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IN THE COMPETITION
APPEAL TRIBUNAL

Case Nos. 1280/3/3/17

Victoria House,
Bloomsbury Place,
London WC1A 2EB

14 February 2018

Before:

THE HON MR JUSTICE MANN

(Chairman)

(Sitting as a Tribunal in England and Wales)

BETWEEN:

(1) VIASAT UK LTD

(2) VIASAT INC

Appellants

- and -

THE OFFICE OF COMMUNICATIONS ('OFCOM')

Respondent

- supported by -

INMARSAT VENTURES LIMITED

Intervener

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CASE MANAGEMENT CONFERENCE

APPEARANCES

Mr Michael Bowsher QC (instructed by Latham & Watkins) appeared on behalf of the Appellants.

Mr Josh Holmes QC (instructed by Ofcom) appeared on behalf of the Respondents.

Mr Tim Ward QC and Miss Anneli Howard (instructed by Jones Day) appeared on behalf of the Intervener.

1 THE CHAIRMAN: Mr Bowsher?

2 MR BOWSHER: Sir, my name is Michael Bowsher, I appear today for the Viasat companies,
3 who have brought these proceedings. Ofcom is represented today by Mr Josh Holmes QC,
4 and the intervening party, Inmarsat, is represented by Mr Tim Ward QC, leading Miss
5 Anneli Howard.

6 Would it help if I quickly review what I think the material is before the Tribunal in terms of
7 the physical material. I think there is a two volume CMC bundle, one confidential bundle
8 with a small number of documents. The notice of appeal, I think one has to get from the
9 appeal bundle itself, which comes in two parts. The only document which I think has been
10 sent to the Tribunal that may not yet have found a home in the bundle is the very short first
11 witness statement of John Colahan, which responded to certain points made in Inmarsat's
12 submissions. I have copies which I can hand up.

13 THE CHAIRMAN: I have read that.

14 MR BOWSHER: It is the two pages that matter.

15 THE CHAIRMAN: He is seeking to justify Mr Janka, I saw that this morning.

16 MR BOWSHER: If it needs a home it would probably fit in at tab 61.

17 THE CHAIRMAN: Somebody else can do that.

18 MR BOWSHER: We don't want to get overwhelmed by stray documents.

19 THE CHAIRMAN: Can I just help you, Mr Bowsher, and your colleagues (if that's the right
20 description), just so you know what I have read and haven't read. I have basically read the
21 material which appears on the reading lists given in the various skeleton arguments, except
22 that I have not delved into correspondence. So I have read the notice of appeal, I've read
23 the witness statement, I have read through the expert's report. When I say I've read the
24 witness statements, the witness beginning with Mr Baldridge, when he started getting into
25 detail of correspondence, I didn't descend into that detail. It didn't seem to me to be
26 necessary. These things are always overtaken by events by the time you get there. I've
27 read the expert's report, the redacted expert's report. I have basically read everything I was
28 asked to read, except, as I say, correspondence. When I say "read", I mean read, but not
29 necessarily absorbed all the detail of.

30 MR BOWSHER: Fair enough.

31 THE CHAIRMAN: That may or may not be a helpful observation.

32 MR BOWSHER: It was very helpful. I am hoping that we may not need to go very much further
33 than that for today.

34 THE CHAIRMAN: So do I.

1 MR BOWSHER: I suspect the only seriously controversial issue is under the general heading of
2 'Confidentiality'. It is possible that, in going into that, I may inadvertently mention
3 something which is, itself, confidential, and so it might be appropriate for that - I'm relaxed
4 about it, but it's Inmarsat's confidentiality, and it may be that, lest I blab something I ought
5 not to blab, that argument should be heard in private.

6 THE CHAIRMAN: We'll see. I would hope, whatever the scope of the debate is, which I want
7 to clarify in due course, we might be able to do it without going into private. I am only
8 going to go into private when it's absolutely necessary, and my experience is that it is very
9 seldom the case that responsible counsel, into which bracket you fall, start revealing things
10 that shouldn't be revealed. One can often conduct these things by pointing at pieces of
11 paper. We'll see where we go. It may be necessary to do that, but we'll see. We are in
12 open court as it were.

13 MR BOWSHER: Yes.

14 THE CHAIRMAN: We're not overrun by spectators, I see, but we are in open court.

15 MR BOWSHER: No, but you never know who might arrive without my noticing. I only mention
16 that, because I was going to suggest that we dealt with that controversial matter last, but I'm
17 in the Tribunal's hands. Probably everything else we can deal with relatively quickly.

18 THE CHAIRMAN: Can we just check what's on the agenda just to work out what we have to
19 discuss? I've got the latest version of the agenda, which is dated 8th February, but in terms
20 of headings, the first thing I've got is forum, but there's nothing for me to decide on that.

21 MR BOWSHER: No.

22 THE CHAIRMAN: Then we've got confidentiality. As I understand it, there are two issues: first
23 of all, what material is to be treated as confidential now, and there have been some further
24 developments on that. I've seen an updated table, but haven't absorbed it. Secondly, in
25 relation to material that is still confidential, who's in the ring?

26 MR BOWSHER: Yes.

27 THE CHAIRMAN: Can I just, before we move on, establish in relation to the first of those what
28 material is confidential and what isn't? Am I going to be expected to resolve that issue
29 today over the few heads of confidentiality where there's still a dispute about
30 confidentiality?

31 MR BOWSHER: It is still an outstanding matter. It may be that it's a matter - I'm not sure at the
32 moment how it can be resolved without you resolving it, Sir. Our position is quite simple:
33 if the seven go into the ring, you don't need to resolve the confidentiality issue. We have no
34 interest in further publicity. We're more than happy that things stay confidential within the

1 ring as long as we have our seven in the ring. The only issue we would then have regards
2 the things which are so confidential that they've been redacted and we haven't been able to
3 read, and that arises only in respect of the further documents which we received on
4 Monday. Some of those redactions, we say, have got to be relevant. We're happy for them
5 to be treated as confidential, but at least those in the ring should be able to read what is
6 under the black splodge.

7 THE CHAIRMAN: So there is inevitably going to be an "is this material confidential" debate?

8 MR BOWSHER: Yes.

9 THE CHAIRMAN: That will arise at least in relation to the correspondence you have described,
10 and which, if I've got it, I certainly haven't seen. Is that to be resolved today, or is that to
11 be resolved in a separate hearing?

12 MR BOWSHER: At the moment it's to be resolved today. I would ask you simply to determine
13 that that material should be treated as confidential, but it should be unredacted, because, just
14 from context, it must at least be, in part, relevant. I've not seen it obviously, so I can't---

15 THE CHAIRMAN: That dispute is going to be dealt with by me today?

16 MR BOWSHER: Yes.

17 THE CHAIRMAN: That materially alters the length of this hearing if we are going to have to
18 have a sentence by sentence dispute about confidentiality.

19 MR BOWSHER: As I say, I can't have a sentence by sentence dispute about it. It's a large patch
20 of black. I'm only requesting that it be put into the ring so that I can read it. That's our
21 only position.

22 THE CHAIRMAN: Would you like to say something?

23 MR WARD: Only this, Sir, that we don't think this is a suitable occasion at all for that exercise.
24 My clients have greatly accelerated the disclosure that the claimant sought. They actually
25 only asked for it in March. Of course, they haven't had a chance to digest it, and of course
26 there is plenty of scope for sensible discussion between the parties to narrow any issues. If
27 it really becomes necessary to come back before the Tribunal on a focused basis, of course,
28 subject to your availability, Sir, that can be done on another occasion.

29 THE CHAIRMAN: Yes.

30 MR WARD: It's really premature to talk about trying to do that exercise today.

31 THE CHAIRMAN: I must confess - do you want to contribute?

32 MR HOLMES: No, we respectfully agree with Mr Ward, the objections to confidentiality were
33 only raised for the first time in Mr Bowsher's skeleton argument, the scope of the
34 confidentiality redactions. They hadn't been raised with Ofcom before that when a table

1 was served, and there hasn't, therefore, been an opportunity yet for the parties to discuss the
2 scope of those confidentiality redactions.

3 THE CHAIRMAN: Yes. I must confess that it was my instinct that we weren't ready to have a
4 footnote by footnote, sentence by sentence, debate about confidentiality, because that is
5 what in theory it may mean if there's a dispute, because it needs setting out more than it has
6 been. We'll see where we get to, but I doubt if we'll be dealing with that. Obviously, if the
7 ring gets widened you don't care, or rather it doesn't matter.

8 MR BOWSHER: It doesn't matter, as long as the redacted material is unredacted so at least those
9 in the ring can read it. Otherwise we simply can't have that debate, other than to argue
10 about black marks. We are neutral - anyway, you know----

11 THE CHAIRMAN: I'm just trying to work out the scope of what we're dealing with today.

12 Dates: is there a further measure of agreement on dates yet, or is there still a dispute? Just
13 tell me whether there's a dispute, I don't need to know about it at the moment.

14 MR BOWSHER: There is no major dispute on dates. I think the only issue might be as to a date
15 for our putting in a reply and reply evidence, and I think the suggestion that we should have
16 a CMC after all the pleadings and evidence is in but before skeleton arguments are
17 delivered. That's only, I think, a procedural debate.

18 THE CHAIRMAN: If there's largely a debate on timing, where does that timing throw the trial
19 date?

20 MR BOWSHER: July.

21 THE CHAIRMAN: We get to July?

22 MR BOWSHER: Yes, we all agree that we would be looking at July. There's no debate about
23 changing the schedule, we're just asking for some dates to be put in. We would like a date
24 fixed now for us to put in a reply, and we suggest that it would be sensible to have a CMC
25 at which we would discuss matters such as cross-examination of witnesses necessary/not
26 necessary and, if so, how?

27 THE CHAIRMAN: Right, and then evidence to establish - is there any dispute under the
28 evidence head, which is----

29 MR BOWSHER: Too early - no dispute that expert evidence is to be admitted, that Inmarsat and
30 Ofcom are going to put in reply evidence, and no dispute that it's too early to decide what
31 we do with it at trial.

32 THE CHAIRMAN: Do you mean whether it's 'hot tubbing' or not?

33 MR BOWSHER: Whether all evidence is required, whether cross-examination is required, let
34 alone 'hot tubbing'.

1 THE CHAIRMAN: Then on the agenda someone has put down to consider the relevance, if any,
2 of EU General Court proceedings and domestic proceedings in other Member States. The
3 answer to that question is none, isn't it?

4 MR BOWSHER: The answer is agreed, none at the moment.

5 THE CHAIRMAN: Right, good. Further issues: are there going to be any further issues raised
6 other than those that appear on the agenda that I'm looking at?

7 MR BOWSHER: No.

8 MR WARD: There's one very small point, which is we would be asking for a direction from the
9 Tribunal that confidentiality protection applies to the access by the public to the documents
10 under Rule 102(5) of the Tribunal Rules.

11 THE CHAIRMAN: I haven't looked at that, but I assume that's the equivalent of 31.22 in the
12 CPR?

13 MR WARD: It's not equivalent to that. It is equivalent to a rule in the CPR, I don't recall which
14 one. It's just to protect the documents from public inspection.

15 THE CHAIRMAN: That's what CPR 31.22 - if I've got the number right, that's what it does.

16 MR WARD: So we're at criss-cross purposes as to the numbering, but that's all it is.

17 THE CHAIRMAN: There won't be any difficulty about that for the time being. Any ruling
18 I make about that will have to be renewed for the trial if it's confidential stuff, but that
19 should be straightforward. That's not going to take time.

20 Thank you, Mr Ward.

21 MR BOWSHER: There's no dispute on that from us, other than it will be premature to make that
22 a general order to cover the trial.

23 THE CHAIRMAN: Right. So, Mr Bowsher, we need to get down to the confidentiality point.

24 MR BOWSHER: Yes.

25 THE CHAIRMAN: You need not open the case and what it's about, because I think I've got
26 enough of what it's about. There is one thing I want to try and understand - I'm not as
27 steeped in this as you are, as you will understand - and that is this: you're seeking to
28 remove the authorisation that Inmarsat has got, putting it briefly, to use these parts of the
29 spectrum for the particular aircraft use that they are going to use it for, that they say they
30 want to use it for.

31 MR BOWSHER: Yes.

32 THE CHAIRMAN: I am not trying to penetrate your client's commercial thinking, but I just
33 want to make sure I've understood where that might or might not leave your clients. Your
34 clients are in the same line of business. If you were to win and get the decision set aside, it

1 still doesn't mean that you would have any different or better access to the relevant bit of
2 spectrum, it just means you have knocked out a competitor from using what the competitor
3 thinks it's got in order to compete with you in practical terms?

4 MR BOWSHER: Until Ofcom have looked at the matter again and decided who should benefit
5 from that position, indeed.

6 THE CHAIRMAN: But it can never be you, can it, because of the EU ruling which puts Inmarsat
7 and Solaris in the driving seat, as it were?

8 MR BOWSHER: It may be, depending on other matters.

9 THE CHAIRMAN: As things stand?

10 MR BOWSHER: As things stand, it would be unlikely to be us, but we would say it certainly
11 ought not to be Inmarsat, certainly not without further conditions being applied to any
12 authorisation, and Ofcom should look again at the terms on which the authorisation is
13 granted, and whether any authorisation should be granted, and what should be done about it.
14 Of course, again, what the environment will be in a few months' time is literally anyone's
15 guess.

16 THE CHAIRMAN: Yes, but knocking this out doesn't - it improves your clients' commercial
17 competitive position, because it means Inmarsat don't have a competitive product, or at
18 least not this competitive product.

19 MR BOWSHER: Indeed.

20 THE CHAIRMAN: But it doesn't do anything for enabling you to do something which you
21 couldn't otherwise do?

22 MR BOWSHER: It doesn't automatically put us in any better position than we're currently in. It
23 might in the long term, but it doesn't without many more steps in between.

24 THE CHAIRMAN: Your case in the appeal - you haven't used this word, it's just a colloquialism
25 I'm going to use without prejudging anything - you say that effectively Inmarsat are
26 cheating by using a permission that they got for one purpose to be used for another purpose,
27 a more limited purpose, which isn't what they got their permission for in the first place?

28 MR BOWSHER: We don't characterise it that way, but, yes.

29 THE CHAIRMAN: That's why I'm careful to say it's my terminology, not yours, and it's simply
30 a colloquialism, and nobody should assume I've decided anything or that the case will be
31 decided by using pejorative terms like that. That is, in essence, what you say?

32 MR BOWSHER: Yes.

33 THE CHAIRMAN: Right, that's cleared that out of the way. Then I do understand correctly
34 where you are.

1 Shall we move then on to confidentiality, which is basically - are you going to press for me
2 to determine details of confidentiality, yes/no, yes/no, for the various disputed items today,
3 or are you going to say that can be parked?

4 MR BOWSHER: No. There are two issues of confidentiality. There are the various matters that
5 are identified in the authorisation decision and have been subsequently identified in
6 documents produced as being confidential, and asserted as being confidential, by Inmarsat.
7 It is right that exchanges are still going on as to what is or is not confidential.

8 We are relaxed as to what is confidential, as long as we are able to expand the ring. So our
9 starting point on that is that the ring should be expanded. We certainly do not propose that
10 we should have a line by line analysis as to what is or is not confidential in that category.

11 THE CHAIRMAN: I have to approach this part of the debate then on the footing that, amongst
12 the material which has so far been redacted and withheld from you, there is some
13 commercially confidential material?

14 MR BOWSHER: Indeed. That will be the point of the ring.

15 There is a different level of - I'll call it confidentiality, although again it may be that this is
16 partly confidentiality, it may partly be relevance, I'm not able to discern and different
17 assertions have been made. If you take the confidential CMC bundle, Sir - again, taking
18 this briefly without necessarily going into the detail of all of this - if you go to tab 3, you'll
19 see the unredacted decision, and that has a number of references to documents in particular
20 in footnotes.

21 THE CHAIRMAN: Yes.

22 MR BOWSHER: We sought disclosure of that material. There is an issue which I don't think
23 needs to trouble you as to how that was done, and the timing of that. We had hoped to be
24 able to get that a little bit earlier so that we could have gone through all of this, but in any
25 event we have received the documents that we sought within the ring, with one or two
26 exceptions - there are one or two annexes which are referred to which aren't provided, and
27 there may be an issue, but I don't propose we take that up today, I propose that we deal with
28 that after today. There are one or two documents which we're not clear why they weren't
29 produced. Broadly speaking, from 6 to the end of that file are the documents which were
30 produced. Some are said to be all confidential, and in some the confidential parts are
31 identified in yellow. For example, if you go to tab 8, there was an exchange of emails and
32 this illustrates the point as well as any other. This document at tab 8 is a document which is
33 relied upon by Ofcom in its authorisation decision, and it arises out of three questions which
34 are clearly pertinent to the authorisation decision. It's this exchange in its entirety which

1 appears to be relied upon in the decision, and what one sees is that part of the questions
2 which are on the second page - obviously, we're in reverse order - is said to be open, part of
3 it is said to be confidential and part of we can't see. I don't know whether or not that is said
4 to be irrelevant or confidential.

5 THE CHAIRMAN: What's the answer to that question?

6 MR HOLMES: All of the redactions that are blacked out are blacked out on grounds of
7 irrelevance.

8 MR BOWSHER: We find that surprising, given that the whole document is relied upon, and
9 you'll see that the response again - you can see the same in the response on p.1 - the dual
10 level of redaction applies. There's confidentiality and then the blacked out material.
11 Clearly a judgment has been made as to what is or is not irrelevant, and it's clearly quite a
12 fine judgment because some quite specific points have been taken out.
13 If you go on to tab 13 you will see a lengthy document. Again, it's referred to in a number
14 of the footnotes, and this concerns the way in which Inmarsat's offering is being picked up
15 by the airline industry. You can see a very large part of this document is covered in black.
16 It seems a remarkable amount. Given that the whole theme of this document is to convey to
17 regulators the progress which has been made in launching this service, and the way in which
18 it is being launched, it seems surprising that so much of it could be regarded as irrelevant,
19 particularly when, for example, if you go to the very last page and you have the conclusion,
20 you see the second bullet is all about the customers who are picking up this service, or
21 rather the customer which is picking up this service, in the second bullet at p.22 of that
22 document.

23 Again, I wasn't planning for today's purposes to take you----

24 THE CHAIRMAN: Just a minute. (After a pause) What's COCOM?

25 MR BOWSHER: The Committee of Communications Regulators. It is the group of national
26 regulators.

27 THE CHAIRMAN: (After a pause) Yes?

28 MR BOWSHER: Ground 2 of our appeal in particular goes directly to the issue, what is the
29 service that, in fact, is going to be picked up by the airlines and on what terms? That is
30 what ground 2 directly deals with. It picks up para.3.21 of the authorisation decision where
31 Ofcom itself recognised the extent to which airlines install the satellite terminal is a critical
32 consideration in determining whether the EAN is compliant with the legislative framework.
33 So it's in the authorisation that what, in fact, is being done, or is likely to be done by
34 airlines, forms an essential part of Ofcom's own reasoning. We then challenge the way in

1 which they have applied that finding in paras. 77 to 80 of our notice of appeal - again,
2 I don't think we need to get into the machinery of the argument. This issue about what is
3 happening and what, in fact, is being sold is at the heart of one of our grounds of appeal.
4 Again, we find it surprising that that is irrelevant. All we would suggest is that that material
5 should be revealed, albeit on a confidential basis, so that if there is a battle to be had as to
6 whether it's relevant or not, we can have that properly on some future occasion. That's
7 really the only extent to which there is a challenge as to what is or is not confidential that is
8 live between us as of today.

9 As I say, the other issues as regards what I'll call yellow confidentiality as a shorthand,
10 there is no real issue if we get the confidentiality ring of seven.

11 **THE CHAIRMAN:** Although it's not a matter for today, your point about relevance doesn't quite
12 work, does it, because the other side say, "This is irrelevant, we don't have to disclose it to
13 anyone", and you say, "Well, let's see, so we can really see whether it's irrelevant and then
14 we can have a debate about relevance". That's not how it works, is it? Normally relevance
15 is dealt with by responsible professionals on the disclosing side forming a view as to
16 relevance, and in order to check relevance you don't normally get to see it, that's the whole
17 point. There may be occasions on which the Tribunal itself will see it to judge, I suppose.
18 That can be done with privileged material, at least under the CPR. I assume it can be done
19 with relevance. You don't normally get to see it in order to decide relevance because that's
20 the whole point, they say you shouldn't see it at all.

21 **MR BOWSHER:** Well, in our submission, this material - we've only seen it since Monday, and
22 there's not been an explanation of what it is. The difficulty, of course, is the timing here.
23 The material has been produced. It has not come with an explanation as to what it does
24 cover. If it were genuinely irrelevant one might have expected to see some at least vague
25 indication as to what these other irrelevant issues were so as to demonstrate what is the
26 irrelevant material that's being talked about - not in any way because, by definition, we're
27 not interested. When you look at those documents - and I am not going to take you through
28 all of them now, I've given you two examples - it seems a little bit odd that in the middle of
29 a document which is relied upon by Ofcom, that is surrounded by material that is plainly
30 relevant, and given the context of those documents, that it should be wholly irrelevant.

31 **THE CHAIRMAN:** Mr Bowsher, let me at this stage say two things, which I hope will advance
32 any future debate. First of all, when I've had to address questions of relevance, which
33 I have on a significant number of occasions in the past, I have generally found it surprising
34 that a part sentence can be redacted on the grounds of irrelevance, and I see that that has

1 happened in this case, and I am not making any ruling, but I indicate that I usually find that
2 a surprising claim. It is one which requires considerable justification. That will remain the
3 case if and when we have to debate the case for relevance that is made.

4 Second, I agree with you at the moment, and subject to hearing from Mr Ward, that if one is
5 going to have a debate about relevance, then it is necessary to do so by the party claiming
6 irrelevance to indicate at least in general terms the subject matter of the irrelevant material -
7 without actually disclosing it, of course, which makes the whole exercise pointless - so that
8 it can be seen why they say it is irrelevant, and why, for example, as you would say, a
9 passage in the middle of some other relevant material, is in fact said to be irrelevant.

10 I will leave Mr Ward to reflect on the extent to which he is going to accept that that should
11 be done in general terms in due course. That may present a trickier exercise in respect of
12 some of it rather than others. I notice, for example, that on p. 4 of this, which looks like a
13 sales brochure, there's a number of days in the last paragraph which is removed. I don't
14 suppose there'll be much debate about that because it may not matter. If one can work out
15 what that is, it's a number, and the case for irrelevance may be apparent. That's one thing.
16 However, when one looks at p. 1, the covering letter, as it were, to that document, it seems
17 to me that the back half of a sentence has been removed. That is something which, to my
18 eyes, will require some justification, but maybe it can be justified.

19 If we look at the sections on pp. 8 and 9 of this document, for example, which you would
20 say fall within the description of something which is in the middle of something else which
21 is said to be relevant, there I would expect to see some general indication of what the
22 material is that's been redacted in each line or in each paragraph so that an informed debate
23 about relevance can either take place or can conceivably be avoided. I haven't heard
24 Mr Ward yet, but you can assume my mind is working along those directions.

25 MR WARD: May I assist at this stage, Sir?

26 THE CHAIRMAN: Yes.

27 MR WARD: My clients are entirely happy to give that kind of general explanation.

28 THE CHAIRMAN: On a line by line or paragraph by paragraph basis?

29 MR WARD: Yes, if that would assist. Just to put the position in context though, this disclosure
30 was originally requested by a date in March by the claimants, so it has been brought
31 forward in order to assist today. It was provided yesterday. A lot of work was done very
32 quickly to make the material ready, and that's why no such explanation has been proffered.

33 THE CHAIRMAN: I'm not criticising you, I'm just indicating a way forward which I hope will
34 assist the parties. It seems to me it is going to assist the parties.

1 MR WARD: It will assist, and my clients are very happy to do so.

2 THE CHAIRMAN: Right, so we can have a direction as to that in due course and then we can
3 have, if necessary, a proper formulated debate about that, even if there's no debate left
4 about confidentiality.

5 MR BOWSHER: And which may or may not in due course crystallise into an issue that needs to
6 be resolved.

7 THE CHAIRMAN: Yes. Thank you, Mr Ward, that's helpful.

8 MR BOWSHER: Can I just briefly take instructions. (After a pause) Thank you, Sir. In that
9 case, I think I can probably leave the black spots for further discussion, and I don't think we
10 need to get into it any further. It probably therefore means that the primary point that we
11 wish to raise is the extension of the ring to cover Dr Webb, Mr Janka and Mr Ward. If
12 those three individuals are added to the ring, we are - I hesitate to say 'neutral' - relaxed
13 about what is or is not confidential. We do not regard it as a proportionate use of our or the
14 Tribunal's time to argue about whether or not any particular piece of yellow text is properly
15 confidential or not as long as it can all be disclosed into that broader ring.
16 On that basis we do not necessarily need to get into the detail of what is or is not
17 confidential.
18 It does raise the difficulty that if you are against us on the ring, that does become a problem,
19 because if you are against us as to who is in the ring, Sir, I'm afraid we do then have some
20 quite serious line by line issues about what is or is not confidential.

21 THE CHAIRMAN: That would have to take place, I think, probably on another occasion when
22 proper thought is given to it and when I've got skeleton arguments which address it on a
23 line by line basis. Nobody enjoys those debates, but I think that will have to be done. We
24 could be here for a very long time today, although the table has cut down a lot of that.

25 MR BOWSHER: It has cut down some of it, yes.

26 THE CHAIRMAN: That table, of course, doesn't address the confidential material in the
27 documents newly disclosed. You haven't had a chance to think about that yet?

28 MR BOWSHER: No one has got into that.

29 THE CHAIRMAN: So we can't do the entire exercise anyway.

30 MR BOWSHER: We can't do the whole exercise anyway. It's been worth doing at least so that
31 one can see the scope of what the assertion of confidentiality might be for the purposes of
32 the discussion as to who might be in the ring.

33 THE CHAIRMAN: I noticed when I was looking at the first version of the table that a lot of the
34 claims for confidentiality related to footnotes which simply referred to letters, and you say

1 that can't conceivably be confidential. I have to say, again for the assistance of the parties,
2 where I see confidentiality claimed for materials like that, it does tend to my hearing the
3 clock strike 13 for other claims for confidentiality. Claims for confidentiality must be kept
4 realistic because otherwise, if some are unrealistic, it inevitably calls into question the
5 judgment that has been brought to bear on others which might or might not be thought to be
6 more realistic. That's not a remark aimed at you, Mr Bowsher, it's aimed to assist the
7 parties, and particularly Inmarsat.

8 MR BOWSHER: Thank you. On the basis that a line by line analysis of yellow or black material
9 is only necessary in part and may not be necessary for yellow material at all, and would
10 happen on another occasion, let me focus only, therefore, on who is in the ring, and why we
11 would like to have Mr Janka, Mr Ward and Dr Webb in the ring.

12 THE CHAIRMAN: Is there a dispute about Dr Webb? I thought he was to be in the ring.

13 MR WARD: Yes.

14 THE CHAIRMAN: So there's no dispute about him. Right. So it's Janka and Ward?

15 MR BOWSHER: Janka and Ward. We currently have four London based lawyers in the ring, all
16 with experience of this Tribunal, relevant UK and EU law, but we do not have in the ring
17 anyone with the day to day experience to understand the technical aspects of the
18 authorisation and issues around it - for example, the significance of the sizing of the
19 terminal, inter-relationships between different elements of the system, relevance of different
20 technical features of the system. All of that technical material in the authorisation, much of
21 which is elaborated upon in confidential content, is material which is, to be honest, beyond
22 the four of us in the ring. When we prepared the notice of appeal we relied heavily on input
23 from Mr Janka and Mr Ward. They were intrinsically involved in the preparation of that
24 document.

25 THE CHAIRMAN: But isn't Dr Webb the technical person?

26 MR BOWSHER: Well, two things: he is not, as it were, a hired gun helping us prepare the
27 claim. He has produced expert evidence separately from the preparation of our appeal.

28 THE CHAIRMAN: But he is a technical person who can tell you about the size of the system and
29 the erase of antennae - I run out of good examples.

30 MR BOWSHER: Yes, but again, without downplaying it, his expertise is from the regulatory
31 standpoint historically in Ofcom, for example. He's not in the industry, he's not necessarily
32 *au fait* with what is currently being done in this or that area of satellite construction. There
33 are a number of technical issues about what may or may not arise, and he is not someone
34 who we have directly relied upon for input on those technical issues.

1 THE CHAIRMAN: Mr Janka and Mr Ward are both lawyers?
2 MR BOWSHER: They're both lawyers.
3 THE CHAIRMAN: They're not technicians.
4 MR BOWSHER: But with a long historic background in the industry. Let me carry on with what
5 we haven't got and then I'll cover----
6 THE CHAIRMAN: Yes.
7 MR BOWSHER: Furthermore, what we also get from Mr Janka and Mr Ward is the ability to
8 place UK and EU law in the wider international context, because the regulatory regime that
9 we're talking about sits within a broader international regulatory regime. There are then
10 market and commercial----
11 THE CHAIRMAN: Why does that matter?
12 MR BOWSHER: To interpret some of the EU legislation - for example, there are a number of
13 references to what the ITU, the International Telecommunications Union, has understood
14 certain terms to mean and how they're applied. That may well matter.
15 There's the ability to understand how the market would have responded to auctions put in a
16 certain way. There's the understanding how the market is developing in this area and what
17 airlines can or cannot be expected to take up. There's a whole area of technical expertise
18 which Mr Janka and Mr Ward have, albeit as lawyers, from their long experience in this
19 field, and I will come on to their professional experience. It is from them that we have
20 derived that input up to now, and, in my submission, it would be appropriate for us to
21 continue to have their input on that basis.
22 Furthermore, of course, Viasat, as a party in these proceedings, is entitled to take as full as
23 possible a role in those proceedings. We're about to receive, no doubt, further statements of
24 case from the other parties, and presumably this battle about confidentiality is merely a
25 forerunner of what will be a further argument about whether or not some parts of the
26 response to our notice of appeal are confidential. This will not be the last time these issues
27 arise. So one can expect - for example, we have gone to ground 2 already - that much of
28 what we see in the further submissions will be treated by Inmarsat as confidential, because
29 they no doubt will say, no - well, I don't know what they're going to say. I can begin to
30 gather what they're saying from some of the documents that are disclosed. I'm not in a
31 position to divine whether that is or is not an answer, and the only way of doing that,
32 frankly, is to go and ask my client in some form. Now, the only way one can do that, in my
33 submission, in my experience, is have someone from the client in the ring----
34 THE CHAIRMAN: Ask your client what?

1 MR BOWSHER: Well, that's the difficult question. What one needs to do is to have someone in
2 the ring with whom you can discuss what question you can properly ask which does not
3 give away any confidential material, and who is the person to ask it of. That is why an in-
4 house counsel with particular responsibility for litigation, but not responsible for
5 commercial matters, is a particularly useful and valuable person, someone who can enable
6 Viasat to fully enjoy its rights in these proceedings for a fair trial, but not at risk of sharing
7 the information for inappropriate commercial purposes. It's understanding what even is the
8 right question to ask of the client, and how it can be asked in a neutral, non-confidential
9 way, is something which we will need help on from an in-house counsel typically, because
10 it's someone within the client who will know what is happening in the company, who
11 knows who is available to ask those questions of, and can assist in developing matters that
12 way.

13 Furthermore, perhaps most importantly, I would suggest, there is always the uncomfortable
14 position - we don't anticipate this and no doubt Inmarsat and Ofcom will hope that when
15 they produce their documents they will be so impressive that we will form a view that we
16 shouldn't be proceeding. The likelihood is that the basis of that will be based in highly
17 technical matters which can only properly be assessed if it is to lead to some judgment
18 about whether to proceed, or on what basis to proceed, by someone from within the
19 company who can act on behalf of that company and take proper instructions. Otherwise
20 one is left in the position of the four currently in the ring with Dr Webb, none of whom are
21 Viasat individuals, none of whom have a lifelong experience of Viasat's business able to
22 effectively take litigation decisions for the client.

23 THE CHAIRMAN: Sorry, your concern is that there may be a lot of confidential technical
24 material?

25 MR BOWSHER: There may be.

26 THE CHAIRMAN: For which, again, you would need an expert and not just Mr Ward - he's the
27 in-house man?

28 MR BOWSHER: Yes, we may need to ask questions: is this what is happening? Technical or
29 commercial matters, we may need to ask, "Is this what is really happening? Is this what
30 you expect to happen on the development in satellite terminals?" Dr Webb is no longer, as
31 it were - he isn't working for a company in the manufacturing and supply of these services,
32 he is an expert in this market, but he's not someone whose day to day business is in
33 providing these services so that one can expect that there will be some questions which he

1 will not be able to answer, particularly around the market questions as to what, in fact, is the
2 product that airlines want, what will they be using, and so on and so forth.

3 We accept these are difficult questions, but they will need to be addressed in order to deal
4 with the authorisation in this appeal.

5 THE CHAIRMAN: Supposing you've got some questions of that nature, you're proposing
6 Mr Ward as being a lawyer who is, firstly, subject to lawyers' obligations of confidentiality,
7 and he will understand them, and is, if it's not rude to say so, perhaps more likely to be
8 aware of the need to apply them and to comply with them than a commercial man, who
9 might find himself in impossible conflict situations. So he is primarily a lawyer, and the
10 benefit is that he's not involved in the day to day business and in the sort of activities, just
11 hasn't acquired the sort of knowledge, nor would he be able to deploy it, which would be
12 useful for competing. So, by definition, he is not the sort of person that you can go to to ask
13 questions about, "Do people like Viasat do this sort of thing? Is this what's happening in
14 the industry?" If he were that sort of person then I think Mr Ward will be saying, "Well,
15 he's inappropriate to be in the ring because he can be infected by, or his work will be
16 infected by, what he discovers", so he's not the person to go to to answer these questions, is
17 he?

18 MR BOWSHER: He is the person with whom we can - there is a problem, there's always a
19 problem in these rings--- There is an issue - again, I wanted to avoid mentioning things -
20 about what airlines are taking and the terms on which they're taking them. I think I can
21 probably say that neutrally: whether or not that reflects the proper definition of what it is
22 that Inmarsat is doing, whether what Inmarsat is offering is, in fact, what they were licensed
23 to operate. As I've already read from the authorisation, and which we refer to in ground 2,
24 one of the issues is, and it was an issue for Ofcom, what, in fact, are airlines doing, and
25 what are they likely to take up?

26 THE CHAIRMAN: If you go to Mr Ward, if he's basically a lawyer, he will presumably say,
27 "I haven't the faintest idea, I need to go to my technical director and my marketing
28 director", at which point you'll say, "Oh, you can't do that". You're not advanced, are you,
29 by having him in for that reason?

30 MR BOWSHER: We may have to discuss what he can and cannot - the whole point is that we
31 can discuss what we can and can't say. He at least is in a position within the company to
32 work out what material there is and do his own researches within the company as to what
33 the current expectations are. It may be that we have to have a discussion with Inmarsat at
34 that time about what questions we can properly ask.

1 THE CHAIRMAN: Why can't you do that directly with him without him being in the ring? You
2 say, "We need to know this sort of stuff, how can we go about it?" and he can say, "Well,
3 I can tell you, for this you need to ask him and for this you need to ask her".

4 MR BOWSHER: I would suggest it is much more efficient if we can have him in the ring and he
5 actually can read it, and he will understand, certainly more than I will, about what other
6 ramifications there are and say, "It's primarily that department, but we do also have a
7 department that does this that will have a relevant input, let us craft the question that needs
8 to be asked and decide, is this a question we need to raise with Inmarsat or is it so obvious
9 that we can ask this bland question and get back the answer". The crafting of that question
10 to some extent requires a knowledge as to who you're asking it of: is this question going to
11 give away a secret or not to some extent involves, who am I asking it of? They're based in
12 San Diego, I don't have a daily contact with those people, much as I would like to today.

13 THE CHAIRMAN: I doubt it because you'd be up half the night with them.

14 MR BOWSHER: We would like Mr Ward in because not only can he help us obtain information
15 from within Viasat by helping us frame neutral questions that are properly directed, but he
16 is able to give instructions and also understand what is being said and help form judgments.
17 Again, he will be able to help us if we need to take instructions not only in terms of
18 responding, but also taking judgments about our strategy in this case and what we do going
19 forward with this challenge. It is, we would suggest, much better and more respectful of a
20 party's rights to a fair trial if that party has at least one person in the ring who is properly
21 qualified, properly protected, so that one is not, as an external lawyer, left simply having to
22 say, "Well, it's all very difficult, but I can't really tell you why".

23 I haven't yet taken you to Mr Ward's witness statement.

24 THE CHAIRMAN: Before we go there, can I just ask a practical question about involving
25 somebody like Mr Ward: Mr Ward's witness statement basically says, "I'm a lawyer, I've
26 been a lawyer, I know what I'm doing and I'm not going to breach these confidentiality
27 rules and I offer an undertaking". I've read that, you needn't take me to that. I want to
28 come back to evidential points in a moment.

29 If this material goes to Mr Ward, he is an in-house lawyer. He's not the only in-house
30 lawyer, is he, or is he?

31 MR BOWSHER: No, he's not, and he explains that in his statement.

32 THE CHAIRMAN: Right, so he's part of a department. As a practical matter, if he's going to be
33 seeing this material, he will have confidential material perhaps in paper form and probably
34 digitally as well. If he receives it digitally it will go on to the company's systems and once

1 it's on the company's systems all sorts of people can, in theory and in practice, get access to
2 it. So he's not in the position of, for example, an external lawyer who can control -
3 certainly an external lawyer will control access within the firm, and that can be done, and
4 also, nobody from the enterprise will be snooping around trying to find out. The position of
5 an in-house lawyer is rather different, because of those who control the system and other
6 people in the office who are around. What systems would be put in place to make sure that
7 confidential material is available to, and only to, Mr Ward bearing in mind the
8 considerations that I've indicated?

9 MR BOWSHER: I don't have specific instructions on that. I may be prodded on this. In
10 previous cases, and we've not addressed this in the evidence, we have sought to arrange
11 some temporary arrangement where that external lawyer can access a data room, as it were,
12 held within the external----

13 THE CHAIRMAN: The internal, not external?

14 MR BOWSHER: Internal lawyer - the external lawyer provides, I will call it a data room, a data
15 facility which can be accessed. That's not in evidence, that's not a formal----

16 THE CHAIRMAN: So it doesn't go on the Viasat system?

17 MR BOWSHER: It's not in the order, and it's not been addressed, but again that would be
18 something which I'm sure we'd be prepared to discuss as to how that can be done to keep it
19 out of the Viasat system. It's not addressed in the terms of the undertaking that I've signed,
20 but I'm sure it would be consistent with the spirit of that undertaking to come up with some
21 appropriate mechanism.

22 THE CHAIRMAN: And securing physical documents in a Viasat environment? How is that
23 dealt with in practice in these cases, if it is?

24 MR BOWSHER: Well, in different ways. Sometimes the party agrees never to take them away
25 from their external lawyer's offices, or use them only in the home and never take them into
26 the office, or----

27 THE CHAIRMAN: I see, so if necessary he never receives physical documents, he just looks at
28 them somewhere else?

29 MR BOWSHER: That would be one possibility.

30 THE CHAIRMAN: Where is Mr Janka's office?

31 MR BOWSHER: Mr Janka is in Washington, but Latham & Watkins have an office - they don't
32 have one in San Diego, do they?

33 THE CHAIRMAN: That's the problem.

1 MR BOWSHER: Sorry, I'm wrong, there's a Latham & Watkins office in San Diego, so he can
2 go to them and see them there.

3 THE CHAIRMAN: So there aren't insuperable practical obstacles?

4 MR BOWSHER: Not insuperable practical obstacles.

5 THE CHAIRMAN: Right, sorry, you were going to take me to Mr Ward's witness statement, but
6 I've taken on board what he says.

7 MR BOWSHER: I think you have the point. I just wanted to highlight, in the light of what
8 you've just said, Sir, and I think you have the point, he is not the general counsel, it's para.
9 1 of his statement. Tab 61 of the CMC bundle is Mr Ward's statement.

10 THE CHAIRMAN: Which paragraph?

11 MR BOWSHER: Paragraph 1, his position is as head of litigation, not as providing support to the
12 commercial business as such. Although obviously he reports in to the general counsel, the
13 purpose of his role is to manage litigation so that he is able to enter into these protective
14 orders. You have seen what he says that Bar Rules - I don't think we need to go into that -
15 and that is one of the reasons why he is able to enter into such orders and has done so in the
16 US for exactly that purpose. I am sure that we would be able to accommodate any
17 reasonable additions to protection such as you have in mind, Sir. A sensible one might very
18 well be to say that either he only looks at physical documents in a Latham & Watkins
19 office, or only accesses electronic documents in his home, or something. We would
20 probably have to discuss with Mr Ward - our Mr Ward, not their Mr Ward - the detail of
21 that. That, in my submission, would be a fair way of going forward.

22 THE CHAIRMAN: Right.

23 MR BOWSHER: I need to address you on the nature of the information, Sir, why we say that's
24 distinguishable from a situation such as the *BMI* case, but, in my submission, that would be
25 appropriate.

26 Mr Janka is hugely experienced in the matter. I think that is accepted on all sides. I think it
27 was, in fact, Mr Cotter for Inmarsat, who attached his Latham & Watkins biography to his
28 witness statement, which is at tab 64B of the same CMC bundles. Telecommunications and
29 satellite telecommunications is, as it were, Mr Janka's professional life, and inevitably with
30 that comes a knowledge not just of the sort of detailed legal issues, but also the technical
31 matters that are relevant. He is able to provide a level of experience in this sector which
32 certainly I am not, and I don't think anyone else in the legal team is. He is a partner of
33 Latham & Watkins, the firm instructing me. He is subject to all the usual professional
34 controls. He has had an active role in the process which led up to the authorisation,

1 attended various meetings with Ofcom, and so forth. That's covered in Mr Colahan's
2 witness statement of last night. In our submission, it would be surprising if he were not
3 involved. The only discernible difference between him and Mr Colahan is that he is based
4 in Washington DC and, in my submission, in a matter such as this that really shouldn't
5 make any difference. He is subject to professional discipline just as anyone covered by
6 BSB or SRA rules is subject to discipline.

7 THE CHAIRMAN: Just before we go on, you have been making submissions about the
8 significance of both these gentlemen. You've indicated why it is that you need to have the
9 confidential material going to them. Can you remind me of the evidence that you have to
10 support your submissions about that? I don't recall reading anything about the great
11 technical expertise of Mr Ward and the need to be able to get into the client, if you like, for
12 such matters, via Mr Ward, but perhaps I read the documents too quickly. Where is your
13 evidence to support the need to extend the ring at the moment?

14 MR BOWSHER: In my submission, the fact that we need to be able to understand the
15 authorisation in full is a natural function of these proceedings.

16 THE CHAIRMAN: I agree with that, but where is the evidence that Mr Ward and/or Mr Janka
17 are necessary for that purpose? You and your team are experienced English lawyers who
18 can understand most of it. It is a matter of evidence, it seems to me. You say and your
19 team can only take matters so far, "there are certain matters, such as this, that and other on
20 which we need to go to so and so", and you raise, for example, technical questions. I hadn't
21 appreciated until you said it that actually you were going to need assistance from these
22 lawyers on technical matters. It may be that that does occur in the documents and I read
23 them too quickly, and you can take me to it if that's case. I hadn't appreciated that, but that
24 would seem to me to be a less than obvious proposition which would require some
25 evidential basis, unless I've led a very sheltered life.

26 First of all, is there any evidence which deals with this point? Is this an evidence based
27 application, or is it an "it's obvious, it always happens" based application?

28 MR BOWSHER: It's not evidence based. We have not gone through the confidential material
29 already disclosed to identify that that is material from which we will definitely need further
30 instructions. There is some material in the table where we have said we will need further
31 assistance, but, in my submission, it flows from the nature of the material that the client
32 whose business it is will know more about these technical matters than us. We understand
33 that there are limits in play, not only technically but on the technical and commercial issues,
34 but, in my submission, that ought not to be an issue for the Tribunal. The starting point

1 should be to justify why a party does not have access to the full content of the authorisation
2 which it is challenging.

3 THE CHAIRMAN: Yes.

4 MR BOWSHER: We understand that this is the sort of case in which there are qualifications to
5 that, we are putting forward what, in our submission, is a reasonable qualification, namely
6 to extend the confidentiality ring so as to meet the basic requirements, firstly, that the client
7 can take an active role in these proceedings; and that those who have greater experience in
8 technical and commercial matters in this industry are able to bring their learning to bear in
9 evaluating the material that we have.

10 Part of the difficulty of this is that it's not necessarily a black and white question. I can read
11 that yellow - it's not that we haven't thought about evidence, but----

12 THE CHAIRMAN: Black, white or yellow.

13 MR BOWSHER: I can read a lot of that yellow material and read some of what has come back
14 and I can sort of see what an answer would be. I cannot tell whether that is the best answer.
15 The four of us can come up with an answer, but what our client is entitled to is to come with
16 the best answer that is available to it, and Mr Janka is demonstrably, I fear, more
17 experienced in this industry and telecommunications than I am, or the London based
18 lawyers are.

19 THE CHAIRMAN: You say that, but you haven't demonstrated it in evidence, the point I raised
20 two or three minutes ago.

21 MR BOWSHER: It's in his CV and his experience - I'm sorry, I didn't take you through it. His
22 CV demonstrates many years of experience of telecommunications law, regulatory matters
23 in this field.

24 THE CHAIRMAN: Technical matters?

25 MR BOWSHER: Well, inevitably dealing with technical matters in this field. In my submission,
26 it should be reasonably obvious that a partner of Latham & Watkins, the very same firm that
27 Mr Colahan is a partner of, should also be able to be in the - if he has demonstrably a
28 greater career experience in these matters, he should be able to join the ring to be able to
29 assist us to test and enable us to put forward the best possible answer to these matters.
30 Mr Ward obviously raises questions about the whole question of having an in-house counsel
31 in the ring, but his particular status enables that to be addressed, and he meets a very
32 particular need, not only perhaps in bringing his own personal experience to bear, but more
33 specifically as a conduit - as I've already said, I'm now repeating myself - a conduit for

1 information and instructions, and only he can do that as an in-house counsel. That is all the
2 evidence.

3 Yes, most of that material, I can come up with an answer, but Viasat is entitled to test it to
4 come up with the best answer it can, and this is a way, in our submission, of achieving that.

5 THE CHAIRMAN: Can you just remind me, within the ring at the moment is you?

6 MR BOWSHER: My junior and Alexandra Luchian and John Colahan, and Dr Webb will be.

7 THE CHAIRMAN: Sorry, you, your junior, Mr Webb?

8 MR BOWSHER: Dr Webb, and two solicitors from Latham & Watkins.

9 THE CHAIRMAN: English solicitors?

10 MR BOWSHER: English solicitors, London based.

11 THE CHAIRMAN: Right, thank you. So you want to add another partner at Latham & Watkins,
12 but a US partner?

13 MR BOWSHER: A US partner with specific experience in the telecoms industry.

14 THE CHAIRMAN: Right.

15 MR BOWSHER: I can take you to the evidence of his - it's attached to Mr Cotter's witness
16 statement.

17 THE CHAIRMAN: Let me see that.

18 MR BOWSHER: It's tab 64B. This is an extract - Inmarsat have approved this as the basis of his
19 experience at pp. 4 and 5, it's just the website entry from Latham & Watkins, but it's put
20 forward in the context of Inmarsat essentially saying that Mr Janka knows so much he
21 shouldn't be in the ring.

22 THE CHAIRMAN: Sorry, which part are you reading?

23 MR BOWSHER: Tab 64B, then pp. 4 and 5 is Mr Janka's web entry. Mr Cotter exhibits this is
24 in the context of - again, perhaps unfairly paraphrasing, but saying Mr Janka knows so
25 much that he shouldn't be in. Perhaps that's not a fair way of characterising it. He has
26 plainly relevant experience, he's a partner within the firm instructing me, acting on behalf
27 of Viasat, and, in our submission, it would be peculiar if he were not permitted to be in the
28 ring.

29 THE CHAIRMAN: Your English solicitor, the partner, whose name I'm afraid I've forgotten----

30 MR BOWSHER: Colahan, the firm, Latham & Watkins.

31 THE CHAIRMAN: No, no, the partner who sits behind you?

32 MR BOWSHER: Colahan.

1 THE CHAIRMAN: Mr Colahan, is he - I'm talking about him as though he weren't in the room,
2 but he is in the room, I know - is he a regulatory solicitor, or does he have extensive
3 expertise in the satellite communications industry?

4 MR BOWSHER: No, I would say that Mr Colahan's background would be in EU and public law
5 - would that be right? Competition and EU patent.

6 THE CHAIRMAN: Yes. Thank you.

7 MR BOWSHER: Relevant and proximate areas, but not in the very specific area that we're
8 talking about here, which is not just telecoms but satellite telecoms. As I say, not only does
9 Mr Janka have an expertise background, but he's also been involved in the proceedings, and
10 that's covered in Mr Colahan's statement of last night.

11 THE CHAIRMAN: And who has - I think you can reveal this without being able to claim
12 privilege - primary responsibility for client contact, reporting back to the client about what's
13 going on here? Does it go through Mr Janka?

14 MR BOWSHER: I don't know, I will ask. Yes, it does.

15 THE CHAIRMAN: It goes through Mr Janka presumably direct to client without necessarily
16 going through Mr Ward, though he's no doubt involved?

17 MR BOWSHER: I think it always go directly to - my impression is that it always goes to
18 Mr Ward. The client relationship is Janka/Ward, and then Ward up to whoever it needs to.
19 That's consistent with Mr Ward being in charge of litigation. That is his function.

20 THE CHAIRMAN: Yes.

21 MR BOWSHER: I've gone on much longer than I anticipated, and I apologise.

22 THE CHAIRMAN: No, don't worry. I've been asking you questions to probe your case, so you
23 needn't apologise.

24 MR BOWSHER: As I say, this isn't a case where I'm going to claim that we re-read the yellow
25 text and say this is foreign to us, but it is material where we could usefully have help, and
26 Viasat, in our submission, is entitled to give such help as it can.

27 I don't propose to take you through all the case law, Sir, we have set out the law in our
28 submissions, and I don't think it necessarily helps very much. There is one decision which
29 might be useful in part to distinguish it and in part to rely on it, which is the *BMI* decision.
30 It is a decision concerning a market investigation which involved a lot of very sensitive
31 market data. It was an investigation of the private healthcare market, and this involved
32 management by the Competition Commission, as it then was, of a lot of live market data. It
33 was kept in a data room and highly controlled, and in those circumstances the controls were
34 certainly more stringent than we are arguing for here. The essential points which come

1 from that decision, in my submission, are the same as here. The starting point should be,
2 going right back to the position in all of the case law, going back to the Supreme Court case
3 law, is that any derogation from - any closure of the procedure from a party is a derogation
4 from the normal position and should be no greater than is necessary.

5 Yes, in issues such as competition law or regulatory issues such as this, those derogations
6 are common, but also the corollary of that is that in cases such as this, it isn't just enough to
7 address, as it were, the broad gist of the case, it will be necessary when it comes to the
8 hearing for us to get into the detail, to look at the detail as to what is actually happening,
9 and we can only meet the detail of the case and best represent Viasat if we're able at least
10 to go further than have the four of us plus Dr Webb in the ring.

11 So, in my submission, it would be appropriate to extend the ring to put these further people
12 in the ring, and that would have the huge further benefit of rendering most of the issues
13 about confidentiality otiose. As I say, we have no particular issue about whether stuff is in
14 or out ring. If it's in the ring, we'll deal with it in the ring.

15 THE CHAIRMAN: I haven't read the *BMI* case. I don't think I need to see authority for the
16 proposition that any derogation from disclosure to a client must be justified, and must be no
17 further than necessary. I would be surprised if either of the other counsel disputed that as a
18 proposition. The only case which I have looked at is actually case which was found by the
19 assiduousness of the staff here, which is a case involving *Carphone Warehouse*, where
20 Mrs Justice Rose, sitting I think with the experts on that occasion, did not allow disclosure
21 to be made to a director who was involved in strategy, and so on. It seems to me at the end
22 of the day to be an example on the facts of an application of the jurisdiction which this
23 Tribunal has.

24 MR BOWSHER: Yes.

25 THE CHAIRMAN: Unless anybody wants to see it - I'm sure we'll have copies if they do - and
26 cite it to me, it seems to me just to be an example of the case. I disclose that in case
27 anybody wants to refer to it. I don't think I'm going to be much assisted by authority
28 beyond the proposition that you've given. So I don't need to see it, but for the brethren and
29 sisters, they may cite authority, they may try to cite authority if they wish, but I'm going to
30 start from the position that your proposition is correct.

31 MR BOWSHER: I am much obliged. There are examples both ways, and when you get into the
32 facts of them----

33 THE CHAIRMAN: They're all different.

1 MR BOWSHER: -- the nature of the case and the people involved, you can usually see why it's
2 been decided the way it has been.

3 THE CHAIRMAN: Exactly, yes, thank you.

4 MR BOWSHER: Unless there is anything else on which I can assist, those are my submissions.

5 THE CHAIRMAN: Thank you. Mr Ward?

6 MR WARD: Sir, the essential flaw in this application is there's no evidence at all before the
7 Tribunal of the insufficiency of the current team consisting of a senior partner at Latham &
8 Watkins, an associate, Queen's Counsel, junior counsel and an expert, someone who has
9 been proffered as an expert on these very technical issues that Mr Bowsher says are so
10 important to his case.

11 Before I come to the detail of what is said on behalf of Mr Ward and Mr Janka, I want to, if
12 I may, talk a little bit about the nature of the claim, mindful of the pre-reading you have had
13 the opportunity to do, Sir. The starting point is that this is a claim for an appeal on judicial
14 review grounds against a specific decision by Ofcom. It is not an audit of the entire
15 regulatory process, it is not an audit of Inmarsat's roll-out Europe wide, it is not a
16 commercial dispute between Viasat and Inmarsat in which standard disclosure would be
17 given. In fact, as you know, Sir, in judicial review proceedings disclosure is very much the
18 exception, not the norm. The focus of this particular claim is, quite rightly, on whether
19 Ofcom has correctly applied the law.

20 THE CHAIRMAN: Yes, I agree about your disclosure point, but it's a bit different, isn't it, where
21 the actual decision document itself refers to material that is relied on. That's where I think a
22 lot of this dispute is going to end up. That's effectively part of the decision.

23 MR WARD: Yes, and that's why disclosure has been given, albeit subject to the caveats that will
24 be explored another day, but we didn't say there can be no disclosure because it's judicial
25 review, but it's still relevant context for this dispute before you, Sir, that the reality is this is
26 a judicial review claim, and the grounds of challenge are focused on what are said to be
27 essentially of apprehension by Ofcom in its application of the law.

28 In so far as that involves technical issues, Dr Webb has been proffered as an expert. I know
29 you've had a chance to see his report. He gives a detailed account of the working of the
30 system, and expresses views about whether the way the system operates actually falls within
31 the scope of the intendment of the EU legislative regime. We didn't oppose that evidence
32 being adduced, even though, again, expert evidence is unusual in a judicial review claim.
33 The other vital piece of context for the deliberation that the Tribunal has to conduct is that
34 Viasat is the direct commercial competitor of Inmarsat and, as you said to my friend

1 Mr Bowsher, it is essentially trying to knock Inmarsat. It's very important that this
2 particular claim is part of an international strategy to prevent the launch of Inmarsat's
3 services involving appeals that have been lodged in Belgium and Italy already, and of
4 course proceedings in Luxembourg. So there is a wide ranging strategy being conducted by
5 Viasat of which we are just one limb.

6 This matters because, of course, the material involved is, in fact, highly sensitive to
7 Inmarsat, dealing as it does with its commercial strategy, its relationships with its
8 customers, and so on and so forth. So there is a very, very high degree of sensitivity about
9 whether that material should be shared more widely than is strictly necessary.

10 Of course, Sir, what you have to do is strike a balance the requirements of open justice, the
11 claimants' procedural rights and commercial confidentiality. Another authority that of
12 course I know you're familiar with, *Science Research Council v Nasse*, cited, in fact, in one
13 of the authorities in the bundle, tells us that even disclosure into a confidentiality ring is an
14 incursion into confidentiality, and the question always is whether it is necessary for
15 disposing fairly of the case.

16 My clients have not opposed the setting up of a confidentiality ring, they have not opposed
17 disclosure of an unredacted decision into that ring, and they have not opposed disclosure of
18 the documents they submitted to Ofcom. The question here is whether they need to go
19 further and allow those involved in Viasat in-house and Viasat's American advisers to see
20 this material too. The question is whether that incursion is necessary for the fair disposal of
21 this claim.

22 I won't trouble you, Sir, with any authority, but it is worth bearing in mind what the CAT
23 Guide to Proceedings says about this. I don't know if you've had a chance to look at this
24 already, Sir, but----

25 THE CHAIRMAN: Of course, it may be, may it not, that it would be appropriate to allow the
26 disclosure of some material into an extended ring, but not necessarily all of it, but one can't
27 judge that until one has gone through the material and, first of all, seen whether it is
28 sensitive or not, or confidential or not, and then consider the nature of the confidentiality,
29 because there might be material which is purely plans, detailed plans or overall plans,
30 showing a development which is in no way going to assist the case, but there might be other
31 bits of material which could conceivably assist the case and on which it might be
32 appropriate to push the circle wider. That's a theoretical possibility.

33 MR WARD: That is a possibility. It's not one we can really countenance today----

34 THE CHAIRMAN: No, exactly.

1 MR WARD: -- because it does descend to the detail. Of course, as is implicit in your questions,
2 Sir, there is material here between Inmarsat and the Regulator that is just irrelevant to this
3 proceeding, because the relevance has to be judged by reference to the pleaded issues.

4 What I was going to do was just remind the Tribunal what's said in the Guide to
5 Proceedings, and I can read it out if it would save looking it up.

6 THE CHAIRMAN: I will look it up if I can find it. What is it in, the Rules?

7 MR WARD: In the Guide to Proceedings. It's actually in the bundle, it's not the Rules
8 themselves.

9 THE CHAIRMAN: The Guide, thank you.

10 MR WARD: Page 105. Of course, I respectfully agree with Mr Bowsher, it's all fact sensitive, of
11 course, but this provides at least a helpful starting point, and it's 7.38:

12 "Individuals admitted to the ring will normally be the parties' named legal
13 representatives ..."

14 Do you have that, Sir?

15 THE CHAIRMAN: Yes.

16 MR WARD: And, of course, the named legal representatives are in the ring. We have them in
17 the ring. Then it says:

18 "... and possibly other external advisers or experts such as accountants and
19 economists ..."

20 Of course we have accepted that Dr Webb belongs in the ring. Then after a citation of
21 various examples of Tribunal procedure:

22 "It may sometimes be necessary to add employees of the parties, such as inhouse
23 counsel, to the confidentiality ring subject to them giving suitable undertakings;
24 these may be more onerous ..."

25 But it's a necessity test that is highlighted there, rightly, in the Guide to proceedings, and of
26 course this is a common problem in this Tribunal by the nature of its work. Sometimes it
27 faces cases where one has different alleged cartelists all operating in the same industry, such
28 as, for example, in a recent case a lot of different retailers. Very often it has a lot of
29 telecoms companies before it who are direct competitors. You might have all the mobile
30 companies, as, in fact, was happening yesterday in the Court of Appeal, arguing over
31 spectrum allocation with highly sensitive information as between all of them about
32 spectrum and their attitude to bidding for spectrum, so of course there was an external
33 advisers' only ring.

1 There is, in itself, a competition law sensitivity here, which we pointed to in our skeleton
2 argument, which is horizontal exchanges between competitors of strategically sensitive
3 information are potentially anti-competitive. I won't take you, Sir, to the Commission
4 Guidance. I think that proposition is self-evident. I am not suggesting that these Tribunal
5 proceedings will become the vehicle for a cartel. What I am suggesting is that this
6 highlights the extreme sensitivity of this information. It is, of course, the case that, of
7 course, assume that the individuals themselves act in good faith at all times, they cannot
8 unlearn the information that they have obtained through these proceedings, and there is a
9 very real worry that that information will end up being promulgated beyond these
10 proceedings, whether into Viasat's strategic thinking or into its approach to other
11 proceedings. You will have seen, Sir, already there is a concern that European Court
12 pleadings were used in the Belgian case, which is directly contrary to the European Court's
13 own jurisprudence as to how those pleadings should be used.

14 With that, I'd like to turn to the individuals that we're concerned with. Mr Janka and
15 Mr Ward are both lawyers, as you observed, Sir, they're not proposed as witnesses. In the
16 evidence virtually nothing is said to justify their admission to the ring. In Mr Ward's case,
17 no evidence at all has been given as to his particular expertise. His own witness statement
18 is silent on the subject, Mr Colahan's witness statement is silent on the subject. All you
19 have is the submissions of Mr Bowsher. With respect, those are not evidence.

20 What was actually said was that he was needed to act as a conduit to the client, in effect: he
21 would provide the client that could enable him to do research within the company. It goes
22 without saying really that there is no need at all for him to be in the ring for that purpose.
23 Evidently, those enquiries can be directed properly from those who are within the ring, and
24 there is no basis at all to think he needs to see the confidential redactions in order to be
25 responsive to the queries that are being raised.

26 A few other points by Mr Bowsher: well, these are highly technical matters. That's why
27 they've employed Dr Webb as their expert.

28 There is a wider international context, it was said: again, this is a case about Ofcom's
29 determination. Why is it necessary to see this highly sensitive material in order for
30 Mr Ward to opine about the wider international context?

31 Market analysis: again, why is our highly technical data needed for that? Why is it not
32 sufficient for Dr Webb to see that?

33 So, in my respectful submission, no basis at all has been advanced for Mr Ward to come
34 into this ring. His position is particularly sensitive actually. Could I ask you to turn up his

1 witness statement, Sir, which is in file 1 behind tab 61. It's the very first paragraph that sets
2 alarm bells ringing as far as my clients are concerned:

3 "I am Associate General Counsel and Head of Litigation. My responsibilities
4 include the overseeing of domestic and international litigation for Viasat."

5 Well, Viasat is conducting an international campaign against my client. It appears that
6 Mr Ward is at the heart of that campaign, so inevitably there is a very real concern about
7 him and as to the role he might play and how that information, with the best will in the
8 world, might colour his thinking in other cases.

9 Sir, you also asked Mr Bowsher a very important question about what safeguards there
10 would be. Again, with the greatest of respect, it was apparent that no thought had been
11 given to that at all, still less has any evidence been given or any undertakings proffered.
12 Whilst we're in this bundle, we can turn to Mr Janka's witness statement, which is in the
13 same tab, but in my bundle it is marked at 61.3, and we can see what he says about his
14 expertise.

15 THE CHAIRMAN: Just a minute.

16 MR WARD: Sorry, Sir, 61.3. This is what he says about his expertise:

17 "I am a Partner in the firm of Latham & Watkins, the legal representatives of the
18 Appellant. I have been with Latham & Watkins since November 1988."

19 That is the sum total of what is in his witness statement about his expertise. In fact,
20 Mr Bowsher was reduced to relying on what my client, Mr Cotter, had advanced in his
21 evidence about Mr Janka's CV. If I could ask you just to turn to the very back of this
22 bundle, back to the Latham & Watkins profile, what we see is Mr Janka indeed looks like a
23 regulatory lawyer. If we look at the third bullet point on this page, it explains he has
24 "engagement in spectrum war". Of course, it's a spectrum war that is being conducted
25 against my client. What he doesn't say and what Mr Colahan doesn't say is whether his
26 involvement is confined to this case, or, as appears much more likely, in my respectful
27 submission, he, too, like Mr Ward, is part of the international campaign against my client
28 that they are conducting.

29 The best that can be said for him by Mr Bowsher is that he was highly experienced and
30 obviously has a knowledge of the satellite business, but what has not been explained, and
31 cannot be, is what is the essential lacuna in his absence. Now we have a team of two
32 counsel and an expert, two lawyers in London, one of whom is very senior, so why is it that
33 Mr Janka needs to see this highly sensitive information? There is no evidence at all that

1 serves to justify the proposition that there is some lacuna that will diminish Mr Bowsher's
2 clients' rights of defence.

3 Of course, if it proves a problem, if there are specific documents where instructions are
4 needed, sensible parties can seek to reach agreement. Documents may come out of the ring,
5 or an additional inner ring may be established, or something of the kind, or specific
6 undertakings can be given. In other cases where there is a difficulty undertakings can be
7 given. There's an example in the bundle where I had to give one myself, even as external
8 counsel, not to work in a particular area for three years. So we can do, but nothing like that
9 has been offered by the claimant. In our respectful submission, the reason for that is
10 obvious: it is because, in truth, these two advisers are intending to work on a wider range of
11 matters as between Inmarsat and Viasat.

12 Sir, we're not going to have the debate about the precise information. It is enough to say
13 that the information at stake here is contemporary, it's highly sensitive, it involves
14 commercial strategy. My clients have very real worries about its dissemination any further
15 than is strictly necessary for these appeals. Of course, some of that confidential material is
16 also third party confidential, as it involves my client's relationships with both its suppliers
17 and its customers. So there is an additional sensitivity there. It's not ours to give away.

18 Sir, unless I can assist further, those are our submissions on the confidentiality issues.

19 THE CHAIRMAN: Yes. Do you want to join in, Mr Holmes?

20 MR HOLMES: No, thank you very much, Sir.

21 THE CHAIRMAN: Mr Bowsher?

22 MR BOWSHER: Let me deal with that very last point, third party confidentiality. We are only
23 talking about, and you already have the point, Sir, the decision and material in the decision
24 or directly referred to in the decision. It is material which has already been put forward.

25 THE CHAIRMAN: Yes, the third party confidentiality as described by Mr Ward does not seem
26 to me to lie at the heart of this matter.

27 MR BOWSHER: I won't take it further. Plainly we would be content to discuss and negotiate
28 any further necessary ancillary restraints or controls on the information that went to
29 Mr Janka or Mr Ward. In my submission, really the key point that Mr Ward says is, "Well,
30 you haven't demonstrated that you actually need to speak to Mr Janka or Mr Ward". In my
31 submission, that really misstates the point. While it is true that the practice of this Tribunal
32 is to apply limited rings, that is within the overall English and EU law constraint that the
33 starting point must be open not closed justice. I don't mean in terms of the public being
34 present or not, I mean can a claimant see what it is that it is challenging, and put forward its

1 best possible case? In that context, it is only right that my client should be able, within a
2 limited and confined procedure, to see the full range of material that is put forward in the
3 decision that it is challenging, so that it can take steps to consider what the nature of its
4 challenge can be. It's not a situation where we're saying those already in the ring have
5 nothing to say. There may be specific points where we do have to come back and say we
6 simply don't know how to deal with this when we come to the line by line analysis.
7 The fundamental point is that the client should be represented in the ring unless there is a
8 strong reason not to do so, and I've already set out our legal proposition for that.
9 What is said in advance, this reference to an international campaign and this point about the
10 use of pleadings, in these proceedings we have put in pleadings. We've put in our own
11 pleadings, no one else's pleadings. We are entitled to put in pleadings from whichever
12 proceedings - there's no rule about not using one's own pleadings in another case.
13 This is not an international campaign. Yes, this is a situation where one is dealing with a
14 network of regulators, and we are challenging a number of decisions. Plainly there is a
15 strategy. At least in part that goes to what I was saying about Viasat being able to judge
16 whether it is appropriate to carry on a challenge in one jurisdiction or another. That is why
17 it is important that Viasat is able to participate actively in these proceedings, so that it can
18 judge, is there a case to be made in this jurisdiction or not? Yes, that does involve some
19 knowledge of the strategy, but just because a company is acting in its own interests, that
20 does not mean that somehow what it's doing is reprehensible. That is still the nature of the
21 system in which we work, that companies do indeed work strategically to further their
22 interests.

23 THE CHAIRMAN: I have not detected in my involvement with this Tribunal that altruism
24 features heavily in many of the appeals!

25 MR BOWSER: I don't think so! These are not the typical ring cases. Most of the cases, in
26 fact, that the rings are about are about, broadly speaking, standard disclosure cases or data
27 room cases. That's not entirely true obviously, but a lot of the cases are about those much
28 more general disclosure issues. We're simply talking about the decision and the documents
29 directly referred to in the decision. In our submission, it would be surprising if the client
30 was not able at least to take some active steps to consider that content, subject to
31 appropriate constraints to deal with whatever those risks might be.
32 The international campaign risk is, we say, really just a bit of shroud waving, and this is
33 what international companies do. If they think that they have been wronged, they bring
34 proceedings where it is appropriate to bring them. There's nothing wrong in that, and

1 there's nothing wrong in understanding what is happening in different jurisdictions and
2 applying that.

3 The competition issue, in my submission, again is a non-issue. Assume for the moment that
4 some of this is commercially sensitive material: it is not the sort of material that is going to
5 facilitate some information exchange. This isn't like the pricing material in a market
6 investigation, which might very well be the sort of material upon which a price fixing
7 arrangement---

8 MR WARD: There is price information actually.

9 THE CHAIRMAN: That's the problem, isn't it, Mr Bowsher, I haven't really focused on what
10 this information is at all. Nobody has - I say nobody has, it may be you have down there for
11 your own purposes, but for the purposes of this hearing nobody has.

12 MR BOWSHER: Given the tenor of the discussions here, there is no real likelihood that this is
13 going to actually become the vehicle for some sort of horizontal restraint, bearing in mind
14 the only horizontal restraint in this case is going to be between these two parties. It seems
15 highly unlikely, given what's going on here, that this is, in fact, a real concern. We're not
16 going to somehow dampen competition amongst these two parties just by providing these
17 few documents attached to the decision. That would be highly unlikely, it would seem,
18 given the tenor of the correspondence between us.

19 I don't think I can take the matter very much further. That's all I have to say.

20 THE CHAIRMAN: Yes, thank you.

21 (For ruling, see separate transcript)

22 MR WARD: Sir, in the circumstances, might I ask that the Tribunal make an order extending the
23 operation of the existing interim confidentiality ring and making clear it applies to all
24 documents that might be disclosed in these proceedings in so far as they contain
25 confidential content.

26 THE CHAIRMAN: Allegedly confidential content.

27 MR WARD: Allegedly confidential. As initially formulated, it just applied to the decision.

28 THE CHAIRMAN: Do I need to make an order preserving or extending the current ring? Does
29 the order, which I think Mr Justice Roth made, expire today?

30 MR WARD: I am not sure it does. Just for the avoidance of doubt---

31 THE CHAIRMAN: I am told it is not time limited, but it is document limited. In that case, I will
32 widen the order as to the documents to be encompassed within it any document in which a
33 confidentiality claim is made for the time being. Is there any reason why those documents
34 should not be disclosed so far as there is non-confidential material in them?

1 MR WARD: No, to the extent they're non-confidential, they can obviously be disclosed without
2 restriction. It's just that in so far as there was confidential material in them they need to go
3 into the ring.

4 THE CHAIRMAN: So it is just the confidential material within a document. I thought you were
5 proposing that no document containing allegedly confidential material should be disclosed.

6 MR WARD: No, no.

7 THE CHAIRMAN: So it is no part of a document in respect of which confidentiality is claimed
8 shall go beyond the ring.

9 MR WARD: Yes.

10 THE CHAIRMAN: That's the purpose of the exercise.

11 MR WARD: Yes.

12 THE CHAIRMAN: That must be right, Mr Bowsher?

13 MR BOWSHER: I think that must be right, yes.

14 Sorry, I was also thinking about this: there is a corollary problem we haven't raised today,
15 which is that the ring currently involves Ofcom and Viasat, and in so far as there are issues
16 about any confidential material coming from Viasat that Inmarsat may end up seeing as a
17 party, we haven't addressed that yet, but that may be a matter for a future date, for future
18 discussion.

19 THE CHAIRMAN: I don't even understand the problem, so I can't deal with it today.

20 MR WARD: If it arises then of course we will provide appropriate undertakings.

21 THE CHAIRMAN: Do you mean there might have to be an Inmarsat ring to deal with your
22 confidential material?

23 MR BOWSHER: Yes.

24 THE CHAIRMAN: I am sure you can sort that out. I will hope you can sort that out and I will
25 rule if necessary in due course.

26 MR BOWSHER: Let me just mention a point which actually arose yesterday, and I think again
27 we may need to tinker with the terms of the order. A further wrinkle is that under the terms
28 of the order we cannot disclose to anyone other than Ofcom that which is asserted to be
29 confidential. That has the odd situation that we can't, under the terms of the order, disclose
30 to Inmarsat something which might have something which Inmarsat has asserted as being
31 confidential. I think that we may just need to re-draft it. It is the way the undertaking is
32 worded.

33 MR WARD: I'm sure we can agree a wording.

1 THE CHAIRMAN: I'm afraid I'm baffled, but if you think you can agree a wording, fine, and
2 then you can refer to me on paper if you can't.

3 MR BOWSHER: We may have to do that.
4 I think, on the agenda, the only other thing is to finalise the scheduling issues.

5 THE CHAIRMAN: Yes. What document can I usefully work from in terms of scheduling?
6 I don't know what the most up to date version of anything is?

7 MR BOWSHER: Ofcom's skeleton had some of the dates, but not all of the dates. If you use
8 Ofcom's skeleton I can interpolate some of the dates. Can I just take instructions on one
9 thing? (After a pause) If you have Ofcom's written observations there's a timetable there.

10 THE CHAIRMAN: It doesn't have any of Inmarsat's proposals.

11 MR HOLMES: Sir, if you look at para. 6 Inmarsat has indicated its agreement to it.

12 THE CHAIRMAN: I'm sorry, I'd not spotted that, thank you, Mr Holmes.

13 MR BOWSHER: The dates are more or less tracked in our submissions at para. 28 under the
14 heading "Future conduct of the appeal". Sir, if you have the Ofcom proposal, the----

15 THE CHAIRMAN: I am trying to avoid having two documents open if I don't need to. You tell
16 me what you say about the----

17 MR BOWSHER: Amended notice of appeal would be 7th March 2018.

18 THE CHAIRMAN: You agree to bring it forward, do you?

19 MR BOWSHER: We agree to bring it forward to that.

20 THE CHAIRMAN: Can I just ask about that? It's unusual in my experience for any court or
21 tribunal to, as it were, sanction in advance any old amendment that somebody wants to
22 make. What amendments are being proposed? Are they formulated? Have they been
23 discussed? How do I know that they're going to be proper? How do I know they're not
24 going to derail this whole timetable?

25 MR BOWSHER: The reason for putting in the date is that we have not had the opportunity to
26 look at and decide whether or not any part of our notice of appeal needs to be amended,
27 having regard to the disclosure of the decision on 23rd January and the documents that we
28 received on Monday. That's why the date is there. Your concern about scheduling is well-
29 founded, Sir, because our corollary concern would be, again, whether or not we're going to
30 be able to take instructions on all the relevant matters we need to take instructions on, and,
31 if necessary, come back to the Tribunal to seek an extension of the ring if we need
32 instructions from someone else in the meantime, whether we can do that by 7th March may
33 be difficult, but it seemed to us that we should fix a timetable and try and work towards that.

1 It may be that we can't get to the end of the confidentiality discussions by 7th March, which
2 would be a concern, but----

3 MR HOLMES: Sir, if I might cut through this, the order is for the service of a draft amended
4 notice of appeal, in the proposed order by the date of 7th March, and then, if objection were
5 taken, that could be raised with the Tribunal. If I correctly understood your question, Sir,
6 I think that should address the concerns.

7 THE CHAIRMAN: It addresses one of my concerns. The plan is to have a date by which they
8 are to propose - you are to propose a draft amendment, and if everybody agrees it then
9 there's not a problem. I presume we have to make an order allowing it, don't I, you can't
10 amend willy-nilly? If the parties agree it, I doubt if I will oppose it, or not approve it. So
11 the proposal is that if you are going to serve one, you should seek to serve it by that date?

12 MR BOWSHER: Yes.

13 THE CHAIRMAN: Then we work from there. You're not asking me to give permission, it's
14 blank----

15 MR BOWSHER: Mr Holmes is right, in our submissions we haven't said it's blank, but it's a
16 draft by then, but the timetable follows on from that.

17 THE CHAIRMAN: That is - where are we now - about three weeks from now, is it?

18 MR BOWSHER: Yes.

19 THE CHAIRMAN: Is that going to be realistic in the light of what you said, because I'm not
20 particularly enthusiastic about proposing a date which is highly unlikely to be realistic,
21 because it only then leads to everything being knocked out of kilter? Only you can know
22 the prospects of your being able to prepare an appropriately worded new notice of appeal in
23 three weeks. Is that realistic?

24 MR BOWSHER: It may be optimistic, that's my concern. We'd originally suggested the----

25 THE CHAIRMAN: That usually means unrealistic.

26 MR BOWSHER: We had originally suggested - as you can see, it suggested 28th March. Our
27 concern obviously is that Ofcom wants to put its defence in on 29th March. I would suggest,
28 if we were to say - I'm confident we will have done it by 21st March, but that puts a lot of
29 pressure on Ofcom. Having said that, the amendments will only be arising out of the yellow
30 material.

31 THE CHAIRMAN: Sir, Ofcom isn't wedded in particular to the date of 29th March for its
32 defence. It is concerned that the appeal should be prosecuted expeditiously, and we had
33 understood that Mr Bowsher's client was comfortable with the deadline of 7th March. If

1 that were to be pushed back, we would need extra time for our defence in order to be able to
2 address----

3 THE CHAIRMAN: That's my concern. I've had experience - frequent and recent experience - of
4 deadlines which go in and they simply become dates from which there's an almost
5 inevitable application for an extension. You've got three weeks, Mr Bowsher, to work on
6 this material. You proposed 28th March originally, as I understand it. The object of the
7 parties is to try and get this case ready for a hearing in July, as I understand it?

8 MR BOWSHER: Yes.

9 THE CHAIRMAN: If that is possible. As soon as we start extending it all gets a bit tight, doesn't
10 it?

11 MR WARD: Sir, if I may interject on that? It actually doesn't get that tight. If you look at the
12 proposed timetable, the statement of intervention, 28th April, and there's----

13 THE CHAIRMAN: 24th April.

14 MR WARD: I'm so sorry, 24th April, and then skeletons two weeks before trial, trial in July.

15 From my client's point of view it really is very, very important that, if possible, the case is
16 heard before the summer, because even the spectre of this case hanging over them is having
17 a commercially damaging effect. So, within that period, evidently there is room for
18 flexibility, but of course if Mr Bowsher says he can do it by 7th March, we welcome that.
19 We are only talking about redacted yellow material here, in the sense that they've had the
20 decision in unredacted form for some time. They got the appendices, the disclosed
21 documents, on Monday. That does give them about three weeks to prepare the amendment.
22 It's hard to imagine that it could justify a wholesale amendment, as opposed to potential
23 refinement of the case.

24 THE CHAIRMAN: Yes, can I just sidestep that point for the moment and understand what's
25 going to happen in terms of documents. Ofcom are going to be defending, but you're going
26 to be intervening and presumably putting in a document, which is rather like a defence,
27 because you're trying to uphold the decision?

28 MR WARD: We'll certainly be supporting the decision, and we anticipate adducing evidence as
29 well.

30 THE CHAIRMAN: No, I'm just wondering what your statement of intervention is going to look
31 like. It's going to be a statement which supports Mr Holmes?

32 MR WARD: Yes, but without----

33 THE CHAIRMAN: And probably says, "and another thing" quite a lot!

1 MR WARD: I'll try and avoid those words! We won't be stepping into Ofcom's shoes.
2 Obviously it's Ofcom's decision to defend.

3 THE CHAIRMAN: No, no, I understand that, but it's effectively a defence document?

4 MR WARD: It will be on the side of defence, yes, and where it says "Statement of intervention
5 and defence", implicitly is "and accompanying evidence" in the shorthand that Mr Holmes
6 has used.

7 THE CHAIRMAN: So you're putting in your evidence at the time of the statement of
8 intervention?

9 MR WARD: Yes.

10 THE CHAIRMAN: It's virtually impossible for me, not knowing how the parties run their case,
11 to say how long you really should take, but I want to avoid a situation in which this
12 timetable is immediately derailed by something which can be seen to be a likely extension.
13 If we say 14th March, Mr Holmes, for any amended notice of appeal, that gives time for
14 bickering about whether there should be an amendment, and so on, but we leave your
15 defence intact. You've got two weeks for your defence, haven't you, there?

16 MR HOLMES: I'm slightly concerned. It depends a little, Sir, on the scale of the amendments
17 which are made to the notice of appeal. On the assumption that more time is needed to
18 prepare those, the risk only increases that we might become derailed when we come to
19 preparing the defence.

20 THE CHAIRMAN: If we say this, and see if it works out: 14th March, so there's a better chance
21 of there not having to be an inevitable extension and then further argument; give you an
22 extra week - it's not an extra week, give you the same period of time by adding a week to
23 the defence, so it becomes the 5th April, but with a bit more because there's Easter in the
24 middle.

25 MR HOLMES: Yes, Sir, that's Holy Week, I think, Sir, so if it would be possible to have a bit
26 more time?

27 THE CHAIRMAN: Perhaps a bit more time so we emerge from Holy Week, but leave Mr Ward
28 intact at 24th April, because he's got a long time to do it. He's got a long time to think about
29 Mr Bowsher's new document, if any.

30 MR HOLMES: We would be content with that.

31 THE CHAIRMAN: That would work, wouldn't it? It becomes a question for Mr Ward.
32 Mr Ward, if we extend by a week, you won't need another week?

33 MR WARD: No.

1 THE CHAIRMAN: Right, so we will say 14th March for an amended notice of appeal for the
2 sake of the order.

3 MR HOLMES: Sir, might I ask for 11th April in order to allow three days the conclusion of Holy
4 Week in which to finalise the defence.

5 THE CHAIRMAN: Easter is 1st April, isn't it?

6 MR HOLMES: 1st April, exactly. So for the following week it may be difficult. There may be
7 additional difficulties, and so I was wondering whether we might say 11th April for the
8 defence, the middle of the following week?

9 THE CHAIRMAN: I think we'll say 9th April, which is a Monday. If this is urgent, people are
10 going to have to work in the holidays, except me of course! It seems to me that will still
11 leave enough time for the statement of intervention, which will be heavily based on the
12 notice of appeal, even though it will obviously wish to take into account your defence.

13 MR HOLMES: I'm grateful, Sir.

14 THE CHAIRMAN: So you have until the 9th, and then we leave your date as at 24th April,
15 Mr Ward - yes?

16 MR WARD: Yes.

17 THE CHAIRMAN: Good, that works.

18 MR BOWSHER: Sir, the other directions which we sought which aren't in this table, that there
19 be time for us to put in any evidence in response or reply. We'd sought that direction. We
20 also suggested there should be a time for a further CMC.

21 THE CHAIRMAN: Well, we'll come to that in a second. Are you going to put in further
22 evidence with your amended notice of appeal, or any further evidence at all?

23 MR BOWSHER: I don't contemplate doing so at the moment, but it might be necessary. It
24 depends what comes out.

25 THE CHAIRMAN: I suppose, in theory, what might be the position is you might decide not to
26 put in an amended notice of appeal, but to put in some more evidence in response to the
27 disclosure that you've got?

28 MR BOWSHER: Indeed.

29 THE CHAIRMAN: You should do that by the same date, 14th March. If you don't put in an
30 amended notice of appeal, you should still file any further evidence that you rely on at that
31 stage, not evidence in answer, we will deal with that in a moment. Is that sensible?

32 MR BOWSHER: That would seem sensible, yes.

33 THE CHAIRMAN: Yes, good, so you'll do that. Mr Holmes, your defence will go in, and you'll
34 put in your evidence at the same time - is that right?

1 MR HOLMES: Yes, Sir.

2 THE CHAIRMAN: Defence plus evidence, right. And statement of intervention plus evidence.

3 Then there is the question of evidence in reply. I suppose, in theory, that's possible, but in
4 practice will be irritating. What do you propose about that?

5 MR BOWSHER: The date that we proposed that works on the Ofcom date programme is
6 15th May.

7 THE CHAIRMAN: Right, I don't see why not.

8 MR HOLMES: That's not opposed, Sir.

9 THE CHAIRMAN: Good, thank you.

10 Then a further CMC - it should be, probably, a PTR. We really need to work back from a
11 trial date, assuming we can have a trial date in July. I think, as far as my Chancery listing
12 diary is concerned, we are working to a date in June. I don't suppose a date in July will be
13 regarded with any disfavour because it's a month later than the dates that are in the diary in
14 any event. We can arrange some dates in July. Then we work back, it seems to me, to find
15 a date for the PTR. I think I propose that we don't actually fix a date for the PTR, but the
16 order should provide there should be a PTR 14 to 21 days before the trial date whenever
17 that is. The precise date can be adjusted. We don't know when the trial date is. It should
18 be no farther away from the trial date than 21 days, but no closer than 14, if you see what
19 I mean. It's a rather cumbersome way of putting it, but there's no point in having a PTR
20 which is too far away, or too close that you can't deal with anything. The order will
21 provide for that when we know what the trial date is.

22 We can't, I think, fix that at the moment because that will have to be fixed by reference to
23 the availability of lay members, which has not been canvassed. (After a pause) The lay
24 members to sit with me have potentially been nominated, and inevitably there are odd dates
25 in July they can't do, but I hope we'll be able to stitch together five dates in July. It looks
26 as though it's going to be rather late in July, which I'm not in favour of, because that leads
27 to burdens in writing the judgment, but we'll work that out. It's more likely to be towards
28 the beginning and middle of July than the end of July. Depending on whether we can
29 identify enough lay members to sit, it may be that their commitments will mean that you
30 have a slightly fragmented hearing. There'll be the odd day in the middle when we won't
31 be able to sit. That may be the price of having an urgent hearing, I'm afraid, but if you want
32 five days you might not get five consecutive days if one or other of the lay members isn't
33 available. Looking at the timetabling we've got we'll try to avoid that, but that seems to be
34 the price that you'll pay.

1 If, in fact, there are problems with the diaries of available lay members, which means that
2 July is not feasible, then it will have to go off, but we will try and make it happen in July.
3 As I say, you may have to contribute some days off in the middle of the hearing, which you
4 wouldn't otherwise budget for.

5 MR WARD: Sir, if it were to come to that, what we would prefer is to canvass a hearing in June
6 compressing the rest of the timetable. Inevitably, if it goes off from July that will build in
7 several months of delay. You said, Sir, originally, June was in contemplation for this
8 hearing. As it stands, we're content with the timetable; a hearing in July, we have no
9 objections to that. Could I just leave that open as a possibility?

10 THE CHAIRMAN: We will leave it open and the order can reflect somehow that there be liberty
11 to apply on the timetabling, in the event that July proves difficult. June, I think, does get
12 rather tight and----

13 MR WARD: It's tight, but----

14 THE CHAIRMAN: Even in June you might still risk a fragmented hearing, but I don't know. It
15 depends on so many variables.

16 MR WARD: Yes, of course.

17 THE CHAIRMAN: It depends on the lay members who are going to be able to sit, and so on, but
18 we'll see. That will be borne in mind.

19 MR WARD: I'm sure my clients would be much happier with a fragmented hearing in July than
20 a different type of hearing in October, if that's what it comes to.

21 THE CHAIRMAN: Yes. Mr Holmes, do you want to contribute?

22 MR HOLMES: Sir, only to note, if it assists, that the parties' agreed estimate for the length of the
23 trial, doing the best we can at this stage, is only four days and not five days, of which the
24 parties scheduled, I think, half a day for pre-reading.

25 THE CHAIRMAN: That's hopeless, half a day's pre-reading. It took me quite a bit of time just
26 to do the reading I've done so far. Half a day is utterly ridiculous, with all due respect.

27 MR HOLMES: That's useful information, Sir.

28 THE CHAIRMAN: It doesn't matter, because I'm going to budget for sitting days, as it were----

29 MR HOLMES: I'm grateful, Sir.

30 THE CHAIRMAN: -- as far as the Clerk of Lists is concerned, my Clerk of the Lists, who'll be
31 interested in that, and then we'll do our own pre-reading. There's at least a day's reading in
32 this if we're to make sense of all of this to avoid lengthy openings.

33 How is your agreement split up, what's likely to happen? I know it's difficult at the
34 moment where we haven't even got as far as an amended notice of appeal. Frankly, time

1 estimates are going to be vague, aren't they? Have the parties worked out how that will be
2 divided up?

3 MR HOLMES: Sir, well----

4 THE CHAIRMAN: The key thing is, do the parties think that by the end of the hearing they will
5 be preparing written submissions - written final submissions based on what's gone on
6 before or not?

7 MR HOLMES: Sir, obviously we will do what the Tribunal would find most helpful. We hadn't
8 envisaged written closing submissions, but if you think they would be helpful then, of
9 course, we'll do it.

10 THE CHAIRMAN: Frankly, they are helpful, but my question was different: if you aren't
11 envisaging them then your four day period may make sense. The only point that I have is
12 that if there are to be written final submissions you have to build in time for the Tribunal to
13 read the written final submissions, which counsel in 99 per cent of cases forget to do. That
14 always adds a half day - a half day or a day - just to read them. You're assuming a four day
15 trial with no written final submissions, we go straight into final speeches after whatever has
16 gone on before, which may or may not have involved cross-examination.

17 Do you anticipate cross-examination within that four days - some cross-examination, no
18 cross-examination?

19 MR HOLMES: Yes, Sir, that was calculated on the basis that there would be cross-examination.

20 THE CHAIRMAN: Some, yes, right.

21 MR HOLMES: Whether some will, in fact, be needed, the parties haven't formed a view on that.

22 THE CHAIRMAN: So you budgeted for some cross-examination - that makes sense. There's
23 nothing else to be budgeted for, and at the end of the day who knows.

24 MR HOLMES: Yes.

25 MR BOWSHER: The only point I was going to make on the timetable is that we've already been
26 co-operative on expedition. I think we would be rather concerned about a June as a date.
27 We're already moving rather quickly towards July. I suspect June, if it were to come it, we
28 might express concerns about that.

29 THE CHAIRMAN: The end of June, which actually looks - what's the date of the last week of
30 June?

31 MR WARD: Friday, 29th June.

32 THE CHAIRMAN: That's a Monday?

33 MR BOWSHER: No, 25th June is a Monday.

34 THE CHAIRMAN: Sorry, 25th June is a Monday.

1 MR BOWSHER: The first working day of July is 2nd July.

2 THE CHAIRMAN: Well, I'm not going to do any diary juggling now, but I hear what the parties
3 say about that. No doubt, with a degree of co-operation from you and from the Tribunal
4 and the court side we'll be able to find a date. It may be at the very end of June spanning a
5 weekend, but we will see what we can do. If it's urgent to get this case on then the nice tidy
6 conception of having it done within a working week may not be possible, and we'll have to
7 span a weekend, but cases do.

8 I don't think we can do any more work on timetabling. We have the timetable as it stands at
9 the moment. You're considering consecutive exchange of skeleton arguments.

10 MR HOLMES: Yes, Sir, we hoped that that might assist the Tribunal by avoiding----

11 THE CHAIRMAN: Yes, very much so, it will, and I approve of that. If something has to be
12 condensed you may find that the time allowed for meeting the skeleton gets itself
13 condensed, but we'll see where we go on that.

14 If it's necessary to liaise further about dates then it can be dealt with in writing by
15 application to me, so we can sort it out. There are lots of things to be juggled here.

16 We will aim for a hearing in July, not at the end of July. It might take place at the end of
17 June, and if I come up with dates which present Mr Bowsher with difficulties then
18 somebody can make an application. I understand Mr Bowsher's concern about over-
19 condensing. I hope we can avoid disappointing Mr Bowsher.

20 Is there anything else we need to deal with?

21 MR BOWSHER: I don't think so.

22 THE CHAIRMAN: I've lost my agenda. Is there anything else we need to deal with
23 Mr Bowsher? No. Mr Ward, Mr Holmes?

24 MR WARD: No, thank you.

25 THE CHAIRMAN: Do I deal with costs of this - costs in the proceedings. Costs of this
26 application, the CMC?

27 MR HOLMES: My only hesitation, Mr Bowsher's application, I obviously wasn't a party to that.
28 It did generate very large volumes of litigation correspondence between the two US law
29 firms involved. Of course, Ofcom is a public authority and----

30 THE CHAIRMAN: Didn't you enjoy reading it?

31 MR HOLMES: We all took great pleasure in some of the purple prose, Sir! I do wonder whether
32 the costs of that application might be borne by each party, rather than saved up as a
33 potential costs risk for Ofcom at the end of this process.

1 THE CHAIRMAN: I think, Mr Holmes, the way I'm going to deal with that is this: for the
2 moment, subject to - you can make a carve-out, if you like, if appropriate, for those costs at
3 the end of the hearing. So you can apply again at the end of the hearing. I'm going to say
4 the costs of the application are costs in the appeal, with liberty to you to apply to vary that
5 order in respect of the costs of the ring debate in due course.

6 MR HOLMES: I am grateful, Sir.

7 THE CHAIRMAN: I suspect it will create more costs than it saves to carve them out and have a
8 separate assessment.

9 MR HOLMES: That's well understood, Sir.

10 THE CHAIRMAN: You can keep your powder dry on that, otherwise costs in the appeal.

11 MR HOLMES: Yes, Sir.

12 THE CHAIRMAN: Anything else? No. Thank you all very much.

13 _____