IN THE HIGH COURT OF JUSTICE **Claim No. CP-2018-000038**
BUSINESS AND PROPERTY COURTS
COMPETITION LIST (Ch D)
BETWEEN:

PHONES 4U LIMITED (In Administration)

Claimant

- and -

(1) EE LIMITED
(2) DEUTSCHE TELEKOM AG
(3) ORANGE SA
(4) VODAFONE LIMITED
(5) VODAFONE GROUP PUBLIC LIMITED COMPANY
(6) TELEFONICA UK LIMITED
(7) TELEFÓNICA, S.A.
(8) TELEFÓNICA O2 HOLDINGS LIMITED

Defendants

SECOND DEFENDANT'S SKELETON ARGUMENT
FOR ADJOURNED CMC TO BE HEARD
ON 2-3 JULY 2020

An Agreed Reading List has been provided to the Court

I. INTRODUCTION AND OVERVIEW

1. This is the skeleton argument of D2, Deutsche Telekom AG ("**DT**") for the adjourned second CMC in this matter, to be held on 2-3 July 2020. DT continues to rely on its detailed skeleton argument lodged on 5 June 2020 [**E2/3**]. This supplemental skeleton argument provides an update to the Court on developments in the interim and the key issues that remain in dispute between the parties.

2. From DT's perspective, the following main issues arise for the 2nd CMC.

    a) ***DT's disclosure.*** Substantial progress has been made on certain aspects of DT's disclosure. In particular, the parties have compromised on the global and custodian-specific date ranges for searches, the practical effect of which is to extend DT's disclosure periods materially. However, there remains a significant difference between the parties on two related matters. The first is

DT's custodians. DT has proposed all of its Directors on EE's Board during the relevant period as custodians. These were the senior decision-makers (one is now DT's CEO). Instead of accepting these custodians as a comprehensive (and reasonable) approach to disclosure, P4U has adopted a scattergun approach to adding new custodians. Before the adjourned 2nd CMC, it proposed 5 individuals who were secretaries or administrative staff in relation to existing custodians. This suggestion has now, wisely, been withdrawn completely. But, after the 2nd CMC adjournment, P4U proposed that six brand new custodians should be searched (while maintaining the remaining two custodians previously proposed by P4U, ignoring the explanations provided by DT as to why they are not appropriate custodians). This is also an unfocused approach; for example, it includes two senior DT in-house lawyers and an unheralded suggestion that DT's former CEO should be searched. But P4U does not explain why DT's current proposal is problematic. Instead, it reflexively seeks to add more custodians, almost for its own sake. The second issue involves "early disclosure" of "Board documents" and communications between DT and other Defendants, as well as provision of "hit reports" and document hold notices sent several years ago before the case began. These disclosures are put forward by P4U mainly so that it can "audit" DT's custodian selection. This is a backwards approach in circumstances where DT has put forward a comprehensive proposal for disclosure that does not exclude a reasoned specific disclosure request by P4U, once it has received DT's disclosure. It is also a one-sided approach that is inappropriate in general, and will simply lead to pointless satellite disputes as partial disclosure of documents will, inevitably, lead to documents being read out of context.

b) ***P4U's disclosure.*** Several discrete matters remain in issue. The most important is on the question of disclosure going to the cause of P4U's entry into administration, which is a key issue in the proceedings particularly in view of P4U's private equity owners extracting an enormous dividend a year (in excess of £200 million) before its collapse by issuing new debt. P4U has resisted making sufficient disclosure on this point and has belatedly made some proposals, albeit which remain insufficiently explained or inadequate. It is essential that the relevant documents going to causation are searched and disclosed and that P4U provides sufficient information to allow its proposed searches to be verified.

c) ***Security for costs*.** DT pursued its application for security for costs up to the end of disclosure. P4U had resisted providing security for prospective phases of the litigation but has now done so. The issue in dispute is as to the amount of security. DT seeks 75%; P4U refuses to pay more than 65%. DT submits that there is a compelling basis for the amount of security sought.

d) ***Further information from P4U*.** DT has applied for an order that, following disclosure, P4U should then provide further information particularising the case that DT itself made anti-competitive commitments or disclosures to other Defendants as respects the non-renewal/termination of P4U **[D1/4]**. Since P4U's skeleton for the adjourned CMC indicated that P4U was not opposed to giving such further information following disclosure, DT sent P4U a Consent Order for this purpose. At the date of lodging of this skeleton argument, no response has been received.

II. DT'S DISCLOSURE

3. DT's submissions on its disclosure before the June CMC are set out at §§17-57 of its 5 June 2020 skeleton argument [**E2/3/8**]. In the interim, the parties have worked hard to narrow areas of disagreement and a measure of progress has been made. However, some material differences remain. For the Court's reference, the key correspondence between DT and P4U on DT's disclosure since the service of skeleton arguments on 5 June 2020, is: (i) P4U's letter of 22 June 2020 **[C/592]**; and (ii) DT's letter of 24 June 2020 **[C/603]**.

A. The Context

4. The starting point for assessing DT's disclosure is to consider its position in the litigation and the case brought against it:

a) DT is in a very different position from the retail MNO Defendants. It was not itself active in the UK market; its role rather arises due to its 50% shareholding in EE, which it has since sold. DT is a major global multi-national communications operator with operations mainly outside the UK, and its interest in EE was, relatively speaking, limited.

b) The pleaded case of direct collusion against DT remains uniquely lacking in particulars, leading to the extant RFI issues discussed in Section IV below. Not a single concrete particular of DT's alleged direct participation is provided. This

stands in stark contrast to the position of every other Defendant, for whom at least some relevant individuals, dates, and detailed particulars have been provided by P4U.

c) P4U accepted at an *inter partes* meeting convened to discuss disclosure that DT is in a different position from the other Defendants. Despite this, P4U continues to press for exaggerated disclosure requests that turn out to be speculative fishing expeditions, which would put DT to further expense (on top of the very significant costs of disclosure already estimated and budgeted for by DT).

B. DT's Comprehensive Disclosure Proposals

5. Notwithstanding the above, DT has developed a comprehensive proposal for disclosure that is for practical purposes effectively standard disclosure. DT's proposal is focused on all of its representatives on the EE Board at the relevant time (as well as hard copy document disclosure). These individuals held very senior positions within the DT group (one is the current DT CEO for example) and were the DT decision-makers when it came to EE. These are self-evidently the key figures in DT's camp who had dealings with EE; if, in fact, there were communications and documents of the sort that P4U contends, the overwhelming likelihood is that they would have passed through these individuals, since that was the only real practical means that the alleged decisions DT is said to have made as respects EE could have been channelled and effected.

6. More particularly, DT proposes to give disclosure as follows [**B/34/1**]:

a) The emails of the DT custodians would be reviewed following the application of filters. The filters would identify and capture:

i. All emails between the DT custodians; and

ii. All emails between the DT custodians and any individuals at any of the other MNO Defendants, as well as any individuals at Three, P4U, Carphone Warehouse and Dixons.

b) These emails would all be reviewed for relevance; the body of emails to be reviewed would not be reduced by applying keyword searches (meaning that the body of emails that would be reviewed would be larger and more comprehensive than would otherwise be the case): see DT's EDQ, [**B/28/5**].

c) Other electronic documents, such as Word and Excel documents, as well as any emails not captured by the filters described above, would be identified using keywords and then reviewed for relevance: [**B/28/5**].

d) DT would also conduct a manual review of its hard copy files.

7. These searches would be conducted over the global and/or custodian-specific date ranges (as explained further below).

C. Developments on DT's Disclosure

1. Date ranges

8. **Global date range.** DT and P4U now agree on the start date for the global date range, which will be 1 June 2012–31 October 2014. This has involved both parties making concessions, and the practical effect is to materially expand the DT disclosure period.

9. **Custodian-specific date ranges.** DT had proposed custodian-specific date ranges corresponding to the period over which each of its custodians had served as directors of EE, with an additional month allowed on either side (DT 5 June Skeleton, para 30 [**E2/3/14**]). P4U asserts that DT should apply longer custodian-specific periods (although, notably, its 5 June Skeleton Argument did not explain why).

10. DT has also, in the interests of compromise, made concessions to P4U on this issue. In particular, DT proposes to allow 2 months on either side (within the global date range) such that its custodian-specific date ranges would be:

a) Timotheus Höttges: 1 June 2012 - 31 March 2014;

b) Claudia Nemat: 1 June 2012 - 31 March 2014;

c) Thomas Dannenfeldt: 1 December 2013 - 31 October 2014; and

d) Michael Tsamaz: 1 December 2013 - 31 October 2014.

11. It is submitted that this is a proportionate approach and would capture documents of potential relevance, since it is tied to the periods over which these individuals had germane roles on the EE board. P4U's position in correspondence (P4U letter of 22 June 2020, para 17 **[C/592/5]**) is that longer periods (using 31 October 2014 as the end date for all custodians, and 1 September 2013 as the start date for Mr Dannenfeldt and Mr Tsamaz) should be applied. There is no reasoned basis for this approach,

which is based on the speculative assertion that the custodians would have been involved in EE for much longer periods than their tenure on the EE board. Even if the custodians were involved outside of their respective tenure on the EE board, it is inherently highly improbable that the other custodians who were on the EE board at that time would not have also been party to any such documents or communications (and any such documents would therefore be captured by DT's proposals) (DT letter of 2 June 2020, para 24 **[C/554/15]**).

2. DT custodians

DT's proposals

12. The issue of custodians is addressed in DT's 5 June Skeleton Argument, at §§24-29 [**E2/3/10**]. As there noted, the four custodians identified by DT were its nominated EE Directors at the relevant times, and held senior roles in the DT group [**B/34/1**]:

    a) Timotheus Höttges (is the current CEO of DT, and was the member of the DT Group Board of Management responsible for Finance and Controlling during the relevant period).

    b) Claudia Nemat (is the current DT Board member for Technology and Innovation, and was the DT Board member responsible for Europe during the relevant period).

    c) Thomas Dannenfeldt (has now left DT's employ, and was the former CFO of DT during the relevant period).

    d) Michael Tsamaz (was during the relevant period (and remains) the current CEO of OTE Group, a DT-related entity active in the Greek telecoms market).

13. For the reasons given in DT's 5 June Skeleton Argument, the selection of these custodians was based on the structure of the EE JV, and the overwhelming likelihood is that any documents of potential relevance to P4U's pleaded case would have flowed through these individuals.

P4U's protean approach

14. P4U's response to DT's proposals has been unfocussed, knee-jerk, and has failed to engage with the underlying factual position as repeatedly explained by DT's solicitors. This is borne out by continual shifts in P4U's position:

    a) In its comments on DT's Disclosure Schedule, P4U criticised DT's proposal as inadequate and asserted that, in addition to the senior individuals nominated as custodians by DT, seven other DT persons should be included as custodians **[B/40/15]** and **[B/41/17]**. This was based solely on P4U's observation that these individuals were copied on an email of which a DT custodian was also a recipient. DT pointed out that most of these individuals were secretaries or administrative staff to people who were already custodians. P4U has therefore, wisely, withdrawn entirely its claims that five of these individuals should be custodians: see P4U letter of 22 June 2020, §32.1 **[C/592/8]**.

    b) Having jettisoned most of the extra custodians it sought in advance of the adjourned 2nd CMC, P4U has now proposed that a further six new individuals be included for the purposes of certain email searches. These persons had not previously featured in P4U's requests or comments on DT's proposals.

    c) P4U still maintains its position that two other DT employees (Fridbert Gerlach and Daniel Daub) whom it had earlier identified should be custodians, despite DT's explanations as to why such employees should not be custodians **[C/554/12-14]**.

DT's response

15. P4U's contentions that additional custodians should be included (or for the addition of further individuals to email searches) are not sustainable in view of DT's comprehensive proposal. Despite repeated rounds of correspondence and comments on Disclosure Schedules, P4U has not sought to engage with DT's rationale for its proposals and has blithely asserted that they are "*inadequate*" (see 5 June Skeleton Argument, §65). This appears to be a largely reflexive approach that refuses to engage with the basis on which DT has explained its approach to custodians in this case.

16. ***Fridbert Gerlach and Daniel Daub***. As set out in DT's letter of 2 June 2020 **[C/554]**, Mr Gerlach and Mr Daub were part of DT's "area management" team. The area

management team provided support with respect to entities that DT had invested in across a number of territories, including EE. Whilst some members of the area management team on occasion attended EE Board meetings, they did not have any decision-making powers and simply provided support to the DT Directors as and when required. Accordingly, any documents of relevance held by such people would in any event be held by the DT-nominated Board members, and would thus be captured by DT's disclosure proposals. Put differently, these individuals were not the decision-makers, but gave support to the decision-makers, and reported to the decision-makers, who are custodians.

17. The basis for P4U's request for the inclusion of these individuals as custodians would appear to be no more than they were copied on an email regarding intermediaries that P4U has seen, and that they were identified in a "hit report" provided by EE on communications between its custodians, and other Defendants. As to this:

    a) In general, the mere fact that in large multi-national organisations someone was copied on something provides a slender basis for adding that person as a custodian or someone to be searched.

    b) DT's proposed custodians (the actual EE Board members) were also parties to the email cited by P4U. This further confirms DT's position that the custodians it has proposed would capture documents of relevance.

    c) The EE "hit report" does not advance matters. It identifies some 84 individuals at DT who communicated with EE custodians. This is entirely unremarkable given the existence of the joint venture and does not provide a basis for singling out these two individuals as custodians, in addition to the persons already proposed by DT. It would obviously be absurd to suggest that DT should have 84 custodians (in addition to the four it has selected).

18. ***New proposal of six additional persons for "Search 1."*** P4U has now (in its solicitors' letter of 22 June 2020 **[C/592]**) proposed the addition of six further individuals for the purposes of "Search 1", which is the search for emails between DT custodians and external individuals. These individuals are: Wolfgang Kniese, Michael Wilkens, Joachim Neubauer, Dr Uli Kühbacher, Volker Stapper and René Obermann. The proposal appears to be made solely on the basis that they were included in the EE hit reports, and "*are either senior DT executives (or executives of related entities) and/or*

senior DT lawyers (including those who held regulatory and/or competition roles)" (P4U's letter of 22 June 2020, para 29 [**C/592/7**]).

19. This proposal is also purely speculative and confirms that P4U is essentially engaged in a fishing expedition in the hope that '*something might turn up*':

    a) The fact that individuals are identified in the EE hit reports takes matters no further, for the reasons set out above. EE was a DT/Orange joint venture: the fact that individuals are identified in the hit report does not provide any indication that these individuals had any role in the matters at issue. It is a banal observation.

    b) Messrs Kniese, Wilkens and Neubauer were members of DT's area management team. As explained above in relation to Messrs Gerlach and Daub, area management had no role in making actual decisions, and rather acted in support of the Board members, whom DT has nominated as custodians. So there is no proportionate basis for including these individuals as custodians.

    c) Dr Kühbacher and Mr Stapper are senior in-house lawyers at DT. In general, it is inappropriate and disproportionate that senior in-house lawyers should be search custodians, not least since most of their documents are very likely to be privileged. It is not even suggested that these individuals had any particular role at all in relation to EE/P4U. The <u>only</u> basis P4U gives for including them is that they corresponded with James Blendis, EE's former General Counsel. This is not a sufficient reason for searching the documents of these individuals. It is unremarkable that senior DT and EE lawyers should be in communication given that they were in a JV together.

    d) P4U also proposes to include René Obermann in this search. Mr Obermann is the former CEO of DT (Mr Höttges' predecessor), and, for the avoidance of doubt, never sat on the board of EE or exercised any function at EE during the relevant period. Mr Obermann had already left DT in 2013, before P4U's collapse. This was always a matter of public record. Despite this, P4U had never previously suggested that his documents should be searched. To the extent that there were relevant exchanges involving Mr Obermann (which is highly doubtful), it is highly likely that such documents would in any event be captured by DT's proposals to treat its EE Board members as custodians,

since, again, this was the only practical means for such communications to be channelled on the DT side of the JV. This is yet another example of P4U's unfocused and knee-jerk approach to this issue.

20. ***Conclusion.*** P4U's requests for these additional individuals to be treated as custodians, or included within specific searches, are unjustified and should be refused. The proper course would, if necessary, be a focused specific disclosure request once disclosure is provided.

3. Electronic search terms / filters

21. This issue is addressed at §§35-38 of DT's 5 June Skeleton Argument [**E2/3/15]**. As set out above:

a) DT has proposed filters to identify emails between its custodians, and between its custodians and any individual at the other Defendants (or at Three, P4U, Carphone Warehouse or Dixons); these filters are broader than P4U had initially proposed (and, in relation to the latter email filter, was previously agreed by P4U **[B/40/22])**.

b) DT has proposed extensive search terms and it has earlier agreed to additional search terms proposed by P4U.

22. P4U's latest correspondence indicates its agreement to the filters and search terms (albeit on the basis that its proposals as to additional custodians were also accepted: see letter of 22 June 2020, §§49-51). P4U has (rightly) dropped a manifestly disproportionate proposal that DT applied a filter to capture all emails between DT's custodians and any other DT personnel, which would then be individually reviewed without first applying keyword searches.

23. P4U has not otherwise suggested that the filters or search terms are inadequate or advanced any further proposals in this regard. It is submitted that they are proportionate.

4. Early disclosure

24. P4U pursues its proposal for DT to provide "*early specific disclosure*" of "*meeting documents*" and communications between DT representatives and the other Defendants **[B/40]**. DT opposes these proposals for the reasons set out in its 5 June Skeleton Argument, §§44-47 [**E2/3/18**]. To summarise the key points:

a) EE has agreed to provide early disclosure of its Board meeting documents. It would be duplicative and inefficient to require DT to give early disclosure of the same materials. P4U accepts this, and agrees that DT does not need to provide early disclosure of documents that EE has agreed to disclose early (P4U letter of 22 June 2020, §42 **[C/592/11]**).

b) P4U has indicated (P4U letter of 22 June 2020, §41.2 **[C/592/11]**) that it also seeks early disclosure of the meeting documents pertaining to the DT Board. This proposal is completely off-beam. The suggestion that there would be anything relevant in the DT Board meeting documents is highly improbable. EE's decision not to renew the P4U contract did not even require a vote of the EE Board, still less the DT Board. It is highly unlikely that the DT Board would have been concerned at Board level with the position of a local UK distributor in a joint venture in which it held a 50% stake. At the time, DT was a global multi-national with a turnover in excess of €80 billion.

c) It is wrong in principle to require DT to provide early disclosure of communications with other Defendants, and it is noteworthy that P4U specifically did not seek this relief in its application filed on 4 June 2020 **[D1/13]**. The general position is that substantive disclosure should be even-handed and reciprocal. Regardless of whether the numbers of documents involved may (or may not) be low, there is no obvious efficiency or proportionality benefit from providing such documents early; on the contrary, partial disclosure without the context of the rest of the disclosure will simply lead to pointless satellite disputes that could be avoided with a full suite of disclosure in a single first run. In short, providing early disclosure of these documents would require DT to divert resources from its main disclosure exercise, would yield no material case management benefit, and is likely to cause disbenefits and satellite disputes that could be avoided by doing disclosure in a single run.

5. "Hit reports" and document hold notices

25. P4U continues to seek "*hit-rate*" information concerning emails between DT's custodians and external email addresses, to "*provide important information*" as to the "*communication channels*" between the individuals in question **[B/40/22]** and P4U letter of 22 June 2020, §§59-67 [**C/529/13**]. It also seeks an order for disclosure of the identity of the persons to whom document hold notices were given before this claim commenced.

26. These proposals are flawed for the reasons set out in DT's 5 June skeleton argument at §37 [**E2/3/16**]. The hit reports would generate a mass of high-level information that would simply be unhelpful in assessing DT's selection of custodians. The fact that a DT custodian may have communicated with one of the 200,000 other DT employees is not revealing of anything useful; nor is the fact that a DT custodian may have communicated with an individual from one of the other Defendant entities. Similarly, the fact that an individual received a document hold notice at an early stage several years ago before the claim was pleaded does not indicate whether that person is an appropriate custodian, in light of the pleaded issues in the case and the other individuals whose records can be searched, assessed in the round. In DT's case, this applies not least because P4U was required to provide further information on its case against DT due to deficiencies in its pleading. In short, things have moved on considerably, and detailed consideration of what was or was not done several years ago is not a sensible approach to the selection of custodians today.

6. Custodians' personal communications

27. DT has addressed P4U's application for an order that DT's solicitors "*take reasonable measures*" to "*secure and obtain access to*" personal emails and data of its custodians at §§48-57 of its 5 June Skeleton Argument [**E2/3/19**].

28. The requests are objectionable at a threshold stage in principle: there is no basis for ordering DT's solicitors to do anything, and it is not clear that there is power to order a party (still less its solicitors) to take steps to obtain documents that are not within its control, *per* CPR 31.6. P4U certainly has not indicated the source of such a power.

29. In any event, DT has already taken substantial steps to investigate the position regarding personal data and has explained this in detail to P4U **[C/554/2-4]** and **[C/609/6]**. In summary:

    a) The materials sought by P4U are not within DT's control.

    b) DT is moreover constrained by laws on telecommunications to respect the secrecy of personal communications.

    c) Further, DT's employees have a reasonable expectation of privacy in their personal communications.

30. P4U's position in a nutshell appears to be that, notwithstanding its lack of control for CRP 31.6 purposes, DT should request its employees to provide these materials.

However, such a request would place the employees in an invidious position. P4U has advanced no reasonable basis for ordering DT to make such a request: DT has explained that personal devices and communications were not used in relation to the matters at issue, and the employees have a legitimate expectation in the privacy of their personal data (such that it would be oppressive and disproportionate for them to be asked by their employer to provide it for the purposes of a disclosure review).

III. P4U'S DISCLOSURE

31. DT's detailed submissions on the range of issues concerning P4U's disclosure are set out in its 5 June Skeleton Argument, §§58-71 [**E2/3/21**].

32. In this document, DT would propose to provide further context to its submissions on the question of disclosure relating to one issue in particular, namely causation; i.e., the reasons behind P4U's collapse. Two key and connected events are potentially of key relevance (and would be determinative against P4U's claim), which P4U's proposed disclosure exercise would risk missing.

33. First, a year before P4U's collapse, its owners (the private equity group, BC Partners) extracted a dividend of over £200 million, which it achieved by adding more debt to the company. This amounted to a 33% return on the £600 million investment BC Partners had made in 2011 to acquire P4U. The size of the dividend dwarfs the profit of £105 million (before interest, tax, depreciation and amortisation) that P4U was reported by the Financial Times actually to have earned in that year ("*Accusations fly after Phones 4U collapse*", 15 September 2014). The FT also reported that, notwithstanding the collapse of P4U, BC Partners, "*made a tidy profit.*" ("*Q&A: the demise of Phone 4U*", 15 September 2014). The same article explained that the means by which it did so, of raising debt to pay the dividend, "*has been criticised for leaving businesses saddled with high debt and vulnerable to external market shocks, although it has become commonplace in the private equity world*."

34. The second key event was the merger of Carphone Warehouse and Dixons in 2014. By that stage, the hefty dividend extracted by BC Partners, and the additional debt burdening the company, may have left P4U simply unable to adapt to that change in the market. In addition, both Vodafone (and EE) decided in 2014 to materially increase the numbers of their own retail stores, which further made P4U's situation precarious, since it was losing retail coverage through the Dixons/CPW merger, not increasing it. As the FT reported *("Private equity, not the mobile operators, killed Phones 4U*") (emphasis added):

> "*The real story of Phones 4U's demise started rather earlier: it is one of* ***private equity's failure to repurpose the business to deal with a longstanding market shift****.*
>
> *…*
>
> *Declining mobile margins in recent years have only sharpened the sentiment. Increasingly, networks have chosen to sell online and through their own chains of stores.* ***In April, Vodafone announced it would open a further 150 UK shops, taking its total to 500.***
>
> *This could surely have been predicted. BC's first task after buying Phones 4U in 2011 was to keep the networks onside and demonstrate its indispensability by investing in new outlets and retail channels. This should have given Phones 4U an advantage over its main competitor, Carphone Warehouse, the UK's other big independent mobile retailer. And as an unlisted business, the company was not under pressure to produce results every six months: it could afford to invest and take a dip in profits.*
>
> *But BC chose another route.* ***While Phones 4U did increase the number of retail outlets to about 700, most of those units were concessions in Dixons, the electrical retailer, under a contract that was due to expire next year. When Carphone announced its merger with Dixons in February, a panicked Phones 4U struggled to absorb the loss of 20 per cent of its retail network.***
>
> ***BC also pulled capital from the business, selling an insurance subsidiary of Phones4U that offered some income diversification.***
>
> ***Last autumn, the company borrowed £200m to pay BC a special dividend, allowing the group to recoup its original investment plus a 30 per cent return. The payout left Phones 4U with debt on its balance sheet equivalent to four times earnings before interest, tax, depreciation and amortisation – a level leaving precious little wiggle room****.*
>
> *That was all very well for BC's underlying investors, for it eliminated their financial downside at a time of uncertainty, leaving them with a costless option on the company's equity should it subsequently be sold. But the move helped seal Phones 4U's fate."*

35. It is important that the disclosure exercise identifies the documents that will allow these events to be investigated and the issues on causation explored and tested.

36. However, P4U's proposals for disclosure are inadequate in capturing the relevant materials, in several respects:

    a) P4U has constructed a list of issues for disclosure (which DT maintains is flawed for other reasons set out in its 5 June skeleton argument), which makes no reference to a range of important potential possible causes of P4U's financial difficulties and insolvency: see P4U Disclosure Schedule, §6 [**B/46/3**] and Schedule 1 [**B/46/9**]. These causes include the issues pleased as respects the payment of significant dividends to its shareholders and accumulation of high debt ratios which made P4U extremely vulnerable to any changes in its contractual situation.

    b) P4U had refused to treat various individuals at PwC responsible for the administration as custodians, whom it had resisted naming as custodians

(despite having earlier agreed to do so): see DT 5 June Skeleton Argument, §§62-63. It has belatedly agreed to this and adhered to its earlier undertaking (see revised P4U's Disclosure Schedule of 5 June 2020 [**B/49.1/31**]). However, the date range that it is proposed is applied is too constrained:

i. The beginning of the date range is proposed as being 15 September 2014. However, the strong likelihood is that the administrators hold relevant documents prior to that date, given that they would have undertaken some initial analysis prior to the administration formally commencing. P4U has suggested that PwC was engaged in relation to P4U "after" 6 August 2014 **[C/453/5]**, so extending the start of the date range to 1 August 2014 would not materially increase the burden of the disclosure exercise.

ii. The end of the date range that P4U proposes to apply is 31 December 2014 (having on 5 June 2020 suggested 31 October 2014). This an important point: P4U's administrators had commenced an investigation into the causes of its collapse, so it is important that these searches capture the results of that investigation. P4U has, however, not indicated the date by which the investigation was complete (see P4U's letter of 19 June 2020, paras 11-13 [**C/590/3**]).

c) The searches that P4U then proposes to run across PwC's records are in turn problematic. A search of a records system described as BRS Power is proposed, albeit further information is required as to the operation and organisation of that system (see Vodafone's letter of 23 June 2020, para [**C/598/4**]). The search terms that P4U proposes to run would be only of the surnames of certain senior P4U executives. The documents of interest on causation held by the administrators, however, would not be limited to documents containing those surnames. Broader searches are appropriate.

d) P4U continues to resist naming as a custodian Mr Paul Copley, who has been a concurrent administrator since 11 December 2018. Mr Copley is likely to have documents relevant to the causes of the administration. P4U confirms at PoC §12 that he was appointed "*to investigate the facts and circumstances leading to the administration of P4U*" **[A/2/9]**.

e) DT has requested that P4U include as custodians persons who instructed or received advice from external financial, valuation or accounting advisers since 2012. P4U has refused to expand its proposed custodians in response to this point and provided only very limited information as to the individuals who were in contact with external advisers. It has, rather, simply asserted that it considers its proposed custodians to accurately respond to the Defendants' requests (see P4U letter of 5 June 2020, para 26 [**C/565/6**].

f) On the acquisition of P4U by BC Partners in 2011, P4U has refused to make any proposals for disclosure. Documents from that acquisition would clearly be of potential relevance, such as the terms of the acquisition, the debt financing, valuations, forecasts, business plans and similar documents (see Vodafone's letter of 22 May 2020, para 3.9 [**C/529/5**]).

g) The relevance of documents held by these persons to causation is self-evident.

37. Sufficient disclosure on these points will be necessary for the Court and Defendants at trial to investigate the reasons behind P4U's collapse.

38. P4U has also resisted providing sufficient disclosure on issues going to quantum, including by limiting the end date of its searches and by proposing not to give any disclosure on the question of recoveries by the administrators. Instead, P4U proposes to provide a witness statement addressing these issues (P4U letter of 5 June 2020, para 49.6 [**C/565/13**]). This is plainly insufficient as the witness evidence in question would need to be capable of being verified and tested against the underlying documents.

IV. DT'S REQUEST FOR FURTHER INFORMATION

39. The basis on which DT applied [**D1/4**] for an order for further information to be provided by P4U following disclosure is set out in detail in DT's 5 June Skeleton, at §§6-16 [**E2/3/4**]. As explained therein, the case that DT engaged in direct collusion with the retail MNOs is advanced without any concrete particulars having been provided at all. DT seeks further information as to that case, within 6 weeks of disclosure being provided. This is essential in order to allow DT to prepare its case, including its witness evidence.

40. It is apparent that P4U does not in principle resist providing further information, or dispute the suggestion that it should do so. Its 5 June CMC skeleton [**E2/1/37**] stated

that prior to disclosure, its ability to provide particulars was limited, and that it anticipated providing further and better particulars following disclosure.

41. In view of this common ground, DT invited P4U to consent to the application and will advise the Court as to whether this occurs.

42. P4U's objections (at §137 of its 5 June Skeleton) to an order being made lack any substance:

    a) It contends that DT has already sought (and obtained) the order it now applies for. This is incorrect: the order now sought by DT is on a wider basis (including CPR 3.1(2)(m) as well as CPR 18), and would apply in different factual circumstances; i.e., following disclosure.

    b) It contends that any application should be made following disclosure, rather than at this stage. This is simply stalling. Since there is no particularised case, it is unavoidable that DT will need this further information to prepare its case to trial (e.g., witness evidence) and understand the case it has to meet. There is no reason why this inevitability should be delayed for the sake of it.

43. DT accordingly invites the Court to make the order sought, as set out in its draft Order [**D1/5**].

V. DT'S APPLICATION FOR SECURITY FOR COSTS

44. Prior to the June CMC, DT issued an application (see [**D1/1**]) seeking security for its costs for: (i) the current phase of the litigation (i.e., up to the 2nd CMC); and (ii) the phase that will then follow up until DT provides its disclosure. DT's submissions in support of this application are set out in its 5 June Skeleton Argument, §§72-90 [**E2/3/26**].

45. P4U had resisted providing security for any prospective stage of the litigation. However, it has now agreed to this and provided security (through funds held by its solicitors on account) in the amount of 65% of DT's estimated costs through to the end of disclosure. The only remaining point at issue is whether security at the level of 65% is sufficient or whether, as DT contends, security for 75% of the estimated costs should be provided.

46. DT's case (as set out in its application and its 5 June Skeleton Argument, §§77-81) is that such an award of security is appropriate because: (i) there is a realistic prospect

that, if successful at trial, DT will be entitled to indemnity costs given the nature of the wrongdoing alleged by P4U; (ii) the case that P4U alleges against DT is particularly thin, and entirely lacking in particulars (raising a real question as to whether it was ever appropriate for such a claim to be brought at all), fortifying DT's case on security for costs; and (iii) the practical certainty that recovery of any costs beyond the amount provided by way of security would be impossible. The "balance of prejudice" should be struck in favour of the defendant in such circumstances.

47. P4U's arguments in opposition to security at 75% should be rejected.

48. First, P4U appears to suggest that the nature of the allegations made here would not provide a realistic basis for an order for indemnity costs (P4U 5 June Skeleton Argument, §§101-105). This is mainly based on the *Danilina* case, and the basis on which it was apprehended that the claimant in that case would fail would be because her own evidence would be rejected as false. P4U also seems to suggest that, as no allegation of deceit or fraud is made in this case, the principle would not apply.

49. However, the authorities make it clear that the principle is much broader than this, and extends to instances where the case is "*out of the norm*." These include, "*Where the claimant advances and aggressively pursues serious and wide ranging allegations of dishonesty or impropriety over an extended period of time*": see *Rowe v Ingenious*, as cited in DT's 5 June Skeleton Argument, §77. P4U's case against DT is clearly such a case: it is alleged that DT covertly and dishonestly colluded with its competitors and conspired with its JV partners to destroy P4U, thereby also reducing competition in the market and harming consumers. This is manifestly a claim as to deceptive activity, since its predicate is that the non-renewal of the P4U contract was not an unilateral decision but reflected unlawful collusion with MNO rivals.

50. Second, P4U contends that the claim against DT and the other Defendants could fail for a range of reasons that would not mean that the allegation of collusive wrongdoing was unproven. This is of course inherently unlikely given the centrality of these issues in P4U's case. In any event, it misses the point: DT strenuously denies any collusive wrongdoing and so (at least) one of, if not the main, means by which the claim could fail is if that allegation is rejected, even if P4U's case may also be flawed for other

reasons. The “balance of prejudice” clearly favours DT on this point. The fact that the case of collusion against DT is lacking in any concrete particulars fortifies this point.

51. Finally, P4U also suggests that its claims in conspiracy and inducing breach of contract do not depend on proving dishonesty. This is an unrealistic and artificial submission, given that the factual basis for these parts of the case is substantively the same as its competition law claims. It is striking for example that these claims have received no real attention in the proceedings, and that all the focus has been on the competition law case. This is because the two non-competition claims are in truth entirely parasitic on the competition law case. Thus, if there is a realistic prospect of indemnity costs being awarded as respects the competition law case, the circumstance that P4U also failed on the two non-competition claims does not detract from this point in any way.

52. In summary, P4U has no good answer to the grounds advanced by DT in support of its application for security at a level of 75% to be provided.

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25 June 2020