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

Case No: 1584/5/7/23 (T)

10 Salisbury Square House
11 8 Salisbury Square
12 London EC4Y 8AP

13 Friday 26th April 2024

14
15 Before:

16
17 Hodge Malek KC
18 Timothy Sawyer CBE
19 Andrew Taylor

20
21 (Sitting as a Tribunal in England and Wales)

22
23
24 BETWEEN:

25 **Claimant**

26 **Whistl UK Limited**

27
28 And

29 **Defendants**

30
31 **International Distribution Services Plc and Royal Mail**
32 **Group Limited**

33
34
35 **A P P E A R A N C E S**

36
37 Alan Bates on behalf of Whistl UK Limited (Instructed by Fieldfisher LLP)

38
39 Andrew McIntyre on behalf of International Distribution Services Plc and Royal Mail Group
40 Limited (Instructed by Bryan Cave Leighton Paisner LLP)

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1
2 **Friday, 26th April 2024**

3 **(10.30 am)**

4 **CASE MANAGEMENT CONFERENCE**

5 **MR MALEK:** Morning. You have swapped sides now just to confuse us. That's it.
6 Let me get my notebook.

7 Draft Order. On disclosure the first issue is the Ofcom investigation file and the appeal
8 trial bundle. You have got the index. Everyone has the index?

9 **MR BATES:** We have the index in our bundle.

10 **MR MALEK:** And the Ofcom investigation file, what have you got from that?

11 **MR BATES:** The Ofcom investigation file gives us both the documents (inaudible) file.
12 What we did not receive until last night was what Ofcom was asking for i.e. the
13 section 26 requests prepared. Also it has become clear, from what was provided to
14 us last night, that at least some of the material may have been provided in response
15 to an informal request, so not in response to a section 26 request.

16 **MR MALEK:** That's fine. As long as you have it now, that is fine.

17 **MR BATES:** We have got it now, but obviously it has impacted on what we have
18 called the point of principle, which is shorthand really for an issue that cuts across
19 a number of Whistl's requests, which is to what extent can Royal Mail properly respond
20 to those requests by saying "All material will have been collected by Ofcom and will
21 be in the Ofcom file disclosure we have already given you".

22 **MR MALEK:** We will come back. That's a different point. I am just trying to find out
23 what you have. Then you are saying that you can't match everything with the index
24 you have got of the appeal bundle and that you may have further requests based on
25 that index. Is that right?

26 **MR BATES:** Yes. We have some documents from the index that we are not sure that

1 we have received copies of in the Ofcom file disclosure. So I think we have raised
2 queries about specific documents. So that's all in progress and hopefully will be
3 resolved soon.

4 **MR MALEK:** So that's fine. Are there any documents you have requested that you
5 have had a refusal to? Are there any issues?

6 **MR BATES:** Not so far.

7 **MR MALEK:** If there are, we could just deal with it in the normal process. You do
8 a schedule of what has been requested, what has been refused, the reason for the
9 refusal, and then I can deal with it either on paper or at the next time we have
10 a hearing.

11 **MR BATES:** I think for us we're very grateful.

12 **MR MALEK:** That's fine. The issues in relation to this aspect I can deal with on paper
13 unless either party asks for an oral hearing. If they ask for an oral hearing, then it will
14 be on the normal basis, relatively short, rough and ready. I won't be making adverse
15 costs orders unless someone is acting unreasonably, the same way that I have been
16 dealing with in Trucks, because I want the parties to feel that I am here to help resolve
17 things if there is an issue. It doesn't need to be confrontational. Nothing needs to be
18 fought to the death. I just want to get the case sorted out and proper disclosure.
19 Sometimes, you know, people grandstand and you have a hearing and then they are
20 asking for sums of costs, and it doesn't help the parties but becomes a deterrent. So
21 that is absolutely fine.

22 The next one is the Redfern schedules. That seems to be working okay.

23 **MR BATES:** Yes. There has been a huge amount of progress. As far as Royal Mail's
24 Redfern schedule of their requests to us is concerned, it looks as though that is almost
25 entirely agreed. There are a few outstanding points of confirmation, requests from
26 one party to another. I would suggest that those matters might well be resolved

1 between the solicitors outside the room in very short order rather than trying to go
2 through them all now, because there's been very late correspondence about some of
3 these points, but it does seem as though they are very close to being resolved.

4 **MR MALEK:** That's absolutely fine. Look, the whole idea of the Redfern schedule is
5 to identify what the parties' positions are, to help everyone resolve the issues. It is
6 only if you get to the final column and you can't agree something that you come back
7 to me and then I will give a ruling. If you have a long Redfern schedule and it is only
8 a few items from the schedule, you don't need to send me the full Redfern schedule.
9 Just send me a mini Redfern schedule that only relates to the ones that are still in
10 issue and then we can deal with that.

11 **MR BATES:** (Inaudible). What has happened in this case is that after the last column
12 had already been reached there were then further discussions and there has been
13 further progress since then.

14 As far as Whistl's requests to Royal Mail are concerned, there seem to be three
15 significant outstanding issues. I don't know if now is convenient for me to outline what
16 they are.

17 **MR MALEK:** We are still on the Redfern schedule process, yes?

18 **MR BATES:** Yes, this is to do with the Redfern schedules.

19 **MR MALEK:** Just tell me what they are.

20 **MR BATES:** There is what we have called the point of principle, which is essentially
21 this. Can Royal Mail, in response to a request made in Redfern schedule, simply say
22 "Well, these documents have already been provided to you or will have already been
23 provided to you as part of the Ofcom file disclosure, but if there are other documents
24 that you are aware of that have not been provided then you need to identify them
25 specifically".

26 Our difficulty with that is obviously we don't know what other documents may not have

1 | been captured by Ofcom. Insofar as we can look at what Ofcom asked for and see
2 | that Ofcom was pressing for documents in particular categories or dealing with
3 | particular subject matters, we can understand that the scope of what Ofcom was
4 | asking for and was provided corresponds to the documents we are asking for in our
5 | Redfern schedule, then, of course, that may be a basis for accepting that it has all
6 | been captured by Ofcom.

7 | **MR MALEK:** In that category, if there is a category of document that had been asked
8 | for by Ofcom and there's no evidence that the task has not been done properly, we
9 | are not going to ask Royal Mail to do it again. Okay?

10 | On the other hand, if in that category you can see that there's a gap there somewhere
11 | or there's a reference to a document which seems significant, then, of course, you
12 | should write to Royal Mail and say "Well, we are not asking to you completely re-do
13 | the thing, but there is this issue. Please look into it", and we see what comes back.

14 | **MR BATES:** That's exactly right.

15 | **MR MALEK:** But then if there is an area where there hasn't been an express request
16 | and you are asking for something outside that request, it is probably not enough for
17 | them to merely say "Well, we would have picked it up as part of the Ofcom
18 | investigation" if it is not part of a specific request. So what they will need to do is
19 | explain what they did at the time, what they were looking for at the time, and get
20 | someone to confirm, on the basis of what they are saying, that they are satisfied that
21 | there are no further relevant documents in this category. They will only do that once
22 | they have personally satisfied themselves.

23 | At the end of the day I will expect statements of truth on all of this. So you are going
24 | to have disclosure statements, you will be having further disclosure as you go along,
25 | but there is going to have to come a point whereby all the new stuff that's being
26 | provided is added to the disclosure statement and someone is going to have to sign

1 the statement of truth; and that's quite a good discipline.

2 The other thing is that I consider, at least in the CAT jurisdiction, I have power to
3 require a party to specify by way of a witness statement exactly what searches they
4 have done in order to comply with their duty of disclosure. So if everyone knows that's
5 where we are going, it is a good discipline. I think that's where we are on that.

6 So where a category is clearly covered, that's one regime, subject to you finding gaps.
7 Where a category is not clearly covered, then they are going to have to satisfy you,
8 and possibly me later on, that they did a proper search at the time and they don't
9 believe there are any further documents. We need to see on what basis they say that,
10 otherwise they are going to have to go back and do it.

11 **MR BATES:** I am very grateful.

12 **MR MALEK:** This will be on the transcript, so everyone will understand what they are.
13 I am not saying they have to do exactly what you specified at paragraph 10 of your
14 skeleton. They need to do what I have just specified now, obviously subject to what
15 Mr McIntyre may say, pushing back on what I have just said. If there is no push back
16 then we can move on to the next topic.

17 Mr McIntyre, are you happy with the way I have put it there?

18 **MR McINTYRE:** May I just take instructions?

19 **MR MALEK:** Of course you can, yes. (Pause)

20 **MR McINTYRE:** Sir, I think we are broadly okay with that subject just to clarifying this
21 point. The difficulty we have with the approach that has been taken is that the Redfern
22 requests that have been made in relation to infringement essentially don't take account
23 at all of the existence of the file and appeal bundle, and, in fact, most of the relevant
24 infringement material, as both parties have agreed in the past, is going to be in there
25 in all likelihood. That's the problem we have, we have these very unfocused requests.
26 You will recall that at the last CMC what was ordered was a staged disclosure process:

1 file, then indexes to the appeal bundles so that you could get whatever was missing
2 from the file. The idea was at the end the Redferns would just close the gaps. We
3 don't have that. We have very, very broad infringement related requests for huge
4 disclosure which massively overlap with the file.

5 The point of clarification we just want to make is that those broad requests, all of the
6 ones that are in dispute between the parties on the basis of this point of principle,
7 marked in yellow on the Redfern, they come out of the Redfern for now. The burden
8 is then on Whistl, who review the Commission file which, with respect, it has had for
9 a few months.

10 They asked us for the RFIs on 22nd April. It wasn't part of the original order. We
11 provided those. So it has the file itself which is I think about 2,000 documents. The
12 index to the file has the RFIs, has the bundle index. Just last night they asked us for
13 documents from the bundle. So the ones that are agreed they will get that.

14 It needs to look through all of that material we have already given it, plus we have also
15 agreed in correspondence, to try and compromise this, to hand over some other
16 specific infringement related categories of document. This is in addition to the Redfern
17 stuff. So again we have offered even more.

18 Whistl needs to look through all of that material and then identify the gaps. At that
19 point we are content for it to come back and say "We think there is a gap here", and
20 then we can deal with those requests as and when they come.

21 **MR MALEK:** The file is going to be compiled largely, not completely, based on what
22 requests Ofcom was making for documents and the recipients of those requests
23 complying with that request.

24 So I think what Mr Bates is saying is that, insofar as they can see that a topic is
25 covered by a request, they are not going to ask you to re-do that topic unless there's
26 an issue that specifically they can flag saying that this document or this category of

1 documents is missing, at which point, if at the end of the day you accept that area is
2 relevant, you will do the normal search.

3 The other category is where they are asking for material which is not the subject of
4 a request that they can identify, and so they can't be satisfied themselves that all the
5 material in relation to that particular aspect has been disclosed, in which case you are
6 going to have to respond to that in some way. You can either say it is irrelevant or you
7 can say actually it has all been disclosed on that topic and explain why. In order to do
8 that, if it is not the subject for specific requests, you are going to have to speak to
9 whoever worked on the exercise at the time and then satisfy yourself that, in fact, that
10 category was searched for; and if it is and there is no evidence it hasn't been done
11 properly, then that's the end of it.

12 What you are saying is not quite what I have got in mind, but I think at the end of the
13 day we will probably come back to the same position that you are talking about.
14 Clearly the claimant has to go through the whole file.

15 You know, these proceedings are expensive enough as they are and I know the claim
16 is for a big figure. I don't want disclosure to be an unnecessary burden. If you have
17 already done the exercise once and there is no reason to consider that it has not been
18 done properly, I don't want you to have to go through the same exercise again. I think
19 we all understand where we are. if there is any need for clarification, we can deal with
20 it at our next hearing. We have one fairly soon coming up on the preliminary issue.

21 There's a number of ways how we deal with this. One is that if there's a dispute, you
22 write in, say what the dispute is and then I will say what my preliminary view is.
23 Normally the parties go with that, there is no formal ruling and there is no hearing.
24 Sometimes the parties say "No, Malek, we want to push back on what you are
25 suggesting. We want you to have a hearing and we will resolve it". That's also fine.

26 The informal letter procedure was very effective in the Trucks case because there

1 were so many coming in, but it was easy to deal with it that way rather than having
2 expensive hearings.

3 I am quite happy to deal with disclosure on the informal letter approach, a hearing
4 approach, whatever works, but everyone needs to bear in mind hearings cost money.

5 **MR McINTYRE:** I am grateful for that. I just want to make it absolutely clear -- it may
6 be agreed between my friend and I -- that all of the requests currently in the Redfern
7 which are expressed as being contingent on this principle are going to come out. That
8 is important for us because we need to start our disclosure searches, but we need to
9 know whether we have to start carrying out these fresh infringement searches.

10 **MR MALEK:** Look, they may need to revisit the categories they are asking for. Insofar
11 as there is a category that falls within a specific Ofcom request which you have
12 answered and you have provided the documents, then the first limb will apply. Insofar
13 as there's a request that's not covered by a specific request of Ofcom, then the second
14 limb applies.

15 It is neither what you are saying and neither what he is saying, it has to be a bit more
16 sophisticated than that, but everyone should understand that if there's
17 something -- a category of document which is the subject of a specific request that you
18 have answered, you don't need to do the job again. If there's something that's not part
19 of a specific request but you say it would have been included in the Ofcom file, it is
20 a bit more nuanced than that, because you will need to satisfy yourselves and write to
21 the other side and say "Though that's not the subject of precisely the specific request
22 we, in fact, did cover this whole thing when responding to Ofcom", and then you give
23 that answer.

24 So I hope I am clear enough that it is neither what you are saying nor what he is saying.

25 It is somewhere in between. It is a bit more nuanced than what either of you are
26 saying. You will get the transcript. If there is any dispute, come back and I will resolve

1 it on paper.

2 **MR McINTYRE:** I understand that, sir. Just to be clear, I think it is for Whistl to identify
3 categories it still wishes to consider.

4 **MR MALEK:** Of course. They have the Ofcom requests now. They said they are
5 going to look at that and they will look at it. Of course, in the light of those Ofcom
6 requests they will have to reformulate, or at least reconsider, those broad requests,
7 because I am not going to require you, unless there's a major hole, to re-do something
8 on infringement that you have already done.

9 While you are here, have you got continuity? Have you got someone in the legal team
10 who was involved in the disclosure exercise that long ago?

11 **MR McINTYRE:** No, there is no-one either internally at Royal Mail or within the
12 solicitor and counsel teams.

13 **MR MALEK:** It makes it a bit harder, though, doesn't it, if you have no continuity? So
14 you can't have someone in your office and say "Look, you did this" and all that. You
15 will have to go back a bit and look and see what's on the file, if necessary, identify
16 them and have them available.

17 **MR McINTYRE:** (Inaudible).

18 **MR MALEK:** Yes. Okay. I think that's where we are.

19 **MR BATES:** I want to make it clear for the sake of the transcript, and for clarity, that
20 it is not the case that Whistl has received full disclosure of the Ofcom file materials.
21 We have received some documents from the Ofcom file -- and that's shown by the fact
22 that we didn't have the section 26 requests themselves. One would rather expect it
23 would have been in the Ofcom file.

24 So far as the Redfern schedules are concerned --

25 **MR MALEK:** Going back to the Ofcom file.

26 **MR BATES:** Yes.

1 **MR MALEK:** On the Ofcom file, as I said last time, you are not required to give the
2 full contents of the Ofcom file. You are only required to give the contents of the Ofcom
3 file insofar as they are relevant to the issues in the action. So insofar as Mr Bates is
4 saying he hasn't had the whole file, well, that's what I expected. There may be issues
5 as to whether specific parts of the Ofcom file should be disclosed or not and that should
6 clearly be targeted in correspondence first and go into the Redfern schedule.

7 **MR BATES:** What we sought from the Redfern schedule is to use it for its proper
8 purpose, which is for all the parties to work out what matters need to be covered by
9 the disclosure and what has been covered already. That's very important. We don't
10 accept that we have failed to review the material we were given in February because
11 we have spent time reviewing it.

12 **MR MALEK:** Have you got the index to the Ofcom file?

13 **MR BATES:** No.

14 **MR MALEK:** Is there no index?

15 **MR BATES:** I don't think we have the full index. We are not sure if there was originally
16 an index.

17 **MR MALEK:** Sometimes there isn't.

18 **MR McINTYRE:** Sir, I am told we have provided the index to the Ofcom file.

19 **MR MALEK:** Oh, that's good. That's fine. That is a positive.

20 **MR BATES:** Obviously this point about the extent to which disclosure has already
21 been captured by requests cuts both ways, because Ofcom will not just have
22 requested material from Royal Mail. They will also have requested it from other
23 people -- Whistl, potentially other people in the industry. So it may be that some of
24 our requests may be covered by some of the searches that were undertaken at that
25 time as well. Now we have all the section 26 requests we will be able to take that
26 forward.

1 **MR MALEK:** I have a question for Mr McIntyre. On the loss of profit claim we have
2 seen that it's a very substantial figure and one of the things we are going to have to
3 figure out at trial is how realistic it was that this business was going to make this profit.
4 Are you going to be relying on your own experience in the profitability of this business
5 in order to argue that whatever they are saying just was not viable? There may be
6 implications for disclosure if that's going to be your case. Do you know?

7 **MR McINTYRE:** May I take instructions?

8 **MR MALEK:** Of course you can, yes. (Pause)

9 **MR McINTYRE:** The answer to the question in principle is yes. We will be looking at
10 Royal Mail's performance. As to the disclosure implications, the requests that Whistl
11 has made of us, and which have been agreed, include performance data from --

12 **MR MALEK:** That's what I was looking for. You will be doing that anyway.

13 **MR McINTYRE:** Yes.

14 **MR MALEK:** That's absolutely fine. Thank you.

15 **MR BATES:** The next issue on Whistl's Redfern schedule (inaudible). I am looking
16 at 555 in the bundle, 106, second volume.

17 **MR MALEK:** Which page are you looking at?

18 **MR BATES:** 555. Item 6, the part that's not agreed is the very last words, but the
19 essence of it is it is asking for contemporaneous Royal Mail internal documents
20 "relating to", and then at the very end of that first column you can see:

21 "Correspondence and documents relating to Whistl signing up for a new NGPP [that's
22 a non-geographic postal profile] in 2011 with a view to starting to provide an end to
23 end service."

24 This links up to paragraphs 46, 47 and 48 of the --

25 **MR MALEK:** That's your request.

26 **MR BATES:** Yes, that's Whistl's request.

1 **MR MALEK:** Let me just see what the response says. Where is the response to that
2 bit?

3 **MR BATES:** The middle paragraph of column 4 touches on it I think.

4 **MR MALEK:** They are asking for an explanation and that is (inaudible).

5 **MR BATES:** (Inaudible) the amended particulars of claim. The latest version of
6 events has been inserted behind tab 25 of the bundle.

7 **MR MALEK:** I hope so. We will be looking at that later but yes, okay.

8 **MR BATES:** Paragraph 46 (inaudible) setting out the history (inaudible). Eventually
9 Whistl, because it had in mind to launch an end to end delivery service, was lobbying
10 Ofcom about the appropriateness of Royal Mail's price plans and how they needed to
11 be changed. New price plan arrangements were introduced in 2011. You can see
12 that in paragraph 47. Whistl, in that context, then elected to be on the NGPP price
13 plan. That was the prelude to Royal Mail then seeking to introduce the price differential
14 originally in January 2013.

15 **MR MALEK:** Yes.

16 **MR BATES:** So there was that event before the time of the infringement. What we
17 have asked for is to see Royal Mail's internal communications where they were
18 considering internally the fact that Whistl had elected for the NGPP price plan.

19 **MR MALEK:** So you want to see if they have been saying "We don't like that, we are
20 going to throw a spanner in the works", or whatever.

21 **MR BATES:** That's precisely it. That is why we have asked for it.

22 **MR MALEK:** You are not asking me to rule on that today, but I can see there is some
23 logic in you pursuing that. I don't think we envisaged deciding any issues on the
24 Redfern schedule today unless Mr McIntyre wants us to.

25 **MR McINTYRE:** Sir, it depends what the process going on is. Obviously there is
26 a process for Whistl to articulate further categories and requests in respect to some of

1 these infringement related points. This is not one of them, this is just a free standing
2 issue.

3 **MR MALEK:** I understand that.

4 **MR McINTYRE:** If it is envisaged we will put this before the tribunal at a later stage --

5 **MR MALEK:** I would have thought so. The dispute over the Redfern schedule
6 generally has not yet crystallised and once it has crystallised we will then go through
7 any entries that haven't been agreed.

8 Now on this category it is unclear to me whether it's crystallised or not crystallised, but
9 I would rather do them all at the same time in the normal way where we have
10 a session. Let's have the schedule and we go through the items one by one, and
11 there's quite often an element of give and take. Sometimes you'll say "Okay I'll give
12 this one for you", but both sides should end up having something that they want, or
13 whatever. Whereas the problem with just doing one side only, at a hearing like this,
14 is you may say "Well, look, Mr Malek, I have my own requests on this. What about
15 those?"

16 Typically what happens is that the solicitors meet, they have a meeting and they go
17 through all their requests which are outstanding and there is an element of give and
18 take. You know, each solicitor goes into the meeting. One will have on his piece of
19 paper those things which definitely he needs to leave that meeting he's got. There will
20 be others which will be a nice to have. So it will be the same for both sets of solicitors.
21 They go and they have a give and take.

22 Now if I start doing this exercise now, I don't think it is going to help you resolve all the
23 issues which -- Mr McIntyre -- you know, you are better off, both sides are better off,
24 having the solicitors having their meeting on everything that's outstanding all in one
25 go. At the end of that meeting you will probably find almost everything has been
26 resolved.

1 I am not keen to kick off one now when I don't think that meeting has been held yet
2 and Mr Bates is saying that he thinks it is going to be fruitful to have that meeting, and
3 we still need to refine some of the requests in accordance with the mini ruling I have
4 given earlier today.

5 Mr Bates, is that okay for you? I think I would rather do it that way.

6 **MR BATES:** Yes. I am grateful for that indication.

7 Though there has not yet been a meeting between solicitors, and it's perhaps less
8 productively being done through -- perhaps less efficiently being done through multiple
9 exchanges of correspondence.

10 **MR MALEK:** Yes, a meeting -- look, you get to a stage where the decision makers on
11 each side on disclosure need to be in the same room together. My experience in
12 litigation and disclosure is that they normally work and at least if they don't work you
13 know what the really important things are you are going to ask the tribunal to rule on.

14 **MR BATES:** In that case I will say what are the outstanding issues.

15 **MR MALEK:** Yes.

16 **MR BATES:** I've gone through (inaudible), that really does (inaudible). The other one
17 is on item 18.

18 **MR MALEK:** Yes.

19 **MR BATES:** Item 18, a request for (inaudible), informal, made by Royal Mail to
20 UK Mail or other market participants regarding the potential or likely content of the
21 CCNs and the potential or likely introduction of the price differential. So what this is
22 intended to capture is documents going to Whistl's infringement allegation that, even
23 before the CCNs were issued, Royal Mail was putting out messages to people in the
24 market that the price differential was coming down the line and that already had
25 an impact on competition.

26 Royal Mail's response to this is that they will only look for communications to UK Mail

1 and not to other market participants. We say that can't be right and that
2 communications to other wholesale customers -- so people who were doing similar
3 business to Whistl and UK Mail, other competitors; and indeed those bulk mail senders
4 who were contracting directly with Royal Mail, that should be captured as well. So
5 that's the scope of the disagreement on --

6 **MR MALEK:** How is it going to help you to have those communications?

7 **MR BATES:** Because if Royal Mail was having communications with people other
8 than UK Mail, telling them that a price differential would come in -- and that could
9 already have been affecting competition by (inaudible) enterprise market via services
10 on the basis that Whistl wouldn't be able to successfully do (inaudible). That is part of
11 the pleaded case. There's no issue about that, that the disclosure has to be provided
12 for UK Mail, which we have given in our particulars of claim as an example of one of
13 the competitors, but they weren't the only competitor.

14 So we obviously must have documents that are crucial to an element of the
15 infringement that we are trying to prove that goes beyond the scope of the decision.

16 **MR MALEK:** If we are going to have an argument about that, when we have the
17 hearing or whatever, send me the actual documents that you have got on that so I can
18 get a feel for it, ie the communications with UK Mail. Then I can look at that and then
19 take a view as to whether it is going to be of any assistance, whether we get similar
20 communications with other parties.

21 **MR BATES:** Yes. Obviously our reason for thinking there were communications with
22 UK Mail is largely due to sort of market intelligence, things that we were picking up
23 from what customers were telling us at that time; and that's what we communicated to
24 Ofcom as being part of the source of our concern. So I don't think there are documents
25 even for UK Mail.

26 **MR MALEK:** I thought you were inferring that these soundings must have been in

1 writing and that letters would have been sent out.

2 **MR BATES:** No.

3 **MR MALEK:** If it is oral, then there may not be any documents in that category and it
4 may be a matter for witness statements and stuff like that, or it may be an RFI or
5 something like that they need to consider. If there are no documents and you think it
6 may be oral, then you may want to have an RFI, say, you know, "Were you doing this
7 and if so to whom and on what date?"

8 **MR BATES:** That may be right. There certainly may be some Royal Mail internal
9 documents, records of communications that they were having with UK Mail and
10 internal communications. So that's why we have framed the request as we have,
11 referring to both formal and informal communications.

12 **MR MALEK:** In your pleadings it is an issue and you raise that, I understand that, and
13 they will have to give disclosure by reference to the pleaded issues.

14 **MR BATES:** Yes.

15 **MR MALEK:** If you have pleaded that there were communications other than to
16 UK Mail, then they will have to give disclosure of that. If all you have pleaded -- I can't
17 remember the exact pleading -- is it is only to UK Mail, then obviously it is limited to
18 that.

19 Look, disclosure in this case is going to be by reference to what's in the pleadings
20 unless, for some exceptional reason, someone says "There is a category of
21 documents. Although it doesn't relate to pleaded issues, it is relevant to the issues".

22 Normally, for me, the first port of call is someone is going to show me -- if they are
23 asking for a category of documents, "You tell me which paragraph of the pleadings
24 this relates to", and then I go from there. I am not going to make a ruling on this today
25 because I have not heard Mr McIntyre and I would have to look at this properly if it is
26 still an issue.

1 **MR BATES:** I am grateful for that indication.

2 **MR MALEK:** Thanks very much for just outlining what the issue is on this.

3 Then we now have third party disclosure.

4 **MR BATES:** Yes.

5 **MR MALEK:** If I can have the answer to the question I asked you yesterday about the
6 extent to which in the past, and even now, you have had access to documents from
7 LDC and PostNL, and let's go from there.

8 **MR BATES:** Well, the answer to the question is that to the best of our knowledge we
9 haven't. We can't rule out the possibility, given that PostNL was the parent company
10 of Whistl at some time in the past, that there may have been one or two
11 communications -- a small number of communications which we are not aware of at
12 the moment -- where relevant documents that Whistl was not originally copied in on
13 were provided to Whistl.

14 Leaving that small possibility aside, no, we have not been able to collect third party
15 disclosure from UK Mail -- from PostNL or LDC.

16 **MR MALEK:** Is it envisaged that the requests for disclosure, let's say to PostNL
17 (inaudible), are going to be made on a joint basis, ie both firms of solicitors will be
18 writing saying "We have got this dispute. We would be grateful if you could give us
19 these categories of document"?

20 **MR BATES:** Yes.

21 **MR MALEK:** That's good. So it will be letters coming from both sides.

22 **MR BATES:** Yes.

23 **MR MALEK:** The letter on behalf of both sides, that's a very efficient way of dealing
24 with it.

25 Then where are we on this old question of non-party disclosure in the context of
26 Gorbachev v Guriev decision where (a) the entity that you are requesting it from is

1 outside the jurisdiction and (b), just as importantly, the documents are outside the
2 jurisdiction, because my view, for whatever it is worth, is that it is going to be very
3 difficult to get me to issue a non-party disclosure order against someone outside the
4 jurisdiction in these circumstances absent that non-party indicating that it would accept
5 it and not take a point on jurisdiction.

6 **MR BATES:** I respectfully agree with that assessment, which is applicable to the
7 position of PostNL, given they are not in the jurisdiction.

8 So far as LDC is concerned, my understanding is that they are in the jurisdiction.

9 **MR MALEK:** I don't think there is a problem with LDC. The main problem is going to
10 be PostNL. If we are going to go through The Hague Convention, then we need to
11 start that process fairly soon, given how long it takes to go through the normal
12 channels.

13 **MR BATES:** That's obviously right. Therefore it is important to establish as quickly
14 as possible whether we will have to go through that process. At the moment we think
15 it is unlikely that we will, because we think that PostNL will provide the request for
16 disclosure voluntarily.

17 **MR MALEK:** That's brilliant.

18 **MR BATES:** The process of engaging with PostNL and LDC has already started to
19 an extent. On behalf of Royal Mail it was quite rightly raised by BCLP that there should
20 be a joint approach to communications with LDC and PostNL about disclosure. That
21 was agreed to by Towerhouse, who were Whistl's then solicitors.

22 My understanding is that a joint letter has already gone out to those parties to sort of
23 lay the ground. What has not happened so far is specific requests to them setting out
24 the scope of what they are being asked to do. So that will be the next stage. What
25 the parties have proposed in the draft directions is essentially a timetable for getting
26 that process completed as quickly as possible, but PostNL does continue to have

1 a relationship with Whistl in that it is still a minority shareholder in Whistl.

2 **MR MALEK:** So that will help.

3 **MR BATES:** We are hopeful, yes, that will smooth things somewhat.

4 **MR MALEK:** You have a change of solicitors. Is there any continuity of staff between
5 the two teams?

6 **MR BATES:** There is continuity in that Mr Groves was involved previously when he
7 was at Towerhouse some time ago and the counsel team is --

8 **MR MALEK:** The counsel team. I am just thinking about the disclosure. If you have
9 already started the disclosure exercise with one firm, how that is going to be working.
10 It is for you to sort out any practical problems.

11 **MR BATES:** Yes.

12 **MR MALEK:** That's fine. Okay. So that's third party disclosure.
13 Witnesses of fact.

14 **MR McINTYRE:** Sorry to interrupt.

15 **MR MALEK:** Yes, of course.

16 **MR McINTYRE:** Just one very short point -- we are not going to address the
17 substance of my learned friend's submission.
18 Our draft order currently provides for disclosure to happen on 15th July. Our
19 suggestion is that we should keep that date in for the categories which have already
20 been agreed by the parties so they can start those searches now.

21 **MR MALEK:** Yes, of course, that's fine.

22 **MR McINTYRE:** We may need to revisit those between ourselves with a view to
23 (inaudible).

24 **MR MALEK:** Let's see where we are. Where is this in the draft order?

25 **MR McINTYRE:** It is paragraph 4 of the draft order. This assumes that all the Redfern
26 disputes have been resolved.

1 **MR MALEK:** They may or may not be. We will leave that in and you can modify the
2 wording to reflect what you have just said. That is absolutely fine.

3 **MR McINTYRE:** Yes.

4 **MR MALEK:** We are now moving on to the next topic, witnesses of fact. You have
5 suggested 20th September 2024, which at the moment is fine. If we are going to lose
6 time on the disclosure you may have to push it back, but we will deal with that when it
7 comes.

8 I do find it helpful for the parties to both know well in advance of the actual exchange
9 who the intended witnesses are and their positions. It is not enough for me for you to
10 say you have three to six witnesses. I will want to fix a day whereby both parties will
11 write to each other saying which witnesses they intend to exchange witness
12 statements on and what position they held at the relevant time.

13 So when do you think you are going to be in a position to do that? Presumably you
14 will be starting on the witness statements anyway well before the September date.

15 **MR BATES:** If we are being held to the names that we have put forward, then I would
16 suggest that it has to be after 15th July or later if disclosure is not going to be provided
17 until a later date, as suggested by my learned friends. We have given consideration
18 to who our witnesses will be, but it is to some extent dependent on what documents
19 those witnesses have to speak to.

20 **MR MALEK:** Yes. What I was thinking was by the end of July both parties will
21 exchange letters listing those persons who they currently intend to serve witness
22 statements for. That's not a shutting of the door. If nearer the time you decide "No,
23 I am not going to call this guy, he can be covered by this other guy", or whatever, you
24 can write an updated letter.

25 So what I suggest you do is you write the letter at the end of July -- and you put the
26 date in the order which is the last date in July -- with the persons you intend to provide

1 witness statements on, and if either party after that but before the date for exchange
2 decides it actually doesn't want to call one of those people or it wants someone else,
3 then they write and say "Further to our letter, we have now decided to call this person
4 instead of that person". Okay?

5 **MR BATES:** Yes.

6 **MR MALEK:** What I am trying to avoid is a situation whereby everyone gets a surprise
7 on exchange of witness statements, that one side doesn't call people and then that
8 may affect the preparation. It is clear what I want.

9 **MR BATES:** Yes. That sounds very sensible, if I may say so. What that discussion
10 does bring out is that it is important that the disclosure is completed either on 15th July
11 or in short order soon afterwards.

12 One thing that hasn't been discussed so far is any timetable for dealing with the
13 outstanding disclosure issues.

14 **MR MALEK:** You need to crystallise those. So, look, have your meeting -- revise the
15 Redfern schedule, have your meeting. Certainly by the next time we see each other,
16 which is the preliminarily issues date, we will know where we are and we can revisit
17 the timetable for everything that day because -- we are going to have a whole day on
18 preliminary issues. We will have plenty of time to deal with other things on the day.

19 **MR BATES:** We are grateful for that. Obviously it does then depend on when that
20 hearing will be able to be listed for.

21 **MR MALEK:** We will come to that later.

22 **MR BATES:** Given the limited scope of the outstanding disclosure issues, they can
23 be resolved within the next week and any disputes can crystallise by then in order that
24 there is no significant pushing back of the 15th July date, because the overall timetable
25 is actually quite tight.

26 **MR MALEK:** As Mr McIntyre says, he wants to get to a position quickly as to what

1 has been agreed and then everyone can start working on what has been agreed; and
2 then the others will just carry on with the Redfern process, but hopefully the others will
3 be resolved with this meeting between the solicitors.

4 Now is it envisaged that there be any third party witnesses, ie you will need witness
5 summonses? Is it too early to tell? Presumably you would need to get the disclosure
6 from LDC.

7 **MR BATES:** It is possible there may be third party witnesses. Whether a witness
8 summons will be needed is obviously another matter, but yes, both of those things are
9 possibilities.

10 **MR MALEK:** Yes. So if in the letter at the end of July you will specify those persons
11 you intend to provide witness statements for, and if they are persons that you are
12 minded to issue witness summonses against on the basis they have not provided you
13 with a statement, just indicate there may be a need for a witness summons in respect
14 of Mr X, Y and Z, so at least we know it is on the map, but we will not need to issue
15 witness summonses for a long time because the trial is well ahead. Okay. That is
16 fine.

17 Expert evidence. Now the reports that we have got so far are really helpful and I think
18 it helps -- everyone now knows what the other is going to do, because quite often
19 people don't have a clue what the other side is going to do and the expert reports are
20 a completely different thing.

21 Now are there issues with the methodology or the admissibility between the parties on
22 the topics going to be covered? You have seen what each side's experts intend to
23 cover, but is the other side saying actually what they intend to cover, they can't,
24 because it is not really a matter of expert evidence, they are not allowed to do that, or
25 what they are trying to do is irrelevant.

26 It would be really helpful if there are any issues about admissibility that you raise those

1 now with the other side. You don't need to do it today, but I think it would be helpful,
2 now everyone knows what the other side intends to do, if there are going to be issues
3 about admissibility, et cetera, flag them up now so we can then look at it when we
4 have our next hearing or our next CMC.

5 **MR BATES:** Fortunately there have already been some discussions of that kind and
6 what is recorded in the draft order is essentially an agreed position between the parties
7 as to the scope of the expert evidence.

8 Whistl has laid down a marker about the proper parameters of the expert evidence
9 from Royal Mail's witnesses, but it was simply about the fact that obviously expert
10 witnesses can't speculate on what the true factual reasons were for a commercial party
11 taking a particular decision, but they can say what would have been economically
12 rational for a party to do. I don't understand that to be a matter of disagreement. So
13 on that basis I don't perceive there is any outstanding issue.

14 **MR MALEK:** You will know from other decisions of mine that I have always been
15 prepared to strike out expert evidence at an interlocutory stage if I think it is
16 inadmissible. So the parties need to be well aware of what the experts can cover,
17 what they can't cover. They need to look at Phipson, paragraph 33, paragraph 30 and
18 37. Make sure they read that, because that's what I am likely to apply if I look at the
19 expert evidence.

20 I am very happy to resolve issues, because it is much better that before we get to the
21 trial if something is inadmissible it goes. I know there are other judges who will say
22 "No, we will leave it to trial and we can have it de bene esse and we will deal with it".
23 That doesn't work with Malek (inaudible) at trial. (Inaudible) experts.

24 What concerns me about expert evidence at the tribunal is quite often you get really
25 long, dense reports and the experts are looking for something that doesn't exist. They
26 come up with a figure for loss which has even got a decimal point for the pence and

1 | stuff like that. I don't need that.

2 | You know, if your claim is £600 million, the expert can give -- at the end of the day he
3 | will set out what his assumptions are and he can give a range depending on which
4 | assumptions are there, but I am not going to be looking for a precise figure when you
5 | can't really make something precise. It just gets really complicated if the experts feel
6 | they have got to come up with a precise, precise figure, because I don't think that in
7 | a case like this that necessarily exists. Okay? So as long as everyone realises that's
8 | what we are looking for.

9 | **MR BATES:** I am grateful for that.

10 | **MR MALEK:** The other thing is that everyone will have read the Trucks judgment
11 | about the duties of experts and not to be partisan and stuff like that. The temptation
12 | is that, just because someone is paying you, you have some sort of special
13 | relationship. The best experts I have had in this tribunal are the ones where you listen
14 | to them and you say "This guy would give exactly the same evidence if he was
15 | instructed by the other side". That's what we are looking for.

16 | So it's always best to let the experts do what they want to do, try not to influence them
17 | too much, let them come to their own conclusions, but as lawyers obviously you should
18 | test them. If it doesn't sound right, you try and make sure what comes out is something
19 | that does sound right.

20 | Now on the length of these reports, I know it is a bit early to determine how long they
21 | are going to be. But when it comes to reply reports, I would be inclined to put page
22 | limits on how long the reports are going to be. So the initial reports I am not going to
23 | say it has to be X pages, because it is going to be what it is going to be. But on reply
24 | reports I really do not want reply reports of 25 pages each.

25 | Now if anyone wants --

26 | **MR BATES:** Can I clarify with the tribunal that what the tribunal is envisaging is

1 simultaneous initial reports and then reply reports.

2 **MR MALEK:** I prefer sequential, because I think that is what you have agreed. We
3 will come to that in a minute. What I am saying is every expert, his initial report by that
4 particular expert I am not going to put a page limit. But if an expert is going to be doing
5 a supplemental report I will want to put a page limit and it is going to be 25 pages
6 unless someone writes in and says for a particular reason it needs to be longer, and
7 then I will deal with that administratively.

8 **MR BATES:** That's understood, yes.

9 **MR MALEK:** As regards the dispute between you about the format, I think that it is
10 going to be sensible to have two rounds of report by both sides. I know you are not
11 keen on that, but I am. Okay? It will work as long as it is 25 pages each for each
12 party's second report. So it's going to be as envisaged plus report in reply of Royal
13 Mail, ie a second round, but both second rounds are going to be limited to 25 pages
14 each per expert unless the court otherwise directs.

15 Your solicitor wants to ask something from you. I am sure it is important. (Pause)

16 **MR BATES:** In terms of the length of reply reports that is not going to work for our
17 reply report. Certainly it couldn't be fairly applied to our report bearing in mind the
18 sequential approach, because if one looks at the methodology report it is clear that
19 there are significant differences between the experts in terms of the issues that they
20 are going to be looking at and the kinds of investigation they are going to be doing.

21 So looking at the sequence, if Whistl's experts go first, Royal Mail would then have
22 an opportunity without any page limit to reply to the analysis that Whistl's experts have
23 done.

24 **MR MALEK:** They are going to carry out a full analysis.

25 **MR BATES:** They will carry out a full analysis of a huge amount of material, I am sure,
26 to do with profitability that Whistl could have achieved and different scenarios,

1 et cetera. Our expert will then get that for the first time. In our submission it really
2 wouldn't be fair to confine us to 25 pages to respond to that and then for Royal Mail to
3 have another 25 pages after that for a rejoinder effectively. So that's our concern.

4 We also have a concern about the timetable, because, for the reasons that I have
5 already outlined, given that Whistl's experts will have seen provisional work from Royal
6 Mail's experts for the first time when we get their response to the initial report,
7 (inaudible) be their initial report, we need to have sufficient time to analyse that
8 material and that needs to be built into the timetable.

9 **MR MALEK:** We will look at the timetable separately. We are dealing in principle.

10 I have already directed it is going to be sequential in the way I have directed.

11 The question is the length of the report. I accept the point your solicitors make,
12 because if they are responding to your methodology in a report which I am not limiting
13 in time, then you should be able to -- in length, sorry. You should have the same right,
14 I accept that, but the 25-page limit then will probably only apply to the last round by
15 Royal Mail.

16 **MR BATES:** I am grateful for that indication. My own personal view is that the shorter
17 all these reports can be the better.

18 **MR MALEK:** I am not helped -- the thing is where the tribunal has not put page limits,
19 we have had War and Peace and then as a tribunal you regret that you never did it.

20 Subject to what Mr McIntyre says the final round on his side should be 25 pages unless
21 the tribunal otherwise directs. So it is for him to justify why it is going to be longer than
22 25 pages, when we get to it. It is too early now. That's what I am going to do.

23 Mr McIntyre, the last round, ie your second round, is limited to 25 pages unless
24 I otherwise direct. So when you get there and you look at it and say "Actually I need
25 50 pages", or something, you write in and explain why you need 50 pages, and you
26 will get 50 pages if it is a reasonable point. I am just trying to lay down a marker of

1 getting not too much paper.

2 Now can we have the experts meeting, even if it is informally, before the original -- the
3 first set of reports comes out, because I do like that if they can meet before.

4 **MR BATES:** Yes.

5 **MR MALEK:** So when you come to finalising the order, put in an initial meeting of
6 experts and that the --

7 **MR BATES:** I think that is something the parties had already envisaged that there
8 would be two meetings, one at the beginning and one at the end.

9 **MR MALEK:** That is what I would like. Is that already in the order?

10 **MR BATES:** I think it is.

11 **MR MALEK:** That's fine.

12 **MR BATES:** Paragraph 20 of the draft order.

13 **MR MALEK:** We will look at the wording when we have finished the topic. Okay.

14 Then when we get to the meeting of experts at the end where we have the points of
15 agreement and the points of disagreement, certainly in Paroxetine we found what was
16 produced so helpful that -- if we can have something of that quality, the better. So
17 what you do is you say everything that has been agreed is agreed. That is fine.
18 Everything that's not agreed, you explain why you disagree and you can cross refer to
19 your reports and stuff like that. So when it gets to trial it is so easy for the tribunal to
20 pick up and see "Ah, this is where they actually dispute and this is what we need to
21 focus on when it comes to the evidence".

22 We are not going to decide now the format of how the expert evidence is going to be
23 given. It is too early. I am not going to say hot tubbing or not hot tubbing. I need to
24 see the reports. I need to see the agreed statement after the experts have met and
25 then we can take a view as to what is the best way to get the evidence.

26 **MR BATES:** Yes, and hopefully we can avoid the modern trend of turning the experts'

1 joint statement into yet another report effectively where everyone writes huge screeds.

2 **MR MALEK:** No, we don't want that. That's why I said they can cross refer to where
3 it is dealt with, write "I disagree for the reasons set out in paragraph X of my report".
4 Sometimes you need a bit more and to put some explanations in, but for the tribunal
5 it is so helpful when it comes to preparing for the cross-examination of the parties that
6 you ... That is fine.

7 Shall we now look at the wording of the order insofar as we deal with the experts.

8 (Pause)

9 Do we need to change any of this in the light of what we have said? You need to look
10 at paragraph 21, but anything prior to that?

11 **MR BATES:** No, I don't think anything prior to 21.

12 **MR MALEK:** Okay. So where are we on 21 that I need to resolve?

13 **MR BATES:** Well, it is really the differences of the dates.

14 **MR MALEK:** On C and D, just split the difference -- all right -- on that. I am not going
15 to waste our time dealing with it. E, I have already directed. There is two Es.

16 **MR BATES:** Yes.

17 **MR MALEK:** It is just the dates. So split the difference on the dates in E. Then F is
18 fine subject to the 25-page count.

19 So the next topic (inaudible).

20 **MR McINTYRE:** It has been pointed out to me that the two versions of E, you can't
21 split the difference because those are designed to cater to two different situations.
22 I think the first E is designed for the situation where a claimant files a reply report and
23 that's it. The second E was supposed to cater for the situation where the claimant files
24 a supplemental report and then the defendants do a supplemental report. So the first
25 E goes completely and then it is just a question of the dates in the second E.

26 **MR MALEK:** Are those dates in issue?

1 **MR BATES:** They are.

2 **MR MALEK:** What dates do you want for the second E? So the first E goes. The
3 second E?

4 **MR BATES:** We have the suggestion of middle of May. That is going to be --

5 **MR MALEK:** Mr McIntyre, are you happy with that? You need to give a specific date
6 so it goes in.

7 **MR BATES:** The 15th? I am not sure if that's a weekend or not. Can we say Friday,
8 17th May?

9 **MR MALEK:** Yes, you can. Then F? Mr McIntyre?

10 **MR BATES:** The Friday is 16th May.

11 **MR MALEK:** Mr McIntyre, for F?

12 **MR McINTYRE:** We need to push that back if it is 16th May.

13 **MR MALEK:** Of course.

14 **MR McINTYRE:** We are suggesting end of June and we are just checking the ...
15 (Inaudible).

16 **MR MALEK:** Yes, that's fine unless there is any objection to that. The date for the
17 experts to meet is going to have to be pushed back then, isn't it? That's paragraph 22.
18 Are you able to do it a week before that?

19 **MR BATES:** It's just in relation to the length of time and whether they should have
20 (inaudible). We do have a concern about the impact of that on the overall timetable
21 given it is only a 25-page report.

22 **MR MALEK:** You are running here. I want to keep 27th June for paragraph 22. That
23 is why I am saying we are going to have to modify that last one by maybe a week so
24 that we have that on 20th June. So F I am inclined to put 20th June and then -- that
25 is 21, F is 20th June. Is that all right?

26 **MR McINTYRE:** We extended that deadline in E.

1 **MR MALEK:** Well --

2 **MR BATES:** We do need a substantial amount of time to provide that report, to reply
3 to what's called for by the defendants. It is quite a substantial piece of work compared
4 to what needs to be produced in paragraph F.

5 **MR MALEK:** What have we got for E at the moment, the 16th or 17th May?

6 **MR BATES:** 16th May.

7 **MR MALEK:** I will bring that back by three days. So it will be 13th May as long as
8 that's (inaudible). That way we can keep the date because I don't want to move the
9 dates in 22 and 21.

10 The next topic is --

11 **MR McINTYRE:** That would then be the 20th (inaudible).

12 **MR MALEK:** In F I have said it's the 20th.

13 Now the next one is the amendment to the pleadings. Let's have a look at where we
14 are on the pleadings and we can deal with the costs of yesterday. Where is the
15 up-to-date version of the amended pleading?

16 **MR BATES:** 505.

17 **MR MALEK:** Does that reflect what happened yesterday?

18 **MR BATES:** It does.

19 **MR MALEK:** That's brilliant, that's very good.

20 **MR BATES:** I understand that the amendments are agreed.

21 **MR MALEK:** Show me what page I need to look at.

22 **MR BATES:** (Inaudible).

23 **MR MALEK:** On the draft amended particulars show me the amendments.

24 **MR BATES:** Yes. So it starts on bundle page 664, page 37 of the amended
25 particulars.

26 **MR MALEK:** All right. Let me read it. We have other things to talk about. Let's have

1 our break now, because otherwise we will carry on for too long and there is
2 a transcriber. So we will have a break of ten minutes and then we will look at the
3 pleadings. Have you got -- is costs agreed or is there going to be a costs schedule to
4 argue about?

5 **MR BATES:** Of yesterday?

6 **MR MALEK:** Yes.

7 **MR BATES:** There is a costs schedule to argue about. The costs schedule is behind
8 the earlier tab, 124.

9 **MR MALEK:** I will take that with me now so I can look at the costs schedule and then
10 we will deal with what these amendments are and the costs after the break. So we
11 will take a break of ten minutes.

12 **(Short break)**

13 **MR MALEK:** Let's look at the amendments from both sides first and then we will deal
14 with the costs.

15 **MR BATES:** Yes, the amendments. I will have to (inaudible).

16 **MR MALEK:** That's fine. Have the defendants prepared -- Mr McIntyre, when it
17 comes to your amendments, are you only intending to do consequential amendments
18 or have you got any other amendments you would like to make?

19 **MR McINTYRE:** Just consequential amendments.

20 **MR MALEK:** That's absolutely fine. So that deals with the pleadings. As regards
21 your particulars of your heads of loss and damage.

22 **MR BATES:** Yes.

23 **MR MALEK:** Are you going to be amending your RFI insofar as you have changed
24 anything or are we going to have it as a separate schedule? How are we going to do
25 that because your pleading is a bit out of date now, isn't it?

26 **MR BATES:** There is a very small amount that has been agreed which is our response

1 to paragraph 12 of the RFI. I don't know actually if that is in the bundle. I am afraid --

2 **MR MALEK:** Don't worry about it. Just tell me what it is.

3 **MR BATES:** I think a draft of it has been provided to the tribunal separately but we

4 will make sure that has been done if it hasn't been.

5 **MR MALEK:** Is that agreed?

6 **MR BATES:** That is also agreed as I understand it.

7 **MR MALEK:** So we will make that order. That's fine.

8 **MR BATES:** Thank you.

9 **MR MALEK:** Then the costs of yesterday.

10 **MR BATES:** Yes. The costs of yesterday. So the costs schedule is at tab (inaudible).

11 **MR MALEK:** I have the costs schedule.

12 **MR BATES:** There are very minor adjustments to do with the VAT and not significant

13 amounts.

14 **MR MALEK:** Okay.

15 **MR BATES:** Our headline point in response to this is the amount claimed of around

16 92,000 excluding VAT is simply too much. It is disproportionate, given the nature of

17 the application. I have specific points to make about elements of what's in the costs

18 schedule, but, even just stepping back and looking at it as a whole, this was

19 an application made by way of --

20 **MR MALEK:** Do you know roughly what your costs were?

21 **MR BATES:** Yes, we do. Our costs were around £35,000 plus VAT. One of the

22 disadvantages of an application for summary assessment where the parties had not

23 already filed costs schedules is the tribunal does not have the benefit of costs

24 schedules from both parties that were filed in advance, but we have worked out what

25 our costs were and they are around £35,000.

26 We accept that the costs of the defendants should be slightly higher because they

1 prepared the bundle and they presented the application by way of their seven-page
2 letter, but, you know, this was a short application to determine, a half-day hearing.
3 There was no witness evidence filed in support of the application. There were some
4 documents that were exhibited. There was a need for a skeleton argument. My
5 headline point is that £92,000 is manifestly disproportionate for that sort of hearing.

6 **MR MALEK:** There are two things. What we will do is we will look at any particular
7 entries that you query.

8 **MR BATES:** Yes.

9 **MR MALEK:** Then I need to look at the overall proportionality and I will come up with
10 a figure. Now I am not going to come up with a scientific figure. I am going to come
11 up with a figure. All right? Okay.

12 **MR BATES:** In terms of solicitors' attendance at the hearing, they have included the
13 attendances of three fee earners. We say that's excessive. By way of comparison,
14 the hearing yesterday was attended on behalf of Whistl by two fee earners, a partner
15 and a paralegal.–

16 **MR MALEK:** What I am inclined on that is to take out one of the partners just for this,
17 but how much does that take off the figure if I take off one partner?

18 **MR McINTYRE:** There was only one.

19 **MR MALEK:** Was there only one partner?

20 **MR McINTYRE:** One partner and one associate.

21 **MR MALEK:** That's all you are claiming for?

22 **MR McINTYRE:** For the attendance at the hearing.

23 **MR MALEK:** I am happy to have one partner and a trainee being claimed for at the
24 hearing.

25 **MR BATES:** So in terms of there being three people, those two would be (inaudible).

26 **MR MALEK:** Mr McIntyre, what are you saying on the attendances at court?

1 **MR McINTYRE:** There was one associate and one partner for the occasion, they are
2 the ones who attended to give instructions (inaudible), and one trainee who was here.

3 **MR MALEK:** I'm saying you can have two people, not three people.

4 **MR McINTYRE:** Okay.

5 **MR MALEK:** We will take off the trainee because this is an important application and
6 I would expect people of the level that turned up to be there. I would expect the partner
7 in charge to be here and someone else of a relatively high level because of the nature
8 of this litigation. Yes, I have got that.

9 **MR McINTYRE:** That's £924.

10 **MR MALEK:** Take that out, yes.

11 **MR BATES:** In terms of the work done on documents, there is more than 60 solicitor
12 hours claimed for work on documents including more than 45 senior associate hours.
13 We say that that's disproportionate in circumstances where they have also had three
14 counsel including a silk working on this application, who together put in some £11,000
15 of work on it.

16 **MR MALEK:** Where do we get the hours figure?

17 **MR BATES:** It is 60 hours for the application.

18 **MR MALEK:** I am just trying to find that.

19 **MR BATES:** The last page.

20 **MR MALEK:** It is at the back. Sorry. I have got it.

21 **MR BATES:** Yes.

22 **MR MALEK:** Item 1, drafting of the application, that shouldn't take that amount of
23 time. So I will put (b) down to 18 hours. Okay?

24 Preparation of the hearing bundle. These things do take time actually. So that's fine.
25 Drafting the skeleton argument. Who would have been drafting the skeleton
26 argument? Surely that is Mr McIntyre.

1 **MR McINTYRE:** Of course that was me, sir. I think what that really means is reviewing
2 the skeleton argument (inaudible) in the case of the trainee bundle.

3 **MR MALEK:** That one, (a) is going to go down to four hours and (b) goes down to
4 four hours as well. We will leave in (d).
5 Costs schedule. That's fine, because these things take time.
6 So what impact does that have on the figures, Mr Bates?

7 **MR BATES:** (a) is going down and (b) (inaudible).

8 **MR MALEK:** That's on drafting the skeleton argument. One brings (b) down to
9 18 hours from 36.7. (Pause)
10 Mr Sawyer is looking at item 1, drafting the application. He is asking what is the figure
11 for item 1 now that the fee has been reduced from 36.7 to 18?

12 **MR McINTYRE:** That's about £7,000 I think.

13 **MR MALEK:** Yes. I am thinking roughly we have taken off about £10,000, but I may
14 be wrong.

15 **MR BATES:** Certainly reducing by around £10,000 seems appropriate on the
16 solicitors' costs. While we are dealing with the costs of drafting the application, there
17 is also Mr McIntyre's costs of £7,250 on page 3 of the schedule also for advising and
18 drafting the application. So we say that there should also be a reduction there on the
19 basis that there is then significant double counting if both counsel and solicitors have
20 been involved in drafting the same application.

21 **MR MALEK:** I am leaving McIntyre's, because when I look at the work he has done,
22 the skeleton he has done, preparation, this is not a straightforward area of law. We
23 could have easily had silks doing it and we didn't. So at the moment I am going to
24 leave his figure of £32,000. I am going to take out Daniel Jowell and Ciar McAndrew.
25 I don't think we need them, particularly as I am allowing Mr McIntyre in full.
26 Where does that leave us on the figures now? Mr McIntyre, can you check the figures

1 as well so we can agree where we are on the figures.

2 **MR McINTYRE:** Sir, yes. (Inaudible). Bear with me. A reduction (inaudible).

3 **MR MALEK:** I think we are at more than that by now.

4 **MR BATES:** It's a reduction of around £12,000 on documents. Then it's a reduction
5 of about £4,500 on counsel fees.

6 **MR MALEK:** Counsel fees are down 7, I think. 15 hours, 35. No, no, don't worry.

7 **MR BATES:** So the items removed from counsel fees are the £3,225 and the £955.

8 **MR MALEK:** Correct.

9 **MR BATES:** That's about £4,200.

10 **MR MALEK:** Yes. Okay. In total how much -- Mr McIntyre, have you got the figure
11 as to how much we have taken off so far?

12 **MR McINTYRE:** I don't have a precise figure, sir, but I think about £12,500 down on
13 the work done is correct and £8,180 down on the counsel fees and then the £924 for
14 the trainee attendance.

15 **MR MALEK:** Yes, sure. I'm down to about £80,000 at the moment.

16 **MR BATES:** Then there is the VAT as such. The VAT will be at the end, looking at
17 the VAT figures.

18 **MR MALEK:** Is this the pre-VAT figures? It may have an impact on what ...
19 So the grand total at the moment, which is 97, that includes VAT.

20 **MR McINTYRE:** Based on a reduction in counsel fees of (inaudible) thousand, as you
21 can see the portion of un-reclaimable VAT is about 33 per cent. So we would knock
22 the VAT down by a third. So that's about £1,300 taken off the VAT.
23 I am told I may have oversimplified things, sir, so I will just double check.

24 **MR MALEK:** I will come up with a ballpark figure at the end of the day. I just want to
25 see where we are before I do the stepping back and deciding what's proportionate.

26 **MR BATES:** Also in relation to the rates, the actual rates that have been paid, they

1 should be reflected in a percentage (inaudible). The partner rate for both partners of
2 £700 is significantly above the guideline rate, which is £506, and the rate that the
3 partner at Fieldfisher is charging, which is (inaudible). We ask that that be reduced
4 down to (inaudible).

5 A similar point for (inaudible) as well where there is (inaudible) guideline rate and the
6 rate being charged by Fieldfisher is actually lower at £350.

7 **MR MALEK:** Let me see what Mr McIntyre says about the guideline rates, because
8 quite frankly the rates sound right to me but it may be I have been mistaken. Let's just
9 see what Mr McIntyre says.

10 **MR McINTYRE:** There is actually a helpful cost ruling from August of last year in the
11 Merricks case.

12 **MR MALEK:** I have that. That has higher rates.

13 **MR McINTYRE:** Where they landed on that was 30 per cent over the guideline
14 because it was substantial and complex. So we have worked out what would be
15 30 per cent on top of that. Those numbers are for grade A £665 -- it's not that far off
16 the £700 and bear in mind Merricks was six months ago. £665 for grade A. £450 for
17 grade B. £350 for grade D. So that is guideline plus 30 per cent (inaudible).

18 **MR MALEK:** On that basis surely the partner should be about £650?

19 **MR BATES:** We are content with the guideline rate (inaudible).

20 **MR MALEK:** We apply the Merricks rates I think. So that's going to be another sort
21 of discount. How much is that roughly going to take off?

22 **MR BATES:** That's a £5,000 reduction overall based on a round 10 per cent reduction
23 in the fees.

24 **MR MALEK:** Yes. So what are you saying is the figure I should put in on a global
25 basis, just standing back, and what is the reason?

26 **MR BATES:** We are saying that, standing back, a reasonable figure is somewhere

1 between £40,000 and £50,000 for an application of this kind. I have heard what the
2 tribunal said about counsel fees, and I am not pushing back on that, but just thinking
3 about how much then has been done by counsel, for £32,000 for junior counsel I would
4 suggest that that is at least a week's work for looking at drafting the skeleton argument,
5 assisting and advising on the application and also presenting at a half-day hearing;
6 and that was the bulk actually of what was required for the purpose of this application.
7 Obviously there were also costs in putting together the bundle, et cetera, and that does
8 take time, but, even taking all of that into account, we suggest that the kind of costs
9 that Whistl has incurred of £35,000 are realistic for someone that was responding to
10 the application and that the additional costs of someone putting together the
11 application and setting it out in brief terms by way of a letter that they sent, setting out
12 arguments that were then developed in the skeleton argument in due course, should
13 not increase the fees by more than about £10,000 to £15,000 at the most.

14 **MR MALEK:** Mr McIntyre, so the detailed fee is probably somewhere around – I don't
15 know -- £70,000 and £75,000 with a specific deduction, and I don't need to hear from
16 you. What about the global figure that you say is reasonable? I have one specific
17 question relating to your fees, which is I assume you got a separate brief fee for the
18 CMC and that hasn't been affected by -- you know, in your own records you have kept
19 them separate. Do you understand what I mean?

20 **MR McINTYRE:** Yes, that is correct.

21 **MR MALEK:** That's fine. As long as you have done that I am happy. What I want to
22 hear from you really is what a global stand back figure should be, in light of what
23 Mr Bates has said.

24 **MR McINTYRE:** As you say, you end up with a global figure once you do a detailed
25 adjustment of 70 to 75. We say that is proportionate. Using the original figure of 98,
26 that is 3.5 per cent of the amount that was at stake. That percentage is now even

1 lower, 75. It was a half-day hearing, it is true. It was a half-day hearing, though, which
2 involved a reasonably tricky area of law as shown by the fact that we had 30 authorities
3 over two very full bundles.

4 **MR MALEK:** I am aware of that.

5 **MR McINTYRE:** Sir, more than anyone because you had to read them all; plus
6 a 20-page skeleton from me and a 15-page skeleton from my learned friend. We say,
7 although it was half a day, that conceals some complexity to the matter.

8 In terms of the point that has been made about drafting the application and so on, it is
9 true that the application letter itself was quite brief, but the entries for the application,
10 both in counsel's fees and in the schedule of work done, include a lot of prior work
11 done both evaluating the claim, advising and considering internally. So there was a lot
12 of internal research and advisory work into those (inaudible). That's why they are
13 higher than you might expect for a short application letter.

14 **MR MALEK:** No doubt the time (inaudible) spent, these things take time. All I really
15 want from you is what you say the global figure should be. That's all I am asking you.

16 **MR McINTYRE:** We stand by the 70 to 75.

17 **MR MALEK:** So you are saying it should be somewhere in the region of £70,000 to
18 £75,000. (Pause)

19 The figure is £60,000. Right. So we have resolved that with a bit of give and take on
20 both sides.

21 Time for payment?

22 **MR BATES:** 14 days.

23 **MR MALEK:** 14 days will be fine. Thank you. Will you need an invoice and stuff like
24 that for them to send you for VAT purposes and all that?

25 **MR BATES:** (Inaudible).

26 **MR MALEK:** You will deal with the mechanics. Sometimes solicitors want that to

1 make the payment. Okay.

2 So that's that one. The next topic on my list, put back again, is the PTR. On the trial

3 I will tell you what I want and then everything works backwards. We will start the actual

4 hearing on 3rd November 2025. I need to have the trial bundle with the skeleton

5 arguments and all the authorities precisely three weeks prior to the opening of the trial.

6 Okay? There is no point sending it any later, because I might not have time to read it,

7 but I know three weeks before I will be able to read the stuff before we start.

8 So what date does everything have to be delivered, with the bundles? Look at the

9 calendar. What date is that going to be?

10 **MR BATES:** That's (inaudible).

11 **MR MALEK:** Let's have a look at the dates.

12 **MR BATES:** Yes. Paragraph 29 of the draft order (inaudible). That's the last of the

13 bundles and skeletons.

14 **MR MALEK:** Which paragraph are we looking at now?

15 **MR BATES:** Paragraph 29 of the draft order.

16 **MR MALEK:** Let's look at paragraph 29.

17 "No later than three weeks ..."

18 So we'll get the submissions – look, all I care about, I come in on that day and the

19 bundle is going to be there with all the skeletons. That's all I care about.

20 **MR BATES:** 13th October.

21 **MR MALEK:** 13th October. So we put 13th October in. That's all I am looking for.

22 Let's put the date in.

23 Paragraph 28, what is the date going to be on that?

24 **MR BATES:** That is two weeks before. That will be 29th September.

25 **MR MALEK:** Right. Then paragraph 27?

26 **MR BATES:** Paragraph 27, in terms of providing the tribunal with bundles, would the

1 tribunal be content as long as it is by 13th October?

2 **MR MALEK:** Exactly. As long as I can come in on 13th October, it will all be laid out
3 in a room and I can start working on it, that's all that matters.

4 **MR BATES:** Yes. What has been agreed between the parties is that bundles should,
5 of course, be available for the use of the parties at least a couple of weeks before the
6 claimant's written opening is to --

7 **MR MALEK:** Of course. That's between you lot.

8 **MR BATES:** Yes. So we will be expecting that at the end of September.

9 **MR MALEK:** You are going to have to agree times for you providing them with a draft
10 index and them commenting on the draft index. So obviously all that needs to be
11 done, but I am not going to make orders on that. You are a big boy. Just sort it out
12 amongst yourselves. All I care about is what happens when I come in on that day.

13 **MR BATES:** What that should mean is by the time of the (inaudible) September the
14 bundles should be ready by then (inaudible).

15 **MR MALEK:** It is really down to you lot to do it behind the scenes, but yes, that's fine.
16 Then the next item is this whole question of the preliminary issue and the date
17 suggested for that. The suggestion is 14th June.

18 **MR BATES:** I think it's no longer possible for us to do either of those dates. We can
19 do 12th June.

20 **MR MALEK:** Are we going to be doing it with the juniors or silks? Quite frankly you
21 two can argue it if the silk is not available on the 14th, because the 14th is available.

22 **MR BATES:** I am not available on the 14th. That's our difficulty.

23 **MR MALEK:** Okay.

24 **MR McINTYRE:** Our position on the silks is there is still (inaudible).

25 **MR MALEK:** Look, at the end of the day I want to encourage juniors to get the
26 experience of standing on their feet. This type of application is the ideal opportunity

1 for you two to shine, as you did yesterday. One of the problems at the commercial bar
2 and the competition bar is so many juniors don't have that much exposure and it is
3 only when they become silks they start doing hearings, and that is not good for you.
4 At the end of the day, whatever you two agree, it can be either the silks or the juniors,
5 I really don't mind. All I am saying is that I am happy, at least for my part, for the
6 juniors to do it, but if either side thinks it is so important or so complicated, then, of
7 course, they can have their silk. But, you know, we are very conscious about (a) costs,
8 but (b) importance of the experience for the juniors. We will be hearing Mr Turner at
9 the trial.

10 **MR BATES:** Can I ask if the (inaudible) juniors (inaudible) for the tribunal?
11 (Inaudible).

12 **MR MALEK:** Okay.

13 **MR McINTYRE:** Just to note, sir, I am not available on the 12th. That may well lead
14 us to having to instruct a silk for that reason alone.

15 **MR MALEK:** Is your silk available on the 14th?

16 **MR BATES:** I am told that he is, yes.

17 **MR MALEK:** Then (inaudible). Are we in a position now that you can't have the 12th
18 or the 14th with both juniors doing it?

19 **MR BATES:** That's right.

20 **MR McINTYRE:** Yes.

21 **MR MALEK:** So we will stick with the silks then and we will have it on the 14th unless
22 someone says -- I can't have an imbalance. Either it is the silks or the juniors.

23 **MR BATES:** I think our position is we would rather have the 12th in any event if
24 Mr Turner is not available then.

25 **MR MALEK:** That's fine. We will fix it for the 12th. Ideally both parties should have
26 the same level, juniors or silks, but if you are happy to do it against a silk, that's

1 absolutely fine. That's that.

2 Now on the issues you have got section 57A, i.e. what is the decision, and that's
3 binding and there is some guidance. There is the Trucks case and there are other
4 cases that deal with how you deal with section 58A and presumably (inaudible)
5 whatever we (inaudible).

6 On section 58, which are facts found in the decision, there is a caveat that says "lest
7 the tribunal (inaudible)", and in relation to all of this we will need clarity as to those
8 items which are in dispute. Is it a section 58 dispute or section 58A dispute? If the
9 parties are in dispute as to which one it is, then obviously I will need to know that when
10 (inaudible).

11 If it is a section 58 dispute, is it simply a dispute that "We don't accept it is a finding of
12 fact", in the relevance sense, or is it that "We are asking the tribunal to otherwise
13 direct"? If they are going to ask the tribunal to otherwise direct, are they going to be
14 asking us to do the otherwise directing at the hearing on the 12th, or whatever the date
15 we finally jumped on, or are they saying that "You make a decision that it falls within
16 section 58 or not, but if you do find it is in section 58, we are going to be asking you
17 later to direct otherwise". As long as we have clarity on that issue and know what we
18 are dealing with.

19 When I looked at the issues in dispute between the parties, there is some scope, for
20 example, on the issue of why LDC -- an argument as to whether that's something that
21 should be subject at least to argument whether we should otherwise direct, because
22 if LDC are going to turn up for trial with a live witness and they are going to be giving
23 us disclosure, that may be a lot more reliable way of ascertaining the reasons why
24 they pulled the plug than what is actually said in the Ofcom decision.

25 **MR BATES:** In my submission the otherwise direct issue should be dealt with on
26 12th June.

1 **MR MALEK:** As long as we know what we are going to be doing and that the parties
2 have at least done the schedule so it is clear what people are asking for, but then, if
3 they are asking for otherwise direct, it may be that there will need to be some evidence
4 in the form of a witness statement exhibiting documents, because it may be you will
5 say "Look, this is what the decision says, but it is wrong or it does not have the right
6 context. I have something that contradicts it".

7 Now if they have got that, either side, then you may need to put that in evidence. So
8 we would have to have some sort of direction for this hearing as to evidence. Okay?
9 You haven't got to the end of the schedule discussions and process, but once you
10 have, in relatively short order, I will want to see a witness statement or whatever, what
11 of the evidence is relied upon, as to why otherwise direct should be applied.

12 **MR BATES:** (Inaudible).

13 **MR MALEK:** It has to be focused. I don't want otherwise direct to be for the first time
14 enunciated in skeleton argument. That's going to be too late for people to respond.

15 **MR BATES:** The tribunal has seen the parties have already made a lot of progress
16 on the binding findings and what was a huge table with the areas of disagreement are
17 now only a few items. I would hope that in short order the parties could define the
18 issues between them in terms of where it fits in 58A, 58, otherwise directs. If that can
19 be done fairly soon, then perhaps a deadline can also be set for any witness evidence
20 to be filed; perhaps mid-May, something like that.

21 **MR MALEK:** Yes. Mr McIntyre, is that too early or is that fine, mid-May? I would
22 have thought the third week of May. You probably need a bit more time, because you
23 never know how long that discussion is going to be.

24 **MR McINTYRE:** We are content with the third week of May.

25 **MR MALEK:** Third week of May. Mr McIntyre, can you just suggest the date then?

26 **MR BATES:** Perhaps on (inaudible).

1 **MR McINTYRE:** 24th May.

2 **MR MALEK:** 24th May. What would be helpful is also to have filed and done, in short
3 order, the schedule of what has been agreed, because then everyone can get on with
4 their disclosure exercises knowing that that's agreed and that's all bagged, it's not fluid.
5 So if the parties two weeks from today, whenever that's going to be, will agree and file
6 with the tribunal the schedule of agreed items, then that's fine.

7 Mr McIntyre, you are good on the dates. What date is that going to be?

8 **MR McINTYRE:** 10th May.

9 **MR MALEK:** 10th May. Okay.

10 **MR BATES:** My understanding of that document will be that it will identify those facts
11 that are agreed to be binding, or at any rate not contested, including any necessary
12 reservations or qualifications, but with the emphasis on necessary, because there is
13 quite a lot in the existing table that is argumentation or context that perhaps could be
14 stripped out, because at the moment it is not a particularly user friendly document in
15 terms of its size.

16 **MR MALEK:** But what I want is a document that's agreed. From the tribunal's point
17 of view I am not going to be prescriptive as to what that table should be. As long as it
18 is clear from looking at the table what's agreed, I am happy. I don't really -- I am not
19 bothered about how long it is. As long as it says what's on the side of the tin, that's
20 fine.

21 Anything else from the CMC?

22 **MR BATES:** I don't think there is more on (inaudible) the 12th. So is the tribunal
23 envisaging there would be time on the 12th to resolve disclosure issues as well?
24 I think the parties originally proposed a half-day hearing for the binding findings.

25 **MR McINTYRE:** I think what may have been said in the letter was a half day for the
26 hearing (inaudible) reserve. So we could use that half day in reserve.

1 **MR MALEK:** I envisage that on 12th June we will be dealing with the disclosure issues
2 as well insofar as either party wants them to be resolved at a hearing as opposed to
3 on paper, but we all have something to work to.

4 Then (inaudible).

5 **MR BATES:** Date of the PTR.

6 **MR MALEK:** No, the PTR date is fine. It is in the order. We accepted that.

7 **MR BATES:** (Inaudible).

8 **MR MALEK:** Well, I think it is better to have a precise date so we all know. Let's put
9 the 15th.

10 **MR BATES:** I think that concludes everything.

11 **MR MALEK:** The draft orders, when will they be ready? Obviously you two have to
12 agree the wording.

13 **MR BATES:** (Inaudible).

14 **MR MALEK:** The sooner the better. So if I can have the draft as agreed between the
15 parties and anything that's not agreed put in square brackets showing me what the
16 disagreement is by 2 o'clock on Tuesday, then I will resolve it on Tuesday afternoon if
17 there's any tidying up.

18 **MR BATES:** (Inaudible).

19 **MR MALEK:** But the ruling I gave or the judgment I gave yesterday, we will get the
20 transcript and tidy it up and then hopefully it will not (inaudible).

21 Mr McIntyre, anything else on your agenda?

22 **MR McINTYRE:** No, thank you.

23 **MR MALEK:** Thank you.

24 **(12.40 pm)**

25 **(Hearing concluded)**

26