haven't gone quite as quickly as I had
18 anticipated, but I will make sure that we can fit things
19 in.

20 THE CHAIRMAN: That doesn't affect the plans for the
21 economists' evidence on Tuesday, which remain in place?

22 MR BEARD: Yes, absolutely.

23 THE CHAIRMAN: As I said earlier, we also have
24 a distinguished visitor from Hong Kong, and he will be
25 sitting in on Monday afternoon and for the rest of the

1 week.

2 MR BEARD: What is the best means of providing the materials
3 that were asked for for him? Is it to provide them to
4 the référendaires?

5 THE CHAIRMAN: I think we provided a bare modicum. We
6 discussed it if you remember at the beginning.

7 MR BEARD: Yes, I didn't know whether you needed copies
8 provided, that was all.

9 THE CHAIRMAN: I think we can handle that ourselves. That's
10 very kind of you.

11 (Pause)

12 I spoke out of turn.

13 MR BEARD: A rash rejection, yes.

14 THE CHAIRMAN: Did you get the message, then?

15 MR BEARD: I think so.

16 THE CHAIRMAN: Is it the economist materials, you are happy
17 for him to see all those?

18 MR BEARD: I will confirm with those behind me.

19 THE CHAIRMAN: He may not know what he is getting.

20 MR BEARD: I think, yes.

21 THE CHAIRMAN: I think he has been sent the skeleton
22 arguments, which is enough to get him into the picture.

23 MR BEARD: Does Mr Justice Lam actually want all of the
24 reports for economists that are going to be in the hot
25 tub? Joint is sufficient. Okay. Then that's fine,

1 that's easy. We can provide a copy.

2 THE CHAIRMAN: Could you perhaps settle the appropriate
3 bundle once we have finished?

4 MR BEARD: Yes, we can liaise directly, there's no problem
5 with that.

6 THE CHAIRMAN: There was also a supplemental report from
7 Mr Parker, I'm not sure we have seen that.

8 MR BEARD: Yes. Now, that, we caveated the position in
9 relation to it. Mr Turner described it as a report
10 merely making corrections. One element of it I think
11 clearly is seeking to make a correction. The other
12 element of it stretches the definition of "correction"
13 not quite to the point that economists use it when
14 talking about macroeconomics, but nonetheless in that
15 direction.

16 Nonetheless, we understand that this material is
17 material that Mr Parker wants to put forward and rely
18 upon. In the circumstances, we are going to have to go
19 away and think further and deal with it, but if
20 the tribunal wants to see the material de bene esse and
21 have it in advance of the hot tub, we don't have
22 an objection to that.

23 THE CHAIRMAN: It would be relevant to Mr Parker's
24 appearance in the hot tub?

25 MR BEARD: Yes, I believe it will.

1 MR TURNER: It may be you should see it anyway in case there
2 is going to be a dispute.

3 MR BEARD: I'm just confirming I'm not objecting to that
4 course of action.

5 THE CHAIRMAN: It's certainly within your rights to raise
6 an objection, which we will consider, and we will be
7 better able to do that if we've actually seen what
8 you're talking about.

9 MR BEARD: Exactly, and so it's for that reason that I did
10 not want to stop the tribunal seeing it.

11 THE CHAIRMAN: Right. Perhaps that could be clear by Monday
12 lunchtime.

13 MR BEARD: I think it's unlikely that we are going to say
14 "No, treat it as formally inadmissible". There may be
15 further matters that need to be dealt with in
16 consequence of it, but we will consider further over the
17 weekend.

18 MR TURNER: Sir, do you have copies of it?

19 THE CHAIRMAN: Thank you. That is the end of the
20 transcript.

21 (Discussion off the record)

22 THE CHAIRMAN: Thank you very much.

23 (1.05 pm)

24 (The hearing adjourned until 2 pm on Monday, 24 June 2019)

25

INDEX

PAGE

MR NICHOLAS MARK WELLS (sworn)1

Examination-in-chief by MR TURNER1

Cross-examination by MR BEARD3

Housekeeping85

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25