

# OPUS 2

## INTERNATIONAL

Further Issues - Alan Bates & Others v Post Office Limited

Day 1

October 23, 2019

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1 Wednesday, 23 October 2019  
 2 (11.00 am)  
 3 MR JUSTICE FRASER: Mr Warwick.  
 4 Submissions by MR WARWICK  
 5 MR WARWICK: May it please your Lordship, I appear again for  
 6 the claimants with Mr Miletic and the Post Office is  
 7 represented again by Mr Draper.  
 8 Just for the transcript, to make clear that this is  
 9 a costs management conference.  
 10 In the flurry of activity, my Lord, prior to  
 11 the deadline for filing and serving, bar exchanging,  
 12 skeleton arguments on Monday, for which both my learned  
 13 friend and I are very grateful for the adjustment to,  
 14 certain documents were filed and served. I just wanted  
 15 to check, my Lord, that your Lordship had the position  
 16 as it stands when the dust settles for the purposes of  
 17 today so we're all operating on the same basis.  
 18 The claimants' draft order that's sought is in fact  
 19 the one that appears in the hearing bundle at <Z1/3/1>.  
 20 MR JUSTICE FRASER: Now, I don't have, because I've not been  
 21 sent, a hard copy application bundle, but I have got my  
 22 own hard copy bundle which has got a variety of  
 23 different draft orders in it. The one you've just  
 24 called up on the screen. (Handed)  
 25 Sorry, what's this? Thank you very much.

1

1 Have you got a hard copy of the order?  
 2 MR WARWICK: I do have a hard copy of the order, which  
 3 I could hand up if it would assist.  
 4 MR JUSTICE FRASER: It's just I can't navigate through  
 5 the common screen myself very quickly while I'm  
 6 listening to you. (Handed).  
 7 I mean, I can navigate through the common screen,  
 8 but ...  
 9 MR WARWICK: Yes.  
 10 MR JUSTICE FRASER: Right. So this is the one you're  
 11 seeking?  
 12 MR WARWICK: That's right, my Lord, and the only difference  
 13 in fact is that there were rapid negotiations --  
 14 MR JUSTICE FRASER: No, I entirely understand and it is not  
 15 an issue. I mean, it's --  
 16 MR WARWICK: I'm most grateful.  
 17 MR JUSTICE FRASER: It's just effectively a logistical  
 18 catch-up of where we are following, as I understand it,  
 19 the constructive discussions --  
 20 MR WARWICK: That's right, my Lord.  
 21 MR JUSTICE FRASER: -- so it's not a problem.  
 22 MR WARWICK: And also under the umbrella of logistical  
 23 catch-ups, there is something in my skeleton that  
 24 I should just correct so that it aligns with the current  
 25 position. If I could ask Opus to call up <Z1/1/3>, it's

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1 paragraph 9(b) of my skeleton argument, page 3 of that  
 2 document.  
 3 MR JUSTICE FRASER: Yes.  
 4 MR WARWICK: That particular phrase, "Group  
 5 Litigation /Management", where the negotiations ended was  
 6 in fact that £100,000 has been agreed for that phase for  
 7 the Post Office's budget, but Post Office has  
 8 effectively taken out of that budget the fees of  
 9 Herbert Smith Freehills, reserving the right to  
 10 re-insert that in budgets relating to later stages.  
 11 MR JUSTICE FRASER: Well, the fees of HSF are a live issue  
 12 as of this morning, aren't they?  
 13 MR WARWICK: Indeed they are.  
 14 MR JUSTICE FRASER: So what correction do you want to make  
 15 to your skeleton?  
 16 MR WARWICK: After the words "Group Litigation/Management",  
 17 "if the numbers £100,000 is agreed, but ..." be  
 18 inserted, and after the word "costs" in the second line,  
 19 the first word in the second line to be inserted "for  
 20 HSF".  
 21 MR JUSTICE FRASER: All right. Well, why don't you read out  
 22 to me what the amendment --  
 23 MR WARWICK: It will now read:  
 24 "Group Litigation/Management: £100,000 is agreed but  
 25 likewise ..." --

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1 MR JUSTICE FRASER: Hold on, "£100,000 is agreed but ..."?  
 2 MR WARWICK: -- "... but likewise, Post Office intends to  
 3 seek its budgeted costs for HSF in this phase in budgets  
 4 relating to later stages of the litigation."  
 5 MR JUSTICE FRASER: You went too fast and I lost you  
 6 after "HSF".  
 7 MR WARWICK: I'm sorry.  
 8 MR JUSTICE FRASER: "... Post Office intends to seek its  
 9 budgeted costs for HSF ..."  
 10 MR WARWICK: Yes, my Lord.  
 11 MR JUSTICE FRASER: Go on.  
 12 MR WARWICK: "... in this phase in budgets relating to later  
 13 stages of this litigation."  
 14 That's the existing words.  
 15 MR JUSTICE FRASER: Right. All right. Just pausing there  
 16 just one moment, then, Mr Warwick.  
 17 So, Mr Draper, that's an accurate summary of where  
 18 we are as at today in respect of group  
 19 litigation /management; is that right?  
 20 MR DRAPER: It is, my Lord. There's an element of costs  
 21 falling under that broad heading of "Group  
 22 Litigation /Management" that it is agreed does fall to be  
 23 budgeted at this stage, has been budgeted and has been  
 24 agreed at 100,000.  
 25 MR JUSTICE FRASER: And that's in the different summary

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1 documents I've got it, is it?  
 2 MR DRAPER: That's right, my Lord. There is another chunk  
 3 which it has been agreed is not for now and so will be  
 4 dealt with if appropriate in later budgets.  
 5 MR JUSTICE FRASER: Is that different to the situation as it  
 6 was set out in the letter or one of the letters, which  
 7 I think was dated 16 October, which came last week?  
 8 I don't have the Opus reference for it, but it was from  
 9 Womble Bond Dickinson to my clerk on 16 October  
 10 <Z4/10/1>. It's a two-page letter which has a table on  
 11 the front of it with category 1, 2, 3, 4, leading to  
 12 a total of 16,322,000.  
 13 MR DRAPER: I'll have to confirm that, I'm afraid, my Lord.  
 14 MR JUSTICE FRASER: It's just that -- in paragraph 5 of that  
 15 letter --  
 16 MR DRAPER: Oh no, my Lord, those are different entirely.  
 17 Those are different again.  
 18 MR JUSTICE FRASER: I know, but that's the update  
 19 notification, isn't it, that letter?  
 20 MR DRAPER: Yes, my Lord. The costs mentioned there are  
 21 costs that are being incurred by Post Office, but it  
 22 doesn't seek from the claimants -- has no intention to  
 23 seek from the claimants. They're effectively costs of  
 24 which we're informing your Lordship because they're  
 25 costs borne by Post Office but not costs that it will

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1 seek as costs in these proceedings. They're there  
 2 effectively for completeness.  
 3 MR JUSTICE FRASER: All right. Well, I'm not trying to be  
 4 difficult, but just one follow-up question before I come  
 5 back to Mr Warwick. That does say, however, in item 5.4  
 6 that <Z4/10/1>:  
 7 "... costs not included within that update are those  
 8 expended in relation to ...  
 9 "The engagement by Post Office of  
 10 Herbert Smith Freehills to provide legal advice in  
 11 respect of the Group Actio ..."  
 12 Just pausing there, does the 100,000 form part of  
 13 that or is that separate?  
 14 MR DRAPER: No, the 100,000 I think is mostly  
 15 Womble Bond Dickinson -- it's all Womble Bond Dickinson,  
 16 the 100,000.  
 17 MR JUSTICE FRASER: I understand.  
 18 MR DRAPER: So there is a fairly discrete category of costs  
 19 that it is agreed do fall to be budgeted at this stage,  
 20 100,000. We've reached agreement --  
 21 MR JUSTICE FRASER: And that's in relation to  
 22 the heading "Group ...", the heading that's in  
 23 Mr Warwick's skeleton?  
 24 MR DRAPER: It is, my Lord.  
 25 MR JUSTICE FRASER: That's 100,000 in relation to

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1 Womble Bond Dickinson and that falls to be budgeted at  
 2 this stage; is that right?  
 3 MR DRAPER: Exactly, my Lord.  
 4 MR JUSTICE FRASER: And that has been agreed at 100K?  
 5 MR DRAPER: It has.  
 6 MR JUSTICE FRASER: Thank you very much.  
 7 Right Mr Warwick, that's corrected your skeleton.  
 8 MR WARWICK: My Lord, if it helps, I wonder if Opus'  
 9 assistant could call up <Z2/6/1>. This document,  
 10 my Lord, is a summary, specifically the first page of  
 11 a Precedent H that was filed by Post Office on Monday at  
 12 4.30 pm and, so far as I'm concerned, my Lord,  
 13 accurately reflects the position of what's agreed and  
 14 what remains outstanding.  
 15 MR JUSTICE FRASER: Right, well, just pausing there, because  
 16 I have got a document similar to that, when you said  
 17 "Monday", I think there's a different version of this  
 18 which was sent under cover of an email of Mr Parsons on  
 19 22 October, so that's Tuesday, at 16.26 --  
 20 MR WARWICK: Yes, my Lord. That was --  
 21 MR JUSTICE FRASER: -- which I understood that was the one  
 22 that was currently in play because that has the  
 23 corrected formula.  
 24 MR WARWICK: Indeed, my Lord. The front pages of those two  
 25 documents are identical.

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1 MR JUSTICE FRASER: I don't think they are because if you  
 2 just look alone at the bottom right-hand corner of this  
 3 one, the total is 15.793.  
 4 MR WARWICK: I beg your pardon. I should correct myself on  
 5 that. That is the recast budget with a correction made  
 6 that has been filed -- was filed yesterday, and so it is  
 7 the budget in full, so it contains the full claimed  
 8 sums. I was quite wrong to suggest the front pages are  
 9 identical. They're not.  
 10 MR JUSTICE FRASER: You see, when I get two versions of  
 11 documents, the first thing I do is look at the front  
 12 page to see if they are identical and I can tell you it  
 13 wasn't.  
 14 MR WARWICK: Indeed, my Lord, yes --  
 15 MR JUSTICE FRASER: In fact there is about £2 or £3 million  
 16 non-identical.  
 17 MR WARWICK: My Lord, what I meant to say -- and I correct  
 18 myself -- is the document that I took your Lordship to  
 19 a moment ago that remains on the screen now at <Z2/6/1>  
 20 reflects what is agreed, so the lower sums that are  
 21 agreed, save the ADR phase, which falls to be reviewed  
 22 in exercise of your Lordship's powers today.  
 23 So this document --  
 24 MR JUSTICE FRASER: I don't -- I just don't follow that, I'm  
 25 afraid. Looking at the one on the screen --

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1 MR WARWICK: Yes.  
 2 MR JUSTICE FRASER: -- which has the 15.793 --  
 3 MR WARWICK: Yes, my Lord.  
 4 MR JUSTICE FRASER: -- hold on one second.  
 5 MR WARWICK: If I could explain and my learned friend will  
 6 correct me if I'm wrong. What Mr Draper's solicitors  
 7 have done is used this a little like a budget discussion  
 8 report, I suppose, in that what they have done is they  
 9 have substituted all the further issues trial incurred  
 10 and estimated fees and then correspondingly the totals  
 11 that are affected by this with the agreed sums, save for  
 12 the ADR sum which remains subject to your Lordship's  
 13 discretion today. The reason I mention --  
 14 MR JUSTICE FRASER: And that ADR sum that you just  
 15 identified is the one that runs all the way across to  
 16 the far right-hand column with a total of 1,384,127?  
 17 MR WARWICK: That's right, my Lord, yes.  
 18 MR JUSTICE FRASER: Is that right?  
 19 MR WARWICK: Yes.  
 20 MR JUSTICE FRASER: Well, I -- excuse me one second.  
 21 (Pause)  
 22 Just for my own rather retentive interest, I added  
 23 up some of the figures and that was before I understood  
 24 there may or may not be some issues with the formulae  
 25 and the underlying spreadsheet, and I'll explain to both

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1 the parties why I did that in a minute.  
 2 But in the process of doing that, if you look along  
 3 the "Grand total" row on the document that has  
 4 the 15.793 total, in other words the one that's up on  
 5 the screen of <Z2/6/1> --  
 6 MR WARWICK: Yes, my Lord.  
 7 MR JUSTICE FRASER: -- I was interested to add up columns D,  
 8 E, F and G --  
 9 MR WARWICK: Yes.  
 10 MR JUSTICE FRASER: -- which I did before I realised that's  
 11 what column H was supposed to be. Having added up those  
 12 four figures, I actually got a different total to  
 13 the 4.270, which I couldn't immediately understand why  
 14 that was because I would have thought it should be  
 15 identical.  
 16 MR WARWICK: Well, your Lordship's alighted on a problem  
 17 which I had not, and without myself performing the same  
 18 calculation, I'm probably unable to comment.  
 19 But I do have a proposed solution to this which  
 20 would allow this to proceed today on figures which are  
 21 common ground, and that is that all of the figures in  
 22 F and G, both of those entire columns save for the ADR  
 23 and settlement figures, are agreed figures and together  
 24 with the incurred costs --  
 25 MR JUSTICE FRASER: That may very well be the case, but the

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1 ADR settlement lines in columns F and G on the face of  
 2 it are nearly £750,000.  
 3 MR WARWICK: That's correct.  
 4 MR JUSTICE FRASER: When one is considering a costs  
 5 management order, there are supposed to be two exercises  
 6 performed. One is satisfaction of the individual  
 7 elements and one is satisfaction of the overall total.  
 8 MR WARWICK: Yes, my Lord.  
 9 MR JUSTICE FRASER: It's a bit difficult to approach  
 10 the satisfaction of the overall total exercise if there  
 11 are such sizeable amounts that fall within the total  
 12 which aren't agreed.  
 13 So, for example, if one looks across the ADR --  
 14 I mean, I'm going to come on to ask Mr Draper a couple  
 15 of questions about this anyway, but if one looks along  
 16 the line of ADR settlement discussions before we then  
 17 turn to the next document, the one which does correct  
 18 the formulae, there's £500,000 in column E that is not  
 19 agreed -- is that right?  
 20 MR WARWICK: Yes, it's not agreed.  
 21 MR JUSTICE FRASER: That's not agreed -- there's 22,000 of  
 22 disbursements in column F which is not agreed --  
 23 MR WARWICK: That's correct, my Lord.  
 24 MR JUSTICE FRASER: That's right -- and there's 714,451  
 25 which is not agreed.

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1 MR WARWICK: That's correct, my Lord.  
 2 MR JUSTICE FRASER: Those figures more or less, with a bit  
 3 of juggling, depending on if the formula are right, is  
 4 what leads to the total of 1.239 in column H?  
 5 MR WARWICK: That's correct, my Lord.  
 6 MR JUSTICE FRASER: And that is not agreed out of a total of  
 7 4.270?  
 8 MR WARWICK: Again that's correct, my Lord, yes.  
 9 MR JUSTICE FRASER: Right, so on this particular summary  
 10 sheet, I've correctly understood the items in issue,  
 11 I think.  
 12 MR WARWICK: Yes, my Lord.  
 13 MR JUSTICE FRASER: Is that right?  
 14 MR WARWICK: Yes.  
 15 MR JUSTICE FRASER: Now, before we get to the next one --  
 16 and I've got some questions for Mr Draper on  
 17 specifically this document so I'm going to ask you to  
 18 sit down. I'm just going to explore those questions and  
 19 then I'm going to come back to you.  
 20 Right, Mr Draper.  
 21 MR DRAPER: Yes, my Lord.  
 22 MR JUSTICE FRASER: Firstly I want to make it absolutely  
 23 clear that none of this is criticism and the degree of  
 24 discussion and agreement between the parties is  
 25 obviously enormously constructive and very helpful.

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1 I just need to make sure that I've caught up with where  
 2 the parties are because of the way the documents have  
 3 come in in the last 24/48 hours.  
 4 MR DRAPER: I understand, my Lord.  
 5 MR JUSTICE FRASER: There are two documents which I'm  
 6 effectively using as a summary sheet for the defendant's  
 7 costs and I just want to make sure I've got them  
 8 correctly.  
 9 MR DRAPER: Yes.  
 10 MR JUSTICE FRASER: One of them is <Z2/6/1>, which is on  
 11 the common screen at the moment and which I've just been  
 12 going through with Mr Warwick.  
 13 MR DRAPER: Yes, my Lord.  
 14 MR JUSTICE FRASER: And that is the one that is dated  
 15 21 October.  
 16 MR DRAPER: Yes.  
 17 MR JUSTICE FRASER: Then there's the other one which came  
 18 under the cover of Mr Parsons' email correcting some  
 19 issues. I don't know what the reference is for that on  
 20 the common screen, but it's got a total of  
 21 18.401 million in the bottom right-hand corner.  
 22 MR DRAPER: Yes, my Lord, I'll just find that.  
 23 MR WARWICK: It's <Z2/5.2/1>.  
 24 MR JUSTICE FRASER: Z2/5.2/1. Now it's quite a simple  
 25 question, but it's one for you really, not Mr Warwick.

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1 Which of those two should I be using?  
 2 MR DRAPER: You should, my Lord, be using the one that is on  
 3 the common screen, the one that consists only of  
 4 a summary sheet, and that's because --  
 5 MR JUSTICE FRASER: Sorry, when you say "on the common  
 6 screen", you mean the one with the reference <Z2/6/1>,  
 7 the one that Mr Warwick has been taking me to?  
 8 MR DRAPER: Yes, entirely, my Lord. The one that totals  
 9 7.9 million or you can call it "the Monday document".  
 10 MR JUSTICE FRASER: On the basis that the other one came  
 11 more recently than that, what is -- do I just ignore  
 12 this one? What's the underlying rationale for it?  
 13 MR DRAPER: For most purposes you can, my Lord. If  
 14 I explain the rationale, it will then be clear why it  
 15 was sent to your Lordship.  
 16 The full version received by the court yesterday is  
 17 a corrected form of Post Office's original budget prior  
 18 to agreement with the claimants, so it's the starting  
 19 point, corrected for an error in the formula.  
 20 The only reason, my Lord, it came after the summary  
 21 sheet showing agreement is that by oversight it wasn't  
 22 sent to the court at the same time as it was sent to  
 23 the claimants when corrected on Monday.  
 24 MR JUSTICE FRASER: I understand. So it's an accurate  
 25 version of a document that had effectively been

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1 overtaken by events, but it was to correct an inaccuracy  
 2 and so it was right to resubmit it.  
 3 MR DRAPER: Exactly, my Lord.  
 4 MR JUSTICE FRASER: So I don't need to concern myself with  
 5 that at all for today.  
 6 MR DRAPER: You don't, my Lord.  
 7 MR JUSTICE FRASER: Right. So if we then go back to  
 8 Mr Warwick's -- and, Mr Draper, I don't know if you've  
 9 got a calculator and it is possible that I have made  
 10 a mistake but I will do it again. I am now going to add  
 11 up for myself columns D, E, F and G across the "Grand  
 12 total" line to see what I get to so ... and I'm going to  
 13 ignore the pence. (Pause)  
 14 All right. Well, that shows that my first exercise  
 15 was wrong because the total is correct. For some reason  
 16 I got it to 4.147 million before, but it should be  
 17 the 4,270,844, shouldn't it?  
 18 MR DRAPER: Yes, my Lord.  
 19 MR JUSTICE FRASER: That is correct. Well, I'm sorry I set  
 20 that hare running.  
 21 MR DRAPER: Not at all.  
 22 MR JUSTICE FRASER: Looking therefore at <Z2/6/1>, as  
 23 I understand it -- and this is just confirmatory for  
 24 you -- with the exception of the line across,  
 25 "ADR/settlement discussions", that is agreed by the --

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1 it's not approved by the court, but it's agreed by the  
 2 claimants?  
 3 MR DRAPER: The estimates -- the budgeted costs estimates as  
 4 contrasted to incurred are all agreed save for ADR. Of  
 5 course incurred costs are in a different category.  
 6 They --  
 7 MR JUSTICE FRASER: Well, I can't do anything about that  
 8 anyway, other than make comment.  
 9 MR DRAPER: Any comment, yes. But that's right, my Lord.  
 10 MR JUSTICE FRASER: That therefore brings me to the next  
 11 point, which is one for you first and then for  
 12 Mr Warwick because it relates -- because it does  
 13 directly impact on today's exercise. The costs  
 14 management order for the common issues trial, which was  
 15 however many weeks it was with however much evidence of  
 16 fact, was 3.614 million; is that right? I'm taking that  
 17 off your column B.  
 18 MR DRAPER: It sound right and if it's in column E, I'm sure  
 19 it is right.  
 20 MR JUSTICE FRASER: At the bottom of column E.  
 21 MR DRAPER: Yes, my Lord.  
 22 MR JUSTICE FRASER: So that's common issues.  
 23 The Horizon trial which started in March and  
 24 finished in July and had experts and fact --  
 25 MR DRAPER: Yes, my Lord.

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1 MR JUSTICE FRASER: -- the case management -- sorry, the  
 2 costs management order in respect of that is  
 3 3.749 million; is that right?  
 4 MR DRAPER: That's seems to be right, my Lord.  
 5 MR JUSTICE FRASER: So those are two figures which the court  
 6 has already approved?  
 7 MR DRAPER: Yes, my Lord.  
 8 MR JUSTICE FRASER: If we then jump ahead to column H, we  
 9 get a figure well north of 4 million just in respect of  
 10 the further issues trial; is that right?  
 11 MR DRAPER: That is right, my Lord.  
 12 MR JUSTICE FRASER: Now, can you remind me -- and I don't  
 13 know where this is in the electronic trial bundle --  
 14 where is the case management directions order that sets  
 15 out what the further issues are and the directions in  
 16 respect of the trial?  
 17 MR DRAPER: I'll just turn that up, my Lord.  
 18 MR WARWICK: I might be able to assist with that.  
 19 MR DRAPER: I'm told it's <C6/57/1>, my Lord, and that does  
 20 sound right.  
 21 MR JUSTICE FRASER: Can we call that up, please. <C6/57/1>.  
 22 Right. I'll just have to work out which ...  
 23 Right, so that's to deal with one issue only,  
 24 I think, which is called "Further issue 2" --  
 25 MR DRAPER: That's right, my Lord.

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1 MR JUSTICE FRASER: -- with a time estimate of three weeks.  
 2 MR DRAPER: That's right, my Lord. From that point onwards  
 3 there's the slight wrinkle that, of course, until this  
 4 hearing it was two issues including settlement, but --  
 5 MR JUSTICE FRASER: Until the hearing in July?  
 6 MR DRAPER: That's right, my Lord, but since that date it  
 7 has been limited to the one of the two.  
 8 MR JUSTICE FRASER: That's in the schedule and I'll just  
 9 remind myself what that is. And that's supposed to  
 10 start on 2 March.  
 11 MR DRAPER: Yes, my Lord. If we go through to page 5 of  
 12 the <C6/57/5>, that's the schedule.  
 13 MR JUSTICE FRASER: That's being done, so I understand it,  
 14 on assumed facts, I think; is that right?  
 15 MR DRAPER: Where not agreed. I think the expectation is  
 16 there will be some facts that can be agreed which may be  
 17 of more utility than an assumed fact, but beyond that  
 18 the facts will be assumed.  
 19 MR JUSTICE FRASER: Yes, because there's a process, I think  
 20 in the order, for the parties to agree assumed facts.  
 21 If they can't agree all of them, there's going to be  
 22 further directions in December and a resolution -- one  
 23 of those further directions is going to require  
 24 consideration of what we do about facts if there's  
 25 a disagreement between the parties about the assumed

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1 facts; is that right?  
 2 MR DRAPER: Yes, my Lord. It may not be entirely  
 3 straightforward; for example, we might -- one or other  
 4 of us might invite the court to approach a particular  
 5 sub-issue on the basis of distinct alternative assumed  
 6 facts.  
 7 MR JUSTICE FRASER: Yes, which is perfectly -- or seems  
 8 potentially sensible.  
 9 But on the basis that further issue 2 deals with  
 10 measure of loss effectively as a matter of legal  
 11 analysis and explanation, there's either going to be  
 12 assumed facts or potentially some relatively narrow  
 13 disputes of fact?  
 14 MR DRAPER: Yes, I wouldn't quite say "disputes of fact".  
 15 There might be circumstances in which the court is asked  
 16 to proceed on alternatives. So if one starts with  
 17 a dispute of fact, either we assume one set of facts or  
 18 we assume both in the alternative. What we're not going  
 19 to do, my Lord, in my submission, is seek to resolve  
 20 the difference of fact between the parties principally  
 21 because we're not going to have evidence.  
 22 MR JUSTICE FRASER: For all the obvious reasons. So there's  
 23 not going to be evidence.  
 24 MR DRAPER: No.  
 25 MR JUSTICE FRASER: In those circumstances, I am struggling

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1 as to why any costs management order in respect of  
 2 the further issue trial should be so much in excess  
 3 of -- just the global figures which the costs management  
 4 orders for further issues and Horizon issues reached for  
 5 obvious reasons, both of those -- and I know you've both  
 6 been involved substantially and I think you, Mr Draper,  
 7 have been involved in both Horizon and common issues.  
 8 MR DRAPER: Yes.  
 9 MR JUSTICE FRASER: They were very substantial hearings with  
 10 enormous ranges of disputed facts and, so far as the  
 11 common issues are concerned, wide-ranging disputes of  
 12 legal argument as well, and the Horizon issues had two  
 13 very detailed expert exercises involved.  
 14 MR DRAPER: It did, my Lord.  
 15 MR JUSTICE FRASER: Simply in terms of the headline figure,  
 16 I would have thought the further issues trial is going  
 17 to be narrower in scope than each of those two  
 18 mega-trials, but am I approaching it from the wrong  
 19 point of view?  
 20 MR DRAPER: I think the proposition with which I wouldn't  
 21 seek to disagree, my Lord, is that the trial itself one  
 22 would anticipate being less heavy than the other two.  
 23 That, my Lord, is a proposition I wouldn't quibble with.  
 24 If I could take you back to the spreadsheet at  
 25 <Z2/6/1>, which is the updated summary page, my Lord.

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1 MR JUSTICE FRASER: Yes.  
 2 MR DRAPER: If one looks down in the yellow column, which is  
 3 column H, which is the totals for the cost of  
 4 the further issues trial, the meat of the difference, my  
 5 Lord, is attributable to ADR/settlement. If your  
 6 Lordship looks at the total there of 1.239 million and  
 7 then if you cast your eye across, my Lord, to  
 8 the equivalent figures in the columns for the common  
 9 issues trial and the Horizon issues trial, obviously  
 10 those are still substantial numbers for Horizon and  
 11 the common issues trial, but by comparison they are  
 12 extremely small. So that does account, my Lord, for  
 13 a great deal of the difference.  
 14 MR JUSTICE FRASER: It does and I've just now done  
 15 a calculation to remove the sum of £1,239,353 in the ADR  
 16 line --  
 17 MR DRAPER: Yes, my Lord.  
 18 MR JUSTICE FRASER: -- and to take it out of the 427,844 and  
 19 I've got a total of 3,031,491, which you're right, both  
 20 of those are -- well, one's 80% and the other's about  
 21 75% higher -- sorry, that's 80% or 75% lower than  
 22 the corresponding costs for the common issues and  
 23 Horizon issues.  
 24 MR DRAPER: Yes, my Lord.  
 25 MR JUSTICE FRASER: But the problem with approaching it like

21

1 that is if -- and I know we're going to get on to the  
 2 substantive point this morning anyway, but in a way,  
 3 because those settlement figures are for the whole  
 4 action, it's misleading, isn't it, to have them in  
 5 the further issues costs management order -- or, sorry,  
 6 a costs management order that on its face looks as if  
 7 it's approving costs for the further issues because, if  
 8 those ADR settlement costs are expended and result in  
 9 the whole matter going, then the group litigation as  
 10 a whole is resolved and not just the further issues.  
 11 MR DRAPER: Yes, my Lord. I think it's right to say that it  
 12 was the anticipation of the way the cost budgeting has  
 13 been arranged that ADR and settlement costs incurred in  
 14 the relevant stage would fall within the budget for that  
 15 stage and the situation here arises just because of the  
 16 peculiarity of timing, that by far the most substantial  
 17 efforts towards settlement have fallen within this  
 18 stage.  
 19 MR JUSTICE FRASER: Now I understand. I understand. All  
 20 right. Well, I mean, that -- I do -- I mean, for  
 21 example, other ways of comparing like with like, which  
 22 I think are perfectly valid comparisons --  
 23 MR DRAPER: Yes, my Lord.  
 24 MR JUSTICE FRASER: -- if you look at witness statements  
 25 in common issues, there's £500,000 there. Now there

22

1 aren't going to be any witness statements for the  
 2 further issues, so one would expect, if the two  
 3 exercises were broadly the same, that the further issues  
 4 trial at the very least would be £500,000 cheaper  
 5 because you haven't got the £500,000 on witness  
 6 statements --  
 7 MR DRAPER: I can see that, my Lord.  
 8 MR JUSTICE FRASER: So although some of it is explained by  
 9 the sizeable figure for ADR, not all of it is explained  
 10 because, if you look at other headline differences, one  
 11 would expect the further issues figure to be really  
 12 quite a lot lower than it is.  
 13 MR DRAPER: It's obviously a comparison between the further  
 14 issues trial or one or other or both of the previous  
 15 trials does show a -- it is a very mixed picture,  
 16 my Lord. We see -- many of the costs that one would  
 17 anticipate being higher in the earlier two trials we see  
 18 were in fact higher. So, for example, we see the  
 19 figures for trial preparation were substantially higher  
 20 for those two trials, reflecting your Lordship's point  
 21 about simply there being more meat.  
 22 MR JUSTICE FRASER: Yes, the nature of the trials.  
 23 MR DRAPER: Entirely so, my Lord. I'm not sure I can assist  
 24 you much further than saying --  
 25 MR JUSTICE FRASER: No, no, I just wanted to explore that

23

1 with you first so that I could make sure I was not  
 2 missing anything glaringly obvious. I don't think I am.  
 3 MR DRAPER: No, my Lord.  
 4 MR JUSTICE FRASER: Thank you very much and I'll now hear  
 5 from Mr Warwick.  
 6 MR WARWICK: My Lord, yes. Might I comment on what's been  
 7 said? Just two very short things. First of all there  
 8 has been a chronology of orders relating to this stage  
 9 of the proceedings. There were CMCs that your Lordship  
 10 will recall back on 31 January of this year and  
 11 12 February and the original order for directions given  
 12 by your Lordship was on 12 February. The proceedings  
 13 were then stayed -- these directions were stayed from  
 14 12 April onwards. So there's a narrow window at that  
 15 stage of compliance with directions. Then of course  
 16 came your Lordship's order of 23 July to which reference  
 17 has already been made.  
 18 The second point to comment on, my Lord, is that in  
 19 fact --  
 20 MR JUSTICE FRASER: But even before they were stayed, there  
 21 were only two further issues.  
 22 MR WARWICK: Indeed, my Lord, and in fact the deadlines at  
 23 that time for, for example, individual particulars of  
 24 claim didn't even bite until 15 May and so on.  
 25 MR JUSTICE FRASER: Okay.

24

1 MR WARWICK: There is a second point to be made, my Lord, on  
 2 what's been said, and that's that the recast budget, if  
 3 I may call it that --  
 4 MR JUSTICE FRASER: Which one is that one?  
 5 MR WARWICK: That is the document at <Z2/5.2/1>.  
 6 MR JUSTICE FRASER: This is the one that's been overtaken by  
 7 events?  
 8 MR WARWICK: Indeed. By agreement it's been overtaken. But  
 9 of course that is Post Office's budget.  
 10 MR JUSTICE FRASER: That's the one with the 18 million?  
 11 MR WARWICK: Indeed my Lord, and I hope to refer --  
 12 appreciating fully, my Lord, that in the exercise of  
 13 your powers you're not going into rates and approving  
 14 specific allocations of time and so on and your exercise  
 15 of costs management powers will be impressionistic, but  
 16 understanding what is driving costs of such magnitude  
 17 for ADR, one has to glance at the page at <Z2/5.2/6>--  
 18 MR JUSTICE FRASER: Yes.  
 19 MR WARWICK: -- because on that page appears, putting this  
 20 neutrally, a cascade of different fee-earner rates and  
 21 grades of seniority and estimated hours that do comprise  
 22 that figure and that page may be relevant to your  
 23 assessment, my Lord, of proportionality/overall  
 24 reasonableness.  
 25 MR JUSTICE FRASER: When you say "that page", that page

25

1 doesn't have all the fee-earners, etc, on. Do you mean  
 2 the page that goes after it, page 1 of 6, with all  
 3 the HSF fee-earners?  
 4 MR WARWICK: That's correct, my Lord, yes.  
 5 MR JUSTICE FRASER: In the "Common costs" column?  
 6 MR WARWICK: Internally it appears as page 5 of 6 in  
 7 the document and it's at the foot of the document that's  
 8 on our common screen presently.  
 9 MR JUSTICE FRASER: I was looking at page 1 of 6 first  
 10 because in the left-hand column there are 17 HSF  
 11 fee-earners in that column.  
 12 MR WARWICK: Yes, my Lord, and those fee-earners' rates and  
 13 so forth are replicated in the page that I took  
 14 your Lordship to a moment ago; that's to say page 6.  
 15 MR JUSTICE FRASER: All right. So that's page 5 of 6?  
 16 MR WARWICK: Yes, my Lord, and the background observation on  
 17 this as well is that this was recast because originally  
 18 all of those HSF fees appeared quite wrongly as  
 19 disbursements.  
 20 MR JUSTICE FRASER: No, no, I understand.  
 21 MR WARWICK: That's an argument under the bridge.  
 22 MR JUSTICE FRASER: That's now been changed.  
 23 MR WARWICK: Indeed, my Lord, yes.  
 24 MR DRAPER: My Lord, just to interrupt for a small point of  
 25 factual correction. There aren't in fact 17 fee-earners

26

1 in the sense of persons charging a fee. It's that there  
 2 are 17 different rates and in many instances the same  
 3 person has two different rates because they have agreed  
 4 a discount.  
 5 MR JUSTICE FRASER: So "trainee London" and "Trainee London  
 6 reduced".  
 7 MR DRAPER: Exactly, my Lord.  
 8 MR JUSTICE FRASER: But that only happens in a couple of  
 9 situations, I think. And also some of them are  
 10 e-discovery as well. I think there's three where  
 11 there's reduced rates given in brackets immediately  
 12 afterwards.  
 13 MR DRAPER: That's right, my Lord.  
 14 MR JUSTICE FRASER: "Partner London (London reduced)",  
 15 "Associate London (London reduced)" and "Trainee London  
 16 (London reduced)".  
 17 MR DRAPER: Yes, those are the reduced figures, my Lord.  
 18 MR WARWICK: Yes, my Lord. That's fully understood. I'm  
 19 not seeking to suggest there are 17 people. In fact  
 20 there may well be very many more, and if one glances at  
 21 some of the hours allocations, that must be the case.  
 22 It's a point I'll come to in a moment, if I may,  
 23 my Lord.  
 24 So in essence, my Lord, what falls for determination  
 25 today then is this ADR phase, but your Lordship will

27

1 have seen that comments are also sought on two incurred  
 2 costs that appear in the budget. So that your Lord has  
 3 them by way of introduction, they are the incurred costs  
 4 for statements of case.  
 5 Going back, my Lord, to the summary document that we  
 6 were looking at a moment ago at <Z2/6/1>, on the second  
 7 row --  
 8 MR JUSTICE FRASER: These were the comments in your draft  
 9 order?  
 10 MR WARWICK: Indeed, my Lord, yes.  
 11 MR JUSTICE FRASER: So which document are you taking me to  
 12 now?  
 13 MR WARWICK: Back to what I might propose we refer to as  
 14 the "summary", which is the document that summarises  
 15 the present position, including the agreed sums filed by  
 16 Mr Parsons.  
 17 MR JUSTICE FRASER: The one at <Z2/6/1>?  
 18 MR WARWICK: That's correct, my Lord, yes.  
 19 So the comment is sought -- if one looks under  
 20 columns D and E, the combined total of D and E for  
 21 issues statement of case, that total is 269,729.  
 22 MR JUSTICE FRASER: Right.  
 23 MR WARWICK: Comment is sought on that, my Lord, because  
 24 that has been incurred up to 3 September, before any  
 25 pleadings had been served upon Post Office, and

28



1 possibly -- a point I'll come to just in one a second,  
 2 my Lord -- a comment in relation to ADR and settlement  
 3 incurred costs, which is £502,000.  
 4 This requires just a small amount of introductory  
 5 clarification. In my witness statement the possibility  
 6 of an adverse comment in respect of witness statements  
 7 was canvassed, but that's been clarified now and it's  
 8 not sought because it's not included in the budget now  
 9 at all. Those costs have been taken out for another day  
 10 if Post Office wishes to pursue them. Secondly --  
 11 MR JUSTICE FRASER: But these are all in respect of -- these  
 12 are comments you're seeking in respect of incurred  
 13 costs --  
 14 MR WARWICK: That's right, my Lord, yes.  
 15 MR JUSTICE FRASER: -- but we don't get to that yet.  
 16 MR WARWICK: Indeed, my Lord, and I was going to propose  
 17 that we deal with the ADR position first.  
 18 MR JUSTICE FRASER: Right, well, let me just do -- I thought  
 19 I had a handle on exactly what was in issue. So far as  
 20 today's business is concerned --  
 21 MR WARWICK: Yes.  
 22 MR JUSTICE FRASER: -- which I think it was possibly a bit  
 23 optimistic to reduce the time estimate, actually --  
 24 there's a CMO sought by the claimant for its further  
 25 issues budget which is agreed by the defendant; is that

1 right?  
 2 MR WARWICK: Yes, my Lord.  
 3 MR JUSTICE FRASER: There's a CMO sought by the defendant  
 4 for its further issues budget which is substantially  
 5 agreed by the claimant, but there are some non-agreed  
 6 items?  
 7 MR WARWICK: Just the ADR phase, my Lord, yes.  
 8 MR JUSTICE FRASER: Well, it's a non-agreed phase, but it  
 9 includes more than one item.  
 10 MR WARWICK: Indeed, my Lord.  
 11 MR JUSTICE FRASER: Right. And so it's the ADR phase that's  
 12 in issue, and the ADR phase, if I can put it like this,  
 13 the headline issues are duplication of solicitors --  
 14 MR WARWICK: Yes, my Lord.  
 15 MR JUSTICE FRASER: -- so let's call that the  
 16 "Herbert Smith Freehills point" --  
 17 MR WARWICK: Yes.  
 18 MR JUSTICE FRASER: -- together with effectively the overall  
 19 total.  
 20 MR WARWICK: That's right, my Lord, yes.  
 21 MR JUSTICE FRASER: Are those the two?  
 22 MR WARWICK: Those are the two issues, yes.  
 23 MR JUSTICE FRASER: Then the third point is you want  
 24 comments on incurred costs which are in the budget.  
 25 MR WARWICK: That's right, my Lord.

1 MR JUSTICE FRASER: And I'm permitted to do that under  
 2 the costs management regime.  
 3 MR WARWICK: Indeed, my Lord, yes.  
 4 MR JUSTICE FRASER: And those three are the one you've just  
 5 identified to me --  
 6 MR WARWICK: They are in fact only two, my Lord, issues  
 7 statements of case, 269,729.  
 8 MR JUSTICE FRASER: 269,000 ...?  
 9 MR WARWICK: ... 729, my Lord.  
 10 MR JUSTICE FRASER: Yes, and what's the other one?  
 11 MR WARWICK: Incurred for ADR and settlement, total 502,527,  
 12 but particularly Herbert Smith's fees of 454,171, my  
 13 Lord.  
 14 MR JUSTICE FRASER: Yes.  
 15 MR WARWICK: Subject to a rider, my Lord, because, of  
 16 course, whether making a comment on those incurred costs  
 17 is appropriate, my Lord, will depend upon the approach  
 18 your Lordship chooses to take --  
 19 MR JUSTICE FRASER: Correct.  
 20 MR WARWICK: -- to the overall because, of course, you can't  
 21 have it twice, both factoring in incurred costs for  
 22 the purposes of reducing budgeted costs and an adverse  
 23 comment, and that I made clear to my learned friend  
 24 yesterday.  
 25 MR JUSTICE FRASER: Well, let's take this step by step and

1 I'm just going to make some introductory comments which  
 2 apply to everybody.  
 3 The parties agreed to adopt the costs management  
 4 regime in this case. It was not imposed on them by  
 5 the court. There therefore must be some purpose in  
 6 the parties having agreed that and they must want  
 7 the involvement of the court insofar as their future  
 8 costs are concerned, otherwise they would never have  
 9 agreed to adopt the costs management regime. On  
 10 the basis I have made costs management orders already,  
 11 although I consider as a matter of discretion I would be  
 12 entitled not to make a costs management order and to say  
 13 to the parties that there's no point in continuing  
 14 the costs management regime in this case because of  
 15 the way costs are being dealt with, I'm not going to do  
 16 that and I am going to make costs management orders.  
 17 But I'm afraid the point has come in this case that,  
 18 notwithstanding agreements between the parties,  
 19 the court is not now simply content to waive through  
 20 very substantial sums just because they're agreed.  
 21 Having said that, obviously that might come as a bit  
 22 of a surprise given the court's approach to cost  
 23 management orders already, but one point which gives me  
 24 very great concern is that the further issues trial as  
 25 now reduced to a single issue is going to be a trial far

1 narrower in scope than either of what is undoubtedly  
 2 properly described as two earlier "heavy trials", one is  
 3 common issues and one is Horizon, and I'm just using  
 4 the claimants' budget -- I beg your pardon --  
 5 the defendant's budget because it's in front of me, but  
 6 just as an example. The costs management order in  
 7 respect of the common issues trial had a total of  
 8 3.614 million; the costs management order for  
 9 the Horizon issues trial had a total very slightly less  
 10 than 3.75 million.

11 It seems to me that the global figure for  
 12 the further issues, even including settlement, can't  
 13 possibly be reasonable and proportionate if it's in  
 14 excess of either of those two figures. So that's  
 15 the approach I'm adopting.

16 The claimants' budget is agreed and I'm just going  
 17 to check this with Mr Draper. Mr Draper, am I right  
 18 that that sum is 2.814640 million?

19 MR DRAPER: That sounds right, my Lord. If we just call it  
 20 up. It's at <Z2/7/1>. These are --

21 MR JUSTICE FRASER: That's the one I've got. It was sought  
 22 in the sum of 2.931 and it was given at 2.814 and that  
 23 omitted security for costs, which the parties agreed  
 24 won't fall into the costs management regime today at  
 25 all. That was going to be dealt with separately; is

33

1 that right?

2 MR DRAPER: Yes, that's right.

3 MR JUSTICE FRASER: And it has a figure for ADR settlement  
 4 of 130K -- is that right?

5 MR DRAPER: That's right.

6 MR JUSTICE FRASER: -- which is the total sum that was  
 7 sought.

8 MR DRAPER: Yes, that's right, my Lord. I think I'm right  
 9 to say that aside from the removal of the costs security  
 10 management figures, there were no figures that were  
 11 negotiated down, if your Lordship looks up.

12 MR JUSTICE FRASER: Right. So you are content for me to  
 13 make a costs management order in respect of the further  
 14 issues trial on this figure of 2.814, which includes the  
 15 130,000 for ADR?

16 MR DRAPER: There is a slight difference between the two --  
 17 the ways the two have been -- the two budgets have been  
 18 produced, my Lord. If your Lordship wants the  
 19 equivalent for Post Office's figure of the figure you  
 20 were looking at, 737, estimated costs for ADR and  
 21 settlement --

22 MR JUSTICE FRASER: Sorry, 737? I don't understand where  
 23 you get that from.

24 MR DRAPER: That's from the updated Post Office summary,  
 25 the <Z2/6/1>.

34

1 MR JUSTICE FRASER: Yes, which I've got in front of me.  
 2 MR DRAPER: I believe it's 737, but if one adds up the two  
 3 estimated figures there, disbursements and time costs --

4 MR JUSTICE FRASER: Oh, that's the 714 and the 22?

5 MR DRAPER: That's right.

6 MR JUSTICE FRASER: So what you're saying is 737 for  
 7 the Post Office --

8 MR DRAPER: Yes.

9 MR JUSTICE FRASER: -- is the comparable figure against  
 10 the 130?

11 MR DRAPER: No, my Lord. This is the point I'm coming to.  
 12 We have taken the ADR and settlement element -- phase --  
 13 as including ADR and settlement generally, but also the  
 14 specific mediation that the parties have agreed should  
 15 take place.

16 If you go back to the claimants' document -- sorry,  
 17 our budget discussion report for the claimant's figures,  
 18 where they're all shown as being agreed, there is ADR  
 19 and settlement about just over halfway down the page at  
 20 130,000, but also right at the bottom, the last listed  
 21 figure, there's 284,000 for mediation. So one would  
 22 need to add those two together to get the equivalent  
 23 figure.

24 MR JUSTICE FRASER: That's a very good point. So in other  
 25 words it's not just 130. It's the 130 plus the 284?

35

1 MR DRAPER: It is, my Lord.

2 MR JUSTICE FRASER: Right. Well, let's do that calculation,  
 3 please.

4 MR WARWICK: I have the figure, if it helps my Lord.

5 MR JUSTICE FRASER: Yes, it does.

6 MR WARWICK: It's 415,122.

7 MR JUSTICE FRASER: 415 ...?

8 MR WARWICK: ... 122.

9 MR JUSTICE FRASER: And your budget includes within it,  
 10 I believe, although it's called the "Further issues  
 11 budget" -- your budget includes, because of the timing  
 12 of the mediation settlement ADR, all the costs in  
 13 respect of which you seek a CMO and the total of those  
 14 is 415,122?

15 MR WARWICK: For ADR, yes, my Lord.

16 MR JUSTICE FRASER: Well, ADR and mediation, isn't it?

17 MR WARWICK: Correct, my Lord, yes.

18 MR JUSTICE FRASER: And settlement discussions?

19 MR WARWICK: Indeed, my Lord, yes.

20 MR JUSTICE FRASER: So all of those activities of a like  
 21 nature are included within the 415?

22 MR WARWICK: That's correct.

23 MR JUSTICE FRASER: You haven't apportioned some bigger  
 24 figure and said, "We're putting 415 of it in further  
 25 issues"; it's all in there at 415?

36

1 MR WARWICK: That's right. I mean, that's not to say that  
2 if discussions aren't successful at later stages of  
3 the trial --  
4 MR JUSTICE FRASER: No, no, no, of course. But just so that  
5 the parties understand why so much time is being taken  
6 doing this, the essential thing is to make sure that I'm  
7 pairing like with like.  
8 MR WARWICK: Yes, my Lord. Well, to assist your Lordship on  
9 that, I think it would be remiss of me not to mention  
10 that of course the sum in the budget discussion report  
11 of 2,814,640, in respect of which a CMO is sought,  
12 my Lord, obviously that doesn't include the claimants'  
13 incurred costs for the further issues trial --  
14 MR JUSTICE FRASER: And any incurred costs for ADR and  
15 mediation?  
16 MR WARWICK: Absolutely, my Lord.  
17 MR JUSTICE FRASER: Well, are there any of those?  
18 MR WARWICK: There are. I wonder if the following document  
19 could be called up. It's <Z2/1/1>. That is the front  
20 page of the claimants' budget. When it was filed, it  
21 still included security for costs.  
22 MR JUSTICE FRASER: Sorry, are we at <Z2/1/1>?  
23 MR WARWICK: That's correct, my Lord.  
24 MR JUSTICE FRASER: Which figure is it you're going to show  
25 me?

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1 MR WARWICK: The total figure at the bottom of column H.  
2 That is the figure that includes incurred costs, but out  
3 of it has to be taken security for costs and the total  
4 is 3,284. So were your Lordship to wish to compare  
5 the claimants' total budget including incurred costs  
6 with the defendant's total budget including incurred  
7 costs --  
8 MR JUSTICE FRASER: No, no, I don't, I don't --  
9 MR WARWICK: -- that would be the sum.  
10 MR JUSTICE FRASER: But if you look in incurred costs in  
11 the left-hand column --  
12 MR WARWICK: Yes, my Lord.  
13 MR JUSTICE FRASER: Well, let's start with ADR settlement  
14 discussions --  
15 MR WARWICK: Yes, my Lord.  
16 MR JUSTICE FRASER: -- you don't get to any entry at all in  
17 the orange box of column D and E, do you?  
18 MR WARWICK: Well, there's very limited sums, £90 of time  
19 costs and 3,574, so --  
20 MR JUSTICE FRASER: So apart from that tiny wrinkle --  
21 MR WARWICK: That's right.  
22 MR JUSTICE FRASER: So in order -- well, it's not necessary  
23 to add 3,664 of incurred mediation ADR costs. That's  
24 what the total is, isn't it?  
25 MR WARWICK: Yes that's right, my Lord, yes.

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1 MR JUSTICE FRASER: So your figure for further issues  
2 trial --  
3 MR WARWICK: Yes.  
4 MR JUSTICE FRASER: -- excluding ADR and mediation is your  
5 2,814,640 at the bottom --  
6 MR WARWICK: Yes, my Lord.  
7 MR JUSTICE FRASER: -- take away the 284,860 --  
8 MR WARWICK: Yes, my Lord.  
9 MR JUSTICE FRASER: -- and take away the 130,262.  
10 MR WARWICK: Yes, my Lord.  
11 MR JUSTICE FRASER: I get that to be £2,399,518 for  
12 the further issues trial, excluding mediation and ADR.  
13 MR WARWICK: Yes, my Lord, but from 3 September --  
14 MR JUSTICE FRASER: I understand that.  
15 MR WARWICK: -- because there are incurred costs behind  
16 that.  
17 MR JUSTICE FRASER: I understand that.  
18 MR WARWICK: Yes.  
19 MR JUSTICE FRASER: And that's not at issue as far as I'm  
20 concerned and you're both agreed that that's the right  
21 date, I think.  
22 MR WARWICK: Absolutely, my Lord, yes.  
23 MR JUSTICE FRASER: So Mr Draper --  
24 MR DRAPER: Yes, my Lord.  
25 MR JUSTICE FRASER: -- if I were minded to make a costs

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1 management order today, I consider I have two  
2 alternatives so far as the claimants are concerned. One  
3 is a figure of 2,814,640, which includes their mediation  
4 and ADR costs --  
5 MR DRAPER: Yes, my Lord.  
6 MR JUSTICE FRASER: -- or a similar way of expressing  
7 the same figure would be 2,399,518, excluding mediation  
8 and ADR costs, if I wanted to deal with them separately.  
9 MR DRAPER: Yes, my Lord.  
10 MR JUSTICE FRASER: But on either footing, those totals are  
11 agreed by you --  
12 MR DRAPER: Yes, my Lord.  
13 MR JUSTICE FRASER: -- and that's just a methodological  
14 difference; is that right?  
15 MR DRAPER: Yes, my Lord.  
16 MR JUSTICE FRASER: Thanks very much.  
17 Mr Warwick, this isn't building up to a great  
18 drum-roll, but it's important I think that this case  
19 proceeds on a like-for-like basis.  
20 MR WARWICK: Yes, my Lord, yes.  
21 MR JUSTICE FRASER: Is there anything you would like to say  
22 to me about which of those two approaches in principle  
23 you would invite me to adopt because it's important that  
24 I compare like with like? I'm not suggesting that  
25 the budget shouldn't include ADR or settlement. All I'm

40

1 suggesting is whatever the costs management order that  
 2 I make, it needs to deal with both parties in the same  
 3 way, doesn't it?  
 4 MR WARWICK: Absolutely, my Lord, yes, it does. That's  
 5 common ground.  
 6 MR JUSTICE FRASER: Right.  
 7 MR WARWICK: There are foreseeable benefits to having two  
 8 CMOs, a CMO for further issues and a CMO for settlement  
 9 and ADR. Actually I think it's within the realms of  
 10 possibility that the parties could strip out ADR costs  
 11 should, for example, your Lordship make a costs order  
 12 with respect to the further issues trial at the end of  
 13 the further issues trial. Obviously the effective  
 14 rule 318 compels a costs judge to have regard to the  
 15 figures that your Lordship has approved, but the figures  
 16 that your Lordship is approving are these totals, and so  
 17 it would, on my understanding anyway, be permissible for  
 18 a costs judge to take those out if your Lordship gave an  
 19 order just about the further issues trial at a later  
 20 date and so there are benefits to it.  
 21 But I'm agnostic on which approach. I think for  
 22 ease of methodology, keeping them included in this,  
 23 noting that they relate to something different, which is  
 24 the group as a whole, would be acceptable, providing  
 25 it's acceptable it to my learned friend.

41

1 MR JUSTICE FRASER: Right. So you would -- so you're  
 2 relatively neutral, but your approach is on the basis  
 3 that all -- that's how the budgets have been prepared to  
 4 keep them in, but just to recite that they're not  
 5 strictly speaking attributable solely to the further  
 6 issues --  
 7 MR WARWICK: That's right, my Lord.  
 8 MR JUSTICE FRASER: -- because they're not, are they?  
 9 MR WARWICK: No, by all means. And of course, my Lord, in  
 10 recording your Lordship's order, I see no difficulty, if  
 11 your Lordship's minded to, to include a comment to that  
 12 effect, to which the judge on detailed assessment would  
 13 have regard.  
 14 MR JUSTICE FRASER: All right. Okay.  
 15 Mr Draper, do you have any observations?  
 16 MR DRAPER: I respectfully agree, my Lord, for this reason:  
 17 there are in fact various elements of the cost budgeting  
 18 process for the further issues trial stage that don't  
 19 relate specifically to the further issues. There are of  
 20 course things like ongoing group management that is just  
 21 a cost that rumbles on.  
 22 MR JUSTICE FRASER: Understood.  
 23 MR DRAPER: That is as true for other things as for  
 24 settlement, but we obviously recognise settlement is  
 25 a huge chunk here that otherwise might distort

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1 a comparison across the trials. So something in your  
 2 Lordship's order merely to draw attention to that fact  
 3 may well be sensible.  
 4 MR JUSTICE FRASER: All right. Well, in that case you have  
 5 both persuaded me then.  
 6 Order  
 7 I'm going to make a costs management order, so far  
 8 as the claimants are concerned, in the overall total of  
 9 2,814,640, but I would like the order to include  
 10 the following note, which is: although this costs  
 11 management order is expressed as being the further  
 12 issues costs management order, the budgets and approved  
 13 figures include substantial figures for ADR/settlement  
 14 discussions/mediation which relate to the group  
 15 litigation as a whole and therefore could be seen as  
 16 potentially distorting the overall total if one were to  
 17 compare the overall total for the further issues  
 18 CMO with the overall totals for the CMO for the common  
 19 issues trial and for the Horizon issues trial. I'm just  
 20 recording that for the benefit of the costs judge.  
 21 Right.  
 22 MR WARWICK: I'm very grateful, my Lord.  
 23 MR JUSTICE FRASER: Right, so that then brings me to CMO for  
 24 the Post Office.  
 25 MR WARWICK: Yes, my Lord. I should give way.

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1 MR JUSTICE FRASER: Yes.  
 2 Mr Draper.  
 3 Submissions by MR DRAPER  
 4 MR DRAPER: Yes, my Lord, in relation to Post Office there  
 5 are two distinct issues. One is whether your Lordship  
 6 ought to make any effectively adverse comment under 3.15  
 7 in relation to incurred costs and the other is whether  
 8 your Lordship -- what figure your Lordship ought to  
 9 approve for estimated costs for settlement.  
 10 Now, those two principles -- that distinction  
 11 becomes blurred somewhat because my learned friend seeks  
 12 both a criticism of incurred costs for ADR settlement  
 13 and/or that your Lordship reduce the estimated figure  
 14 for settlement.  
 15 MR JUSTICE FRASER: Right. Well, before we get on to that,  
 16 there's also another point, isn't there, which is  
 17 whether the court is satisfied that the total excluding  
 18 ADR and settlement is a reasonable and proportionate one  
 19 for the further issues trial; in other words, just  
 20 because it's agreed doesn't mean it's going to be  
 21 approved. It still has to be reasonable and  
 22 proportionate for me to make a CMO in respect of it  
 23 anyway, rather than reduce it down.  
 24 MR DRAPER: To make a CMO at all, my Lord?  
 25 MR JUSTICE FRASER: No, not to make a CMO at all; to make

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1 a CMO in that figure, in the figure that's sought.  
 2 MR DRAPER: My Lord, you are -- in respect of agreed costs,  
 3 the position is that the court will note the agreement.  
 4 It's in respect of costs that aren't agreed that  
 5 the court has a role of reviewing and reducing an  
 6 estimate as it may consider appropriate. So there's  
 7 a distinction there to be drawn between those costs that  
 8 are live --  
 9 MR JUSTICE FRASER: Well, there is, but --  
 10 MR DRAPER: -- and those that are agreed.  
 11 MR JUSTICE FRASER: Well, there is a distinction, but the  
 12 court's not bound by an agreement between the parties if  
 13 it's not satisfied that they're reasonable and  
 14 proportionate. I'm not saying I'm necessarily going to  
 15 do it. I'm just saying it's a formal step that still  
 16 needs to be considered by the court because the whole  
 17 purpose of costs management is that the court --  
 18 MR DRAPER: I understand.  
 19 MR JUSTICE FRASER: -- becomes directly involved in deciding  
 20 what's reasonable and proportionate.  
 21 MR DRAPER: Yes, my Lord, but -- I'm just turning up  
 22 the rule. I think it's --  
 23 MR JUSTICE FRASER: Where are we looking?  
 24 MR DRAPER: Yes, my Lord, it's 3.15. If your Lordship looks  
 25 at 3.15.2 --

1 MR JUSTICE FRASER: Could you just give me the page?  
 2 MR DRAPER: Someone has stolen my 2019 White Book. It's  
 3 page 134 in last year's.  
 4 MR JUSTICE FRASER: Don't worry. It's 139 in this one.  
 5 3.15.2, yes.  
 6 MR DRAPER: Yes, my Lord. The chapeau of 3.15.2 records  
 7 the point that your Lordship made at the outset, which  
 8 is that your Lordship could choose not to make a CMO,  
 9 although that's water under the bridge. It says:  
 10 "Where costs budgets have been filed and exchanged,  
 11 the court will make a costs management order unless it  
 12 is satisfied that a litigation can be conducted justly  
 13 and with proportionate costs in accordance with the  
 14 overriding objective without such an order being made.  
 15 By a costs management order the court will (a) record  
 16 the extent to which the budgeted costs are agreed  
 17 between the parties and (b) ..."  
 18 In my submission only in (b).  
 19 "... in respect of the budgeted costs which are not  
 20 agreed, record the court's approval after making  
 21 appropriate revisions."  
 22 Then (c):  
 23 "Record the extent, if any, to which incurred costs  
 24 are agreed."  
 25 MR JUSTICE FRASER: Yes, but if you look at 3.15.3,

1 the notes over the page, assuming it's the same in last  
 2 year's version as it is here, second sentence:  
 3 "The court should decline to make a CMO for the time  
 4 being if it wishes to urge the parties to reconsider  
 5 their budgets, whether or not those budgets are agreed."  
 6 MR DRAPER: Oh, of course, my Lord, but that's, if you like,  
 7 refraining from making the CMO because the court's view  
 8 is that the parties aren't in a position yet to put  
 9 a sensible one forward. That's not, my Lord, the same  
 10 process as going through and, if you like, editing down  
 11 figures, revising them. The court can refrain from  
 12 making a CMO --  
 13 MR JUSTICE FRASER: Okay, look at the first paragraph,  
 14 the next -- sorry, the first sentence of the next  
 15 paragraph:  
 16 "Circumstances may arise in which the court approves  
 17 budgeted costs in part only and neither approves nor  
 18 comments upon the rest of it."  
 19 So in terms of the costs management order, there's  
 20 a wide range of options available. I might be, for  
 21 example, perfectly satisfied that your figure for  
 22 the pre-trial -- this is just hypothetical --  
 23 MR DRAPER: Of course.  
 24 MR JUSTICE FRASER: -- that your figure for the pre-trial  
 25 review for the further issues trial is unobjectionable,

1 reasonable and proportionate and I will make a costs  
 2 management order in respect of it. That doesn't mean  
 3 that, notwithstanding agreements between you on all  
 4 the items, you're entitled to the same approach on all  
 5 the items, does it, or do you say it does?  
 6 MR DRAPER: It slightly depends what your Lordship means  
 7 by "the same approach". If we take hypothetical facts  
 8 where the parties, if you like, collude together to both  
 9 agree obviously disproportionate budgets, so they come  
 10 before you and say, "We're each spending £12 million on  
 11 pleadings and we're both happy with that", the court  
 12 could, in that circumstance, simply refuse to make a CMO  
 13 because it would say, "This is not costs management and  
 14 I'm not prepared to put the court's name to it".  
 15 What the court, in my submission, can't do in  
 16 relation to agreed costs -- agreed estimates that come  
 17 before the court is to reduce them down and then approve  
 18 them as --  
 19 MR JUSTICE FRASER: When you say "can't", you mean in  
 20 the sense that the court doesn't have the power to do  
 21 it?  
 22 MR DRAPER: Yes, my Lord.  
 23 MR JUSTICE FRASER: I'm not sure that's right. Give me  
 24 a moment.  
 25 MR DRAPER: Of course. (Pause)

1 MR JUSTICE FRASER: That's the whole rationale of the  
 2 different cases, including CIP, isn't it, Mr Warwick?  
 3 MR WARWICK: My Lord, if it helps, declining to grant  
 4 a CMO was one of the options considered in CIP, but if  
 5 it helps the position, I am with my learned friend on  
 6 this point. A CMO should record the extent of  
 7 agreement, though it is in your gift, my Lord, not to  
 8 make a CMO, as foreshadowed at the beginning of the note  
 9 at 3.15.3 in the White Book to which you took my learned  
 10 friend.  
 11 MR JUSTICE FRASER: Yes, but that's about not making  
 12 a CMO at all. I have the ability to -- I mean, we're  
 13 getting slightly sidetracked because it's not  
 14 necessarily something I'm going to do anyway, but I have  
 15 the ability to make a CMO in respect of certain heads of  
 16 costs in the budget, whether they're agreed or not, and  
 17 not to make a CMO in respect of others. Just because  
 18 the parties are agreed I should make a CMO --  
 19 MR WARWICK: Yes.  
 20 MR JUSTICE FRASER: -- and to take Mr Draper's example of  
 21 £12 million for pleadings -- just because the parties  
 22 might be agreed, they're not necessarily entitled to  
 23 a CMO in respect of that item that they have agreed.  
 24 MR WARWICK: Yes, that may well be right, but, my Lord, what  
 25 your Lordship -- I respectfully can't do is revise

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1 agreed figures.  
 2 MR JUSTICE FRASER: No, no, I see. I see what you mean.  
 3 I understand. So I have taken us down a rabbit hole.  
 4 All right.  
 5 MR WARWICK: Not necessarily, my Lord, because actually it  
 6 is worth, while passing through this point, to observe  
 7 that Mr Justice Coulson, as he then was, in CIP --  
 8 I appreciate it's not an authority that's binding on  
 9 this court, but it is useful guidance. It's one of  
 10 the earliest cases on this point -- observed the pitfall  
 11 of not making a CMO is that what it effectively does is  
 12 sidesteps -- allows one body to sidestep costs  
 13 management because something that's not subject to  
 14 a CMO is later up for grabs on detailed assessment.  
 15 MR JUSTICE FRASER: No, I understand that.  
 16 MR WARWICK: It might not actually achieve the effect that  
 17 on a superficial analysis it might look as though it is  
 18 achieving if one considers what a party in that position  
 19 might later do with it.  
 20 MR JUSTICE FRASER: Although the difference in CIP was all  
 21 of the many defendants were lining up to attack  
 22 the budget --  
 23 MR WARWICK: Yes.  
 24 MR JUSTICE FRASER: -- and it was not agreed.  
 25 MR WARWICK: That's absolutely right, my Lord, but that

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1 overall effect of declining to give a CMO was considered  
 2 by then Mr Justice Coulson and ruled out for that  
 3 reason.  
 4 MR JUSTICE FRASER: Yes. All right.  
 5 Okay. Right, Mr Draper. It looks as if I might  
 6 just have just spent ten minutes taking everyone up  
 7 a side street.  
 8 MR DRAPER: Not at all, my Lord.  
 9 MR JUSTICE FRASER: So back to your budget then.  
 10 MR DRAPER: Yes, my Lord, I don't know -- I mean there's  
 11 a question about what's the most efficient way to  
 12 address this, first as to who goes first and in what  
 13 order we deal with points.  
 14 MR JUSTICE FRASER: Well, one is adverse comment on incurred  
 15 costs.  
 16 MR DRAPER: Yes.  
 17 MR JUSTICE FRASER: I think Mr Warwick's explained that and  
 18 also said in his --  
 19 MR DRAPER: Fine.  
 20 MR JUSTICE FRASER: -- skeleton what the situation is. What  
 21 would you like to say about that?  
 22 MR DRAPER: That's fine. If we take adverse comment then  
 23 first, my Lord.  
 24 MR JUSTICE FRASER: On incurred costs?  
 25 MR DRAPER: That's right.

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1 MR JUSTICE FRASER: Yes. He says it's the issues statement  
 2 of case figure of 269 and the incurred costs on  
 3 ADR/settlement of £500,000.  
 4 MR DRAPER: Yes, that's right, my Lord. If I could first  
 5 address your Lordship on the general approach to be  
 6 adopted to any request that the court exercise its  
 7 discretion to make a comment. Could I ask you to turn,  
 8 please, to the case at tab 4 of the authorities bundle,  
 9 which is Richard v BBC. We'll call it the "Cliff  
 10 Richard" case. In this case, my Lord, Chief Master  
 11 Marsh addressed obviously the request to make a comment  
 12 before him on its facts, but also the general approach  
 13 that the court should adopt to this jurisdiction. If  
 14 your Lordship looks at paragraph 2, he says there:  
 15 "The court's power to make a comment about a party's  
 16 incurred costs is contained in 3.15 and the power is  
 17 repeated in similar form in the practice direction  
 18 at 3(e). There is no doubt that it is a discretionary  
 19 power and the discretion is a very broad one. Neither  
 20 the rule nor the practice direction gives any guidance  
 21 about the circumstances in which a comment may be or  
 22 should be made."  
 23 In the paragraphs that follow, my Lord, Chief Master  
 24 Marsh proceeds, in my respectful submission, with a very  
 25 impressive piece of reasoning to essentially give

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1 the guidance that is lacking in the practice direction.  
 2 He says in paragraph 3:  
 3 "A comment about incurred costs is to be taken into  
 4 account in any subsequent assessment. Although  
 5 a comment must be taken into account, that falls some  
 6 way short of it being binding on the costs judge. On  
 7 a detailed assessment the costs judge will have far more  
 8 information about the costs than the judge at the costs  
 9 management conference. It seems to me that a costs  
 10 judge is entitled, having taken a comment into account,  
 11 to disagree with it or to put it to one side if, on  
 12 the detailed assessment, a fuller picture emerges."  
 13 Chief Master Marsh then deals in paragraph 4 with  
 14 a slightly different point about not carrying out an  
 15 assessment at a cost management hearing.  
 16 He then comments in paragraph 5, second sentence,  
 17 that:  
 18 "The exercise at a costs management hearing is  
 19 necessarily a summary one that has to be undertaken  
 20 briskly."  
 21 He says in paragraph 6:  
 22 "This leads me to conclude that a degree of caution  
 23 is appropriate when the court considers whether to make  
 24 a comment about incurred costs. It is asked to do so in  
 25 the context of the overall costs management exercise and

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1 the restraints that are clearly stated in practice  
 2 direction 3(e), paragraph 7.3. The exercise of  
 3 producing budgets and their review is necessarily an  
 4 exercise based on limited information. Even in relation  
 5 to incurred costs, the amount of information that is to  
 6 be included in the budget is very limited indeed."  
 7 Paragraph 7, he explains the facts of the case  
 8 before him.  
 9 At paragraph 8 he records the comment that he was  
 10 invited to make.  
 11 MR JUSTICE FRASER: Paragraph what? 8?  
 12 MR DRAPER: Yes. He records there the comment that  
 13 Mr Eardley asked him to make. If I pick it up, my Lord,  
 14 at paragraph 10, bearing in mind the nature of  
 15 the comment there was to the effect that the costs were  
 16 excessive and disproportionate, what Chief Master Marsh  
 17 says about that is:  
 18 "To my mind there is little or no value in the court  
 19 recording a general comment about incurred costs along  
 20 the lines that the incurred costs are substantial or  
 21 they are too high. If the court wishes to record  
 22 a comment that the incurred costs are excessive or they  
 23 are unreasonable and disproportionate, it will wish to  
 24 be sure that the comment is made on a sound footing  
 25 rather than impression because commenting is quite

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1 unlike the exercise of approving a figure per phase for  
 2 future costs. The court will also wish to consider the  
 3 utility of making a comment unless it is specific and  
 4 well founded."  
 5 Paragraph 11 then, my Lord, third sentence:  
 6 "Making a comment does bear the risk, however, that  
 7 on a detailed assessment disproportionate weight might  
 8 be given to it, although the comment is based on limited  
 9 information."  
 10 Paragraph 12, he expands on the point:  
 11 "The costs judge on a detailed assessment will have  
 12 the benefit of a full review of all the work that has  
 13 been carried out. That is a safer basis."  
 14 He then says two sentences on:  
 15 "I am also concerned that a comment could unfairly  
 16 skew a detailed assessment."  
 17 Then in the final sentence of that paragraph he  
 18 says:  
 19 "That consideration, set against there being no real  
 20 benefit to the BBC in making such a comment other than  
 21 a short-term tactical advantage, leads me to conclude in  
 22 the exercise of my discretion that I should reject the  
 23 BBC's request."  
 24 My Lord, those are the -- I respectfully ask  
 25 the court to endorse those remarks as the correct

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1 approach.  
 2 MR JUSTICE FRASER: Right.  
 3 Before you go on to the figure for estimated costs,  
 4 I've got a question on this specific point --  
 5 MR DRAPER: Yes.  
 6 MR JUSTICE FRASER: -- but I have been asked if  
 7 the shorthand writers can have a short break and now is  
 8 probably a good time given we started at 11.  
 9 MR DRAPER: Yes, my Lord.  
 10 MR JUSTICE FRASER: So I'll rise now just until 20 past so  
 11 they can have a shorthand writers' break, I'll come back  
 12 in and I'll ask you my question and then you can come to  
 13 your second point.  
 14 MR DRAPER: Yes, my Lord. I was going to deal first with  
 15 the specific reasons why the comment here is  
 16 inappropriate and then come to estimated costs after  
 17 that, if I may.  
 18 MR JUSTICE FRASER: Right.  
 19 (12.13 pm)  
 20 (A short break)  
 21 (12.21 pm)  
 22 MR JUSTICE FRASER: Right, Mr Draper.  
 23 MR DRAPER: Back then, my Lord, on incurred costs.  
 24 Unsurprisingly a lot of the points that I make in  
 25 relation to incurred costs will apply also to estimated

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1 costs because they're points of fairly broad  
 2 application, points about Herbert Smith's involvement  
 3 and those kind of general points.  
 4 But focusing on the jurisdiction to comment on  
 5 incurred costs, what we take from the Cliff Richard case  
 6 is it is a broad discretion but it is one where there is  
 7 very good reason for the court to be cautious, bearing  
 8 in mind the difference between the material before  
 9 the court now and the material that will be before  
 10 the costs judge --  
 11 MR JUSTICE FRASER: Yes.  
 12 MR DRAPER: -- and also, in that regard, taking into account  
 13 the kind of comment it is that's sought.  
 14 I draw a distinction, if I may, between two types of  
 15 comment at a fairly high level of generality. One is  
 16 the kind of comment considered by Chief Master Marsh,  
 17 which is just, "These costs are unreasonable,  
 18 disproportionate or look high". In my respectful  
 19 submission that's quite a difficult case in which to  
 20 seek a comment because essentially you're asking the  
 21 court now on a costs management basis to do on a very  
 22 summary basis precisely what the costs judge will be  
 23 seeking to do on the basis of much more detailed  
 24 information and there is a risk of skewing that full  
 25 assessment by a remark to which -- it will be hard for

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1 the costs judge to know effectively what to do with it.  
 2 MR JUSTICE FRASER: Well, it depends what the remark is,  
 3 I suppose.  
 4 MR DRAPER: It does, but if I draw a distinction between  
 5 that, where it's just I would like the court to say the  
 6 costs look high, where Chief Master Marsh says, "Well,  
 7 that's quite dangerous because you're effectively doing  
 8 the costs judge's job just on very limited information",  
 9 and a different kind of case, where there's some point  
 10 of overarching principle which the judge at the costs  
 11 management hearing can identify.  
 12 My Lord, these proceedings provide an example. You  
 13 will recall, my Lord, that you commented in relation to  
 14 expert costs incurred by Post Office that were not  
 15 the costs of their expert for the Horizon issues trial.  
 16 You were invited to comment on those. Then you said  
 17 effectively, "Well, bearing in mind that they have  
 18 experts for the one expert trial, it's not clear to me  
 19 that these costs could be recoverable". My Lord, that  
 20 is a point of principle. What that's not doing is  
 21 effectively doing the costs judge's job on a summary  
 22 basis in my submission.  
 23 So I then turn to the specific complaints. My  
 24 learned friend's point about settlement costs, both  
 25 incurred and estimated, is a kind of "Stand back, it all

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1 looks very high" kind of point. But in my submission,  
 2 my Lord, if the court does stand back, it's a fairly  
 3 strange attack for the claimants to mount.  
 4 I say that for two sort of headline reasons:  
 5 the first is that if you take the litigation as a whole,  
 6 so all stages, the claimants are in fact spending  
 7 slightly more than Post Office, so this isn't a kind of  
 8 David and Goliath case, where David says, "Look what  
 9 Goliath's doing, he's vastly outspending me, isn't this  
 10 disproportionate?" This just isn't this kind of case.  
 11 Even if your Lordship looks at this stage,  
 12 the further issues trial stage, it is true to say the  
 13 Post Office costs are higher, but they are not massively  
 14 higher. The claimants' costs are very slightly under  
 15 80%. So it's a substantial difference, but it's not, my  
 16 Lord, chalk and cheese.  
 17 So the "Stand back" point, "they just look very  
 18 high", is a difficult one for the claimants to make. So  
 19 the specific points that they come to -- if I can deal  
 20 with ADR and settlement. There is also the pleadings,  
 21 but taking ADR and settlement first. There's no shying  
 22 away, my Lord, from the fact that Post Office has spent  
 23 and proposes to spend a great deal of money seeking to  
 24 settle the litigation at this stage. It's seeking to  
 25 devote resource proportionate to what it's spending on

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1 fighting the case trying to settle it, trying to resolve  
 2 it by compromise. If one puts the costs of settlement  
 3 in the context of the total costs of the proceedings,  
 4 whilst very substantial, they are not out of line.  
 5 MR JUSTICE FRASER: Yes.  
 6 MR DRAPER: The question then is: well, what does  
 7 Post Office have to do to put itself in a position to  
 8 maximise the chance of settlement? What it has to do is  
 9 be able to take an informed view on the merits of  
 10 the claims, and that doesn't mean merely looking at what  
 11 duties were owed, the common issues trial or the general  
 12 reliability of Horizon, the Horizon issues trial; it  
 13 involves applying those duties and applying general  
 14 conclusions about Horizon to specific cases. That is  
 15 inherently, for Post Office at least, a document- and  
 16 fact-intensive process, to identify what has happened in  
 17 relation to a particular claimant.  
 18 MR JUSTICE FRASER: Well, the difficulty with that,  
 19 Mr Draper, is in a sense any litigant can do whatever  
 20 any litigant wants to do in terms of preparation for, in  
 21 this case, as I understand it, a mediation.  
 22 MR DRAPER: Yes, my Lord.  
 23 MR JUSTICE FRASER: The particular characteristic that jumps  
 24 out -- and this covers both one of Mr Warwick's points  
 25 on incurred costs and adverse comment and also estimated

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1 costs going forward -- is the involvement of a wholly  
 2 separate firm of solicitors .  
 3 MR DRAPER: Yes, my Lord.  
 4 MR JUSTICE FRASER: Now, that is a very unusual situation .  
 5 I see you shrug your shoulders and I know that there's  
 6 been some correspondence on this, where your instructing  
 7 solicitors have said that it's entirely usual. In order  
 8 to save time, I can assure you that my point of view is  
 9 it's quite unusual. That's not to say it's not  
 10 justified , but it is unusual and it does lead, on  
 11 the face of it , potentially to the risk of duplication,  
 12 which would naturally increase the costs .

13 MR DRAPER: I entirely take the point, emphasising the  
 14 word "potentially ". The answer is it depends. You have  
 15 to look at what the allegation of duplication is and  
 16 whether, on the basis of the material before the court,  
 17 the court can be satisfied it's a good one.

18 I say that because my learned friend's starting  
 19 point is to almost make this a point of principle ,  
 20 "They've got two sets of solicitors so they can't have  
 21 the costs of both". But that point put in that way,  
 22 my Lord, and not just as an introduction to a point  
 23 about duplication is obviously bad.

24 MR JUSTICE FRASER: Well, I'm not sure it isn't a point of  
 25 principle for this reason: in litigation , any party

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1 represented by a firm of solicitors has that firm of  
 2 solicitors on the record. They are the entity upon whom  
 3 documents are served.

4 MR DRAPER: Yes, my Lord.

5 MR JUSTICE FRASER: They have certain roles and duties and  
 6 rights and responsibilities and it is unusual to have  
 7 two firms. That's not to say, as I've said already,  
 8 that it's not justified in certain situations .

9 MR DRAPER: Yes.

10 MR JUSTICE FRASER: As I understand, the current situation  
 11 is Herbert Smith are dealing with the attempts to appeal  
 12 in respect of common issues --

13 MR DRAPER: That's right. They are the solicitors on record  
 14 in relation to that one.

15 MR JUSTICE FRASER: -- and they are the solicitors on record  
 16 for the Court of Appeal --

17 MR DRAPER: That's right, my Lord.

18 MR JUSTICE FRASER: -- and they are also dealing with  
 19 settlement/ADR/mediation; is that right?

20 MR DRAPER: That's right, my Lord.

21 MR JUSTICE FRASER: On the face of it , that does lead to --  
 22 and I wouldn't say it's an allegation of duplication so  
 23 far as the court's concerned. It is more a concern of  
 24 duplication .

25 MR DRAPER: Yes.

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1 MR JUSTICE FRASER: And at the moment, picking up on your  
 2 explanation or your point that's it's on the basis of  
 3 the material before the court, there's is very little  
 4 material before the court in respect of either of those  
 5 points, isn't there?

6 MR DRAPER: There is very little , but I can obviously deal  
 7 with the points that are made about duplication and  
 8 address them.

9 MR JUSTICE FRASER: Of course.

10 MR DRAPER: If you start from the question of to what extent  
 11 does it raise concern just in principle , in my  
 12 submission it depends on what work it is that's being  
 13 done. If , for example, you were using two firms of  
 14 solicitors for the pleading stage, there's a high risk  
 15 of duplication there, in my submission, just standing  
 16 back and looking at it from first principles, because  
 17 you would have two sets of solicitors doing what is  
 18 likely to be very similar or indeed the same work.

19 But what we have here is a distinct part of  
 20 the case, ie attempts at settlement, that doesn't have  
 21 substantial overlap with preparation for the further  
 22 issues trial . So Womble Bond Dickinson are doing  
 23 the preparation for the further issues trial and all  
 24 other aspects and Herbert Smith Freehills are to a very  
 25 large degree off doing different work and that different

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1 work is in relation to settlement.

2 Now, save in the kind of case where, as I said,  
 3 there's something inherent about the type of work that  
 4 raises a real concern about duplication, in my  
 5 respectful submission the fact that there are two firms  
 6 of solicitors really doesn't raise much of a red flag at  
 7 all for this reason: there is a given amount of work to  
 8 do. That work can be done by 20 solicitors in one firm  
 9 or it can be done by ten solicitors in one firm and ten  
 10 solicitors in another. All else being equal, the costs  
 11 will be identical .

12 So what my learned friend has to say is that there  
 13 is something about the facts of this case to indicate  
 14 that what you've got is duplication, that what  
 15 Herbert Smith Freehills is doing must be duplicative of  
 16 work that Womble Bond Dickinson has done or is presently  
 17 doing. So that's the persuasive burden that my learned  
 18 friend bears.

19 So if I come on then to look at the points he makes.  
 20 It's at paragraph 37 of his skeleton. I don't need you  
 21 to turn it up, but he says that by reference to the  
 22 points they make there, the court can be satisfied on  
 23 this summary basis that there's a big enough red flag  
 24 about duplication that your Lordship ought to say  
 25 something.

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1 MR JUSTICE FRASER: Well, it's not just say something  
 2 because these points go to estimated costs as well,  
 3 don't they?  
 4 MR DRAPER: They do.  
 5 MR JUSTICE FRASER: So that's more than saying something.  
 6 MR DRAPER: They do. I would say the obtaining a comment on  
 7 incurred costs, all else being equal, is harder for my  
 8 learned friend than invoking the ordinary jurisdiction  
 9 to assess estimated costs down.  
 10 MR JUSTICE FRASER: Right.  
 11 MR DRAPER: So his first point is the SOIs. Now, of course,  
 12 those help. It would be strange if the solicitors,  
 13 looking at settlement, weren't to start from the SOIs  
 14 and seek to investigate -- to use them as a jumping off  
 15 point for investigation. But, my Lord, that's not  
 16 really a point about duplication because if  
 17 Womble Bond Dickinson were doing the settlement work,  
 18 they'd do the same thing. They'd read the SOIs and use  
 19 them as a jumping off point.  
 20 So what my learned friend's really saying is, "Well,  
 21 you've had the SOIs for a very long time". So on the  
 22 hypothesis where Womble Bond Dickinson were doing this  
 23 work, they wouldn't need to read them again; they'd just  
 24 remember when they read them back in 2017. I'm  
 25 caricaturing his case extremely unfairly, but in order

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1 to make the point. The fact that the SOIs exist just  
 2 tells you that there's a very helpful first step in  
 3 looking at each of the cases. One starts with the SOI  
 4 and then seeks to investigate from Post Office's  
 5 perspective whether the facts alleged in that document  
 6 are true.  
 7 MR JUSTICE FRASER: But, Mr Draper, it's a slightly  
 8 vernacular phrase, but you will understand what I mean.  
 9 Bringing yourself up to speed on a case is a different  
 10 process to having already been involved in the case and  
 11 coming on to the next phase.  
 12 For example, if there's a partner at  
 13 Herbert Smith Freehills who's in charge of this  
 14 litigation --  
 15 MR DRAPER: Yes.  
 16 MR JUSTICE FRASER: -- when they were first engaged they  
 17 would have known nothing about it at all except possibly  
 18 for having noticed an entry in the paper or something  
 19 like that.  
 20 MR DRAPER: Yes.  
 21 MR JUSTICE FRASER: That's very different from the  
 22 background knowledge that the partners at  
 23 Womble Bond Dickinson will have had who have been  
 24 involved in it for three/four years upwards.  
 25 MR DRAPER: Yes.

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1 MR JUSTICE FRASER: So I think it's more difficult to say  
 2 that there can't be any duplication at all when you take  
 3 that into account, isn't it?  
 4 MR DRAPER: Yes, well, there will obviously be some costs  
 5 that if claimed under this head will be duplicative. If  
 6 we could call those sort of reading-in costs, so getting  
 7 a feel for litigation -- but that's not claimed --  
 8 MR JUSTICE FRASER: Well, finding what it's about.  
 9 MR DRAPER: Yes, my Lord. So say the very-high-fee-earning  
 10 partner says, "Well, I can't really get involved in  
 11 doing any work until I've got a feel for this thing",  
 12 and he says he'd like a week to read in, a perfectly  
 13 sensible proposal. But that's not what we're talking  
 14 about here with ADR settlement. That's not claimed  
 15 under this phase of the litigation.  
 16 MR JUSTICE FRASER: What's that claimed under then? So are  
 17 there HSF fees that have been incurred which are not  
 18 included in this budget on the incurred costs?  
 19 MR DRAPER: Yes, my Lord. It was in fact indicated in  
 20 the update letter to which the court was referred that  
 21 HSF actually has a broader role.  
 22 MR JUSTICE FRASER: Is that the letter I started with of  
 23 the 16th?  
 24 MR DRAPER: It was, my Lord, yes.  
 25 MR JUSTICE FRASER: Well, I thought you told me that that

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1 was about something completely different.  
 2 MR DRAPER: It is partly about -- if we could turn it up  
 3 again, my Lord.  
 4 MR JUSTICE FRASER: I've got it here, which is why I asked  
 5 about it.  
 6 MR DRAPER: Trying to find ... oh, I have it.  
 7 For the benefit of the screen, it's <Z4/10/1>. If  
 8 your Lordship turns again to the second page of that  
 9 document, so paragraph 5 is dealing --  
 10 MR JUSTICE FRASER: Yes.  
 11 MR DRAPER: -- if you look at the head of it, with costs not  
 12 included in this update because they're either not  
 13 recoverable in the High Court group action or  
 14 Post Office isn't seeking to recover them from --  
 15 MR JUSTICE FRASER: I understood. But then when you look at  
 16 5.4, it says:  
 17 "The engagement by Post Office of HSF to provide  
 18 legal advice in respect of the group action ..."  
 19 That must be the group action generally.  
 20 MR DRAPER: That's right.  
 21 MR JUSTICE FRASER: "... with the exception of those costs  
 22 incurred by HSF in relation to advising on settlement  
 23 matters ..."  
 24 You can't advise on settlement matters unless  
 25 you know what it's about.

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1 MR DRAPER: Exactly, my Lord, but the bit of the sentence  
 2 before the comma is HSF generally are not included as  
 3 costs that Post Office is seeking to recover.  
 4 So Post Office entirely accepts --  
 5 MR JUSTICE FRASER: Okay.  
 6 MR DRAPER: -- that it has instructed a second set of  
 7 solicitors , it bears the cost and does not seek to visit  
 8 on the claimants the -- I'm not going to say  
 9 the word "luxury" because that's offensive , but the  
 10 element of that that would be duplicative . So reading  
 11 that new firm in falls within the first part of 5.4.  
 12 The fact that Post Office has instructed HSF brings  
 13 with it some initial and general costs that aren't  
 14 sought in any of these budgets.  
 15 So one starts from the point that Herbert Smith  
 16 Freehills are read in and they're at that point able to  
 17 start doing useful work and it's only when they start  
 18 doing -- I'm sure I've just offended them -- but it's  
 19 only when they start doing work of direct utility to  
 20 settlement -- it's only when they start doing settlement  
 21 work that the clock starts .  
 22 MR JUSTICE FRASER: Right.  
 23 MR DRAPER: If I could return, my Lord, to my learned  
 24 friend's paragraph 37, if you have that. So what we're  
 25 looking for here is some factual basis to establish that

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1 there must be duplication; not there might be, my Lord,  
 2 because if there merely might be duplication, well that  
 3 is absolutely classically a point for the costs judge to  
 4 interrogate based on all the materials.  
 5 My learned friend's points (b) and (c) are  
 6 essentially the same point. What is said is that lead  
 7 claimants were selected back in November 2017 so  
 8 Post Office was able at that stage to identify some  
 9 common features across the claims. Well, that's very  
 10 difficult from looking to assess the merits of 555  
 11 claims for the purposes of settlement. That's obviously  
 12 a high-level exercise, <Z1/1/9>.  
 13 The suggestion that Post Office must have had  
 14 detailed knowledge, which is the point made in that  
 15 paragraph, in January 2019 because, if my Lord looks at  
 16 (d) and over the page, please, to page <Z1/1/10>:  
 17 "... detailed information about claims in the group,  
 18 including precise numbers of claims subject to  
 19 limitation , waiver and settlement arguments."  
 20 My Lord, working out whether or not a claim is  
 21 prima facie subject to a limitation complaint doesn't  
 22 involve anything like the kind of work we're dealing  
 23 with here for settlement. You look at when  
 24 the sub-postmaster left the Post Office and assume on  
 25 a very rough and ready basis that if that's more than

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1 six years ago, there are going to be arguments.  
 2 Similarly estoppel. Well, have they litigated these  
 3 issues? It doesn't take very long to work that out.  
 4 Have they entered into a settlement agreement? Well,  
 5 just check our settlement agreement records.  
 6 So these are just points of an entirely different  
 7 nature from putting oneself in a position to advance  
 8 a position on the merits of the claims for the purposes  
 9 of settlement.  
 10 MR JUSTICE FRASER: Well, I'm not sure I necessarily follow  
 11 that. That's quite a fine distinction . But so far as  
 12 Herbert Smith Freehills are concerned, I mean, there's  
 13 still the pleading -- let's put the issues statement of  
 14 case point off to one side.  
 15 MR DRAPER: Of course.  
 16 MR JUSTICE FRASER: I take the view, which I'm going to  
 17 express to you now and then ask you a question about it ,  
 18 that there's not really very much information in front  
 19 of the court as of today that would enable me to  
 20 conclude that the obvious risk of duplication has been  
 21 avoided. So what I'm going to do is I'm going to ask  
 22 you if you would like to put in -- I'm not ordering you  
 23 to do it -- some further material by way of a short  
 24 witness statement or something of that nature to explain  
 25 after careful reflection exactly how the risk of

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1 duplication has been avoided -- because it's quite  
 2 interesting that I started with that passage in  
 3 the letter having thought I understood it, then it  
 4 appeared to be in relation to something else, then you  
 5 and I have effectively been involved in an English  
 6 grammatical exercise of trying to construe exactly how  
 7 one sentence works and how the other one doesn't and it  
 8 does relate to quite a lot of money.  
 9 MR DRAPER: Yes.  
 10 MR JUSTICE FRASER: Together it's over £1 million , and  
 11 I don't want to put you in a difficult position where  
 12 you're either having to take instructions on the hoof,  
 13 added to which there's always lurking in the background  
 14 the risk possibly of straying into privileged areas.  
 15 MR DRAPER: Of course.  
 16 MR JUSTICE FRASER: So is that an opportunity you would like  
 17 to --  
 18 MR DRAPER: If I could perhaps clarify what it is the  
 19 opportunity is , my Lord? We have --  
 20 MR JUSTICE FRASER: All we've got at the moment -- tell me  
 21 if I've missed everything. We have got the various  
 22 letters , we have the budgets and we have your assertions  
 23 in oral submissions that actually there's no duplication  
 24 is what it comes down to.  
 25 MR DRAPER: There's a fair amount of detail about what work

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1 Herbert Smith Freehills is actually doing in terms of,  
 2 you know, the ordinary breakdown one would anticipate.  
 3 What we don't have, my Lord, is a detailed explanation  
 4 as to sort of conceptually, if I may, why that's not  
 5 duplicative, so, for example, why that's not reading in.  
 6 MR JUSTICE FRASER: Well, that's great. Tell me what --  
 7 the date on which they were instructed, am I allowed to  
 8 know that? I don't think that's anywhere because that  
 9 was actually the first thing I tried to find out.  
 10 MR DRAPER: No.  
 11 MR JUSTICE FRASER: How it's defined that the work they're  
 12 doing is separate, because, for example, settlement  
 13 discussions or advising on settlement, on one view you  
 14 can only do that if you've actually read the pleadings,  
 15 for example, or possibly in this case you'd have to read  
 16 the common issues judgment, you'd have to read  
 17 the submissions to the Court of Appeal. You couldn't  
 18 sensibly advise on settlement without doing that.  
 19 Now, that could be said to be work that would not be  
 20 necessary for somebody like, for example, Mr Parsons,  
 21 who has probably read the common issues judgment several  
 22 times and wouldn't necessarily need to read it again.  
 23 MR DRAPER: Yes.  
 24 MR JUSTICE FRASER: That, together with the fact that there  
 25 are potentially so many different personnel at

1 Herbert Smith, does, I think, give rise to a prima facie  
 2 concern about duplication.  
 3 MR DRAPER: Yes, my Lord. May I take instructions briefly  
 4 on that?  
 5 MR JUSTICE FRASER: Yes of course. (Pause)  
 6 MR DRAPER: Well, my Lord, if I could split it into two  
 7 things. One is comment on incurred costs --  
 8 MR JUSTICE FRASER: Yes.  
 9 MR DRAPER: -- but obviously that may well be where more of  
 10 the fear about duplication arises, it being earlier in  
 11 time.  
 12 MR JUSTICE FRASER: Yes.  
 13 MR DRAPER: So dealing with that and having regard to  
 14 the concerns that your Lordship has raised, we wouldn't  
 15 oppose a comment to the effect that the costs judge  
 16 should have particular regard to the risk of  
 17 duplication, bearing in mind the points that your  
 18 Lordship has elaborated, and that would avoid us trying,  
 19 through this process, to essentially sort of pre-empt  
 20 the more detailed process that would be done on a costs  
 21 assessment anyway.  
 22 MR JUSTICE FRASER: Well, as far as I'm concerned, the real  
 23 issue is in relation to estimated costs because  
 24 the costs judge is not bound by the comment anyway.  
 25 MR DRAPER: No.

1 MR JUSTICE FRASER: So do you want to take an opportunity or  
 2 be allowed time to reflect on whether to take the  
 3 opportunity of putting in some limited further material  
 4 on the point I've identified or not?  
 5 MR DRAPER: In relation to estimated costs?  
 6 MR JUSTICE FRASER: Yes.  
 7 MR DRAPER: Well, in relation to estimated costs, my Lord,  
 8 sort of taking a step back, the incurred costs are, in  
 9 my respectful submission, where most of this concern  
 10 about duplication would bite because it's about  
 11 Herbert Smith Freehills being put in a position where  
 12 they are as well informed to do the exercise as  
 13 Womble Bond Dickinson would be. From that point  
 14 onwards, different name, different firm, same work.  
 15 In relation to estimated costs, my Lord, those  
 16 concerns don't really arise so what I would be content  
 17 to do is address your Lordship on how --  
 18 MR JUSTICE FRASER: So the short answer is you don't want  
 19 any time to put in any more material?  
 20 MR DRAPER: That's right, my Lord.  
 21 MR JUSTICE FRASER: Right. Okay. That's fine.  
 22 MR DRAPER: And that's on the basis I've explained about  
 23 a comment one could sensibly be crafted to --  
 24 MR JUSTICE FRASER: Well, I'm not negotiating a comment with  
 25 you.

1 MR DRAPER: Of course, my Lord. I'm just indicating the way  
 2 in which we think --  
 3 MR JUSTICE FRASER: No, no, I've given you the opportunity  
 4 and you don't see it as necessary and that's understood  
 5 so we'll continue.  
 6 Right. So is there anything else you would like to  
 7 say in relation to Herbert Smith Freehills before we go  
 8 on to the comment sought in respect of incurred costs on  
 9 issues and statement of case?  
 10 MR DRAPER: Yes, my Lord. So putting to one side the  
 11 duplication concern, which we've been through in detail,  
 12 what one really has here in relation to estimated costs  
 13 is the contention that, because our costs are  
 14 700,000-odd and that is much more than my learned  
 15 friend's 300,000-odd, that calls for the court to  
 16 intervene and approve at a lower figure. I've dealt  
 17 with that in a fair bit of detail in my skeleton  
 18 argument so I don't propose to take your Lordship  
 19 through it as slowly as I otherwise would.  
 20 The point is, if one is looking at 300,000 as  
 21 contrasted to 700,000 for ADR and settlement, that delta  
 22 is explained by the very different burdens placed on  
 23 the parties as a result of their different positions.  
 24 So the claimants -- and this is no criticism -- each  
 25 give their account of what they say happened in the

1 course of their engagement by Post Office and that may  
 2 require a review of such documents as they have. We've  
 3 been told in general that they don't have many; whereas  
 4 on Post Office's side, as your Lordship knows and has  
 5 first-hand experience of from these proceedings,  
 6 Post Office has a huge and rather disparate documentary  
 7 record that it has to interrogate in order give proper  
 8 disclosure and in order to put together the position  
 9 based on the contemporaneous documents and the  
 10 recollections of the various individuals involved in  
 11 dealing with the particular sub-postmaster.

12 That is just inherently a bigger and more expensive  
 13 process than making the allegation in the first place in  
 14 this kind of case, my Lord. So when Post Office sets  
 15 out to see whether a particular claimants' case looks  
 16 like a good one for the purposes of settlement, there's  
 17 quite a lot of work to be done in order to form a view.

18 My Lord, those are my submissions on estimated costs  
 19 for settlement.

20 The other point -- the only point that we skipped  
 21 over, my Lord -- is pleadings, where what is sought is  
 22 a comment on incurred costs, the estimated costs being  
 23 agreed.

24 MR JUSTICE FRASER: Yes, which I think is 270,000; is that  
 25 right?

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1 MR DRAPER: I believe it is, my Lord, yes. So the headline  
 2 point -- and I'm sure my learned friend will forgive me  
 3 for making it -- is that Post Office's total costs for  
 4 the pleading stage are lower than the claimants'.

5 MR JUSTICE FRASER: Yes.

6 MR DRAPER: Post Office's total incurred plus estimated,  
 7 which are now agreed, is 719,000. The claimants'  
 8 equivalent figure is 807,000. So not a promising  
 9 starting point for asking your Lordship to say that  
 10 the costs are obviously objectionable.

11 In my respectful submission there's another problem  
 12 of principle here with what the claimants are trying to  
 13 do in relation to the pleadings, which is a form of  
 14 double discounting. So what happens, my Lord, is the  
 15 parties agree between them a reasonable figure for  
 16 Post Office's future costs, estimated costs of  
 17 the pleadings. Obviously part of that process involves  
 18 looking at how much has already been spent. You can't  
 19 ask "What is reasonable to spend from now on?" without  
 20 asking "How much have you spent so far?"

21 Now, if your Lordship turns to my learned friend's  
 22 skeleton argument at paragraph 23, <Z1/1/6>. It's just  
 23 a convenient place to take that point from the  
 24 authorities.

25 MR JUSTICE FRASER: Paragraph 23?

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1 MR DRAPER: That's right, my Lord.

2 MR JUSTICE FRASER: Yes.

3 MR DRAPER: So that's a reference to Redfern, the Redfern  
 4 case, and that is a fair summary of what one can take  
 5 from that case. So (a):

6 "incurred costs are to be taken into account when  
 7 considering whether a proposed costs budget is  
 8 reasonable and proportionate ..."

9 (b):

10 "the point of departure is to fix a figure that  
 11 would be reasonable and proportionate ..."

12 And (c):

13 "where incurred costs have been excessive, it is  
 14 appropriate to limit estimated costs at figures below  
 15 what might otherwise have been approved ..."

16 Now that's right on the authorities, my Lord, and  
 17 it's obviously common sense. If one has already spent  
 18 a lot, there's less still to be spent. But that, my  
 19 Lord, is the background to the agreement that was  
 20 reached in relation to the future estimated costs. And  
 21 the reduction that has been agreed, a very substantial  
 22 reduction in those estimated costs, as I've said, takes  
 23 Post Office's total below the claimants' total.

24 MR JUSTICE FRASER: Total for what?

25 MR DRAPER: Pleading stage.

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1 MR JUSTICE FRASER: Right.

2 MR DRAPER: So having already spent a lot, the Post Office  
 3 isn't going to be permitted for budgeting purposes to  
 4 spend as much more as it otherwise would have done.

5 But to then say, having used that process to agree  
 6 an estimated cost where the incurred cost was obviously  
 7 a relevant part of that consideration -- to then say,  
 8 "Well, we'll bank the estimated costs and we'll now go  
 9 after the incurred costs", in my respectful submission,  
 10 my Lord, that's not an appropriate way to deal with  
 11 coming to an overall view on the total. It's  
 12 effectively to turn the whole process around. Do it  
 13 the right way first by saying, "Let's set the future  
 14 figure having regard to the past figure", and then, once  
 15 you have the future figure banked, you say, "Well, now  
 16 I'm going to start attacking the past figure". In my  
 17 respectful submission, if that were the right approach,  
 18 it would encourage all sorts of unattractive tactical  
 19 playing around from parties.

20 But looking at the merit of the point, my Lord,  
 21 the only real point my learned friend makes about  
 22 the fact that Post Office has incurred a substantial  
 23 amount on pleadings is: well, they haven't had  
 24 the particulars yet. Now, if this were a case where  
 25 they were proceedings coming out of the blue and we

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1 don't really know what the case is against us until we  
2 see it, it would obviously be a very forceful point, but  
3 where the court has set down the issues for trial,  
4 the parties have agreed those issues, they have been  
5 properly formulated, it is entirely unsurprising that  
6 the defendant can do a lot of the work preparing for its  
7 pleading before it receives the particulars.

8 In fact, my Lord, on the timetable set down,  
9 Post Office obviously has to do that because otherwise  
10 it would have only four weeks in order to get up the  
11 entirety of its case in response to the particulars of  
12 claim. In my respectful submission that's entirely  
13 unrealistic and it is to be expected that Post Office  
14 will spend about half of its money before it gets to  
15 particulars.

16 Those are my submissions in relation to that topic.

17 MR JUSTICE FRASER: All right. Thank you very much.

18 Mr Warwick --

19 MR WARWICK: Yes, my Lord.

20 MR JUSTICE FRASER: -- it seems to me we are going to have  
21 to come back.

22 MR WARWICK: Yes, my Lord.

23 MR JUSTICE FRASER: On the basis it's only 7 minutes to 1,

24 I think we'll stop now and give you a clean start at 2.

25 MR WARWICK: Yes, my Lord.

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1 MR JUSTICE FRASER: I will just give you my provisional  
2 views prior to hearing what you've got to say so you can  
3 focus your submissions. I am going to make a comment in  
4 relation to the incurred costs in respect of ADR and  
5 settlement. I would like to hear from you on the point  
6 about incurred costs relating to issues and statement of  
7 case. I'm obviously going to spend some time over  
8 the short adjournment crafting what that comment is, but  
9 you can address me en passant if you want, and then  
10 I will need to hear from you, but I don't think in  
11 enormous detail, in respect of what you suggest is the  
12 correct approach to adopt on the Herbert Smith figure  
13 for estimated costs.

14 MR WARWICK: I'm grateful, my Lord.

15 MR JUSTICE FRASER: All right? So we'll come back at

16 2 o'clock. Thank you very much.

17 (12.55 pm)

18 (The short adjournment)

19 (2.00 pm)

20 MR JUSTICE FRASER: Yes.

21 MR WARWICK: My Lord, shortly prior to the on lunch break,  
22 I'm very grateful indeed for the indications given by  
23 your Lordship, you've asked me to deal with the ADR  
24 settlement comment and also to deal with the approach to  
25 the estimated costs for ADR.

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1 MR JUSTICE FRASER: No, not the ADR comment.

2 MR WARWICK: I beg your pardon. I'm so sorry, my Lord.  
3 Issues of statement of case, absolutely, and the ADR  
4 estimated costs.

5 With your leave, my Lord, might I take the second  
6 one first, since it's the more substantial point?

7 MR JUSTICE FRASER: Yes.

8 MR WARWICK: In response to a point made by my learned  
9 friend, I wonder if I might just quickly correct  
10 something while passing through here, and that was  
11 a suggestion made that the claimants are spending more  
12 on this litigation than the defendants. They're not,  
13 my Lord. I wonder if we could have on screen <Z4/10/1>.

14 You'll see, my Lord, that a total was given in  
15 response to your Lordship's direction about costs  
16 reporting in the 23 July order. The total given there  
17 is 16,322,000. But if one turns over the page, please,  
18 <Z4/10/2>, you'll see the first note to that is that  
19 the figures are exclusive of VAT. Adding VAT it comes  
20 to 19.5 million or thereabouts.

21 MR JUSTICE FRASER: Yes.

22 MR WARWICK: I think your Lordship has the claimants' total  
23 spend from the letter sent in previously, but that  
24 appears on <Z4/9/2>, and your Lordship will have  
25 the comparable figure of 16,828, which includes VAT.

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1 And that explores in the way that you have asked,  
2 my Lord, the various respects in which that figure has  
3 been reached.

4 It's also noteworthy, my Lord, that going back to  
5 <Z4/10/2>, where we were a second ago, the second page  
6 of the Womble Bond Dickinson letter reporting to  
7 your Lordship on costs, that of course that excludes  
8 quite a large category of different types of cost,  
9 namely those itemised at point 5 on that letter.  
10 Naturally it excludes the common issues appeal, so do  
11 the claimants' costs, but it also excludes engagement of  
12 Fujitsu and your Lordship will recall from the last  
13 CMC about a year ago that that's quite a substantial  
14 amount of money in respect of which your Lordship made  
15 a comment.

16 MR JUSTICE FRASER: I can't remember what the amount was.

17 MR WARWICK: Something approaching £800,000, my Lord.

18 MR JUSTICE FRASER: Oh, was that the shadow --

19 MR DRAPER: No, that's a different thing altogether.

20 MR JUSTICE FRASER: That's shadow experts.

21 MR DRAPER: It's what they call "shadow experts". That's  
22 a ridiculous misnomer, but --

23 MR JUSTICE FRASER: I know that, but just in terms of using  
24 the same word for the same thing, that's what  
25 the 800,000 was. That was called "shadow experts" --

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1 MR DRAPER: Yes, experts --  
 2 MR JUSTICE FRASER: -- and that's not Fujitsu?  
 3 MR DRAPER: It's not Fujitsu. It's experts other than those  
 4 instructed for the Horizon issues trial.  
 5 MR JUSTICE FRASER: Is that the same as internally appointed  
 6 experts in your number 3 on that page? <Z4/10/2>,  
 7 point 3.  
 8 MR DRAPER: That is very largely the same thing, yes.  
 9 MR JUSTICE FRASER: As ...?  
 10 MR DRAPER: As shadow experts.  
 11 MR JUSTICE FRASER: Right. Okay.  
 12 MR WARWICK: Yes, my Lord. Obviously use of  
 13 the term "shadow experts", we're not trying to imply  
 14 it's shadowy experts, but just an additional set of  
 15 experts; but also the wider engagement of  
 16 Herbert Smith Freehills, which has been the subject of  
 17 submission just before lunch, my Lord, as well.  
 18 MR JUSTICE FRASER: So what you're saying is to compare like  
 19 with like you look at the 19.5 with that and compare it  
 20 to the 16.8 or I suppose you could look at the 16.8 to  
 21 8 discounted down to exclude that and compare it with  
 22 the --  
 23 MR WARWICK: Indeed, my Lord, yes. Yes, absolutely.  
 24 MR JUSTICE FRASER: Okay. Well, I've got that point.  
 25 MR WARWICK: My Lord, then Herbert Smith's fees

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1 prospectively; that's to say estimated costs for  
 2 Herbert Smith's fees.  
 3 The difference and difficulty corresponding that  
 4 follows from this difference, my Lord, with this set of  
 5 fees is that this represents an inflection point in  
 6 the costs history, if you like, my Lord, of this case.  
 7 The existing legal team for Post Office your Lordship is  
 8 familiar with. It includes a team spread across some  
 9 four fee-earner grades at Womble Bond Dickinson, for  
 10 the Horizon trial leading counsel and four junior  
 11 counsel by my count and for other aspects of this case  
 12 a further two leading counsel for different applications  
 13 or stages.  
 14 MR JUSTICE FRASER: I thought it was a further three.  
 15 MR WARWICK: Excluding the Court of Appeal.  
 16 MR JUSTICE FRASER: Oh, excluding common issues Court of  
 17 Appeal.  
 18 MR WARWICK: Again, trying to achieve like for like on this  
 19 basis.  
 20 What the new team comprises of can be seen at  
 21 <Z2/5.2/6>, my Lord. This is the document I took  
 22 your Lordship to early on in this hearing. It's  
 23 the page of Post Office's recast budget that actually  
 24 itemises this particular claim, if you like.  
 25 MR JUSTICE FRASER: Do you want Z2/5.1 or 5.2?

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1 MR WARWICK: 5.2, please.  
 2 THE EPE OPERATOR: (inaudible).  
 3 MR WARWICK: I'm sorry, I was informed last night that this  
 4 document had been inserted at 5.2. Can I just  
 5 double-check?  
 6 MR JUSTICE FRASER: Yes. What document is it?  
 7 MR WARWICK: It is page 5 of 6 of the recast budget filed by  
 8 Mr Parsons on --  
 9 MR JUSTICE FRASER: Yesterday.  
 10 MR WARWICK: Yesterday.  
 11 MR JUSTICE FRASER: Are you sure that's not the document on  
 12 the screen?  
 13 MR WARWICK: That is the document on the screen. It's  
 14 <Z2/5.1/6> and that's my mistake, my Lord.  
 15 MR JUSTICE FRASER: Don't worry. I've got mine in hard  
 16 copy, which makes life a bit easier. But I've already  
 17 got that document. We've already looked at it once to  
 18 see the list of Herbert Smith people.  
 19 MR WARWICK: We have indeed, my Lord, but one can see  
 20 quickly from a glance at this that there are  
 21 20 different fee-earner grades.  
 22 MR JUSTICE FRASER: Across both?  
 23 MR WARWICK: Across both firms, 17 of which -- that's from  
 24 below row 4 to just above row 5 -- are Herbert Smith  
 25 partners, senior associates, associates, trainees,

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1 managers, solicitors in Belfast, legal analysts in  
 2 Belfast and e-discovery personnel.  
 3 We'll spare your Lordship adjectives, but a very  
 4 significant increase in the size of its team dedicated  
 5 to this case. One has to bear in mind, my Lord, that  
 6 previous budgets have not been put on this basis. The  
 7 existing team has been considered acceptable for both  
 8 the common issues trial, the Horizon issues trial and  
 9 even at an early stage when the GLO application was made  
 10 and for other CMCs and the like. So there is  
 11 a significant change here.  
 12 What we know about this work -- your Lordship has  
 13 already been referred in my skeleton argument to  
 14 the letter that gave some explanation; that's to say  
 15 the letter of 16 October from Womble Bond Dickinson.  
 16 But I wonder if we could just glance for a moment at my  
 17 learned friend's skeleton because the detail of this is  
 18 quite informative. If we could turn to <Z1/2/3>, this  
 19 is the review that Herbert Smith is undertaking.  
 20 By my learned friend's skeleton argument,  
 21 Post Office makes clear at 10(2) that they want to  
 22 investigate, with respect to each of the 555 claimants,  
 23 training materials, accounts, correspondence; at 10(3)  
 24 they want to investigate whether each has been subject  
 25 to a bug or error that caused a lasting shortfall, so

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1 they want to look at Horizon data date by date  
2 presumably.

3 Overleaf at paragraph 12, <Z1/2/4>, it's made clear  
4 that this "... covers decades, different contracts and  
5 many different types of alleged breach of duty". So  
6 breach is to be looked at as well.

7 At paragraph 13 it's made clear that this is going  
8 to come to a cost of £1,328 per claimant, a matter I'll  
9 return to in a moment, my Lord, as to the character of  
10 this type of cost.

11 MR JUSTICE FRASER: But all of these -- whether they're done  
12 in this way or not, you're at risk, aren't you, of  
13 re-inventing the wheel on the basis that I have already  
14 explained my view on duplication to Mr Draper --

15 MR WARWICK: Yes.

16 MR JUSTICE FRASER: -- and he, on instruction, has declined  
17 the opportunity to provide any further information.

18 MR WARWICK: That's fully understood and I don't wish to  
19 re-invent that wheel or indeed any wheel, but there are  
20 three submissions that come from this, if I may,  
21 my Lord. The first is -- and it's obvious -- this is  
22 group litigation. The normal approach -- there's an  
23 element of crystal-ball gazing and I appreciate in this  
24 setting it's not going to be appropriate to look at  
25 the specifics of what might happen in a mediation -- but

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1 just viewed at a level of abstraction, the approach to  
2 be taken by parties is top down.

3 MR JUSTICE FRASER: Well --

4 MR WARWICK: It's to look --

5 MR JUSTICE FRASER: Mr Warwick, that doesn't really help  
6 because there are a number of different ways that cases,  
7 group litigation and individual cases, can be settled.

8 MR WARWICK: Yes.

9 MR JUSTICE FRASER: Whether it's decided to do it top down,  
10 bottom up, pick off each one of the 550 one by one or do  
11 it globally is not really the issue for today.

12 MR WARWICK: My Lord, I fully agree it's not, and in fact  
13 Post Office's approach is up to Post Office, and  
14 I should stress so it's heard in all corners of this  
15 room --

16 MR JUSTICE FRASER: No, no, that's absolutely right.

17 MR WARWICK: -- that there's no criticism of its particular  
18 approach. The question is whether it's recoverable  
19 costs and whether, by seeking a CMO in respect of it,  
20 the Post Office is asking for your endorsement of those  
21 as recoverable costs.

22 MR JUSTICE FRASER: I understand and I have got the point  
23 predominantly based on what Mr Draper explained to  
24 the court about the way in which they are approaching  
25 it.

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1 MR WARWICK: Yes. Well, that's fully understood.

2 MR JUSTICE FRASER: Whether that necessarily helps him or  
3 not is something that everyone's going to find out in  
4 about 20 minutes probably.

5 MR WARWICK: Well, that may well be the case, but suffice it  
6 to say, my Lord, that any settlement discussion should  
7 and following the scheme of part 19 at least take into  
8 account and take the benefits of the fact that this is  
9 group litigation in the way that issues track down as  
10 decided and ruled on by your Lordship in the first --  
11 sorry, the third judgment that you gave and as will be  
12 seen from the taxonomy of losses in pleadings to be  
13 served later this week and on the Horizon issues when  
14 those are determined.

15 So to look at this the other way, as if it is 555  
16 unitary claims -- the Post Office may wish to do that  
17 but for these to be recoverable costs in this group  
18 litigation, that's a surprising suggestion.

19 MR JUSTICE FRASER: Understood.

20 MR WARWICK: And on the definition of "common costs", as  
21 that's found in rule 46(6), these are highly unlikely to  
22 be regarded necessarily as common costs because they're  
23 costs of investigating cases.

24 The second submission, my Lord, is that on one view  
25 at least, one respectable view, much of this following

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1 your Lordship's judgment number 3 is overhead because  
2 your Lordship has found what the true construction of,  
3 for example, section 12, clause 12 of the SPMC means and  
4 therefore does, which is impose a contractual burden of  
5 proof on Post Office, and your Lordship has found in  
6 that judgment a number of implied terms. Implied term  
7 H, for example, requires contractually Post Office to  
8 make "reasonable requirements" and so forth with respect  
9 to "reasonable losses and shortfalls". The common issue  
10 on implied terms also led to a ruling by you, my Lord,  
11 on implied term L, which is reasonably and fairly to  
12 investigate shortfalls.

13 The risk here, my Lord, is whether the court can be  
14 satisfied at all that this is not simply something that  
15 this business has to undertake anyway as business cost  
16 following the judgment that you have given on the common  
17 issues.

18 MR JUSTICE FRASER: Understood, yes.

19 MR WARWICK: The third submission, my Lord -- and  
20 I appreciate that your Lordship is astute to this -- is  
21 on duplication and so I won't re-invent the wheel on  
22 that particular point. I've given a summary of  
23 the points taken.

24 The essence of this is that the only decision that  
25 can be reached on this is on what is before

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1 your Lordship presently for this hearing.  
 2 MR JUSTICE FRASER: Understood.  
 3 MR WARWICK: I've given a summary at paragraphs 35 to 38 of  
 4 my skeleton for reference. The only thing that that  
 5 misses is what the situation was even pre-action,  
 6 my Lord. If your Lordship will indulge me, I could  
 7 refer your Lordship to the letter of response, which  
 8 makes plain that exhaustive investigation was carried  
 9 out.  
 10 MR JUSTICE FRASER: I don't think you need to. I'm very  
 11 familiar with that particular --  
 12 MR WARWICK: I'm grateful.  
 13 MR JUSTICE FRASER: -- with all the pre-action --  
 14 MR WARWICK: So it's not said that I've overstated  
 15 the point, that was with a more limited group of  
 16 claimants that had issued a claim form at that time --  
 17 as I understand it, some 90, my Lord.  
 18 MR JUSTICE FRASER: Yes.  
 19 MR WARWICK: So, my Lord, whether viewed through that lens,  
 20 that's to say the nature and character of these  
 21 particular costs, or viewed on an impressionistic basis  
 22 as to what's reasonable, the claim made to estimated  
 23 costs just can't be sustained as satisfactory for  
 24 the purposes of this exercise, my Lord, and those are my  
 25 submission on this point.

1 MR JUSTICE FRASER: And you're inviting me to disallow it?  
 2 MR WARWICK: I'm inviting you to disallow it, my Lord --  
 3 that's our primary case -- but if not doing so, reduce  
 4 them so as to render the phase as a whole  
 5 a proportionate and reasonable sum, my Lord.  
 6 The second issue then, numbered the first in your  
 7 helpful summary shortly before the break, my Lord, is  
 8 the comment with respect to issues -- issues and  
 9 statements of case.  
 10 I just want to make sure that this isn't put too  
 11 high. The point taken is that £269,000 or thereabouts,  
 12 just under 270, has been incurred before pleadings have  
 13 been served. Now, the claimants fully accept that quite  
 14 a lot of analysis might be done before pleadings have  
 15 been served that might go in to later inform how one  
 16 pleads. But one has to remember what this exercise is.  
 17 This is a trail of assumed facts which can't be assumed  
 18 yet because we haven't pleaded what our assumed facts  
 19 are and there is a mechanism within the order for  
 20 agreeing them after that.  
 21 Assumed breaches, even causation, my Lord, is  
 22 assumed on the wording of schedule 1 to your Lordship's  
 23 order of 23 July. What has to happen from this point,  
 24 my Lord, is the claimant has to set out, particularise,  
 25 what the heads of loss are that they say are in

1 principle recoverable and what the measures are that are  
 2 applicable to those heads of loss, my Lord, on assumed  
 3 facts and breaches.  
 4 So how it is that £270,000 has been incurred -- and  
 5 I point out while passing through, my Lord, that most of  
 6 that is time cost, not counsel's fees, and counsel might  
 7 reasonably be expected to draft these pleadings -- is  
 8 a very burning question. It's for that reason that  
 9 I ask the court to look at those incurred costs askance  
 10 and record, if it is with me on this point, an adverse  
 11 comment with respect to them.  
 12 My learned friend takes a point about us having  
 13 agreed on one basis and then turning round and seeking  
 14 something extra for a sort of two bites at the cherry.  
 15 That, I'm afraid, is not correct. Our budget discussion  
 16 report, which appears in the bundle, made clear that we  
 17 always reserved the right to seek this type of order and  
 18 that's at <Z2/3/1> and the page that's relevant to that  
 19 is the second one, <Z2/3/2>. It's the second row,  
 20 "Issue/statements of case". The offer made there was an  
 21 earlier offer, but it has been agreed at 450, my Lord.  
 22 MR JUSTICE FRASER: Sorry, what's been agreed at 450?  
 23 The --  
 24 MR WARWICK: Absolutely, my Lord. So the first sentence  
 25 reads:

1 "Case not yet fully pleaded as per budgeted date  
 2 (03/09/19) and Cs invite the Court to make a note on the  
 3 court file about the £238,489.30 incurred costs which  
 4 are not understood - see also Preliminary Point 1 (P1)."  
 5 And above the preliminary point P1 is about  
 6 proportionality, my Lord.  
 7 MR JUSTICE FRASER: Yes.  
 8 MR WARWICK: Finally on this, my Lord, some submissions have  
 9 been made about the right approach. I don't take any  
 10 issue with the approach taken by the chief master in  
 11 the BBC case. What I would take issue with is putting  
 12 that too high. It's specific to the facts of that case.  
 13 He did make some comments of wide of application, but I,  
 14 with the greatest respect to my learned friend, think he  
 15 puts the authority too high. It's not binding on this  
 16 court and, if taken to its logical conclusion, it would  
 17 almost never be relevant or appropriate to make any sort  
 18 of comment at this stage and that's just not right.  
 19 MR JUSTICE FRASER: What is the situation as at today so far  
 20 as pleading is concerned in further issues?  
 21 MR WARWICK: The deadline for pleadings is 4 pm on Friday,  
 22 my Lord.  
 23 MR JUSTICE FRASER: What pleadings are those then?  
 24 MR WARWICK: For the further issues trial, individual  
 25 particulars of claim in four lead cases.

1 MR JUSTICE FRASER: And they haven't been served yet?  
 2 MR WARWICK: No, the deadline for that is Friday, my Lord.  
 3 MR JUSTICE FRASER: So the incurred costs of 31,000 for  
 4 disbursements plus 238 time costs, which comes to 269,  
 5 I think --  
 6 MR WARWICK: Yes.  
 7 MR JUSTICE FRASER: -- is in relation to an exercise  
 8 which -- one step of which, which is normally seen as  
 9 the early step, service of the individual particulars of  
 10 claim hasn't yet happened?  
 11 MR WARWICK: That's right, my Lord, yes.  
 12 MR JUSTICE FRASER: Is that right? Okay.  
 13 MR WARWICK: Unless I can assist you further on those  
 14 points, my Lord --  
 15 MR JUSTICE FRASER: Well, you can in one thing. What's  
 16 the date of this Friday?  
 17 MR WARWICK: It's 25 October, my Lord.  
 18 MR JUSTICE FRASER: Thanks very much.  
 19 Mr Draper, is there anything that you would like  
 20 to --  
 21 MR DRAPER: Just a very short point, if I may, my Lord, on  
 22 the like-for-like comparison of total costs, whether  
 23 one's got apples and apples or apples and pears. In my  
 24 submission, my Lord, one can only compare apples with  
 25 apples if you're looking at costs recoverable or sought

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1 to be recovered in these proceedings from the other  
 2 side. It's not a meaningful comparison to say, "What  
 3 are they spending in total?", even where those things  
 4 aren't sought to be recovered. I say that, my Lord,  
 5 because if one were to adopt my learned friend's  
 6 approach of saying, "Let's put everything in", then  
 7 we'd have their funding costs and that would mean they  
 8 are spending vastly more than Post Office if one were to  
 9 include those.  
 10 VAT, of course, we won't recover from the claimants.  
 11 So the fact that we're incurring it is neither here nor  
 12 there for these purposes. That's the only point  
 13 I wanted to make.  
 14 MR JUSTICE FRASER: In terms of recoverability of the VAT,  
 15 though, would they recover that from you?  
 16 MR DRAPER: Yes, in principle they would as individuals.  
 17 MR JUSTICE FRASER: And then you would deal with that as an  
 18 output --  
 19 MR DRAPER: Yes.  
 20 MR JUSTICE FRASER: -- if you're VAT registered?  
 21 MR DRAPER: Yes.  
 22 MR JUSTICE FRASER: So far then as a real cost --  
 23 MR DRAPER: Forgive me, my Lord, I entirely misled you  
 24 there. In relation to -- we can't recover the VAT we  
 25 are spending on our legal services from the claimants

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1 because it's an input for Post Office's operation so we  
 2 already get it back by our own VAT calculations.  
 3 MR JUSTICE FRASER: Yes, so your costs bill to you is  
 4 VAT-neutral?  
 5 MR DRAPER: Yes, which means when we -- if we were to obtain  
 6 costs from the claimants applying the indemnity  
 7 principle, we don't recover the VAT because we already  
 8 compensated for it through our own processes.  
 9 MR JUSTICE FRASER: Whereas they do pay VAT on their costs?  
 10 MR DRAPER: Yes, so if we were to come to indemnify them,  
 11 VAT would be part of what we would pay to them and that  
 12 would be a cost to Post Office --  
 13 MR JUSTICE FRASER: I understand.  
 14 MR DRAPER: -- so that wouldn't be cancelled out.  
 15 MR JUSTICE FRASER: But one point where, in my judgment, an  
 16 absolutely clear and accurate comparison can be made,  
 17 completely putting VAT to one side, is the amount of  
 18 the total both for incurred as at today -- I'm sorry,  
 19 incurred as at the date in September that you agreed and  
 20 estimated ADR/settlement/mediation costs.  
 21 MR DRAPER: My Lord, yes.  
 22 MR JUSTICE FRASER: There is a pure obvious comparison.  
 23 MR DRAPER: That's like with like, yes.  
 24 MR JUSTICE FRASER: I think, based on the CMO I made just  
 25 before the short adjournment, the claimants' figure for

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1 that is 415,000 and to get to yours one needs to look in  
 2 column H, I think, and it's 1.239353.  
 3 MR DRAPER: That's like for like.  
 4 MR JUSTICE FRASER: Is that right? That is a like-for-like  
 5 comparison.  
 6 MR DRAPER: That is, my Lord.  
 7 MR JUSTICE FRASER: And of that 1.239, you've already spent  
 8 502,000, I think --  
 9 MR DRAPER: Exactly.  
 10 MR JUSTICE FRASER: -- in respect of which I can only record  
 11 a comment.  
 12 MR DRAPER: Yes.  
 13 MR JUSTICE FRASER: I can also take it into account -- if  
 14 I'm not with Mr Warwick on not making a CMO at all in  
 15 with respect of that line item and I'm persuaded by you,  
 16 which I am, that I should make -- I should include that  
 17 line item in the CMO that I'm about to make, I can take  
 18 the 502 into account when deciding what figure for  
 19 estimated costs is reasonable and proportionate; is that  
 20 right?  
 21 MR DRAPER: Entirely right. That's what Redfern says and we  
 22 are agreed that that's the right approach.  
 23 My Lord, just to complete that picture, 300,000 of  
 24 the estimated costs are agreed.  
 25 MR JUSTICE FRASER: 300,000 are agreed?

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1 MR DRAPER: Well, we have had -- I think it's fair to say  
 2 it's an offer. Yes, the BDR offer was 300,000. Sorry,  
 3 I mis-spoke. That's just to complete the picture of  
 4 what all the numbers at play are. That's what was  
 5 offered.

6 MR JUSTICE FRASER: But the 300 is in respect of -- well,  
 7 Mr Warwick is inviting me today not to make an order in  
 8 respect of that line item at all, so far as I understand  
 9 it; is that right?

10 MR DRAPER: I think that's his primary position.

11 MR JUSTICE FRASER: Do you want to just show me where  
 12 the 300 is so I can see what I can compare it with?

13 MR DRAPER: Yes, my Lord. Forgive me. I'll just turn it  
 14 up.

15 My Lord, if we could get up <Z2/3/1> --

16 MR JUSTICE FRASER: Which I've got open.

17 MR DRAPER: -- this is the budget discussion report. You  
 18 can see the claimed figure there under "ADR settlement"  
 19 and next to it an offered figure of 331,215. That's  
 20 just to complete the picture as to what the claimant was  
 21 contending was an acceptable figure.

22 MR WARWICK: Yes, my Lord, but it's also relevant -- if  
 23 the screen could go on to page 3 of that document  
 24 <Z2/3/3> -- that the comment -- and I'm looking at  
 25 the top row, my Lord -- also made clear that the point

1 made above, to which I've taken your Lordship a moment  
 2 ago with respect to another phase, from "... the  
 3 incurred costs [48,000 and so on] ...", and in  
 4 particular disbursements is repeated; meaning that that  
 5 offer was made, but of course the claimants reserve  
 6 the right to seek relief such as the adverse comment  
 7 that's sought by me today, my Lord, in respect of  
 8 the incurred costs.

9 MR JUSTICE FRASER: Right, but in respect of the 756, you --

10 MR WARWICK: Offered 331, my Lord, yes, indeed.

11 MR JUSTICE FRASER: Mr Draper, is there anything you want to  
 12 add?

13 MR DRAPER: No, my Lord.

Order

14 MR JUSTICE FRASER: I'm just going to explain what I'm going  
 15 to do. I'm about to make a costs management order in  
 16 respect of defendant's costs. There are three items  
 17 that are not agreed. The items that are agreed should  
 18 be taken as being the subject of this costs management  
 19 order and the three separate items I am going to deal  
 20 with as follows:  
 21

22 I am invited by the claimants to record a comment in  
 23 respect of incurred costs for the further issues trial  
 24 concerning issues/statements of case. Disbursements are  
 25 included in column D-- I'm going off the summary --

1 which is at <Z2/6/1> of £31,240 and the time costs are  
 2 included as £238,489.30. This is in the circumstances  
 3 where, so far as the further issues are concerned,  
 4 the individual points of claim in the four lead cases  
 5 that are going to be the subject of the further issues  
 6 trial have not yet been served and will not be served  
 7 until 25 October 2019.

8 I have taken account of the approach identified both  
 9 in a case called Redfern v Corby City Council [2014]  
 10 EWHC 4526 (QB) and also in particular an authority that  
 11 Mr Draper has drawn to my attention, which is a decision  
 12 of Chief Master Marsh in the Cliff Richard litigation  
 13 against the BBC and Chief Constable of South Yorkshire  
 14 Police. The neutral citation for that judgment is  
 15 [2017] EWHC 1666 (CH).

16 Chief Master Marsh said, having analysed  
 17 the situation in that particular case, looking at his  
 18 paragraph 10, which I'm going to quote -- he says:

19 "To my mind there is little or no value in the court  
 20 recording a general comment about incurred costs along  
 21 the lines that the incurred costs are substantial or  
 22 they are too high. If the court wishes to record  
 23 a comment that the incurred costs are 'excessive' or  
 24 they are 'unreasonable and disproportionate', it will  
 25 wish to be sure that the comment is made on a sound

1 footing rather than an impression because commenting is  
 2 quite unlike the exercise of approving a figure per  
 3 phase for future costs. The court will also wish to  
 4 consider the utility of making a comment unless it is  
 5 specific and well founded."

6 I do wish to record a comment in respect of incurred  
 7 costs or issues in statement of case. That comment is  
 8 as follows: that the total of time costs appears to be  
 9 excessive based on the fact that the individual  
 10 particulars of claim in the four lead cases have not yet  
 11 been served. That's the end of the comment. It is  
 12 a matter for the costs judge what and how they deal with  
 13 that comment and that is not to say on a detailed  
 14 assessment that the defendant would not necessarily be  
 15 able to justify expenditure of that figure.

16 Turning to the next item, which also is in relation  
 17 to incurred costs, there is an overlap between this and  
 18 the third item, which is estimated costs, because they  
 19 both substantially concern the same issue. The line  
 20 item is "ADR/settlement discussions". In column E in  
 21 the summary, the expended or incurred costs against this  
 22 line item as at the date in September that the parties  
 23 agreed would be the cut-off, which I believe is  
 24 3 September 2019, is £502,527.27 and going forward  
 25 estimated costs as disbursements of £22,375 and time

1 costs of £714,451.  
 2 Both of these different types of costs, both  
 3 incurred and estimated, arise in the following  
 4 circumstances: the Post Office are currently represented  
 5 in this litigation, the group litigation, by  
 6 Womble Bond Dickinson, who are the solicitors on  
 7 the record, except for the attempt to obtain permission  
 8 to appeal from the Court of Appeal in respect of  
 9 the common issues trial judgment where the solicitors on  
 10 the record are Herbert Smith Freehills.  
 11 Herbert Smith Freehills are also the solicitors that  
 12 the Post Office are using to advise them and act for  
 13 them in what I'm told is a forthcoming mediation.  
 14 There is a dearth of material before court to  
 15 explain how or what steps have been taken to avoid  
 16 duplication of costs on the part of Herbert Smith  
 17 Freehills and Womble Bond Dickinson. The Post Office  
 18 have sought to persuade me that it is entirely usual in  
 19 large litigation or complex litigation to have two firms  
 20 of solicitors acting for the same party. I have  
 21 difficulty in accepting that submission. In my judgment  
 22 it's very unusual.  
 23 I did offer the Post Office this morning the  
 24 opportunity to put in some further material, whether by  
 25 way of a short witness statement or something else, to

1 explain what steps, if any, had been taken in respect of  
 2 avoiding duplication and that was not an invitation  
 3 which they wished to take up. I am therefore in  
 4 the position that I have to make the best of the  
 5 material that's before the court and, as I've said,  
 6 there isn't really a great deal. There are some  
 7 letters, some entries in budgets and Mr Draper's  
 8 extremely able submissions, but in terms of factual  
 9 content, the available material is somewhat light.  
 10 I do consider in all the circumstances that  
 11 a comment is justified in respect of the incurred costs  
 12 of over £500,000 for ADR and settlement discussions.  
 13 That comment is, however, as follows: the incurred costs  
 14 for this line item appear on their face to be extremely  
 15 high. However, there are the following particular  
 16 aspects of this case that may have affected this level  
 17 of costs. They are: 1, the nature of the particular  
 18 group litigation, including the number of claimants; 2,  
 19 the length of time that the disputes have gone on  
 20 between the individual claimants and the Post Office;  
 21 and 3, the involvement of Herbert Smith Freehills as  
 22 a second firm of solicitors and potential duplication.  
 23 It is a matter for detailed assessment whether there is  
 24 any duplication and that is a matter which the costs  
 25 judge may wish to consider and review. That's the end

1 of the comment.  
 2 Turning now to the costs management order which I'm  
 3 prepared to make in terms of estimated costs going  
 4 forward. I'm very much aware of the need to compare  
 5 like with like. The sum which the Post Office seek to  
 6 have included in the costs management order going  
 7 forward against ADR settlement discussions is the  
 8 addition of 714,451 together with 22,375. I make  
 9 the total of those two sums to be approximately  
 10 £736,800.  
 11 The figure in the approved claimants' cost budget  
 12 which I have made a costs management order in respect of  
 13 this morning is £415,000. However, the claimants have  
 14 incurred hardly any costs at all and in order to compare  
 15 like with like it's necessary to take account of the  
 16 Post Office's incurred costs together with the  
 17 £736,000-odd of costs going forwards, which gives a very  
 18 sizeable total of £1.239 million for the  
 19 ADR/settlement/mediation phase.  
 20 There are two important points. The first is it's  
 21 obviously not necessarily immediately attractive to  
 22 disapprove costs that are going to be incurred in  
 23 potentially settling the whole litigation. However, on  
 24 the other hand and reading from the dicta of  
 25 Mr Justice Leggatt, as he then was, in

1 Kazakhstan Kagazy plc v Zhunus [2015] 158 Con Law  
 2 Reports 253 at paragraph 13, which in that case was in  
 3 the context of an application for an interim payment on  
 4 account of costs, he said the following:  
 5 "What is reasonable and proportionate in that  
 6 context must be judged objectively. The touchstone of  
 7 reasonable and proportionate costs is not the amount of  
 8 costs which it was in a party's best interests to incur,  
 9 but the lowest amount which it could reasonably have  
 10 been expected to spend in order to have its case  
 11 conducted and presented proficiently having regard to  
 12 all the relevant circumstances."  
 13 It plainly is in the Post Office's best interests to  
 14 incur whatever the necessary expenditure of costs is  
 15 going forward through what would undoubtedly be an  
 16 important phase of the litigation. However, that of  
 17 itself does not mean that the total is reasonable and  
 18 proportionate, and I am entitled -- and do -- take into  
 19 account the incurred cost of 502,000 when assessing what  
 20 the correct figure is going forward.  
 21 In assessing -- when I say "the correct figure"  
 22 I mean the reasonable and proportionate figure, I take  
 23 account of the fact that the overall expenditure by  
 24 the claimants on this phase is going to be approximately  
 25 £415,000. The amount which I am prepared to include in

1 today's costs management order, which takes account of  
 2 the 502, is whatever the balance is required to take  
 3 the total up to £900,000, which in my judgment, based on  
 4 my somewhat inapt mental arithmetic, is going to be  
 5 approximately £397,500-odd. I will leave counsel to  
 6 agree the mathematics between them. That means  
 7 the total sum, both for incurred and estimated costs,  
 8 for the AVR settlement discussion/mediation phase is  
 9 going to be £900,000.

10 Does that deal with everything?

11 MR WARWICK: My Lord, I believe it does.

12 MR JUSTICE FRASER: Mr Draper, does that deal with  
 13 everything?

14 MR DRAPER: It does, my Lord.

15 MR JUSTICE FRASER: You'll have to draw up the order,  
 16 obviously. If you could extract the comments from Opus  
 17 and put them in the order, or in a schedule to  
 18 the order.

19 MR WARWICK: Yes, by all means, my Lord.

20 MR JUSTICE FRASER: And then obviously, if there's any  
 21 tweaking required, I'll do that myself when you submit  
 22 the order.

23 Other than something I have to address both of you  
 24 about, is there anything else, so far as the costs  
 25 management order is concerned?

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1 MR DRAPER: No, my Lord.

2 MR JUSTICE FRASER: Okay. Just give me a second to organise  
 3 my papers. (Pause)

4 The only thing I wanted to say to the parties is it  
 5 would be somewhat artificial, given that you're all  
 6 here, to ignore the fact that you're waiting for  
 7 a judgment, so I thought I would give you an update.  
 8 The judgment, at one point I had hoped to be able to  
 9 send that by the very end of October in draft. That is  
 10 not now going to be possible, but it won't be much past  
 11 the early days of November.

12 The judgment is in two parts. There is a judgment  
 13 and what I have called a "technical appendix" which  
 14 deals with some of the more technical computer aspects,  
 15 which an average reader won't necessarily need or want  
 16 to read. Both of those documents are going to be of  
 17 equivalent standing, but you might get them separately,  
 18 so you can make a start on typographical error review,  
 19 etc, on one of the documents before you get the other  
 20 one. But I won't send them out in draft until they're  
 21 both finished. So that's just to give you an idea.

22 MR DRAPER: My Lord, if I may, there's a point arising out  
 23 of that that may be a problem or may not be. I think  
 24 your Lordship is aware from correspondence between  
 25 the parties that the court has seen that Fujitsu have

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1 identified to Post Office some old versions of KELs that  
 2 were before the court on the Horizon issues trial.

3 MR JUSTICE FRASER: Older versions?

4 MR DRAPER: Older versions.

5 MR JUSTICE FRASER: Of the same KEL?

6 MR DRAPER: Of the same KEL.

7 MR JUSTICE FRASER: I had seen in the foothills a bit of  
 8 toing and froing about KEL disclosure, but I hadn't  
 9 looked at it in any detail.

10 MR DRAPER: That's right. Well, I'll just explain it very  
 11 briefly. What we have discovered are not new KELs in  
 12 the sense that they are documents never before the court  
 13 in any form, they are just back versions of existing  
 14 KELs.

15 MR JUSTICE FRASER: So they're different in content to the  
 16 ones that were in the trial bundle, are they?

17 MR DRAPER: Some of them, my Lord.

18 MR JUSTICE FRASER: Right.

19 MR DRAPER: My understanding is some of them differ in tiny  
 20 and immaterial respects, like a typo has been corrected.

21 MR JUSTICE FRASER: Understood.

22 MR DRAPER: Others -- if your Lordship recalls how some KELs  
 23 at least are structured, there will be an initial block  
 24 of text relating to the first instance of the problem  
 25 and then it will be updated with further entries. So my

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1 understanding is that some of these earlier versions  
 2 will just be less complete versions of the final one.

3 But we're obviously conscious that, without  
 4 reviewing them, neither side can form a view as to  
 5 whether they are material in any way to any of  
 6 the issues your Lordship is addressing. So they are  
 7 almost in a position, I think --

8 MR JUSTICE FRASER: So have they been disclosed?

9 MR DRAPER: No, they are being gathered to make sure we've  
 10 got them all essentially.

11 MR JUSTICE FRASER: How many are there?

12 MR DRAPER: We think low hundreds, but, as I've said,  
 13 because they are earlier versions, you may, for example,  
 14 find that there are ten very similar versions of an  
 15 existing KEL.

16 MR JUSTICE FRASER: Why do they need to be gathered though?  
 17 Why can't the ones you've got just be sent over  
 18 straightaway?

19 MR DRAPER: The process is essentially one of extraction.  
 20 I don't know if your Lordship recalls that Fujitsu  
 21 actually originally said, "We're not sure we can even  
 22 get them off", and then they devised a piece of coding  
 23 to do it. We want to make sure that that extraction has  
 24 been done properly so that we then don't disclose two  
 25 tranches where there's overlap, for example, or

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1 potential overlap.  
 2 MR JUSTICE FRASER: All right. So there's more disclosure  
 3 coming and the claimants know about this?  
 4 MR DRAPER: The claimants know about it, but they don't yet  
 5 have it.  
 6 MR JUSTICE FRASER: And what is the date projected on your  
 7 side for when they will have it?  
 8 MR DRAPER: By the end of the week, my Lord.  
 9 I only raise it because your Lordship said that we  
 10 may be talking as little as slightly over a week and  
 11 the claimants may find them entirely innocuous when they  
 12 review them or they may say, "There are three on which  
 13 we want to make submissions". Well, I'm guessing,  
 14 my Lord, but it is not impossible that one or other side  
 15 or both sides might say, "Could we deal with this before  
 16 your Lordship has done a draft judgment?"  
 17 MR JUSTICE FRASER: Understood. Thank you very much,  
 18 Mr Draper.  
 19 Mr Warwick, have you got anything to say?  
 20 MR WARWICK: Just very briefly, if I may, my Lord. I was  
 21 not myself --  
 22 MR JUSTICE FRASER: No, no, I know that.  
 23 MR WARWICK: I didn't appear in the Horizon trial and  
 24 I hadn't anticipated this topic arising. In fact  
 25 the claimants would very likely have quite a lot to say

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1 about these particular --  
 2 MR JUSTICE FRASER: Well, there has already been some  
 3 correspondence.  
 4 MR WARWICK: There has been some correspondence and the  
 5 present status is that a full explanation has been  
 6 requested, I believe, in open correspondence and that is  
 7 awaited, but obviously I think it awaits some extraction  
 8 activity that it sounds as though is presently taking  
 9 place, which is reassuring to know. I'm afraid I simply  
 10 can't --  
 11 MR JUSTICE FRASER: No, well, I will tell you what I'm going  
 12 to do.  
 13 MR WARWICK: -- accept the explanation given.  
 14 MR JUSTICE FRASER: I have read the letters. I was taking  
 15 the view that -- I didn't realise that disclosure hadn't  
 16 been given. I assumed from the letters that disclosure  
 17 had been given and the fact I hadn't heard anything  
 18 meant it was not an issue. I will keep ploughing my own  
 19 furrow. This judgment is not going to be distributed in  
 20 draft by the end of this week. If the Post Office can  
 21 give disclosure of those or at least a substantial  
 22 number of those by the end of this week, so let's say  
 23 5 o'clock on whatever the date is on Friday --  
 24 the 25th -- then that gives the claimants enough leeway  
 25 to raise a point with me if a point has to be raised,

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1 and what I will do is, before I distribute the draft  
 2 judgment or 24 hours before I distribute the draft  
 3 judgment, I'll just notify the parties that I'm about to  
 4 distribute the draft judgment and if either party wants  
 5 to saying anything to me about it along the lines of,  
 6 "Please don't do that yet. We'd like to come and speak  
 7 to you about it", to raise a particularly important  
 8 point", then they can. I'm not encouraging that. I'm  
 9 just saying it's sensible to have provision.  
 10 MR DRAPER: I'm grateful, my Lord. If we may, my Lord, we'd  
 11 like to keep your Lordship informed of roughly where we  
 12 are.  
 13 MR JUSTICE FRASER: That's what has been being done on  
 14 the disclosure point generally, but obviously, because  
 15 I'm at the point where, so far as I was concerned,  
 16 the trial has ended --  
 17 MR DRAPER: Of course.  
 18 MR JUSTICE FRASER: -- I was taking what could be described  
 19 as a passing mental note of it and not really paying too  
 20 much attention.  
 21 MR DRAPER: Yes.  
 22 MR JUSTICE FRASER: All right. So, Mr Warwick, you've got  
 23 your solicitors here with you, I can see.  
 24 MR WARWICK: Yes, my Lord, yes.  
 25 MR JUSTICE FRASER: So that was the Horizon issue team --

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1 well, actually --  
 2 MR WARWICK: Mr Miletic was present.  
 3 MR JUSTICE FRASER: Mr Miletic was on it anyway --  
 4 MR WARWICK: Yes.  
 5 MR JUSTICE FRASER: -- so none of this is going to be  
 6 a secret.  
 7 MR WARWICK: No. Suffice to say, my Lord, that the  
 8 explanation given of the nature and number of those  
 9 documents is not necessarily accepted at all, but I just  
 10 don't have full instructions on that.  
 11 MR JUSTICE FRASER: No, well, that's a different matter.  
 12 MR WARWICK: Thank you.  
 13 MR JUSTICE FRASER: I'm not going to say anything else  
 14 about it, other than it's obviously a point that's  
 15 currently being addressed by both parties and it will be  
 16 kept under review. All right. Anything else?  
 17 NEW SPEAKER: No, my Lord.  
 18 MR JUSTICE FRASER: So if any of you do have children of  
 19 half-term age who have half-term holidays next week, you  
 20 won't be getting the draft judgment during half-term,  
 21 which is purely coincidental.  
 22 Thank you all very much.  
 23 (2.47 pm)  
 24 (The hearing adjourned)  
 25

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