Claim No. CP-2018-000038

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS

COMPETITION LIST (ChD)

BETWEEN:-

PHONES 4U LIMITED (In Administration)

Claimant

-and-

(1) EE LIMITED

(2) DEUTSCHE TELEKOM A.G.

(3) ORANGE S.A.

(4) VODAFONE LIMITED

(5) VODAFONE GROUP PLC

(6) TELEFONICA UK LIMITED

(7) TELEFÓNICA S.A.

(8) TELEFONICA O2 HOLDINGS LIMITED

Defendants

CLAIMANT'S SKELETON ARGUMENT ON COSTS

For consequential hearing on 19 December 2023

References to the Consequential Hearing bundles are in the form {N/Tab/Page} and {O/Tab/Page}.

A. Introduction

1. This is the Claimant's skeleton argument for the consequential hearing following the hand-down of judgment on the liability issues on 10 November 2023, addressing the Defendants' costs applications. By email on 11 December 2023, the Judge gave permission for the Claimant to file a separate skeleton argument addressing its application for permission to appeal.

2. The time estimate for the hearing is 1 day, and the following pre-reading is suggested:

   2.1. The Parties' composite draft order {N/1}

   2.2. The Claimant's application for permission to appeal and grounds {N/6-7};

   2.3. The Defendants' applications for costs {N8-28}; and

   2.4. Mr Copley's first witness statement of 14 December 2023 ("**Copley 1**") {N/7.1}.

3. Each of the Defendants makes an application for their costs, interest on costs and a payment on account. To avoid repetition, the issues raised by those applications are addressed thematically, rather than Defendant by Defendant.

4. Thus, this skeleton addresses:

   4.1. Section B: EE and DT's applications for indemnity costs

   4.2. Section C: What proportion of the Defendants' costs should be awarded

   4.3. Section D: Whether Telefonica should be awarded any of its costs

   4.4. Section E: Pre-judgment interest on costs

   4.5. Section F: Post-judgment interest on costs

   4.6. Section G: Payments on account

B. EE and DT's applications for indemnity costs

5. EE and DT seek their costs on the indemnity basis. As made clear in Excelsior Commercial & Industrial Holdings Ltd v Salisbury Hammer Aspden & Johnson [2002] EWCA Civ 879, [32] (see also [39]):

> "Before an indemnity order can be made, there must be some conduct or some circumstance which takes the case out of the norm. That is the critical requirement."

6. Norm in this context means "*the ordinary and reasonable conduct of proceedings*" (Esure Services Ltd v Quarcoo [2009] EWCA Civ 595, [25]).

7. There are no such circumstances in this case. Nothing in the Judgment marks out P4u's conduct in bringing or pursuing its claims as meriting the sanction of indemnity costs. Indeed, it is the Defendants and various of their witnesses whose conduct and whose evidence are the subject of adverse comment in the Judgment (addressed in greater detail in section C below). The majority of the Defendants (including Orange which was found to be part of the same undertaking as EE and DT) are not seeking indemnity costs, and clearly recognise that this is not a case in which they can or should be awarded.

8. The particular points relied on by EE and DT are addressed below.

Refusal of settlement offers

9. Both EE and DT rely on P4u having refused two settlement offers made by the Defendants. EE contends that P4u "*refused to engage constructively*" in WPSATC dialogue, and settlement would have removed the need for the trial that followed (Ward 3, [13(c)]) {N/10/4}. Similarly, DT submits that indemnity costs are warranted because "*Had P4u accepted either offer, Phones 4U and its creditors would manifestly be far better off*" (DT App Notice, [5]) {N/12/6}.

10. This does not justify an award of indemnity costs. These were not Part 36 offers and do not carry the costs consequences of such offers. As the Court of Appeal held in Kiam II v MGN Ltd [2002] EWCA Civ 66, [2002] 1 WLR 2810, [13]:

> "it will be a rare case indeed where the refusal of a settlement offer will attract under Rule 44 not merely an adverse order for costs, but an order on an indemnity rather than standard basis… It is very important that Reid Minty should not be understood and applied for all the world as if under the CPR it is now generally appropriate to condemn in indemnity costs those who decline reasonable settlement offers."

11. A refusal of a settlement offer "*would need to be unreasonable to a high degree*" to attract indemnity costs; it does not suffice that the refusal to settle ultimately proved "*merely wrong or misguided in hindsight*" (at [12]).

12. More recently in Knight v Knight [2019] EWHC 1545 (Ch); [2019] Costs LR 1459, HHJ Paul Matthews explained (following Kiam II v MGN Ltd), that (at [31]):

> "A mere failure to accept a reasonable offer is not enough. That happens every day of the week, with both parties acting reasonably and in accordance with the advice that they are receiving from their professional advisers. So if the matter is to be taken "*out of the norm*" there must be something more, something which prompts the court to visit the paying party with a special mark of condemnation."

13. Nothing about P4u's refusal of the Defendants' settlement offers approaches this high threshold, and indeed it is telling that despite those offers having been made on behalf of all Defendants, the other Defendants (aside from EE and DT) do not even pursue this argument.

    13.1. The first offer was made on 23 March 2022 with commencement of the trial fast approaching and was to settle proceedings on a "*drop hands*" basis. It cannot be said that it is 'unreasonable to a high degree' to reject an offer under which P4u would recover nothing and receive nothing towards its costs (SW3, pages 104-105) {N/11/106-107}. Indeed, as the correspondence shows, P4u sought to engage in mediation at that time, and had suggested a date and a mediator. It was the Defendants who responded that they did not want to pursue mediation.

    13.2. The second offer was made on 9 May 2022 and offered to settle for £60 million inclusive of costs and without any admission of liability (SW3, pages 112-116) {N/11/114-118}. This offer was made at the eleventh hour (1 week before the commencement of a 10 week trial), after most of the costs of trial had already been incurred and when nothing had happened to alter P4u's view of the merits. As QE pointed out at the time, once P4u's own costs were deducted from this sum, it left little recovery for P4u and was far below the value of its claims. Refusal of such an offer made at such a late stage can hardly be said to be conduct "*out of the norm*".

Further grounds relied on by EE

14. The further grounds on which EE relies for indemnity costs are equally without foundation.

15. First, EE contends that P4u pursued "*quasi-criminal and potentially criminal allegations*" and "*sought to impugn the honesty and integrity of eight of EE's (current*

or former) senior executives and employees" (Ward 3, [13(a)]) {N/10/3}. P4u's claims were not criminal or quasi-criminal and were never suggested as such by P4u; they were private law claims seeking civil law damages to be decided on the ordinary civil standard of proof. In any event, this point was already addressed when EE, DT and Orange sought to have the security for their costs fixed at a higher level because of the alleged likelihood they would ultimately be granted their costs on the indemnity basis. In rejecting this argument, the Judge noted that ([2020] EWHC 1943 (Ch), [2020] Costs LR 1065 at [34]):

> "An allegation that large companies made secret anti-competitive arrangements or agreements of the kind here alleged is not out of the norm when considered against the substance of numerous competition law decisions. Because of the difficulties of proving such arrangements or agreements, those decisions are generally made by competition authorities which have much greater powers of investigation than a private claimant. Although the protection of security for costs for defendants is important, and while I recognise that there may be some claims that are so weak as to justify an exceptional order, I think that the court should in general be cautious about awarding costs on the indemnity basis just because a claim making such allegations fails at trial…"

16. EE has not identified any way in which P4u's claims are outside the norm of competition claims, where serious allegations of anti-competitive conduct are necessarily going to be common.

17. Second, EE says it and its executives and employees have been the subject of adverse publicity and reputational damage as a result of the proceedings (Ward 3, [13(a)]) {N/10/3}, and that:

> "P4u appears to have been keen to encourage publicity of the allegations… by taking the unprecedented step of publishing (in real time) on the website of its Administrator (Mr Paul Copley of Aldan Management Limited) every pleading, order, skeleton argument and transcript from the entirety of these proceedings." (Ward 3, para 40) {N/10/14}

18. This attack on P4u's Administrator is unfounded and regrettable. Again, the same complaint was made in EE, DT and Orange's application for security for costs in 2020, and it was rejected (at [30]):

> "As for the Defendants' reference to para 25(8)(c) of the considerations set out in Three Rivers (the deliberate courting of publicity: see para 11 above), Mr O'Donoghue referred to the fact

> that the administrators of P4U have set up a website on which they have posted all the pleadings, skeleton arguments and transcripts of court hearings. However, this point, which was advanced somewhat faintly, is without substance. Since P4U is in administration and presumably has many creditors, the administrators responsibly wish to be transparent about the litigation on which such significant funds are being spent. Indeed, this will also make clear the vigorous denial by the Defendants of P4U's allegations. I consider that this is far removed from the deliberate courting of publicity to which Tomlinson J was there referring."

19. Furthermore, Ms Ward is wrong to say that the publication of documents from the proceedings on the Administrator's website is "*unprecedented*". PwC has taken the same steps in the administration of Lehman Brothers International (Europe): Copley 1, [12] {N/7.1}. QE, in a letter to Clifford Chance on 11 December 2023, drew this to EE's attention and invited it to withdraw this allegation {O/94}.

20. Putting EE's unfounded allegation against Mr Copley aside, EE's complaint becomes simply that there have been reports in the press, based on information already in the public domain. This is not something that takes this case "*out of the norm*".

21. Third, EE suggests that P4u failed to put allegations "*fairly and squarely*" to EE's witnesses (Ward 3, [13(b)]) {N/10/3-4}. Although EE pursued this argument in closing (EE Closing, pages 8-9) {A/16/8-9} there is no criticism in the Judgment that P4u failed to put allegations fairly to EE witnesses. Furthermore, all parties at trial were required to make judgments as to what points were put to which witnesses in order to avoid repetition and respect the constraints of the trial timetable. As counsel for Vodafone put it in relation to P4u's witnesses {Day5/90:11-91:20} {I2/5/25}:

> "90:11 MR McQUATER: Obviously there are matters on which
> 12 Mr Whiting gives evidence that we disagree with, but we
> 13 can't put our case, as I have said a couple of times, to
> 14 every witness; there is overlapping evidence. For
> 15 example, we do not agree with his evidence on the
> 16 late August meetings, but I can't put those within the
> 17 time allowed to every witness; and your Lordship will
> 18 appreciate, and I hope not hold it against us, that we
> 19 haven't put our case on every point.
> 20 MR JUSTICE ROTH: Yes."

22. Fourth, EE's suggestion that P4u's claim for exemplary and/or punitive damages "*was calculated to exert pressure on EE to encourage it to settle*" (Ward 3, [13(d)]) {N/10/4} is baseless speculation. This plea was properly based on P4u's assessment of its case and the evidence available at the time. In any event, this issue would only have arisen for determination at a future damages trial, if it had taken place.

23. Fifth, EE claims the case against it was "*speculative and thin*" and relies on the fact that "*the only documentary evidence identified by P4u in its original pleading was exculpatory of EE*" i.e. Mr Whiting's note of his conversation with Mr Dunne on 27 January 2014 (Ward 3, [13(e)]) {N/10/4}. This ignores the fact that it was this pleading that prompted EE's admission that it had been the recipient of "*a number of approaches from O2, Vodafone UK and CPW*", including Mr Dunne approaching Mr Swantee "*to suggest that O2 was willing to reduce volume from indirect channels and appeared to want to mitigate the risk of EE taking up that volume*" (EE Re-Amended Defence, [74a]-[74b]) {B/3/29}. Prior to this, in pre-action correspondence, EE had denied all P4u's claims and had kept to itself its knowledge of O2's attempts to collude with it {J0/84}. Furthermore, although the Judge concluded that the Landmark Lunch did not meet the threshold for an anti-competitive exchange (Judgment, [217]), he rejected EE's further argument that it had publicly distanced itself from Mr Dunne's approach (Judgment, [229]). In those circumstances, EE's contention that P4u's claim was so speculative and weak as to take the case "*out of the norm*" is obviously wrong.

24. In any event, as per the Court of Appeal in Arcadia Group Brands Ltd v Visa Inc [2015] EWCA Civ 883, [2015] Bus LR 1362 at [83]:

> "The weakness of a legal argument is not, without more, justification for an indemnity basis of costs, which is in its nature penal. The position might be different if proceedings or steps taken within them are not only based on a plainly hopeless case but are motivated by some ulterior commercial or personal purpose or otherwise for purely tactical reasons unconnected with any real belief in their merit."

25. This is plainly not the territory we are in. P4u's case against EE was arguable, properly pursued and indeed succeeded on the issue of public distancing.

Further grounds relied on by DT

26. In addition to reliance on the offers to settle addressed above, DT asserts that P4u pleaded a case of direct collusion as against DT, and then did not put the case to its witnesses.

27. DT's Opening Submissions for trial set out DT's understanding of the case against it (at [5]-[6]) {A/8/2}:

> "… there is no direct evidence that DT engaged in any collusive contacts with other undertakings; indeed no such allegation is even pleaded against DT (despite repeated clarifications of P4u's case)…
>
> …the case against DT is put in the more oblique terms possible, namely that P4u infers that DT was apprised of the allegedly unlawful contacts between others…"

28. P4u put its case at trial, including (as DT put it) that DT was "*apprised of the allegedly unlawful contacts between others*". For example:

28.1. Mr Dannenfeldt was asked whether he had obtained information from Vodafone about it leaving Carphone Warehouse {Day16/35:20-24} {I2/16/18}.

28.2. Mr Dannenfeldt was asked whether he had discussed with Mr Pellissier a "*unique opportunity*" in the form of "*coordination with Vodafone, or some discussions with Vodafone*" {Day16/63:10-64:13}{I2/16/16-17}, and it was put to him that he would have signalled to Mr Pellissier that DT was aligned with Orange in pursuing this unique opportunity {Day16/65:6-12} {I2/16/18}.

28.3. Mr Dannenfeldt was asked whether he would have informed Mr Kniese of what had been said in his conversation with Mr Pellissier {Day16/64:25-65:5} {I2/16/17-18}.

28.4. Mr Dannenfeldt was asked whether "*the need for some form of cooperation with Vodafone in relation to an opportunity to weaken EE's dependence on the indirects*" was discussed at a meeting on 7 April 2014 {Day16/74:14-20} {I2/16/20}.

28.5. It was put to Mr Dannenfeldt that Orange and DT discussed "*what EE and Vodafone might do together in relation to the indirect distribution channel*" at the 23 April 2014 workshop, and deliberately did not keep a record of what had

been said in relation to discussion with Vodafone {Day16/89:23-90:8}{I2/16/24}.

28.6. It was put to Mr Weber that he attended a meeting with Orange in which "*there was a discussion about the fact that any disruptive move, whether exit or acquisition, required cooperation from Vodafone*" {Day29/54:5-12}{I2/29/15}.

29. The suggestion, therefore, that no direct case was pursued against DT at trial is false. P4u also alleged that DT procured EE's breach of contract and/or entered into a conspiracy with EE and Orange to breach EE's agreement with P4u, and P4u put that case to DT's witnesses including Mr Dannenfeldt (e.g. see Judgment, [714]).

30. In any event it is fully to be expected and indeed proper that parties will continue to re-assess their case up to and throughout trial to determine which particular points are maintained in the interests of the efficient conduct of litigation. It would be perverse to require a party, on pain of an indemnity costs award, to pursue at trial points which were properly pleaded, but which, for whatever reason, it is decided are not borne out on the evidence as it emerges at trial. Indeed, an inflexible decision to put such points would itself be worthy of criticism.

31. For all these reasons, none of the grounds put forward by either DT or EE for indemnity costs hold water. Any costs awarded to EE and DT should be assessed on the standard basis only.

C. <u>Defendants should be awarded only a proportion of their costs</u>

32. P4u accepts that it should pay a proportion of the Defendants' costs (save in the case of Telefonica SA and Telefonica Europe, addressed separately in section D below), however there should be a discount to reflect issues on which each of the Defendants failed, adverse findings made against them and their witnesses, and failures to preserve documents.

33. The Court will be familiar with the relevant principles. By CPR 44.2(2), while "*the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party*", the Court "*may make a different order*" including reducing a party's costs by a certain percentage. In deciding what costs order to make, the court "*will have regard to all the circumstances*", including "*the conduct of all parties*" before and during the proceedings: CPR 44.2(4)-(5).

34. The court may make percentage costs orders to reflect the fact that an otherwise successful party did not succeed on all issues. As Nugee J said in R (Viridor Waste Management Ltd) v HMRC [2016] EWHC 2502 (Admin), [2016] 4 WLR 165, [17]:

> "… parties should be discouraged from taking every point (the "kitchen sink" approach), and that if they choose to raise and pursue a distinct issue which will lead to separate costs, they may well run a costs risk in relation to it, even if otherwise wholly successful."

35. In that case, Nugee J ordered that the unsuccessful applicant pay only 85% of HMRC's costs because HMRC had lost on "*a distinct issue that HMRC initiated and chose to pursue and which inevitably involved a wider inquiry into the facts than would otherwise have been necessary*" (at [16], [26]).

36. A party may also be deprived of their costs when evidence they have given in proceedings is found to be dishonest. Per the Court of Appeal in Sulaman v Axa Insurance Plc [2009] EWCA Civ 1331, [2010] 3 Costs LR 391 at [17]-[18]:

> "Lies maintained and repeated in a complex case are insidious. If Ms Sulaman had said [the truth] from the beginning of the trial… the case against her might well have taken a completely different course… But it is incontrovertible that the litigation was made more difficult and the judge's task more intractable as a result of Ms Sulaman's lies.
>
> When one adds to that that the judge was undoubtedly entitled to express his disapproval of Ms Sulaman's lies, quite apart from their precise effect of their trial process, it becomes even more difficult to attack his discretion… There is, in my judgment, no need for the judge to apportion different parts of his order between lies which prolong the trial process and lies of which he merely disapproves."

37. A party's recoverable costs may be reduced to reflect the Judge's disapproval of its conduct in relation to disclosure, even if any failures were not deliberate: Earles v Barclays Bank [2009] EWHC 2500 (QB), [2009] 6 Costs LR 906, [67]-[77]. In that case, a successful party's costs were reduced by 50% to reflect the fact that its conduct of disclosure "*fell far below the standards to be expected of those practising in the civil courts*", and that costs would have been saved if disclosure had been carried out properly ([74]-[77]).

38. The specific reasons why P4u contends that each of the Defendants should be awarded only a proportion of its costs are set out in turn below. However, two points apply to all Defendants:

38.1. First, the Judge's found that "*a number of very senior executives in various defendants paid scant regard to some of the recommended precautions*" in their organisations' competition law compliance policies, and the Judge held their approach to be "*mistaken and regrettable*". The Judge's examples of this attitude included executives from each of the Defendants. Not only is this an aspect of the parties' conduct that merits a costs sanction to reflect the court's disapproval, but it almost certainly increased the costs of the proceedings. As per the Judge's findings: if "*instead a more prudent approach had been followed, at least some of the accusations levelled in this case might have been avoided*": Judgment [94]-[96]. Indeed, as the Judgment reveals, the Defendants' conduct towards P4u both before and after proceedings were begun substantially contributed to P4u's belief that it had been the victim of collusion.

38.2. Second, the Defendants refused P4u's request to engage in mediation. As referred to above, in March 2022, the Claimant sought to organise a mediation, proposing a date and Bill Wood as mediator. The Defendants refused this proposal, without giving any explanation (SW3, pages 104-105) {N/11/106-107}. An unreasonable refusal to mediate with no reasons given should have costs consequences: PGF II SA v OMFS Company 1 Ltd [2013] EWCA Civ 1288, [2014] 1 WLR 1386.

EE

39. EE should recover only 70% of its costs as assessed on the standard basis, with the 30% discount reflecting the following matters, in addition to the points made at paragraph 38 above:

39.1. EE failed on the issue of public distancing, with the Judge finding that EE's conduct did not satisfy the requirements of public distancing as a matter of law: Judgment, [224]-[230]. This was a distinct factual issue, which on the pleadings was the focus of EE's defence to the allegations as to contacts between Mr Dunne and Mr Swantee, and which undoubtedly led to extra costs being incurred.

39.2. EE, and its witness Mr Harris, were criticised for presenting information to Ofcom that was "*very misleading*" in a manner that was either "*deliberate or*

just grossly negligent", and the Judge described EE's conduct towards Ofcom as "*deplorable*": Judgment, [613]-[615].

39.3. Mr Milsom, witness for EE, was described by the Judge as being "*less than frank in part of his testimony*", in relation to whether or not he received Vodafone's confidential business information: Judgment, [602]. EE should not be awarded its costs where the evidence of its witness increased costs by disguising the true position and complicating the factual inquiry.

39.4. EE did not preserve critical documents evidencing the content of the conversation at the Landmark Lunch: Mr Swantee's iPad, the transcription which Mr Blendis made of the iPad recording, as well as a CD of the recording which had been kept in a safe in Mr Swantee's office: Judgment, [191]-[192]. In particular, the transcription was lost after pre-action correspondence was received in 2015, and Mr Blendis accepted it should have been preserved {Day12/149:16-150:19} {I2/12/39}. If EE had retained any of these documents, the dispute between the parties as to what occurred at the Landmark Lunch (which occupied a significant amount of evidence and submissions) would wholly or very substantially have fallen away.

39.5. Counsel for EE put it to Mr Whiting that a number of individuals were "*asking questions about your honesty*", a line of questioning impugning Mr Whiting's honesty that was unfounded and ultimately went nowhere {Day7/38:10-45:23} {I2/7/11-12}. Similarly, counsel for EE spent significant time cross-examining Mr Kassler and Mr Dobson on the position of its credit insurers in September 2014, and suggesting it was misrepresented to EE at the time. This was not a pleaded issue, it went nowhere and EE did not even pursue it in its closing submissions. EE's costs award should reflect that these points should not have been pursued.

DT

40. DT should recover only 75% of its costs as assessed on the standard basis. In addition to the points made at paragraph 38 above:

40.1. DT failed on the issue as to whether it, Orange and EE comprised a single undertaking. Following R (Viridor Waste Management Ltd) v HMRC, DT's failure on this issue should be reflected in a reduction of its recoverable costs

because it constituted "*a distinct issue that [it] initiated and chose to pursue and which inevitably involved a wider inquiry… than would otherwise have been necessary*". In particular, it required the court to consider:

(a) The case law on decisive influence;

(b) The level of involvement of DT and Orange in EE's day-to-day management and in its strategy, and how much autonomy DT and Orange afforded to EE's management team;

(c) Who appointed key EE management; and

(d) The nature and extent of DT and Orange's rights under the EE shareholder agreement.

40.2. Indeed, DT maintained that P4u needed to establish "*the joint venture carries out, in all material respects, the instructions given to it by the shareholders*", not simply in relation to indirect distribution (DT Written Closing, [90]) {A/17/41} (emphasis added). DT therefore sought by this allegation to require consideration of every aspect of EE's business and the extent of shareholder involvement in it, none of which was relevant to any other pleaded issue.

Orange

41. Orange should recover only 70% of its costs as assessed on the standard basis. In addition to the points made at paragraph 38 above:

41.1. Orange, like DT, raised the issue as to whether DT, Orange and EE were a single undertaking, and failed on it. The reasons why this should sound in a reduction in Orange's recoverable costs are the same as those set out above for DT.

41.2. The Judge held that Mr Scheen failed to give truthful evidence as to his conversation with Mr Humm on 2 April 2014, describing it as "*evasive and unsatisfactory*". Significant time and costs could have been saved if Mr Scheen had been frank about the content and purpose of his conversation with Mr Humm. As set out at paragraph 36 above, the Court is entitled to reduce recoverable costs on the basis of dishonest evidence both (i) to reflect the consequence this had in increasing costs and (ii) to communicate the Court's disapproval of dishonest evidence.

Vodafone

42. Vodafone should recover only 80% of its costs as assessed on the standard basis. In addition to the points made at paragraph 38 above:

42.1. The Judge was critical of important aspects of the evidence of Vodafone's witnesses. He found Mr Humm may have been "*less than entirely frank in his evidence*" regarding both his conversation with Mr Scheen and his meeting with Ms Castillo: Judgment, [575]. The Judge also found that the testimony of Mr Hoencamp and Ms Rose "*was motivated by a desire to avoid any implication that they took a negative view of P4u's prospects since they believed that might impair Vodafone's defence*": Judgment, [404], and rejected other elements of Ms Rose's evidence as self-serving or defensive; Judgment, footnotes 24 and 25. Time and costs were incurred that could have been avoided if Vodafone's witnesses had given frank evidence on these matters.

42.2. The Judge was also critical of Vodafone's conduct towards P4u, describing its conduct in "*deliberately misleading a long-term commercial partner*", as "*distasteful or even disreputable*", and that the Partner of Choice presentation in particular was a "*subterfuge*": Judgment, [390]-[391]. Vodafone's conduct in this period, and its evidence seeking to justify that conduct, that was roundly rejected, should be sanctioned in costs.

42.3. Vodafone failed to preserve potentially relevant documents in the form of Mr Hoencamp's notebooks. Although this loss was found not to have been deliberate, it came after Mr Hoencamp had been instructed to preserve documents, he "*clearly should not have thrown them away*", and the Judge found that the loss was "*unfortunate and one will never know whether those notebooks would contain anything relevant regarding various critical meetings which Mr Hoencamp attended*": Judgment, [61]-[62]. As set out above, a failure to preserve documents may sound in costs even where it is not deliberate, and this failure to preserve documents should be reflected in the level of costs awarded to Vodafone.

42.4. Counsel for Vodafone spent substantial time cross-examining Mr Whiting and Mr Kassler on the events following Vodafone giving notice to terminate its agreement with P4u. The Judge, however, "*rejected[ed] the suggestion that*

Messrs Whiting and Kassler came up with the allegation that P4u was a victim of unlawful collusion in order to deflect criticism of their conduct of the business": Judgment, [397]. A significant discount should be made in respect of these failed attacks on the honesty of P4u's witnesses (which themselves occupied and incurred significant time and cost).

O2

43. O2 should recover only 50% of its costs as assessed on the standard basis. In addition to the points made at paragraph 38 above:

43.1. Mr Dunne's account to Mr Whiting on 27 January 2014 afforded P4u an obvious justification for initiating and pursuing these proceedings. His statement that Telefonica had given commitments to Vodafone to withdraw from P4u was, on the face of it, an admission and compelling evidence of unlawful concertation on which P4u was entitled to rely. Then, Mr Dunne falsely maintained throughout these proceedings that he had said no such thing, which reasonably reinforced P4u's assessment that wrongdoing had taken place and was being covered up. Mr Dunne has now been found following a lengthy trial to have fabricated the account he gave to Mr Whiting. The responsibility that O2 therefore bears for these proceedings having been brought should be reflected in the costs ordered by this court.

43.2. O2's (and Telefonica's) case on important factual issues was rejected, and Mr Dunne's evidence in support of it was found to be false. First, O2's case as to the content of Mr Dunne's conversation with Mr Swantee at the Landmark Lunch was rejected, with the Judge concluding that Mr Dunne's approach was an invitation to collude: Judgment, [197]. Second, Mr Dunne's account as to his conversation with Mr Whiting on 27 January 2014 was roundly rejected, with the judge accepting that Mr Dunne had told Mr Whiting that commitments had been given by Telefonica to Vodafone to withdraw from P4u: Judgment, [305]-[307]. Third, Mr Evans' evidence on whether Mr Swantee briefed him on the Landmark Lunch (which informed the meaning of Mr Evans' text message to Mr Dunne of 2 January 2013) was rejected as "*incredible*"; Judgment, [198(c)]. This false evidence undoubtedly increased the costs of the proceedings, with

significant time and resources having been devoted to resolving the dispute between the parties on these two key issues.

43.3. Mr Dunne's conduct while CEO of O2 should also be reflected in any award of costs to O2. He was found to have sought to collude not only at the Landmark Lunch, but also in subsequent calls to Mr Swantee and Mr Lawrence regarding negotiations with Apple. On the latter, the Judge found that Mr Dunne was not making a "*simple inquiry*" but was seeking "*to encourage the MNOs to adopt the same strategy towards Apple*": Judgment, [174]. Mr Dunne, and by extension O2's, "*cavalier attitude to competition law compliance*", was a large part of the explanation for why the allegations in these proceeding arose.

43.4. Finally, counsel for O2 (and Telefonica SA and Telefonica Europe) spent significant time cross-examining Mr Whiting as to the supposed pressure he was under following O2 withdrawing from P4u, to set up O2 and Telefonica's case that Mr Whiting had fabricated his record of his conversation with Mr Dunne on 27 January 2014 to 'save his own skin'. This serious attack on Mr Whiting's honesty depended on Mr Dunne's false account that he had never said the words attributed to him which was rejected (Judgment, [307]). It should not have been made, and should be reflected in a discount on the costs awarded to O2.

D. <u>Telefonica SA and Telefonica Europe should not recover any of their costs</u>

44. In their opening submissions, Telefonica SA and Telefonica Europe ("**Telefonica**") (presumably in an attempt to deflect the Court from making adverse inferences arising from their document destruction), noted that "*If the Court does wish to sanction Tef SA and Tef Europe in some way, it has the means to do so by way of orders on costs*" (Opening Submissions, [40]) {A/13/12}. Paying only minimal regard to that concession, Telefonica seek 80% of their costs on the standard basis. In P4u's submission, they should not recover <u>any</u> of their costs:

44.1. The Judge found that Telefonica had shown "*an arrogant disregard of the seriousness of the allegations being made*" in failing to take steps to secure Mr Alierta's documents until March 2020 despite Mr Alierta being named as allegedly having given commitments in P4u's pre-action letter. Telefonica's explanation that it was "*unnecessary and disproportionate to spend management time and incur business costs in order to preserve documents in*

respect of a claim that would not withstand scrutiny", was held to be "*wholly inadequate*": Judgment, [57]-[58].

44.2. As a result of Telefonica's conduct, "*some of the documentation which may well have existed is missing for one particular aspect of the claim*": Judgment, [59]. This must be the case, given Telefonica only disclosed 389 emails, and 1,380 documents in total from its custodians.

44.3. Telefonica proposes that its failure to preserve documents should be reflected in a 20% reduction of its costs. While their recognition that they should face a costs sanction betrays some slight acknowledgment of the seriousness of Telefonica's conduct, a 20% reduction does not fairly or realistically capture the seriousness of Telefonica's failings. Mr Alierta was a named individual in the pre-action letter, facing serious allegations of anti-competitive conduct and Telefonica chose to take no steps to capture his documents for almost 4 years. Absent a meaningful costs sanction for Telefonica's conduct, future litigants could understand that they would be better off not preserving documents when claims are intimated against them.

44.4. Furthermore, the points made above at paragraphs 43.1 and 43.4 for O2 equally apply to Telefonica. O2 and Telefonica pleaded a joint defence adopting Mr Dunne's account on the Landmark Lunch and the 27 January meeting with Mr Whiting, and engaged one joint counsel team which pursued that case at trial. That case was rejected and Mr Dunne's evidence found to be false.

44.5. Finally, the points at paragraph 38 above apply equally to Telefonica as to the other Defendants.

45. For all these reasons, there should be no order made as to Telefonica's costs of the proceedings.

E. <u>Pre-judgment interest on costs</u>

46. The court may make an order that a party must pay interest on costs, including from a date before judgment: CPR 44.2(6)(g). All of the Defendants seek pre-judgment interest on costs from the date costs were paid and P4u has in principle accepted to pay simple interest, however the parties do not agree on the appropriate rate.

Where costs paid in GBP

47. EE, Vodafone, O2, and Telefonica all seek pre-judgment interest at Bank of England base rate plus 2%. DT also seeks pre-judgment interest at this rate, however DT appears to have paid its costs in EUR, and is therefore addressed in the next section together with Orange.

48. In Vitol SA v Genser Energy Ghana Ltd [2022] EWHC 1955 (Comm), [2022] Costs LR 1135 , the Judge held that the party recovering its costs was a "*first class borrower*" so that "*the correct rate is that set by the short-term cost of unsecured borrowing for that type of borrower*". The Judge held that this was Bank of England base rate plus 1% (at [11]). This is the rate that is typically awarded in commercial cases,[1] and that is the appropriate rate here given that all the Defendants are first class borrowers.

49. None of the Defendants have put forward evidence that an uplift of 2% on the Bank of England base rate reflects their true cost of borrowing. Rather, in correspondence (SW3, page 11), EE has relied on Marathon Asset Management LLP v Seddon [2017] EWHC 479 (Comm), [2017] 2 Costs LR 255, where Leggatt J held that "*the greater divergence in recent years between the ordinary cost of borrowing and the Bank of England base rate, which is currently at a historic low of 0.25%*", meant that "*an appropriate measure of a commercial rate of interest in current conditions is 2% above the Bank of England base rate*" (at [17]).

50. The Bank of England base rate has been rising since the end of 2021 and currently stands at 5.25%. It has therefore been two years since the base rate was at the "*historic low*" that was said to justify a higher uplift and for the majority of the time since, interest has been accruing on the Defendants' costs at substantially higher rates. A very large proportion of the Defendants' costs were actually incurred in that 2-year period (as that covers the whole trial period and approximately 6 months before), so those costs have been accruing higher interest since they were incurred. Bank of England base rate plus

[1] See: Nova Productions Ltd v Mazooma Games Ltd [2006] EWHC 189 (Ch), [2006] RPC 15, [2] and [18]; J Murphy & Sons Ltd v Johnston Precast Ltd [2008] EWHC 3104 (TCC), [2009] 5 Costs LR 745, [35]-[36]; Re Southern Counties Fresh Foods Ltd [2011] EWHC 1370 (Ch), [2011] 3 Costs LO 343, [113]-[114]; Deutsche Bank (Suisse) SA v Khan [2013] EWHC 1020 (Comm), [31]; Fiona Trust v Privalov [2016] EWHC 2657 (Comm), [9]; Hulley Enterprises v Russia [2023] EWHC 2888 (Comm), [25].

1% is therefore the appropriate rate and will adequately compensate the Defendants for being out of their money over the relevant period.

Where costs paid in EUR

51. Where costs were paid in Euros, the appropriate rate of interest is one that reflects the costs of borrowing Euros. Two of the Defendants paid their costs in Euros: DT and Orange.

52. Orange proposes that pre-judgment interest should be applied at the European Central Bank's main refinancing operations rate plus 2% (Orange App Notice, [7]) {N/15/4}. However, as explained in Copley 1 {N/7.1}:

    52.1. The MRO rate is not the equivalent of the Bank of England base rate. The Bank of England base rate is the rate paid by the Bank of England to commercial banks on deposits. The equivalent rate with the ECB is the Deposit Facility rate, which (again) is the interest paid by the ECB to banks on deposits.

    52.2. The MRO rate is the rate charged by the ECB to banks on borrowings (not the rate paid by the ECB on deposits). Since 2019, the MRO rate has been 0.5% above the Deposit Facility rate.

53. The appropriate benchmark is therefore European Central Bank deposit facility rate (currently 5.0%), and the appropriate uplift is 1%.

54. As noted above, DT seeks Bank of England base rate plus 2% like the Defendants who paid their costs in GBP. However, DT's Schedule of Costs (DT App Exhibit, page 29) {N/14}) has a footnote reference which explains (DT App Exhibit, page 44) {N/14/44}:

> "Incurred costs have been calculated using amounts invoiced to DT in Euros. Accordingly, these amounts have been converted to GBP using the Bank of England exchange rate at the date of the invoice."

55. DT's costs were invoiced in Euros, and it is therefore to be inferred, in the absence of any contrary evidence, they were paid in Euros. DT purports to reserve "*its position as to whether costs claimed in detailed assessment will be calculated in Euros or GBP*" (DT App Exhibit, page 28) {N/14/28}. DT is therefore seeking to ride two horses at once: (i) claiming GBP interest on its Euro costs and (ii) reserving it position as to which currency it ultimately claims those costs in. Those positions are inconsistent and at odds with the compensatory principle.

56. DT's costs should be awarded in Euros as the currency in which they were paid,[2] and the relevant interest rate is one that reflects the cost of borrowing in Euros, namely the ECB deposit facility rate plus 1%.

F. Post-judgment interest on costs

Where costs paid in GBP

57. It is common ground that Judgments Act interest at 8% will accrue on any costs awarded to EE, Vodafone, O2 and Telefonica, however there is a dispute as to when such interest should start accruing.

58. P4u submits that Judgments Act interest should start accruing four months after the costs order is made, to enable the parties to progress to detailed assessment and/or reach agreement as to the quantum of costs in the meantime. This approach has been taken in a good number of cases, and particularly in cases like the present where (i) the costs in issue are very substantial and (ii) there may be real issues of proportionality and reasonableness on detailed assessment.

59. In London Tara Hotel v Kensington Close Hotel [2011] EWHC 29 (Ch), [2011] 2 Costs LO 197, Roth J held it may be appropriate to postpone Judgments Act interest "*in a case where the costs are large and there might be real issues of proportionality and reasonableness on taxation*" (at [38]). In that case, the costs were "*substantial*" and "*it would be unjust in all the circumstances for the judgment rate to apply immediately to the unknown balance*". Post-judgment interest was therefore postponed for four months "*to enable the parties to progress an assessment or reach agreement*" (at [39]).[3]

60. In Involnert Management Inc v Aprilgrange Ltd [2015] EWHC 2834 (Comm), [2015] 5 Costs LR 813, Leggatt J (as he then was) held that (at [23]):

> "I do not think it just to make an order under which interest begins to run at the rate appropriate for unpaid judgment debts before the paying party could reasonably be expected to pay the debt; and, in a case where the court has ordered a suitable interim payment to be made on account of costs, I do not think it reasonable to expect the

[2] EUR is the currency which most truly expresses DT's loss: The Despina [1979] AC 685, 701A.

[3] Four-month postponements were also ordered in Standard Chartered Bank v Ceylon Petroleum Corporation [2011] EWHC 2094, [28] and in Generics (UK) Ltd v Yeda Research & Development Co Ltd [2012] EWHC 2283 (Ch), [4], for the same reasons that the costs in issue were large and there may well be real issues of proportionality and reasonableness on assessment.

> party liable for costs to pay the balance of the debt until it knows exactly what sums are being claimed by the party awarded costs and has had a fair opportunity to decide what sums it accepts are properly payable."

61. In that case, Leggatt J postponed the start of Judgments Act interest for three months as "*the period prescribed by the rules of court for commencing detailed assessment*" (at [24]).

62. It is therefore appropriate in the present case to postpone Judgments Act interest so the parties may progress detailed assessment or seek to reach agreement on costs, and P4u seeks a 4-month postponement.

Where costs paid in EUR

63. It is common ground that s.17 Judgments Act 1838 does not apply to Orange's costs as they were paid in EUR and this provision does not apply to judgment debts in foreign currency. Rather, pursuant to s.44A Administration of Justice Act 1970, where a judgment debt is in a foreign currency "*the court may order that the interest rate applicable to the debt shall be such rate as the court thinks fit*".

64. DT, on the other hand, does seek Judgments Act interest on its costs, but as set out above at paragraph 54, it is to be inferred that it paid its costs in Euros. As such, any costs award in DT's favour should be in Euros, and s.17 Judgments Act 1838 would not apply to such an order. In the alternative, DT seeks interest pursuant to s.44A Administration of Justice Act 1970 and it is submitted that this is the correct order.

65. Orange seeks post-judgment interest on its costs at European Central Bank's main refinancing operations rate plus 3%, which is 1 percentage point higher than the rate it seeks in the pre-judgment period (MRO rate plus 2%). P4u's submissions as to why the European Central Bank's main refinancing operations rate is not the appropriate benchmark are set out above at paragraph 52 and equally apply here. In addition, however, Orange is wrong to contend for a higher rate in the post-judgment period than pre-judgment.

66. This argument was rejected by David Richards J in Barnett v Creggy [2015] EWHC 1316 (Ch) (where the currency in question was USD):

> "10. In a recent decision of the Court of Appeal in Novoship UK Ltd. v. Nikitin [2014] EWCA Civ 908 , a judgment creditor appealed against an award of interest on a judgment in a foreign currency at

> commercial rate rather than a rate of 8 per cent. It was submitted on behalf of the appellant that given the way that judgment rate had departed so clearly from commercial rates without any reduction being made to it, it must be taken that there was a legislative policy of providing more than ordinary financial compensation by the award of interest, which should accordingly inform the approach of the court in deciding the rate of interest on a judgment in a foreign currency.
>
> 11. The Court of Appeal rejected this argument. It held that the underlying purpose of both the Judgments Act and section 44A of the Administration of Justice Act is to provide compensation to the claimant for being kept out of its money. As it was put by Longmore LJ at [56], those considerations:
>
> "point to the conclusion that the judge was right to hold that the compensatory principle provided sufficient (we might even say compelling) grounds for departing from the prescribed rate applicable to sterling judgments."
>
> 12. In my view, this decision of the Court of Appeal resolves the debate as to whether, when awarding interest on a judgment in a foreign currency, the court is to apply a conventional compensatory approach, or is to apply an approach in some way linked to interest at the higher rate of 8 per cent.
>
> 13. … I consider that I should award interest at a commercial rate on the compensatory principle, and it seems to me that the rate should be the same rate as applied prior to judgment, that is to say 3 per cent above 6-month US dollar Libor."

67. Very recently, in Palladian Partners LP v Argentina [2023] EWHC 1425 (Comm), [2023] Costs LR 943, Picken J also held that in cases of judgment debts in foreign currencies, "*the appropriate approach at the post-judgment stage is to have regard to the compensatory principle*".

68. Orange's application for higher post-judgment interest on costs violates the compensatory principle. There is no reason as to why a higher rate of interest should apply post-judgment, save that Orange is seeking a Judgments Act-style elevated rate of interest, despite the Judgments Act not applying. That argument was rejected in the cases cited above, and the correct approach is for interest to continue at the same rate as awarded pre-judgment.

69. Therefore, post-judgment interest on Orange and DT's costs should continue to run at European Central Bank deposit facility rate plus 1%.

G. Payments on account

70. It is accepted that for those parties in whose favour a costs award is made, there should be a payment on account of costs of "*a reasonable sum*" (CPR 44.2(8)). Per Christopher Clarke LJ in Excalibur Ventures LLC v Texas Keystone Inc [2015] EWHC 566 (Comm):

> "23. What is a reasonable amount will depend on the circumstances, the chief of which is that there will, by definition, have been no detailed assessment and thus an element of uncertainty, the extent of which may differ widely from case to case as to what will be allowed on detailed assessment. Any sum will have to be an estimate. A reasonable sum would often be one that was an estimate of the likely level of recovery subject, as the costs claimants accept, to an appropriate margin to allow for error in the estimation. This can be done by taking the lowest figure in a likely range or making a deduction from a single estimated figure or perhaps from the lowest figure in the range if the range itself is not very broad.

71. In estimating a party's reasonable and proportionate costs (per Leggatt J in Kazakhstan Kagazy plc v Zhunus [2015] EWHC 404 (Comm), [13]):[4]

> "The touchstone is not the amount of costs which it was in a party's best interests to incur but the lowest amount which it could reasonably have been expected to spend in order to have its case conducted and presented proficiently, having regard to all the relevant circumstances. Expenditure over and above this level should be for a party's own account and not recoverable from the other party…
>
> Where, as here, the court is not actually assessing the amount of costs to be recovered and has nothing like the level of information that could be required on a detailed assessment, there is additional reason to be conservative. The fact that the total costs claimed are very high cannot by itself be allowed to increase the sum awarded as an interim payment."

72. Fees incurred by solicitors in excess of the guideline rates are not recoverable, unless there is a clear and compelling justification: Athena Capital Fund SICAV-FIS SCA v Secretariat of State for the Holy See [2022] EWCA Civ 1061, [2022] Costs LR 1119, [6] and [10].

73. The Defendants seek the following payments on account:

[4] See also Dana Gas PJSC v Dana Gas Sukuk Ltd [2018] EWHC 332 (Comm), [2018] 2 Costs LO 189.

73.1. EE seeks £12,966,462.94, which is 80% of incurred costs of £16,208,078.68;

73.2. DT seeks £8,000,000, also approximately 80% of total incurred costs of £10,524,031.14;

73.3. Orange seeks EUR 8,903,816.18 or GBP 7,797,962.21, 65% of incurred costs of EUR 13,698,178.74;

73.4. Vodafone seeks £14,806,190.71, which is 65% of incurred costs of £22,778,754.94;

73.5. O2 seeks £5,133,812.97, which is 65% of incurred costs of £7,898,173.79;[5]

73.6. Telefonica SA and Telefonica Europe seek £4,127,389.19, which is 65% of 80% of their incurred costs of £7,937,286.86.

74. Applying the above principles, the costs claimed for each of the Defendants are far above "*the lowest amount which it could reasonably have been expected to spend in order to have its case conducted and presented proficiently*", and as such the amounts paid on account of costs must anticipate that they would be significantly cut down on detailed assessment.

75. By way of illustration only, the following headlines points can be made demonstrating the disproportionate and unreasonable nature of the sums claimed by the Defendants.

Counsel teams for trial

76. With the exception of DT, each of the Defendant counsel teams for trial included at least 2 silks. This was obviously excessive given that:

76.1. The Claimant's counsel team included a single silk, despite the Claimant bearing a much heavier burden than any of the Defendants in terms of oral submissions and cross-examination; and

76.2. A single silk on most of the Defendant counsel teams did the vast majority of the oral advocacy.

77. The cost of the Defendants collectively briefing 10 silks as part of 5 counsel teams for trial cannot possibly come within the "*lowest amount*" which the Defendants could

[5] O2 and Telefonica's incurred costs reflect a division of joint costs on a 70:30 basis. This allocation is not being disputed for the purposes of this hearing, however P4u reserves its position on this issue in detailed assessment, once further and more detailed information as to those parties' costs has been provided.

reasonably spend to have their cases "*conducted and presented proficiently*". The relevant costs (insofar as can be gleaned from the information provided) are:

77.1. EE's counsel team for trial consisted of 2 silks and 2 juniors, whose total fees for trial preparation and trial were £2,888,310 (SW3, pages 63, 75, 86, 87) {N/11/65, 77, 88, 89}.

77.2. Orange's counsel team for trial consisted of 2 silks and 1 junior, whose brief fees totalled £2 million (Orange has not provided details of daily refresher fees) (Orange App, Schedule C, page 1) {N/16/52}.

77.3. Vodafone's counsel team for trial consisted of 3 silks and 1 junior, with brief fees, refreshers and closing submissions costing a total of £4,176,367.50 (Vodafone App Exhibit, pages 38 and 42-43) {N/19/39, 43-44}.

77.4. O2 and Telefonica's counsel team for trial consisted of 2 silks and 2 juniors whose brief fees totalled £2 million, plus daily refresher fees of £15,750 (O2 App, Second Schedule, page 7) {N/25/7}.

Solicitor hourly rates

78. At Appendix 1 to this skeleton argument is a table showing the approximate comparison of the Defendants' solicitors' hourly rates to the guideline rates. As set out above, rates above the guideline rates will not be recoverable absent a clear and compelling justification.

79. Many of the fee earner rates are extremely high and will certainly be subject to significant reduction on detailed assessment. For example:

79.1. Clifford Chance's rates exceed the guideline rates at every level of seniority, usually by about £100 an hour (except in the case of trainees, where the difference is £24 an hour)

79.2. Linklaters' rates are more than double the guideline rates for Grades A-C, and are £100 per hour more than the guideline rate for trainee solicitors.

79.3. Hogan Lovells' rates have increased over time, but since June 2020 are all significantly above current guideline rates: with partner rates of £744 (vs £512 guideline rate), counsel rates of £644 (vs £512 guideline rate), senior associate rates of £592 (vs £348 guideline rate), associate rates of £372 (vs £270 guideline

rate), and trainee rates of £252 (vs £186 guideline rate) (Vodafone App Exhibit, page 20) {N/19/20}.

79.4. Mishcon de Reya's rates are above guideline rates for Grades A-C.

79.5. Norton Rose Fulbright's rates are above guideline rates for Grades A-C.

79.6. Covington & Burling's 'Associate' rate is significantly above guideline rates for Grade C, and the 'Special Counsel' rate is significantly above the guideline rate for Grade B if they are 4-8 years PQE (though not above the Grade A rate if the fee-earner is more senior).

Preparation of fact evidence

80. The Defendants are claiming very high costs for the preparation of their first round of evidence.

80.1. Orange is claiming 5,000 hours of fee earner time for the preparation of its 5 first-round witness statements (Orange App, Schedule B, page 9) {N/16/44}. These statements together totalled approximately 160 pages of substantive evidence. The cost of this fee-earner time (with a discount of approximately €100k) is approximately €1.6 million. In addition, Orange is claiming a further €372k of disbursements in relation to these same witness statements, bringing the total cost of this exercise to just over €2 million {N/16/9}.

80.2. Vodafone is claiming £1,857,678 of fee-earner time for the preparation of Vodafone's first-round witness statements, together with approximately £120,000 counsel fees, totalling almost £2 million (Vodafone App Exhibit, pages 30-33) {N/19/31-34}. This is for the preparation of 7 witness statements, totalling approximately 130 pages of substantive evidence. The sum claimed by Vodafone includes 642.1 hours of partner time (which corresponds to a partner billing 40 hours a week solely on witness statements for approximately 15 weeks).

80.3. EE is claiming £1,882,992.03 for the preparation of first-round witness statements (SW3, page 61) {N/11/63}. This was for the preparation of 7 witness statements, totalling approximately 195 pages of substantive evidence, plus Mr Milsom's witness summary. EE then claims a further sum in respect of Mr Milsom's statement, though the precise amount cannot be separately identified

in EE's costs schedule. Of the sum claimed by EE, £380,898.00 is partner time, which corresponds to 604.6 hours of partner time spent on preparing 7 witness statements.

Trial preparation

81. The Defendants are claiming extraordinary amounts in trial preparation carried out by their solicitors:

81.1. Vodafone is claiming 4,296.5 hours of fee earner time totalling £1,969,086.80 (over phases 4, 5 and 6) (Vodafone App Exhibit, pages 30, 37, 40) {N/19/31, 38, 41};

81.2. Orange is claiming 3,601 hours of fee earner time, totalling €1,034,592.79 (Orange App, Schedule B, pages 13-14) {N/16/48-49}; and

81.3. EE is claiming £1,459,969.45 in fee-earner time (SW3, pages 63, 75, 86) {N/11/65, 77, 88}.

82. These sums are patently excessive. The tasks that were occupying the parties' solicitors, as explained in the costs schedules, included *inter alia*: work on trial bundles, inter partes correspondence, arranging translations, liaising with witnesses and arranging witness familiarisation, and factual investigations. However, preparation of the trial bundle was the Claimant's responsibility, and it was QE who undertook the lion's share of the work on it. The remaining tasks should not reasonably have required millions of pounds (or Euros) to be incurred. Also, Orange includes preparation of submissions for trial, which is clearly a task for its counsel team. (Orange App, Schedule B, page 13) {N/16/48}.

DT's, O2's and Telefonica's costs schedules

83. The analysis in paragraphs 80 to 81 above focuses on EE, Orange and Vodafone's costs schedules. This is because DT, O2 and Telefonica's costs schedules simply give the totals expended at each of the security for costs 'phases', together with a description of all the tasks carried out in that phase. Therefore, DT, O2 and Telefonica's costs schedules do not contain any of the detail required in order to glean how much has been spent on, for example, witness statements, or what level of fee earner worked what number of hours on such tasks.

84. In the absence of such detail, however, it is still clear that the sums claimed by DT, O2 and Telefonica are far beyond what would be recoverable on detailed assessment.

84.1. First, there are the points made above regarding these parties' counsel teams, and the hourly rates of their solicitors.

84.2. Second, since June 2021 O2 and Telefonica have instructed separate sets of solicitors, despite previously jointly instructing one firm (Telefonica App, [10]) {N/26/4} and despite continuing to instruct one counsel team. This raises clear risks of duplication of work, the costs of which would not be recoverable.

84.3. Third, the total costs expended by these parties are at least on par with the totals expended by their co-defendants. So, insofar as the detail provided in EE, Orange and Vodafone's costs schedules raises serious doubts about the reasonableness and proportionality of those costs, the same must be true of DT, O2 and Telefonica. For example, DT claims total costs of £10,524,031.14, which is comparable to Orange's total costs of EUR 13,698,178.74. O2 and Telefonica's costs together (£15,835,460.66) are comparable to those of EE (£16,208,078.68).

85. In any event, DT, O2, Telefonica cannot be in a better position than their co-defendants by virtue of the fact that they have not provided the information needed to consider even at a high level how their costs have been incurred in these proceedings.

P4u's proposals as to payments on account

86. In the premises, P4u proposes the following payments on account which reflect (i) that any award should be on the standard basis (which ordinarily assumes recovery at 65%); (ii) that P4u should only be ordered to pay a proportion of the party's costs as set out in section C above; and (iii) the payment on account should reflect a further margin of error to reflect the fact that the Defendants' very high costs would likely be substantially cut down in detailed assessment.

87. As to (iii), P4u proposes a further 20% discount for all Defendants save Vodafone. Looking just at the totals claimed by each Defendant, the sums incurred by Vodafone over the proceedings are particularly eye-watering; £22,778,754.94. This is only moderately less than P4u's costs of pursuing its case against all the Defendants (approximately £29 million). As set out above, there are serious reasons to believe that

all the Defendants' costs would be cut down substantially on detailed assessment, but that applies with especial force to Vodafone. Therefore, P4u proposes a further 40% discount on the costs claimed by Vodafone for the purposes of calculating the payment on account.

88. Proposed payments on account:

88.1. EE: £16,208,078.68 total costs x 65% x 70% x 80% = £5,899,740.64

88.2. DT: £10,524,031.14 total costs x 65% x 75% x 80% = £4,104,360. For the same reasons as given above, DT's payment on account should be in Euros. At the Bank of England exchange rate on 14 December 2023 (EUR 1 = GBP 0.8616), the payment on account proposed is EUR 4,763,663.12.

88.3. Orange: EUR 13,698,178.74 x 65% x 70% x 80% = EUR 4,986,137.06

88.4. Vodafone: £22,778,754.94 total costs x 65% x 80% x 60% = £7,106,971.54

88.5. O2: £7,898,173.79 total costs x 65% x 50% x 80% = £2,053,525.19

88.6. No payment on account to Telefonica as no costs award should be made in Telefonica's favour.

Time for P4u to make the payments on account

89. P4u seeks 21 days for making such payments on account as are ordered. This is to account for the fact that the Christmas and New Year period falls very shortly after this hearing, which may cause delays in organising the required payments.

Payment from the Secured Amounts

90. Orange has stated in correspondence that it does not agree that P4u should have permission to make the payments on account from the sums that have been provided as security for the Defendants' costs (the "**Secured Amounts**") (Orange App Exhibit, page 33) {N/16/34}. The very purpose of Secured Amounts is to set aside sums out of which the Defendants' costs can be paid. To contend that the Secured Amounts should remain in place while very substantial payments on account are made from another source is both wrong in principle and to seek by the back door an increase in Orange's security, which was ordered at 65% (despite Orange seeking 75%).

H. Conclusion

91. For the all the reasons given above, P4u respectfully invites the Court to make the Order in the terms sought by P4u.

KENNETH MacLEAN KC
OWAIN DRAPER
GIDEON COHEN
STEPHANIE WOOD

One Essex Court
15 December 2023

Appendix 1: Defendants' solicitors' hourly rates compared

Aside from Clifford Chance, the defendants' solicitors have not provided the years' experience of their fee-earners to enable a precise comparison with the guideline hourly rates. Set out below are approximations based on the information provided.

	Guideline rates	**Clifford Chance (EE)**	**Covington & Burling (DT)**	**Norton Rose Fulbright (Orange)**	**Hogan Lovells (Vodafone)**	**Mishcon de Reya (O2 and Telefonica)**	**Linklaters (Telefonica)**
Grade A: 8+ years' PQE	**£512**	Partner: £630	Partner: £500	Partner: £550-£580	Partner: £495-£744 Counsel: £644	Partner: £555-£648	Partner: £1,125-£1,165
Grade B: 4-8 years' PQE	**£348**	Associate (4-7 years PQE): £450	Special counsel: £450	Senior associate: £459-£469	Senior associate: £420-£592	Managing associate: £385-£390	Managing associate: £805-£890
Grade C: 0-4 years' PQE	**£270**	Associate (0-4 years PQE): £390	Associate: £350	Associate: £277-£371	Associate: £274-£372	Associate: £295-£340	Associate: £615
Grade D: Trainee solicitors	**£186**	£210	£150	£147-£180	£184-£252	£185	£295
Grade D: Paralegals	**£186**	n/a	n/a	£100	£110-£216	£140-£185	£170