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6 **IN THE COMPETITION**  
7 **APPEAL TRIBUNAL**  
8  
9

Case No. : 1381/7/7/21

10 Salisbury Square House  
11 8 Salisbury Square  
12 London EC4Y 8AP  
13 (Remote Hearing)  
14

Thursday 4th March 2021

15  
16 Before:  
17 The Honourable Mr Justice Waksman  
18 Derek Ridyard  
19 Eamon Doran  
20 (Sitting as a Tribunal in England and Wales)  
21  
22

23 **BETWEEN:**  
24

25  
26 Justin Le Patourel

Applicant

27  
28  
29 -v-

30  
31 BT Group PLC

Respondent  
32  
33  
34

35 **A P P E A R A N C E S**  
36

37 Ronit Kreisberger QC, Nicholas Bacon QC and Jack Williams  
38 (On behalf of Justin Le Patourel)  
39 Sarah Ford QC and Sarah Love (On behalf of BT Group PLC)  
40  
41

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Thursday, 4 March 2021

(10.30 am)

**Case management conference**

**THE CHAIRMAN:** Good morning, everyone. I hope you can hear me. I am Mr Justice Waksman and I, together with Mr Doran and Mr Ridyard, comprise this tribunal. Before we start, let me just read out the usual warning about remote proceedings such as this. Although the case is being heard remotely, it is of course a full tribunal hearing in just the same way as if everyone was here present in a courtroom. An official transcript will be produced in the usual way, but it's prohibited for anyone to make an unauthorised recording, audio or video, of the proceedings and that is punishable as a contempt of court.

In the course of the hearing it may be necessary for I to confer with the other tribunal members, we will do so by accessing a separate retiring room, I will tell you if that is going to happen, we will then disappear and reappear shortly afterwards.

I'm grateful for all the materials that have been provided by both sides. As both sides have spent some time on the issue of when the CPO application should be heard I intend to deal with that first. In order to do so we need to have an idea of how long it's thought to take, bearing in mind the guidance that it shouldn't usually take more than two days.

Can I first of all ask, Ms Kreisberger, are you content that it is a matter which can be dealt with in two days?

**MS KREISBERGER:** Thank you, sir, yes we are. That is this line with our proposal. One matter which we might come on to, which would be helpful to know, sir, from

1 Ms Ford is whether BT will be making an application to strike out, because  
2 that would, according to the guidance, generally be heard at the CPO hearing  
3 and should be brought promptly of course.

4 **THE CHAIRMAN:** Yes. Thank you very much.

5 Ms Ford, can I turn to you please. I think the most helpful way is if you can indicate  
6 what the particular issues are that you would wish to raise at the hearing of  
7 the CPO application.

8 **MS FORD:** Sir, as the tribunal appreciates we are at a relatively early stage in our  
9 review and consideration of this claim. So I'm not in a position to give any sort  
10 of definitive indication as to the matters that we consider it would be  
11 necessary to raise. For that reason we don't at the moment have a basis to  
12 suggest that more than two days would be necessary. I'm in particular not in  
13 a position at the moment to say whether or not we would seek to strike out,  
14 although that is certainly a matter that is under consideration.

15 **THE CHAIRMAN:** Right. Thank you. That's helpful, because one of the things  
16 which any pre-application CMC has to deal with is setting a date for the  
17 application. We will do that today. On the basis that at the moment you are  
18 not in a position to say it's more than two days, I think that allows us then to  
19 move to -- since this has generated quite a lot of content, I need to explain  
20 how various dates have come about. That is because in the middle of May  
21 I commence a two-and-a-half month trial. That is why I was anxious to see if  
22 it was appropriate for both sides to have something before the middle of May.  
23 I would be able to accommodate it much more easily than afterwards, that is  
24 the sole reason why I took the view, which was the view of the whole tribunal,  
25 to see if anything could be done on those dates, it's by no means writ in stone.

26 That said, I have some availability in the course of my trial, provided that it's

1 a two-day hearing -- which at the moment we seem to be agreed it is -- on  
2 a Thursday and a Friday, because my trial doesn't sit on a Friday.

3 I know that various dates in June and July have been swapped around. Can I just --

4 I will hear Ms Kreisberger if she wishes to make the submissions still that it  
5 should be done in late April or May, but to try and shortcut this can I just tell  
6 everyone that the tribunal could do: 1 and 2 July; 8 and 9 July; 15 and 16 July;  
7 and also, if necessary, 24 and 25 June. Those dates correspond with some  
8 of the windows which BT proposed, although, Ms Kreisberger, from your side  
9 there was a suggestion that most of those dates couldn't be done but I don't  
10 know how definitive that is. If this matter, subject to any argument about May,  
11 is to be dealt with before the long vacation, and it is the tribunal's strong view  
12 that it should be, then those are essentially the dates we can offer.

13 Ms Ford, can I just while I've been speaking to you, is that something which in the  
14 course of this hearing you can check availability on for those dates?

15 **MS FORD:** Sir, I'm sure we can. Two of those dates correspond with dates that we  
16 have indicated were already available, those are 1 and 2 July and 24 and  
17 25 June. We can provisionally assume those will be fine and I will ask those  
18 who are metaphorically behind me to check the other dates.

19 **THE CHAIRMAN:** Then I need to revert to you, Ms Kreisberger.

20 **MS KREISBERGER:** Thank you, sir.

21 Sir, could I just mention that the audio seems to be coming and going a little at your  
22 end. I'm happy to plough on. It's been mentioned by those behind me. I'm  
23 not having any difficulty making out what's been said, I think there is  
24 something of delay.

25 **THE CHAIRMAN:** Right. Thank you. All I have been able to do is increase the  
26 volume at my end.

1 Just give me one moment to see if there's anything further I can do on that. **(Pause)**  
2 I don't think that there is. The only thing I can do is try and switch microphones. Just  
3 give me a moment and then, Ms Kreisberger, you can tell me by way of  
4 example whether ... **(Pause)**  
5 Can you hear me now?  
6 **MS KREISBERGER:** I now have an echo on the line.  
7 **THE CHAIRMAN:** That will be because somebody hasn't muted and of course  
8 I should I think all the participants will be muted from the CAT then.  
9 Ms Ford, can you hear me all right?  
10 **MS FORD:** Sir, yes, I can hear you.  
11 **THE CHAIRMAN:** Well let's try and persevere, Ms Kreisberger --  
12 **MS KREISBERGER:** I'm grateful.  
13 **THE CHAIRMAN:** -- on the question of dates.  
14 **MS KREISBERGER:** Could I just go back to a couple of dates, just to check  
15 whether they might be in play as well, given your indication about Thursdays  
16 and Fridays, sir.  
17 27 and 28 May, are those in play at all? I can give an assurance now that those  
18 would be fine.  
19 **THE CHAIRMAN:** Just a moment. **(Pause)**  
20 That's going to prove problematic because that is the first week of the trial, which will  
21 consist of openings. I don't want to find that because there is then a gap for  
22 the vacation and then I start the evidence on the 7th, and at the moment the  
23 intention is that there is a full four days on opening and I can't really start  
24 splitting that up I'm afraid.  
25 **MS KREISBERGER:** Understood.  
26 Then as we go into June, was 24th to 25th on your list as possible

1           Thursdays/Fridays?

2   **THE CHAIRMAN:** Yes, it is. It's also on BT's list.

3   **MS KREISBERGER:** Yes. I think those are the dates that would be workable, of  
4           the menu currently on offer.

5   **THE CHAIRMAN:** Right. Good. Well, we will proceed on the basis of the  
6           indications that we now have from both parties that that is when the hearing  
7           will be. It's vital for me to have that today, because I have a pre-trial hearing  
8           on my trial tomorrow.

9   If we then stay with that, what we could usefully do is go straight to the pre-hearing  
10          directions as far as the CPO is concerned. I know there's the question of  
11          amendment, I want to put that to one side at the moment. We'll come back to  
12          that.

13   Ms Kreisberger, I've been working off your draft order. It doesn't really matter  
14          whose, because it is simply a question of filling in the dates. But on that draft  
15          order -- we'll come back to disclosure in a moment -- item 5 is, "The  
16          respondent file and serve its response, including any evidence by 4.00 pm".

17   We need to work backwards really. But how long do you say you need for your  
18          response, Ms Ford?

19   **MS FORD:** Sir, we envisage working backwards from the hearing date. If the  
20          tribunal puts in for example skeletons either a week or two weeks before --

21   **THE CHAIRMAN:** Yes.

22   **MS FORD:** -- one would then need to leave perhaps two weeks for the PTR's reply.  
23          We would suggest that our response should then be to enable those two  
24          demands to be met.

25   **THE CHAIRMAN:** Let's just see, the PTR's proposal is that the reply comes 14 days  
26          after the response from BT.

1 **MS KREISBERGER:** Sir, I think we would ask for more time on this extended  
2 timetable. That was really a proposal to accommodate an April date. We  
3 would be looking for something in the order of -- I have some suggestions on  
4 dates -- three weeks as a minimum --

5 **THE CHAIRMAN:** All right.

6 **MS KREISBERGER:** -- on this timetable.

7 **THE CHAIRMAN:** Well let's actually work from the beginning then. Let's work from  
8 now. When do you say you can put in your response, Ms Ford? We are now  
9 at the beginning of March.

10 **MS FORD:** Sir, I wonder if I can take instructions on that particular --

11 **THE CHAIRMAN:** I would have thought that -- before you take instructions -- what  
12 we ought to be looking for is really no later than mid to late April, on the basis  
13 that that is effectively going to give another six weeks, because that would  
14 mean that the reply comes in some time in May, everybody needs to consider  
15 those documents before then dealing with skeleton arguments and the like. If  
16 you'd like to take instructions on that basis, Ms Ford, that would be helpful.

17 **MS KREISBERGER:** Sir, if it's helpful we sketched out a timeline to 14 June,  
18 because that was another date being mooted. Shall I set those suggestions  
19 out, because they're quite close to where we are now.

20 **THE CHAIRMAN:** Right.

21 **MS KREISBERGER:** On that basis we would suggest: the response by no later  
22 than 16 April, which is exactly in line with your proposal, sir; the reply then by  
23 12 May; we then have objections by 14 May; and then on this timeline we  
24 have skeleton arguments by 2 June, that would move to 10 June I think,  
25 which would give 14 days.

26 **THE CHAIRMAN:** All right. Let's pause there and let Ms Ford take some

1 instructions.

2 **MS FORD:** Sir, we have said in our skeleton at the very at least we would like  
3 mid-April, at the earliest, but in the light of the fact that tribunal is now looking  
4 at a hearing towards the end of June, we would suggest that it be more  
5 appropriate to go for the end of April. The dates that Ms Kreisberger just  
6 suggested seem to suggest almost four weeks I think, 16 April to 12 May for  
7 the reply. In my submission that can be cut down in order to accommodate  
8 a bit more time for us to have our response by the end of April. Obviously, as  
9 Ms Kreisberger indicated, the skeleton deadline can now move slightly  
10 because we're looking at a slightly later date. So in my submission it is  
11 possible to accommodate a response from us at the ended of April.

12 **THE CHAIRMAN:** Just one moment, please. Just give me one moment. I just want  
13 to write down some dates. **(Pause)**

14 To what extent does the deadline for objections from anyone else have to factor in in  
15 terms of responses and replies? Or is that something which is in practice  
16 likely to be absorbed and then come out in skeleton arguments?

17 Ms Kreisberger?

18 **MS KREISBERGER:** Yes, that's the practice. It's quite usual to have that deadline  
19 around the reply deadline, it needn't anticipate it.

20 Sir, just whilst you are looking at these dates, we would just say in the ordinary  
21 course the defendant would have 28 days for a full substantive defence and  
22 here they are asking for three-and-a-half months after service. That's a very  
23 luxuriant timetable, we would say mid-April is a sufficient indulgence.

24 **THE CHAIRMAN:** Right.

25 **MS FORD:** Sir, I can address in more detail on the reason why we need more time.  
26 I had understood that in a way to have gone by the board, in that we are now



1 looking at a later hearing date. In my submission the later hearing date can  
2 accommodate responses from us by the end of April, at the very earliest, if not  
3 the beginning of May, and there's no reason to curtail us artificially in these  
4 circumstances.

5 **THE CHAIRMAN:** Yes. Well, I think that given where we are on June, I certainly  
6 don't see why we should go into May, because your position was if necessary  
7 you could do it by the middle of April.

8 What we should do in my view is let's have 30 April for BT's response.

9 Let's have 21 days for the reply, which will take one through to Friday -- I'm doing all  
10 these on Fridays -- 21 May.

11 Let's just deal with skeleton arguments while we're here. I'm sure my colleagues on  
12 the tribunal will agree, I mean I think we need skeleton arguments -- if we had  
13 skeleton arguments two weeks before, it's going to take us through to -- that  
14 would be the 10th, wouldn't it? That would be 10 June. Does either  
15 Ms Kreisberger or Ms Ford have any problem with the 10 June?

16 **MS KREISBERGER:** No problem, sir, with 10 June. The only concern on our side  
17 is that we do have sufficient time for the reply. If we're facing a strikeout  
18 application from BT, evidence relevant to that in reply would go in on that date  
19 of 21 May. I would suggest shortening the time for BT's response, even if it  
20 were, say, 25 April -- I'm looking at the wrong month, sorry, 27 April, rather  
21 than the end of that week or 28th. Three weeks is very confined in  
22 circumstances where BT are getting three-and-a-half months.

23 **THE CHAIRMAN:** Subject to any objection why don't we put the time for your  
24 response back to 28 May?

25 **MS FORD:** Sir, that would certainly be preferable from our point of view rather than  
26 curtailing our time. I would just add, the notion that a potential strikeout

1 application in some way increases the work in my submission might be  
2 something of a misunderstanding, in the sense that the strikeout application is  
3 one of the means by which the tribunal is permitted to consider the merits, but  
4 one shouldn't assume that that in and of itself means there's going to be  
5 a massive increase in the amount of material that the tribunal has to consider.

6 **THE CHAIRMAN:** All right. Nonetheless any strikeout application obviously is to be  
7 made at the same time as your response to the application itself, that is  
8 30 April. That's all on the basis of 4.00 pm, please.

9 I'm going to confer with my colleagues in a minute about all of this, but before I do,  
10 would it make sense just to look at the timetable for publicising the  
11 application? Which is at paragraphs 7 to 9 of the draft order. I mean  
12 obviously the publicising of the application should be done as early as  
13 possible. You actually put 9 March, Ms Kreisberger. I think there's no reason  
14 to delay that.

15 **MS KREISBERGER:** We are happy to go ahead with that date, the publicity is  
16 ready to go, sir.

17 **THE CHAIRMAN:** So 7, 8 and 9 of draft order will be 9 March.

18 We then have to look at objections, the time for making an objection. That could be  
19 extended, because I think you were working towards an earlier hearing date  
20 Ms Kreisberger, but on paragraph 10 you have 15 April or 8 April.

21 **MS KREISBERGER:** Yes. In the alternative timeline, with a June hearing, we were  
22 suggesting 14 May. I think it makes sense to move that forward to just after  
23 28 May, but I will just take instructions but I don't think we would have strong  
24 feelings about that.

25 **THE CHAIRMAN:** Before you do that, if it's notified on 9 March and they were to  
26 make their objections, if any, six weeks, giving them six weeks, that would

1 take one through to I think just a bit later in April, about 23 April I think. But in  
2 any event, why not go for 23 April? That's clearly six weeks after the original  
3 notification. I bear in mind what's said to be the nature of the users here, but  
4 nonetheless I would have thought six weeks is quite sufficient.

5 **MS KREISBERGER:** More than sufficient sir.

6 **THE CHAIRMAN:** Do you have any comment, Ms Ford, any observations on that?

7 **MS FORD:** Not on that point, sir.

8 **THE CHAIRMAN:** Objections by 23 April. It would be same date in paragraph 11 as  
9 well. We have dealt with skeleton arguments.

10 The final thing is -- I mean, at the moment I would need some persuading that there  
11 needs to be a PTR here. We have time to do it. I could make provision on  
12 a Friday for it, but I would want to put in the order that if both parties are  
13 agreed that no PTR is necessary, they let the tribunal know as soon as  
14 possible before the relevant date.

15 It will have to be a Friday. All of the responses and the replies are going to be in by  
16 the end of April. Skeleton arguments are going to come in the middle of June,  
17 that rather suggests that some date towards the end of May. Again, we run  
18 up against the holiday period, and skeleton arguments are 14 June. Because  
19 I won't be sitting in my trial, what about Friday, 28 May and I give you a listing  
20 of an hour.

21 **MS KREISBERGER:** I will just take instructions on that if I may. **(Pause)**

22 Yes, I have the confirmation, that is absolutely fine from our perspective, sir. 28 May  
23 for one hour.

24 **THE CHAIRMAN:** From yours, Ms Ford?

25 **MS FORD:** Sir, yes, I also have confirmation that is fine from our perspective as  
26 well.

1 **THE CHAIRMAN:** Can we then take a pause, please, and I am going to confer with  
2 my colleagues about all of this.

3 We should be seen to be leaving the courtroom and we will come back a little later,  
4 thank you.

5 **(10.59 am)**

6 **(A short break)**

7 **(11.03 pm)**

8 **THE CHAIRMAN:** We are back if you can still hear us. We are agreed about the  
9 dates that I have floated and that you have agreed to. So all of those will go  
10 into the order.

11 I think the next thing that we would like to deal with to find out how it's going to be  
12 dealt with is this amendment application.

13 Ms Kreisberger, you need to unmute.

14 **MS KREISBERGER:** Sorry, sir. Just before we move to the amendment  
15 application, I just wanted to double-check that the date for skeletons is  
16 10 June, because there was some reference to 14th as well but I think we  
17 agreed it was two weeks before the hearing.

18 **THE CHAIRMAN:** Yes, it's the 10th. Can I add, please, that we would want the  
19 agreed bundle to be lodged by Thursday, 3 June, because counsel obviously  
20 need to have a bundle so you can make proper bundle references. If, which  
21 I very much hope will not be the case, there is some argument about  
22 bundling, that would be a reason for having the PTR the previous Friday.

23 **MS KREISBERGER:** Understood.

24 Sir, just so you have it, I just wanted to check that you have our draft directions  
25 which are at tab 3 of the skeleton arguments bundle.

26 **THE CHAIRMAN:** Just a moment. **(Pause)**

1 I'm just trying to find the -- I have the skeleton arguments. This is not the same as  
2 your original draft order, Ms Kreisberger?

3 **MS KREISBERGER:** There are some small differences that might be helpful to  
4 have to hand.

5 **THE CHAIRMAN:** I'm having difficulty accessing the bundles. Wait a minute. No,  
6 no, I have -- just a second -- okay. I have one here, a Word document.

7 **MS KREISBERGER:** Yes. I confess I'm looking at a hard copy, but it has three  
8 different shades of colours for dates. Those dates are now otiose, we've  
9 moved on. I don't refer to it for the dates at all but we do have wording in  
10 which might be helpful. At paragraph 5 on the response, which includes  
11 reference to any strikeout or summary judgment application by BT. So that  
12 wording could simply be included. So if we use this version of the draft order.  
13 It also addresses the application we're going to turn to in relation to the defendant  
14 entity.

15 **THE CHAIRMAN:** Right. I'm still having a bit of trouble with this at the moment. Ah,  
16 right. I now have that, just a moment. I have that open. Just the bit about  
17 strikeout/summary judgments that you wanted to --

18 **MS KREISBERGER:** That's at paragraph 5, that the respondents file and serve their  
19 response and any strikeout and/or summary judgment application.

20 **THE CHAIRMAN:** Just a moment.

21 **MS KREISBERGER:** It should be paginated page 50.

22 **THE CHAIRMAN:** Sorry, paginated 50?

23 **MS KREISBERGER:** Yes, sir, at the top of the page, paragraph 5.

24 **THE CHAIRMAN:** My paragraph 5 here is just about response to the CPO  
25 application.

26 **MS KREISBERGER:** Ah, that's not the correct version by the sounds of it. If it's

1 easier we can circulate it separately.

2 **THE CHAIRMAN:** Why don't you circulate it and we can come back to that. That's  
3 just really an add on to the orders we've already made about timing for any  
4 strikeout application, which is the same as the time for the response. I'm sure  
5 we can tweak that if we need to.

6 Then we turn to amendment application. I think at this stage purely as a heads up,  
7 so I know where we're going with this from Ms Ford, (a) whether they're going  
8 to object and (b) if so, whether they are prepared to deal with this today or  
9 they say it should be on another occasion. Ms Ford?

10 **MS FORD:** Sir, we don't object to the amendments which purport to plead the  
11 relationship between BT Group Plc and BT Telecommunications Plc, we are  
12 content to accept those amendments and we will plead to them in due course.

13 We also don't object to the addition of BT Telecommunications Plc as a party for  
14 purposes of the in-time claims.

15 We do think that a question arises out of the tribunal's jurisdiction to add BT  
16 Telecommunications Plc as a party for the purposes of those claims which  
17 may be out of time. I am in a position -- we've added one authority to the  
18 bundle to make that point, I'm in a position to make that point today.

19 **MS KREISBERGER:** Might I help on that?

20 **THE CHAIRMAN:** Yes.

21 **MS KREISBERGER:** I think it's possible that hares have been set running on this.  
22 I should first say we are very grateful that that's now clear that it's not  
23 opposed in relation to the bulk of the claim.

24 Mr Le Patourel's position is that all claims are in time. So the claim period begins on  
25 1 October 2015, they are therefore within the usual six-year time period and  
26 there is no issue as to any time bar for the whole of the claim period.

1 Out of an abundance of caution in making this application, in the application in the  
2 Mishcons letter there is a reference to the five-year Scottish limitation period.  
3 I do not intend to address you, sir, you might be pleased to hear on that point  
4 today. But we will in due course say that five-year time bar doesn't apply, if it  
5 is a point made against us. We thought we should just ventilate it, flag it, at  
6 this stage, given that we are looking at rule 38.

7 Without getting into the substance of this issue, I'll just make two very simple points.  
8 We are talking about a tiny fraction of claims here. We have in evidence, it's  
9 in the Frontier report, which is the evidence in support of the claim form, that  
10 90 per cent of BT's customers were in England & Wales, based on the  
11 average population. Just for your note I can give you the reference, that is  
12 claim form, bundle 1, tab 3, page 270. But that simply says it's just shy of  
13 90 per cent, it's 89.3 I think per cent.

14 So most class members, proposed class members, are in England and Wales. So  
15 Scotland is already a tiny proportion. Of those claims, we're then talking here  
16 about a six-week period in the context of a claim going back to  
17 1 October 2015. That would be the difference between January 2016, which  
18 is five years ago from when the claim form was filed, and March 2016, which  
19 is five years ago from today when BT Telecoms is going to be added as  
20 a party. We're talking about a six-week period, it's a tiny fraction in the  
21 context of less than 10 per cent of the proposed class members, so this is  
22 a very minor issue. We don't think it need trouble you today, sir.

23 If any point had been taken against us on limitation, that can be addressed  
24 subsequently, whether at the CPO hearing or after that. It's notable in  
25 Merricks that issues of limitation have been pushed off. I think it's just helpful  
26 to be clear we don't think this is an issue which should have any material

1 impact on the addition of British Telecommunications Plc.

2 **THE CHAIRMAN:** The only problem is a technical one, which certainly in the  
3 High Court would be one which of course is I give permission to amend, then  
4 the doctrine of relation back means that the claim is deemed to have started  
5 against both defendants on the date when the claim form was issued. So you  
6 might have a six-week advantage, that's what it boils down to.

7 There's a simple and a longer way of dealing with it. The simple way to deal with it is  
8 you can adopt a form of wording which says that effectively in relation to  
9 (indistinct audio) part of a claim where as at today's date a claim would be  
10 time-barred, they're still entitled to take that point in their substantive defence.  
11 Because if you don't do that they can't, because it will automatically be  
12 deemed to be six years before when the claim was issued, rather than  
13 six years out. Does that make sense?

14 **MS KREISBERGER:** Sir, I think if that was a simple way of cutting through it that  
15 would be an attractive and pragmatic approach.

16 **THE CHAIRMAN:** Yes. What it would mean is if BT took the point, and they would  
17 be entitled to take the point, is that of this very small minority of Scottish  
18 claimants, if there's a CPO and if they win at the end of the day then they are  
19 going to get six weeks less worth of damages than anybody else.

20 **MS KREISBERGER:** Yes, if Group Plc is struck off the claim, is no longer  
21 a defendant, because of course this only applies in relation to British  
22 Telecommunications Plc.

23 **THE CHAIRMAN:** That's true. If you are right on your arguments that the existing  
24 respondent is liable in any event, whatever happens about the influence  
25 defendant it won't matter. And you will be entitled -- well.

26 **MS KREISBERGER:** Precisely.



1 **THE CHAIRMAN:** I'm sure that you and Ms Ford can agree a form of wording.

2 Does that seem sensible Ms Ford?

3 **MS FORD:** Sir, we certainly wouldn't want to lose the benefit of any limitation period  
4 that may have expired, and that might appear to deal with that point.

5 However, there is a concern about the jurisdiction of the tribunal to permit  
6 an amendment in circumstances where the limitation period has expired. The  
7 tribunal only has power to do that in certain circumstances. In our submission  
8 that is not satisfied in relation to those claims where the time bar has already  
9 expired.

10 I can take the tribunal to the relevant --

11 **THE CHAIRMAN:** We have done the same as the court, because this point about  
12 jurisdiction arose in the High Court as well and there is a decision -- which  
13 I don't have in front of me -- in the Commercial Court where they said that  
14 sometimes it's done by agreement, the sort of formula that I've suggested, but  
15 there is definitely dicta somewhere to the effect that the court can make such  
16 an order. But I don't have it in front of me.

17 Isn't the alternative, which boils down to the same thing, the court obvious has  
18 jurisdiction, this is a continuing claim, the court obviously has jurisdiction in  
19 relation to matters that are complained of from six years ago from today,  
20 there's no argument about that. It's only about the earlier period. So if you  
21 put something in the order to the effect that -- so the court has jurisdiction to  
22 deal with all of this, except insofar as the amendment to add the party would  
23 purport to deal with the first six weeks.

24 **MS KREISBERGER:** Precisely, sir.

25 **THE CHAIRMAN:** That's the limit of the jurisdictional objection.

26 **MS FORD:** Sir, that's entirely correct. That is the limit of it.

1 **THE CHAIRMAN:** What we would be doing -- I mean it's defining the six-week point,  
2 but you are entitled to take it, would be that permission to amend would be  
3 granted -- to add the defendant, save so far as that defendant is concerned  
4 with any claim of the Scottish claimants that arose before whatever it is,  
5 4 March 2016. It's another way of expressing the same point. But that would  
6 deal with it, won't it, Ms Ford?

7 **MS FORD:** That would deal with it, sir, yes.

8 **THE CHAIRMAN:** It just means we now know that those claimants will lose six  
9 weeks of their claim insofar as it is made against the new defendant.

10 **MS KREISBERGER:** Sir, I hesitate to interrupt, but we don't concede this point. It's  
11 not our position that there is a five-year time bar. It's only if that point is taken  
12 against us, we don't want to get into arguments about limitation today. Our  
13 principal position is that the usual six-year limitation period applies in  
14 Scotland, England, Northern Ireland and Wales. If that's opposed, we will  
15 make our arguments on that.

16 **THE CHAIRMAN:** Can't you build that into the order as well? That it's granted --  
17 permission to amend to add this defendant, save insofar as (a) there is a five-  
18 not six-year time bar, and (b) if so, any part of that claim which would have  
19 expired more than five years since the date of this order. That means BT  
20 have to establish that there is a five-year applicable time bar, and if that's not  
21 agreed the court will determine it. But if they do it will then follow that those  
22 six weeks will disappear.

23 **MS KREISBERGER:** Sir, I'm grateful. I think it can certainly be addressed with  
24 some formulation.

25 **THE CHAIRMAN:** Otherwise we're going to expend a great deal of heat and light on  
26 this.

1 What do you say, Ms Ford?

2 **MS FORD:** Sir, it sounds like a (indistinct audio) to that effect.

3 **THE CHAIRMAN:** Good, well I'm now going to rely upon the good sense of both of  
4 you to draft something about that. I'm very grateful to BT for, in substance,  
5 agreeing to those amendments.

6 On the agenda, I wanted to mention -- I know it's a point which BT say if necessary  
7 they will take at the application for the CPO, but what about this ATE  
8 insurance question that is being raised, the direct indemnity et cetera? As  
9 I read it, the latest was that the claimants said they were going to provide  
10 something and the defendant said well they've sent that but we are not quite  
11 sure what is happening. Are you able to enlighten us a bit, Ms Kreisberger?

12 **MS KREISBERGER:** Sir, I am not, because I have the expert here, Nicholas Bacon  
13 QC will address you on these matters.

14 **THE CHAIRMAN:** Yes.

15 Mr Bacon.

16 **MR BACON:** Yes, very good morning to you, sir.

17 **THE CHAIRMAN:** Good morning.

18 **MR BACON:** Yes, there has been quite a bit of activity behind the scenes in terms  
19 of correspondence over, broadly speaking, a point is taken by BT as to the  
20 adequacy of the ATE policies. Harbour, as you know an extraordinarily  
21 well-established funder, has taken a view to cut through a lot of this  
22 an indemnity could be provided, much in the same way they have provided in  
23 the past in security for costs type applications in the High Court.

24 Yesterday a draft was sent over to Simmons & Simmons of a proposed deed of  
25 undertaking, it's in a supplemental bundle that has been prepared for you, sir,  
26 this morning. It's a bundle of -- at least mine is headed "2B, additional CMC".

1 It's at tab 10 of that bundle, section 1. If I may just say, sir, it's formulaic in the sense  
2 that it's based upon an accepted undertaking that has been given in the past,  
3 most recently in the Ingenious group litigation, of which you will be aware, it  
4 was accepted by the Commercial Court and the defendants in that case as  
5 being an adequate way through very, very similar arguments, not quite the  
6 same because it's security for costs in terms of the Commercial Court, but  
7 here as you know from the authorities, the jurisprudence, the test are pretty  
8 similar.

9 I don't criticise my learned friend Ms Ford if she's not in position to give indication,  
10 but it would be helpful to know -- because she has only heard it recently, but  
11 I do commend it to the court as a way through pretty much all of the funding  
12 problems, which would mean that we wouldn't be occupied in July with sort of  
13 these matters, important as they are, and they can be a detraction.

14 **THE CHAIRMAN:** Unless Ms Ford wants to address me I don't propose to say any  
15 more about it today, I just wanted to have a sort of progress report. Obviously  
16 it needs to be dealt with one way or the other if the claimant is right that what  
17 the undertaking that's provided is clearly sufficient, and the defendants still run  
18 an argument about it they'll be at risk on costs if they lose the argument. On  
19 the other hand, if there are proper concerns they have that need to be  
20 addressed then they should be addressed.

21 I don't think I want to make any directions about it, we just have to try and get on and  
22 deal with that issue.

23 **MR BACON:** Quite, sir. Thank you for that. I think that is the appropriate way to  
24 proceed. As I say, this has been relatively last minute but we were hoping to  
25 try and crystallise the issues and try and resolve as much as we can in  
26 advance of the July date with the need to plead anything out.

1 **THE CHAIRMAN:** What I perceive to be the final two matters, which may be related,  
2 is the claimants' application for disclosure and the proposed confidentiality  
3 ring, which I think is now by consent. Ms Kreisberger, do you want to address  
4 me on either or both of those?

5 **MS KREISBERGER:** Yes. I'm grateful, sir. I think happily both matters are agreed,  
6 so we have the agreed form of the confidentiality ring order in the bundle.  
7 I hope I'm right in saying this is page 18 of the skeleton bundle.

8 **THE CHAIRMAN:** The latest version of that, which came through yesterday, I have  
9 somewhere in hard copy. Yes, I have that.

10 **MS KREISBERGER:** The terms of that, sir, are agreed. Unless you had any  
11 questions on the formulation, I think that can simply be ordered in this form.

12 **THE CHAIRMAN:** Yes.

13 **MS KREISBERGER:** Then in terms of disclosure, we have asked for unredacted  
14 versions of four of the Ofcom documents and Ms Ford has helpfully indicated  
15 that they are content to provide those.

16 If we go to our draft directions, again at page 48, we have the date in there at  
17 paragraph 2 and that provides for 9 March. So unless Ms Ford has any points  
18 or difficulty with that date we could proceed with disclosure.

19 **MS FORD:** Sir, I'm just waiting for confirmation about the date in particular. The  
20 position is we have no objection in principle to providing these documents.  
21 We are just liaising with Ofcom. And the reason we do that is because we've  
22 given undertakings to keep the confidential versions confidential, and so it's  
23 necessary for us to liaise with Ofcom in order to disclose them. I'm just  
24 awaiting current indication as to whether we envisage there should be any  
25 problem with that date, and I am told it should be fine.

26 **THE CHAIRMAN:** Does that mean that disposes of the disclosure in the

1 confidentiality items on the agenda?

2 **MS KREISBERGER:** It does, sir. They can then be ordered in that form.

3 **THE CHAIRMAN:** Right. We don't have anything else.

4 Is there anything else from your side, Ms Kreisberger?

5 **MS KREISBERGER:** I will just check with those metaphorically sitting behind me  
6 that that is my menu. **(Pause)**

7 Sir, I'm grateful. We don't have anything further.

8 **THE CHAIRMAN:** Thank you.

9 Ms Ford?

10 **MS FORD:** Sir, nothing further from us either.

11 **THE CHAIRMAN:** Thank you very much indeed. We've managed it within an hour.

12 I am extremely grateful to both of you for your very helpful approaches. I don't  
13 need to confer on what we've just done now.

14 We will conclude the hearing now and the tribunal will look forward to a copy of the  
15 draft order as soon as possible please. Thank you.

16 **MS KREISBERGER:** I'm grateful, sir, thank you.

17 **(11.30 am)**

18 **(The hearing concluded)**

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### Key to punctuation used in transcript

--	Double dashes are used at the end of a line to indicate that the person's speech was cut off by someone else speaking
...	Ellipsis is used at the end of a line to indicate that the person tailed off their speech and did not finish the sentence.
- xx xx xx -	A pair of single dashes is used to separate strong interruptions from the rest of the sentence e.g. An honest politician - if such a creature exists - would never agree to such a plan. These are unlike commas, which only separate off a weak interruption.
-	Single dashes are used when the strong interruption comes at the end of the sentence, e.g. There was no other way - or was there?