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6 **IN THE COMPETITION APPEAL TRIBUNAL**

Case No 1332/4/12/19

7
8 Victoria House,
9 Bloomsbury Place
10 London WC1A 2EB

11
12 3 October 2019

13
14 Before:

15
16 **HODGE MALEK QC**

17 (Chairman)

18 **PAUL DOLLMAN**

19 **DEREK RIDYARD**

20 (Sitting as a Tribunal in England and Wales)

21
22 BETWEEN:

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24
25
26 **TOBII AB (PUBL)**

Applicant

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28
29 -v-

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31 **COMPETITION AND MARKETS AUTHORITY**

Respondent

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APPEARANCES

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Mr Aidan Robertson QC and Mr Matthew O'Regan (instructed by Preiskel & Co LLP) appeared on behalf of the Applicant.

Ms Marie Demetriou QC (instructed by the Competition and Markets Authority) appeared on behalf of the Respondent.

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Thursday, 3 October 2019

3 (11.00 am)

4

5

Case management conference

6 **CHAIRMAN:** Mr Robertson.

7 **MR ROBERTSON:** Mr Chairman, introductions. I appear on behalf of Tobii with my

8 learned friend Mr Matthew O'Regan and Ms Marie Demetriou appears for the

9 CMA today.

10 **CHAIRMAN:** On her own?

11 **MR ROBERTSON:** Yes. I think Mr Lask is otherwise occupied.

12 I am really in the Tribunal's hands --

13 **CHAIRMAN:** I will do it in my normal way.

14 **MR ROBERTSON:** Can I check first of all you got our supplemental skeleton this

15 morning.

16 **CHAIRMAN:** Very helpful. It looks to me that the issues are fairly clearly defined

17 between both of you now. I thought it was helpful, now you know what their

18 objections were, you have answered those insofar as you can.

19 **MR ROBERTSON:** It is really up to the Tribunal now.

20 **CHAIRMAN:** It is up to us now, but we will hear you on it.

21 So forum is clearly agreed, so England and Wales be the forum. Confidentiality ring,

22 how far have we got on the draft wording for that?

23 **MS DEMETRIOU:** It is agreed.

24 **MR ROBERTSON:** Our understanding is the wording is agreed.

1 **CHAIRMAN:** Okay. I will look at that later on today once it is ready --

2 **MR ROBERTSON:** We will provide you with the order.

3 **CHAIRMAN:** Specific disclosure. You are both experienced parties, insofar as you

4 can't agree anything, can you take out your application for specific disclosure by

5 16 October.

6 **MR ROBERTSON:** 16 October.

7 **CHAIRMAN:** Because that gives you time. You will see what the other side's defence

8 is on 11 October --

9 **MR ROBERTSON:** Yes.

10 **CHAIRMAN:** -- and then you can have that.

11 As regards --

12 **MR ROBERTSON:** I should say with the hearing of that application for specific

13 disclosure, I am not assuming that we are going to be asking for a second case

14 management conference.

15 **CHAIRMAN:** No, I can deal with it on the papers. I will deal with it on my own, unless

16 I feel I need the members to help me with that.

17 **MR ROBERTSON:** In the past sometimes matters such as that have been dealt with by

18 way of telephone hearing.

19 **CHAIRMAN:** If we need one that is fine. Hopefully you will resolve it, but ordinarily

20 there is not going to be much disclosure if you have got targeted documents that

21 you need for the purposes of your case. I am sure the CMA will give it to you.

22 Obviously if it is wide-ranging, a roving disclosure you are never going to get it on

23 a judicial review type case. You know what the rules are.

24 **MR ROBERTSON:** Yes.

1 **CHAIRMAN:** I will point out now that the way I deal with these cases is that I do try
2 and deal with them as quickly as possible. This is a merger situation; we need to
3 have a hearing as soon as possible. I don't envisage this hearing is going to be as
4 far away as December, but when I look at my diary and the diary of the people
5 sitting with me it is very, very difficult to get any slot this year, but we will find
6 a slot and we will go through the dates at the end of today. We need to figure out
7 what the time estimate is as well.

8 As regards the evidence, we have got the issue of Mr Cowen's statement, and CMA, you
9 agree paragraphs 1 to 42 can go in but you have got objections to 43 to 110. I think
10 we all understand what they are.

11 We have got Mr Ericsson's statement.

12 **MS DEMETRIOU:** Mr Eskilsson.

13 **CHAIRMAN:** Eskilsson, yes, the factual witness, and having looked at that, my
14 provisional view, having spoken to the wing members, is that I do find the first part
15 of the statement actually quite helpful where he describes the products of Tobii.
16 I know I can find it in the CMA report, but I did find that useful. The rest of the
17 report I think is up for grabs. The rest of the statement is up for grabs and we will
18 hear you on that, but my provisional view is that the first part, I think it is up to
19 paragraph 38, is helpful. Because at the end of the day, we all want to have this
20 hearing in a way that the evidence is presented in a way that is most helpful to us
21 because we have got to reach a decision one way or another.

22 The next item is Mr Williams' report and that is up for grabs, we will hear what the
23 arguments are on that. It is not helped by the fact it is a mixture of things. Some of
24 it, and indeed most of it to me, appears to be points that the expert himself made,

1 largely in writing, before the CMA at the time. So the argument will be, well, that
2 is not new evidence so we can put it in.

3 Some of it seemed to be new, and I think you have both been debating which is new and
4 what is not new in your communications, and others is a gloss with further
5 arguments and points on points which are already dealt with in the past which is
6 actually new. So it is a mixture of all of that, but by and large I don't encourage
7 expert evidence on these merger hearings because it is the nature of the process and
8 the nature of the decision-making process that is important. If we admitted this
9 statement in, then the CMA, as a matter of fairness, would be allowed to instruct
10 their own expert and before we get into this we will have a hearing too far down the
11 line. But I don't see that there is going to be huge prejudice whether we have it in
12 or out because at the end of the day, largely, it is not new and I feel that the
13 Applicant can make its case without it. But then that raises the issue of what we do
14 with all the exhibits if we do exclude it, and probably what I would do is, if we are
15 going to exclude anything, to give the opportunity to the Applicant to put in a short
16 production witness statement exhibiting any documents that they need,
17 concentrating on documents which are already before the CMA. But if there is
18 something new they can say: this is new and this is why we are putting it in. But
19 by and large when I looked through the exhibits, and I didn't have time to read
20 every single page of those exhibits, the exhibits seemed to me to be quite helpful, to
21 put it that way.

22 So that is where I am at the moment. I am not saying I have made a decision on it, but
23 which ever way it is going to go we will make a decision today. What I am
24 concerned about is what is most helpful to us to reach this decision in the format

1 that I can work with and I feel at the moment that on the issues covered by
2 Mr Williams I don't really need -- I don't mean that in an insulting way, he has
3 obviously put a lot of effort into it, but there is a lot of other detailed stuff which
4 I have looked at already, and when I read that and read Mr Williams I think, is
5 there much more in there that I haven't gleaned from the exhibits.

6 So that is where we are. What I will do is if you make your submissions on the three
7 documents, and then the CMA, and then you have a right of reply and then we will
8 see where we are.

9 **MR ROBERTSON:** I will take it shortly.

10 Dealing with first of all Mr Eskilsson, as you said it is useful background and it is relied
11 upon for those purposes.

12 It is conventional in judicial review cases for someone on behalf of the company to
13 explain who they are, what they do, and that is essentially its background.

14 **CHAIRMAN:** Shall we just look at this. Let's look at the statement, shall we. What
15 I will say is when I look at it, it is tab 7, for my part I found the section on the
16 background and the products up to paragraph 37, including the table, I thought that
17 was really helpful for me and I had a better understanding of what these actual
18 products are than from reading the report. So from that point of view I am very
19 happy with that.

20 Ms Demetriou, are you really pressing for that bit to be excluded?

21 **MS DEMETRIOU:** No, I hear what you say and we are content for that to remain.

22 **CHAIRMAN:** I do find that helpful. The rest of it is really a sort of repetition of what
23 we have seen in other documents, a repetition of what is in your Notice of
24 Application, and there is a bit of gloss and commentary which I didn't find as

1 helpful and really I don't expect to see that; it is more like a contentious
2 submission.

3 **MR ROBERTSON:** Well, I think our submission would be to the extent that you don't
4 find it helpful when it comes to the final hearing, disregard it and don't give weight
5 to it. But there is little to be gained at this stage from making us go through
6 an exercise of filleting out and potentially having to re-exhibit documents that are
7 exhibited to the filleted out parts of the statement. I remember going through this
8 exercise with Mr Ridyard when he was acting as an expert witness in the
9 *Somerfield* case, in 2006, as a consequence of withdrawing ground 1 in that case,
10 and then we had to fillet Mr Ridyard's report and, although it sounds like a simple
11 exercise, it turned out not to be.

12 **CHAIRMAN:** I fully understand that.

13 The problem with the halfway house solution which is what you are proposing, I am
14 proposing a halfway house solution anyway because I am saying the bits I found
15 really helpful, is not contentious, is up to paragraph 38, which is like half the thing,
16 that is fine. The other bit is a mixture of sort of argument, commentary, stuff that
17 we read before, and I don't find it particularly helpful and it is contentious, and at
18 the risk of saying let's leave it to the hearing and you can decide what bits you
19 would like, is that the CMA will feel obliged to put in some witness statement and
20 reply, answering all these points. That is the nature of these cases: it is a snowball
21 coming down the hill. Once you allow something like that type of witness
22 statement in you are going to have that. I really want to keep the system where
23 I like to have things fairly clean and tidy. By and large these points in there, they
24 are made well in your application.

1 **MR ROBERTSON:** If we are going to fillet out Eskilsson then I would fillet out from
2 50 onwards.

3 **CHAIRMAN:** Okay, let's have a look at that.

4 **MR ROBERTSON:** So I would leave the background on the merger between Tobii,
5 Dynavox and Smartbox. That is from 44 onwards. And I would leave background
6 on the Smartbox business from paragraph 39 onwards.

7 **CHAIRMAN:** Just tell me what bit -- I said 1 to 38 is fine, so what additional bit --

8 **MR ROBERTSON:** 39 to 43, which is background on the Smartbox business.

9 **CHAIRMAN:** Yes, 39 to 43, yes.

10 **MR ROBERTSON:** And then paragraphs 44 to 49 which is background on the merger
11 between Tobii Dynavox and Smartbox.

12 **CHAIRMAN:** Okay. Can I just quickly read that? Thank you. **(Pause)**
13 There is a lot of opinion in this, that is the trouble. When I look at -- I will just say it.
14 When I look at 43, yes, I find that helpful. I find 43 helpful.

15 **MR ROBERTSON:** Yes.

16 **CHAIRMAN:** So I can see 43. So look, 39 is not a problem, 43 is not a problem. A lot
17 of the rest is commentary, emotion --

18 **MR ROBERTSON:** Well, if one were to draw the blue pencil from 44 onwards, so we
19 have 1 to 43.

20 **CHAIRMAN:** 43 is sensible, 39 is sensible. It is 40 to 42, which is a mixture of opinion
21 and commentary, which I don't find helpful. So at the moment, and you can try and
22 persuade me, I would, subject to what my colleagues say, keep in 1 to 39 and 43
23 and exclude the rest.

24 **MR ROBERTSON:** Yes. That seems pragmatic.

1 **CHAIRMAN:** All right, so 1 to 39 and 43. Let me just check. **(Pause)**.

2 Yes, okay. So that is where we are on that one.

3 Shall we now -- which bit do you want to look at --

4 Ms Demetriou, do you want to say anything else?

5 **MS DEMETRIOU:** No, we are content with that.

6 **CHAIRMAN:** Okay, so we have dealt with that.

7 **MR ROBERTSON:** Shall we do Mr Cowen next?

8 **CHAIRMAN:** So it is paragraphs 40 to 42 and 81 to 84 are excluded.

9 **MR ROBERTSON:** Yes.

10 **CHAIRMAN:** What are we doing next?

11 **MR ROBERTSON:** Mr Cowen.

12 **CHAIRMAN:** Yes. So there is no objection to the first part of Cowen.

13 **MR ROBERTSON:** 1 to 42 is okay, as I understand it.

14 **CHAIRMAN:** The way I look at it is ordinarily the solicitor's statement in these cases is

15 relatively uncontentious, sets out the history and the background. The problem

16 with Mr Cowen's statement, particularly the latter part of it, it really does go into

17 argument, his opinion and all that sort of stuff. Almost all of that is in your Notice

18 of Application and I don't need to see it there, to be honest.

19 **MR ROBERTSON:** Yes. No, I think as long as we don't lose exhibits.

20 **CHAIRMAN:** What I proposed on that is that if Mr Cowen or someone can just give us

21 a production statement which will have -- insofar as this exercise has excluded any

22 exhibits, I want a statement listing each exhibit, whether that exhibit was before the

23 CMA and, if so, when and at what stage.

24 **MR ROBERTSON:** Yes.

1 **CHAIRMAN:** And if it wasn't before the CMA just briefly say: this is why we are
2 exhibiting it.

3 **MR ROBERTSON:** Yes.

4 **CHAIRMAN:** My initial review of the exhibits to Mr Cowen's statement was that
5 I didn't see anything that leapt out at me and said, well, I don't think that should be
6 there or was not helpful, unless Ms Demetriou has a point about any of those
7 exhibits?

8 **MS DEMETRIOU:** No. I think we suggested ourselves that the appropriate approach is
9 simply to make a short production statement.

10 **CHAIRMAN:** Yes, that is all I want, a short production statement. Mr Cowen is
11 experienced enough to know what I want, so that is fine.

12 So that is Mr Cowen's statement. So we exclude 43 to 110, and then the next one is the
13 expert report, which I suspect is where most of the contention is going to be.

14 **MR ROBERTSON:** That is right. I will explain why I have done it in this format. We
15 wanted to draw together the economic arguments that were put before the CMA
16 and either, we say, wrongly disregarded or just simply weren't referred to in the
17 final report. We could do that exercise by going back to the record of the enquiry.

18 **CHAIRMAN:** But you have largely done that. When I look at the exhibits I can see the
19 detailed submissions put forward by the expert and, in a way, I am happier to work
20 from that than from something else because it is a halfway house, this expert report.
21 In some points he is making a point but in a sort of summary form where he has
22 made it in a lot more detail, and I prefer to look at the more detailed version. And
23 the other bits that he is putting it in a different way to how it was put before in
24 which -- so --

1 **MR ROBERTSON:** We would be relying upon the submissions made to the Inquiry.

2 **CHAIRMAN:** And you have exhibited them. I have seen them, yes.

3 **MR ROBERTSON:** The reason why we have done it in a report like this is to get it in
4 up front, together with the Notice of Appeal so that the CMA have the opportunity
5 to respond to it in their Defence. They can see the arguments, the detailed
6 arguments that we are advancing.

7 If we didn't do it that way then we would have been advancing these arguments for the
8 first time in this level of detail in our skeleton argument for the hearing, which, on
9 the CMA's proposal, is to be served 21 days before the hearing. For them then only
10 to have 7 days in which to respond to that, that is not constructive.

11 **CHAIRMAN:** Yes.

12 **MR ROBERTSON:** So that is why we have done it this way. So they have notice of
13 the economic arguments that we are relying upon in this appeal, those being
14 arguments that were indeed advanced in large measure during the Inquiry.

15 **CHAIRMAN:** Yes. When I look at it, the various arguments put forward by the CMA,
16 lack of independence and what not, as long as the expert knows what his duties are
17 and we are dealing with a professional guy, that argument is not really going to go
18 very far. But they do have notice of what your case is because (a) they had it
19 during the Inquiry and there is a lot of that report which is actually answering these
20 points; and (b) I thought your Notice of Application was actually, you know, very
21 well drafted. It is a detailed document and there is a lot of meat in there. It takes
22 a few hours to read your Notice of Application and I have read it twice now.
23 I understand it. I am sure the CMA understand it. I am not sure whether
24 Mr Williams' statement assists with our understanding.

1 In a way, you are saying it is a useful summary for them to know the case they need to
2 meet but I think the risk for me is that, if you are allowed to have that report in,
3 I would have to give them permission to adduce their own expert evidence in reply
4 and we go down this unsatisfactory route.

5 **MR ROBERTSON:** In my submission, the evidence they would put in in reply would
6 be from a member of the Inquiry team, because --

7 **CHAIRMAN:** Not necessarily. The problem is, I can't circumscribe who the expert is
8 going to be. It could be -- I am not saying it is not going to be but they say now,
9 actually, in the view of what we have seen, we are going to have to go outside the
10 office and get a truly independent expert who will then respond to it.

11 I am just saying what I feel, you know what I am like, I am an open book. If I did find it
12 necessary to justly resolve these proceedings, of course I would put it in, allow you
13 to have it in and understand your case. It really is necessary for me to resolve these
14 proceedings. But I am just saying that is what my feeling is at the moment. You
15 can try and persuade me otherwise.

16 **MR ROBERTSON:** If that is your, feeling I am sure it is fair, if it is shared by the
17 members of the Tribunal.

18 Another way of dealing with this is for us to be placed on record here saying these are
19 arguments that we will be advancing when it comes to the hearing, they will be
20 advanced by way of submission based upon the documents, the documentary
21 record of the Inquiry. It will not be acceptable for the CMA to say in their skeleton
22 argument: well, we have seen these for the first time in your skeleton argument, we
23 have only got 7 days to respond, you have served hundreds of pages of skeleton
24 argument, how can we possibly deal with that?

1 **CHAIRMAN:** We are not going to get hundreds of pages of skeleton argument! We are
2 not going to have that because that is a burden on you and a burden on me. But
3 I understand what you are saying and we will have to see what Ms Demetriou says
4 on that.

5 What we need to be careful about is that, insofar as you are introducing points which
6 weren't raised before, you may have a problem. If, on the other hand -- and I think
7 it the case for at least 95 per cent -- they are points that are in there in the
8 submissions, which I have read already, then of course the CMA can't make that
9 objection.

10 If there is points, and there are some points, which are additional arguments which
11 weren't put before the CMA, that is up for grabs. They can come back and say that
12 is a new point, that doesn't satisfy the judicial review, and you can have that debate
13 when we have the hearing.

14 **MR ROBERTSON:** That is classically a matter for the final hearing.

15 **CHAIRMAN:** Exactly.

16 **MR ROBERTSON:** Can I just take instructions? **(Pause)**

17 We do think that it is a convenient way of drawing together our arguments and providing
18 a template for the CMA to respond to arguments that we will be advancing at the
19 final hearing so, for those reasons, we do seek to have it admitted.

20 **CHAIRMAN:** Okay, that is fine.

21 Ms Demetriou, let's hear what you have got to say on this. You can be sure I have read
22 all the authorities.

23 **MS DEMETRIOU:** Yes, I am not going to take the Tribunal back to the authorities.

24 The difficulty that we see, particularly the way that Mr Robertson has just put the

1 argument now, is he says the reason for doing it this way is to bring together in
2 convenient form the points that were made before the CMA during the Inquiry.
3 Now, if that is all there was to the expert report then my submission would be, and my
4 submission is in respect of those parts, that it is entirely unnecessary. Those points
5 are raised in the Notice of Appeal and they can be made by way of submission.
6 Now, insofar as there are -- there are two other categories of material which are in this
7 expert report and you, Sir, have identified what they are. The first is that there is
8 reference to material which was put before the CMA but that is glossed by
9 Mr Williams in his report.

10 **CHAIRMAN:** We have got that, yes.

11 **MS DEMETRIOU:** There we say that is an unhelpful approach, and the authorities
12 which the Tribunal pointed us to last night make that point good. In those cases,
13 the Tribunal refused to admit evidence on the basis that what they did was
14 impermissibly glossed in the material that was before the decision maker.

15 The third category is new material. We fundamentally do object to that new material
16 because it goes outside the scope of what a judicial review is. The point made by
17 Mr Robertson in his skeleton, which is, well, this is the first time we could have put
18 this material to the CMA because these points only became definitive in the Final
19 Report, that proves much too much. If that were a good point it would be licenced
20 to --

21 **CHAIRMAN:** If there is a completely new point that has come out of the blue in the
22 Final Report, that is not in the preliminary findings, then of course obviously he
23 can't.

24 **MS DEMETRIOU:** So, Sir, the difficulty though is extracting which is which in this,

1 because there is a huge amount -- and I can go through different parts of the expert
2 report if that is going to help, I don't know how much you want from me by way of
3 submission now but I can do that. The difficulty is that even Tobii's own case has
4 shifted, you have seen that. They put in a document saying that there is nothing
5 new in this and in their first skeleton argument they say, this is all -- Mr Robertson
6 says this morning -- all designed to put in a convenient form what was before the
7 decision maker. Now in their supplemental argument in response to what we have
8 said, they acknowledge there is a lot of new material.

9 **CHAIRMAN:** There is not a lot of new material, when you look in percentage terms the
10 vast majority is, if you read the submissions that they have put before the CMA
11 when you read this witness statement or this expert report, it is all fairly familiar.
12 But I do accept there are bits in there which are new and I do accept there are bits
13 in there which are a gloss. Whether or not they can bring in new points depends on
14 whether the points that they are answering appear out of the blue for the first time
15 in the CMA report. I couldn't identify any of those but if you can --

16 **MS DEMETRIOU:** No, Sir, we say that had there been a point -- had there been
17 a fundamental shift in position in the final report, that would have obviously
18 triggered the CMA's obligation to reconsult and, in the many grounds that have
19 been advanced in this application, that is not one of them. So it not said there has
20 been a fundamental shift of position so you should have reconsulted. That is not
21 the case. There is no fundamental shift of position.

22 **CHAIRMAN:** I didn't find any.

23 **MS DEMETRIOU:** The difficulty, sir, is the one you have identified. If this is
24 admitted, there is then necessarily going to follow an exercise which is parsing the

1 statement to work out what simply refers to material that was before the CMA -- in
2 which case that bit is totally pointless, those parts, because those points can be
3 made by way of submission -- which parts are gloss, which is impermissible, and
4 which parts are new. So there is that exercise.

5 Of course, as you say, if this were admitted it would presumably be on the footing that
6 the Tribunal thinks there is something in it and the CMA obviously couldn't leave it
7 hanging and would have to adduce evidence in response.

8 **CHAIRMAN:** What I don't like doing is sort of cop out, which is to say we will leave it
9 to the final hearing.

10 **MS DEMETRIOU:** No.

11 **CHAIRMAN:** Some cases you can do that but, with this process on merger appeals, it is
12 not a good approach because then you have got all the uncertainty of what is going
13 to be considered and what is not going to be considered. It is not fair to the CMA,
14 and it will lead to delay because there is no way I can exclude you from putting
15 an expert report in reply, and before we know it we are talking about a hearing
16 in December or January where the obligation on us in a merger inquiry appeal is to
17 determine as expeditiously as possible.

18 **MS DEMETRIOU:** Sir, that is precisely our concern. In response to Mr Robertson's
19 point, which is that this is all done for the convenience of the CMA and we mustn't
20 at the hearing say we can't respond to these points, of course if they are judicial
21 review points the CMA failed to take account of evidence that was before it
22 wrongly, which is the point that Mr Robertson was emphasising --

23 **CHAIRMAN:** That is the point he is making.

24 **MS DEMETRIOU:** Obviously we will respond to that. We know what points were put

1 to us during the Inquiry, we have got the final report and we will respond to those
2 legal submissions at the hearing.

3 **CHAIRMAN:** The fact is what we have, though, and you may not agree with me, but
4 we do have actually a very well-drafted Notice of Application which has got a lot
5 of detail in there, and essentially that is what you have got to answer.

6 **MS DEMETRIOU:** Yes, exactly.

7 **CHAIRMAN:** I would be surprised if there are points in the skeleton argument which
8 are not reflected in that Notice of Application which you are going to have to
9 answer in any event --

10 **MS DEMETRIOU:** That would be our assumption.

11 **CHAIRMAN:** -- or in the material that was put before the CMA, which we have now
12 accepted is going to be admissible at the hearing with the new production
13 statement. But, you know, you are both very experienced litigants, you both know
14 what the rules are in judicial review and I would be really surprised if we are going
15 to get from Tobii a skeleton argument raising points which are completely new.
16 But if he is trying to put in stuff which is like additional arguments, then obviously
17 he has got to satisfy what the test is in bringing those in.

18 **MS DEMETRIOU:** Sir, yes.

19 **CHAIRMAN:** I do trust Mr Robertson to get these things right.

20 Yes, Mr Robertson.

21 **MR ROBERTSON:** To deal with the point about raising new matters, we have
22 addressed that in our supplemental skeleton, paragraph 30.

23 **CHAIRMAN:** Yes, let's have a look at that then. The points the CMA say are new -- oh
24 yes, I have read this.

1 **MR ROBERTSON:** So I don't accept that we are raising lots of new material in
2 Mr Williams' report. There are, of course, some points which are new, for example
3 the point that is made in subparagraph 2 there of paragraph 30, framing and
4 diversion questions, we didn't know what reliance the CMA would place on that --

5 **CHAIRMAN:** Okay.

6 **MR ROBERTSON:** -- until the Final Report.

7 **CHAIRMAN:** Yes.

8 **MR ROBERTSON:** So that is the point on which I wish to reply. It is not the case
9 there is lots of new material in Mr Williams' report.

10 **CHAIRMAN:** I don't think there is lots of new material in Mr Williams' statement.
11 There is some.

12 What is difficult for us is that there is a mixture, as you know. There is stuff that is
13 wholly not new which is basically replicated or summarised, there is stuff which is
14 a gloss on what he said before, and there is some stuff which looks relatively new
15 from the analysis I have done so far, but at the end of the day we are going to have
16 to make a ruling on whether this expert report should be admitted or not and I need
17 to speak to my colleagues on that.

18 **MR ROBERTSON:** Okay, yes. **(Pause).**

19 **CHAIRMAN:** For the reasons that I will give in a written ruling, hopefully fairly soon,
20 early next week, I exclude the evidence of the expert.

21 Okay, so that goes.

22 So where we are now then is we have we will have the exhibit statement, can we have
23 that by 4 pm on 7 October? Is that too tight?

24 **MR ROBERTSON:** Could we have two more days for that, please?

1 **CHAIRMAN:** 4 pm on 9 October, any objection to that?

2 **MS DEMETRIOU:** No, the only hesitation is that we then only have --

3 **CHAIRMAN:** You know what they are because he is exhibiting the documents that are

4 already there.

5 **MS DEMETRIOU:** Yes. I think on that basis no objection.

6 **CHAIRMAN:** Your Defence in support of the evidence by 4 pm on 11 October. I think

7 any further directions we need to agree what the time estimate is and get the

8 dates --

9 **MR ROBERTSON:** Sir, do we have service of a Reply?

10 **CHAIRMAN:** We will deal with all that once I have got the timetable.

11 **MR ROBERTSON:** Yes.

12 **CHAIRMAN:** The estimate I think is two days but what I will look for is maybe

13 a three-day window within those two days. Looking at my diary and having

14 consulted with my colleagues, December is out so there is no possibility really of

15 a hearing in December, so it has got to be in November. The only slot that I can

16 offer is 6 to 8 November. I know it is going to require a lot of work, it will be

17 fairly tight, but I think that I am not going to change that through convenience of

18 Counsel.

19 **MS DEMETRIOU:** Sir, I hear --

20 **CHAIRMAN:** This is the real world. You know what it is like, we have had this before,

21 this debate.

22 **MS DEMETRIOU:** Yes.

23 **CHAIRMAN:** You don't want this in January?

24 **MS DEMETRIOU:** Sir, it is not just my availability but the CMA has an appeal in *Ping*

1 in the Court of Appeal on those dates so obviously I would be counted out, but

2 I imagine that there may be some pressure within the litigation team --

3 **CHAIRMAN:** There could be, but we all have to work under pressure.

4 Mr Robertson, is that convenient to you?

5 **MR ROBERTSON:** I can do those dates.

6 **MS DEMETRIOU:** The difficulty is not just me, it is also my junior Counsel. We are

7 both involved in *Ping* and we have obviously done a lot of work on this up until

8 now.

9 **CHAIRMAN:** Yes, I know. Well, there are other barristers. You know how important

10 it is to get these cases done quickly and you know how difficult it is to find dates

11 that at short notice we can make. If I could give you another date, I would give you

12 another date, but there just isn't.

13 So it is going to be two days, 6 to 8 November window. Obviously at the beginning of

14 that week or maybe before we can firm up precisely what the timetable is and what

15 the dates are. I think we will probably start on the 6th, or if not, we will start at

16 2 pm on the 6th, whatever. It depends on things nearer the time.

17 Okay, Mr Robertson I don't think we need a sort of formal reply, can't your skeleton

18 argument stand as the Reply at the same time?

19 **MR ROBERTSON:** Yes, Sir.

20 **CHAIRMAN:** I think that is how we will do it. Any evidence by 4 pm on 25 October.

21 The Respondent's skeleton argument by 2 pm on 31 October, the Applicant to

22 lodge six copies of the agreed bundle for the hearing by 4 pm on 1 November, the

23 Applicant shall lodge six copies of an agreed bundle of authorities by 4 pm on

24 1 November, same date, an agreed chronology by the same date and time, list of

1 issues same time. So that will come together. Costs are reserved. Liberty to apply
2 for both parties.

3 Anything else? Ms Demetriou, I am very sorry that I won't see you at the hearing but it is
4 just not practical, I am afraid.

5 **MR ROBERTSON:** From our perspective, we are very grateful to the tribunal for
6 hearing it with such expedition.

7 **CHAIRMAN:** Yes. I understand from your skeleton you want it heard as soon as
8 possible. That is what you have got but what it does mean is you and your team
9 have a lot of work to do in a short period of time, as per the CMA.

10 **MR ROBERTSON:** We are used to it.

11 **CHAIRMAN:** Okay. Thank you very much to everyone. The skeletons were really
12 helpful.

13 Please don't give me 120-page skeleton arguments.

14 **MR ROBERTSON:** No.

15 **(11.40 am)**

16 **(The case management conference concluded)**

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