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4 record.

5 **IN THE COMPETITION**

6 **APPEAL TRIBUNAL**

7 Case No: 1579/4/12/23 (T)

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9
10 Salisbury Square House
11 8 Salisbury Square
12 London EC4Y 8AP

13 Friday 24th March 2023

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15 Before:

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17 Hodge Malek KC

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19 Michael Cutting

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21 Derek Ridyard

22
23 (Sitting as a Tribunal in England and Wales)

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26 BETWEEN:

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28 Cérélia Group Holding SAS and Cérélia UK Limited **Applicants**

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30 v

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32 Competition and Markets Authority **Respondents**

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

36
37 Brian Kennelly KC and Alison Berridge (On behalf of Cérélia Group Holding SAS and
38 Cérélia UK Limited) (Instructed by Willkie Farr & Gallagher (UK) LLP)

39
40 Robert Palmer KC and Michael Armitage (On behalf of and instructed by Competition and
41 Markets Authority)

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(10.34 am)

Case management conference

THE CHAIRMAN: Some of you are joining us via livestream on our website so I must start therefore with the customary warning. An official recording is being made and an authorised transcript will be produced, but it's strictly prohibited for anyone else to make an unauthorised recording, whether audio or visual, of the proceedings, and breach of that provision is punishable as a contempt of court.

Mr Kennelly.

MR KENNELLY: Members of the Tribunal, I appear with Ms Berridge for the Applicants and my friends Mr Palmer KC and Mr Armitage appear for the CMA. You should have the revised agenda, your agenda.

THE CHAIRMAN: Yes. I should, yes.

MR KENNELLY: I think it should be behind tab --

THE CHAIRMAN: Yes, confidentiality ...

MR KENNELLY: Yes, indeed -- behind tab 3.

THE CHAIRMAN: Before we come to that, it's really helpful that I have one core bundle that's going to be the same core bundle at the final hearing, because I don't want to make my notes on more than one version of everything. So there is a core bundle that has been prepared for this CMC.

MR KENNELLY: Yes.

THE CHAIRMAN: Is that going to change in any way? Can I work on the assumption that when it comes to the final hearing, it will be the same bundle?

MR KENNELLY: Yes. Yes, indeed. That was the proposal. And it contains the unredacted confidential versions, so we ought to be able to work from that from now until the very end.

1 THE CHAIRMAN: Yes. Are you intending to file a reply? Because if there is, we're
2 going to have to have another placeholder for that.

3 MR KENNELLY: We may do. I can't close the door to that now, not least because of
4 the disclosure that we just received from the CMA.

5 THE CHAIRMAN: Yes. Okay. I'll just take this as read then, okay? If anything, there's
6 just going to be an insert to this bundle. Okay.

7 Right, let's deal with confidentiality.

8 MR KENNELLY: On confidentiality, again, the Tribunal has the submissions from both
9 sides. The draft order is agreed. The other two matters are the treatment of the names
10 of third parties at the hearing itself, the use of unique identifiers which --

11 THE CHAIRMAN: Do I need to deal with that before I make the confidentiality ring
12 order?

13 MR KENNELLY: No.

14 THE CHAIRMAN: Okay. So I'll make the order in the form of tab 6 of the bundle.
15 Okay.

16 MR KENNELLY: The next issue, although it's not for any order today, as I understand
17 it, is this question of whether we use unique identifiers or anonymisation to minimise
18 the need to go into private at the main hearing.

19 You've seen in the skeletons that we, on the Applicants' side, propose the use of
20 unique identifiers, as has been done in many other cases. The CMA say that's
21 probably not going to be enough to deal with its concerns because of the small number
22 of third parties likely to be referred to at the main hearing.

23 THE CHAIRMAN: It will become pretty obvious pretty quickly as to who those are.
24 But in other hearings we've had, you've been pretty good: you say, "Just read this and
25 read that", and that does tend to work in practice as well.

26 MR KENNELLY: In our submission, the use of discretion, which is, sir, what you

1 described there, the fact that experienced counsel know --

2 THE CHAIRMAN: Yes, it's fine.

3 MR KENNELLY: -- combined with unique identifiers ought to minimise the need.
4 Unique identifiers will avoid slips and will assist in ensuring that the CMA's concerns
5 are addressed.

6 THE CHAIRMAN: Yes, but the problem with unique identifiers is that you get to
7 a stage where it's going to be pretty obvious to everyone that when you say "A", it
8 means a particular retailer, for example.

9 MR KENNELLY: Well, except not if it's combined with the kind of judicial discretion
10 that the Tribunal envisages. Experienced counsel know exactly how to do it and to
11 minimise the risk that, even with unique identifiers, the undertakings themselves will
12 be identified.

13 THE CHAIRMAN: This is something really that you and Mr Palmer should work out
14 amongst yourselves. You don't need anyone else to argue about it and write long
15 letters to each other; just sort it out. If there's a problem, I'll deal with it on paper.

16 MR KENNELLY: We respectfully agree.

17 THE CHAIRMAN: In all the cases I've had with you, I've never had a problem with this
18 in practice. I don't think it's going to happen on this one either.

19 MR KENNELLY: We respectfully agree.

20 THE CHAIRMAN: So I'll leave it to you two to sort it out. If there's an issue, come
21 back to me.

22 MR KENNELLY: Yes, thank you, sir.

23 On the question then of the CMA's review of the material. And this is a very important
24 process where they re-review what ought to be treated as confidential and not
25 confidential.

26 THE CHAIRMAN: They are still doing it, aren't they?

1 MR KENNELLY: They are still doing it. Maybe Mr Palmer wants to address you on
2 that. He's in a position to speak to that; I am not.

3 THE CHAIRMAN: Mr Palmer.

4 MR PALMER: To provide an update, we said that we expected to complete that
5 exercise by this time next week, 31 March, and that's still our expectation. Following
6 that, we'll be able to provide non-confidential versions of the documents as well, which
7 we expect to do by 3 April.

8 THE CHAIRMAN: Yes.

9 MR PALMER: And the sort of discussion which you've just asked us to have, sir, is
10 exactly the sort of discussion I would expect to have once that process is complete,
11 so we can actually see the end product of that confidentiality review and therefore
12 what is and is not still confidential and what the best way of handling it would be. We
13 do have the concern that unique identifiers will have precisely the effect that you
14 anticipated, sir, but there may be other ways that we can work around it.

15 THE CHAIRMAN: At the end of the day, we want everyone to get on well, particularly
16 on the counsel level, and try and agree things like this as much as possible.

17 MR KENNELLY: Yes.

18 THE CHAIRMAN: And then we have a smooth hearing, whenever that hearing is
19 going to be.

20 MR KENNELLY: Exactly. That is our --

21 THE CHAIRMAN: You're both experienced and both highly respected by this Tribunal,
22 so you know what you're doing. And if there's a proposal you're both happy with, then
23 I'm sure I'm not going to dissent from that.

24 MR KENNELLY: I'm grateful, sir. That's all.

25 THE CHAIRMAN: Thank you very much.

26 MR KENNELLY: The next item on the agenda is disclosure.

1 THE CHAIRMAN: Yes. I've seen that some disclosure has been provided and
2 you're -- is it item 6? -- you're still sort of digging. Is that something you want me to
3 resolve today or not?

4 MR KENNELLY: I would be grateful if you could. You may decline the opportunity to
5 resolve it today. It won't take very long to address you on it. It's a narrow point and
6 we're not asking -- I would say this -- we're not asking for much. But because of the
7 timetable --

8 THE CHAIRMAN: I will apply the principles in Ecolab and Tobii, so you'll know what
9 tests I'm going to be applying. Whatever disclosure you're seeking has to be
10 reasonable and proportionate; and in deciding what's reasonable and proportionate,
11 I'm going to take into account what has already been disclosed.

12 I've seen where we are on the correspondence. I think that the CMA has been quite
13 accommodating in relation to all your disclosure requests, because I'm not sure if
14 I would have ordered the amount that you have. But you've done pretty well so far on
15 the other categories; and on this category, as I understand it, the CMA are still going
16 back and seeing if there's more.

17 You might be better off carrying on the route you are at the moment, but it's up to you
18 if you want to press it today.

19 MR KENNELLY: Of course, I can see precisely where the Tribunal is coming from.
20 The problem is timing. Of course, we don't know exactly when the hearing will be. If
21 we have more time, then it might be possible to let them do their digging and then
22 there will be time to come back to you.

23 THE CHAIRMAN: Let's deal with the timetable and then we'll know where we are.
24 Because at the end of the day, on disclosure, I'm always happy -- you can have a short
25 hearing on a Friday morning; or if you don't need a hearing, I'll do it on paper, and you
26 know I'll look at all the material and I'll come to a view one way or another.

1 But if we talk about the timetable for the hearing, it's very difficult to find a slot where,
2 quite frankly, all the members of the Tribunal and all the two counsel teams can make
3 it. And this case has gone sufficiently far that it would not be satisfactory if either you
4 or Mr Palmer are not going to do it. I wouldn't want to put a situation whereby either
5 party, now that the defence has been filed, has to change counsel.

6 What that leads to is that there is the week of 9 July, which is quite late, I appreciate
7 that. And the way I would do it is that as long as I have the hearing bundle and the
8 submissions sufficiently in advance of the hearing, then I will be doing a lot of upfront
9 reading in the normal way. So when it comes to the hearing, the hearing will be
10 relatively efficient, but then it's not going to take as long as otherwise to write the
11 judgment.

12 So I don't want to commit myself, but I would aim to -- if we have the hearing on the
13 9th, I would aim for you to have the decision that month, because it is important on
14 these merger cases to have a decision as early as possible. In an ideal world, we
15 would want to have this in May, but I do have other cases; that's part of the problem.
16 But the other part of the problem is finding a date where everyone can make it.

17 So at least I know the week of 9 July, everyone can make. Unless -- Mr Palmer, can
18 you make --

19 MR PALMER: Give me one moment, I'll check one matter. (Pause)

20 Yes, I mean, our concern before coming in today was that July felt like too late for a
21 completed merger and we were going to press for something earlier. But given what
22 you've said and indicated, sir, about the timing of the judgment, I think that does meet
23 the concerns which --

24 THE CHAIRMAN: We're going to have to factor all this in in the timetable for the prep,
25 because I want to make sure that I do have the submissions --

26 MR PALMER: In good time.

1 THE CHAIRMAN: -- and the bundles well before the hearing; then at least I've read
2 everything and digested it before the hearing starts.

3 MR PALMER: Well, for our part, that works.

4 MR KENNELLY: Indeed, sir, for us also.

5 THE CHAIRMAN: Okay. So we'll fix it for, what, three days, starting the 9th --

6 MR KENNELLY: The 9th is a Sunday, sir.

7 THE CHAIRMAN: Oh, is it a Sunday? No, 9 July ... okay. So it's the 10th, is it?

8 MR KENNELLY: Yes.

9 THE CHAIRMAN: Okay. So we'll start from -- so it would be the 10th, the 11th and
10 the 12th.

11 MR KENNELLY: Yes.

12 THE CHAIRMAN: That's fine. I would not have been popular if it was going to be on
13 a Sunday! Yes, okay. Right, so let's fix that, three days.

14 Shall we come back to disclosure then, and just talk about other things and we'll see
15 where we are. Now we've started the timetable, can we just work back as to the times
16 for everything?

17 MR KENNELLY: Yes.

18 THE CHAIRMAN: Is there a draft order anywhere?

19 MR KENNELLY: Yes, our skeletons suggested certain --

20 THE CHAIRMAN: Let's look at your skeleton for the timing.

21 MR KENNELLY: The back of our skeleton suggests dates.

22 THE CHAIRMAN: So let's look at this.

23 MR KENNELLY: But these will need to be changed, I think, in view of the fact, sir, that
24 you want the hearing bundle and authorities bundle filed much earlier.

25 THE CHAIRMAN: I do, yes. We can do that now can't we?

26 MR KENNELLY: Yes. But it does give us a little bit more flex.

1 THE CHAIRMAN: Yes. For the hearing bundle, is 20 June feasible?

2 MR KENNELLY: Yes, yes, it is.

3 THE CHAIRMAN: Yes. So we'll put that as 20 June.

4 Is there only one witness statement? How many witness statements are there in this

5 case? Is it just the Daly --

6 MR PALMER: Just one, Ms Daly.

7 THE CHAIRMAN: Okay. So don't need to worry about that. Okay.

8 Then obviously we need the authorities bundle and the skeleton arguments. Well, are

9 we able to just have everything on the same day? So the hearing bundle, the skeleton

10 arguments and the authorities bundle, all on the same day? You can work it out

11 amongst yourselves about exchanging names of cases and --

12 MR PALMER: We would support the Applicants' submission that it should be

13 sequential exchange of skeleton arguments, as is normal in a judicial review. We are

14 very much responding to the case as put --

15 THE CHAIRMAN: All I'm saying is: if I can, on 20 June, have everything, so all the

16 skeletons, the hearing bundle, the authorities bundle, the case, so far as I'm ready, is

17 in a fit state for me to start preparing it. Okay?

18 As regards the dates for the skeletons, obviously that may be a different point. You

19 want it sequentially and that's absolutely fine.

20 But, Mr Kennelly, what dates do you suggest for the exchange -- so, look, it's

21 understood I'll have the skeleton arguments, hearing bundle and the authorities bundle

22 all on 20 June. So working back from that, what's the proposal for the skeleton?

23 MR KENNELLY: In order to accommodate the Tribunal, the hearing bundle will

24 go -- the way we'll do it is we'll have the hearing bundle on the 20th, the authorities

25 bundle a week before that, CMA's skeleton a week before that and our skeleton

26 a week before that.

1 THE CHAIRMAN: Yes.

2 MR KENNELLY: And when you come on the 20th, you will have everything together
3 then.

4 THE CHAIRMAN: Okay. You'll be drafting the order anyway, but that is absolutely
5 fine.

6 Mr Palmer?

7 MR PALMER: No. The CMA skeleton can also come on or about 20 June; it doesn't
8 need to be a week before. And given my own availability in a hearing the week before,
9 13th June, that would make it very difficult to respond to my learned friend. So I'd ask
10 for either 20 June for the CMA skeleton or, if logistically it will help to assemble the
11 authorities bundle, perhaps 18 June. I don't know what day of the week that is.

12 MR KENNELLY: I'm happy with that. It's just the authorities bundle needs to come
13 a little bit after the skeletons.

14 THE CHAIRMAN: It does, and I understand that. So if we have the ...

15 MR PALMER: 18 June would be good for the CMA skeleton.

16 THE CHAIRMAN: Okay. So CMA, 18 June.

17 MR PALMER: Sorry, I'm looking at the wrong month then. Sorry, I was looking at July.
18 Sorry. So 16 June is good.

19 THE CHAIRMAN: 16 June, okay.

20 What's the date of your skeleton?

21 MR KENNELLY: It should be 9 June for us, for our skeleton.

22 THE CHAIRMAN: Okay.

23 With your skeleton, will you serve a sort of short dramatis personae and a chronology,
24 if that's all right?

25 MR KENNELLY: Yes, indeed.

26 THE CHAIRMAN: You may want to send the chronology in draft to Mr Palmer, so it's

1 | an agreed chronology rather than --

2 | MR KENNELLY: Indeed.

3 | THE CHAIRMAN: And then it should be cross-referenced to the bundle.

4 | MR KENNELLY: We can cross-reference it once we have the hearing bundle in.

5 | THE CHAIRMAN: Exactly.

6 | MR KENNELLY: Yes.

7 | THE CHAIRMAN: But as long as I have a chronology that appears for the hearing

8 | bundle -- so it's up to you when -- the date for the chronology must be the date of the

9 | hearing bundle.

10 | MR KENNELLY: Yes.

11 | THE CHAIRMAN: So the chronology and dramatis personae, I think we'll just put the

12 | 20th of --

13 | MR PALMER: Perhaps we could all re-serve perfected skeleton arguments which

14 | include references to the hearing bundle on the 20th, so that you have those skeletons

15 | with the actual references in.

16 | THE CHAIRMAN: Yes, sure. Yes, because I'm not going to read them before

17 | 20 June.

18 | MR PALMER: No. But like the Court of Appeal's procedure, doing it again but with

19 | the references in this time, we could do that.

20 | MR KENNELLY: We can do that. That's a good idea.

21 | THE CHAIRMAN: Okay, so that's the bundles. Okay, let's go back to disclosure.

22 | This does mean that you'll have more time to work out what the issues are between

23 | you on disclosure. And if there's anything outstanding, then just make your application

24 | by letter setting out your position, Mr Palmer can reply in a letter setting out his

25 | position, and then I'll look on paper if need be.

26 | MR KENNELLY: Will you please just indulge me for a moment, sir? The problem is

1 | that the CMA has put its foot down on the question of principle, and so --

2 | THE CHAIRMAN: Okay. Let's have a look at the correspondence and we'll see what

3 | point of principle and whether they're right, and I can give you a provisional view as to

4 | whether they're right on principle.

5 | MR PALMER: Can we hand up the latest on the correspondence. There was a letter

6 | yesterday which I don't think will have made its way to you yet.

7 | THE CHAIRMAN: I'll tell you what I have. I have the Daly statement with the exhibit.

8 | I have some minutes and stuff. Then I have Willkie Farr's letter of 23 March --

9 | MR PALMER: Yes.

10 | THE CHAIRMAN: -- the second letter --

11 | MR PALMER: Yes.

12 | THE CHAIRMAN: -- I have Willkie Farr's -- presumably the first letter of 22 March, the

13 | CMA's letter of 23 March, and then that's it.

14 | MR PALMER: Is that headed "C r lia's disclosure request and request for

15 | information"?

16 | THE CHAIRMAN: No.

17 | MR PALMER: That's the one I think you lack.

18 | MR KENNELLY: There were two letters on --

19 | THE CHAIRMAN: Let me look at the second one then. (Handed)

20 | None of us have it. So let's have look at that second letter. Thank you very much.

21 | Mr Palmer, you're still going to do the case team follow-up point?

22 | MR PALMER: Yes, we're not resiling from that. There was that reference in the

23 | minutes, 15 September. The case team will follow up separately, so we'll search to

24 | see if that generates any documents. But what we're refusing to do is go beyond that

25 | to look for documents which were never put before the group, and so didn't inform their

26 | decision.

1 THE CHAIRMAN: Yes, I can see that.

2 MR KENNELLY: So that's the point. And just to come back to the point you made to
3 me --

4 THE CHAIRMAN: What are you looking for? At the end of the day, you have the Daly
5 statement, you have the minutes, you have the defence, which say, "This is the
6 reasons for the extension". The person responsible for granting the extension is -- you
7 have all that material, the decision-maker's material. If there's material that the
8 decision-maker has never seen, is that really going to assist you? I think that's the
9 point that Mr Palmer is making.

10 MR KENNELLY: Yes. We're not in a situation where we're simply asking to see
11 information or documents that the inquiry group hasn't seen. We want to find out what
12 the inquiry group did discuss and did decide. And because they can't find
13 documents -- which is unusual -- they can't find documents describing what the inquiry
14 group did discuss and did decide, we are asking for them to look for documents that
15 would record -- documents of other people, not in the inquiry group, which record what
16 was put to the inquiry group and which record what the inquiry group did discuss or
17 did decide.

18 There may be nothing. But we need to get to the bottom of what was actually before
19 the inquiry.

20 THE CHAIRMAN: But the letter, the notice, extending time, that gives an explanation.
21 You then have the Daly statement, which expands on that to a certain extent. I'm not
22 sure how much more there is that's really going to assist us. Because you're not going
23 to be applying to cross-examine Daly; you have their explanation. You may say that
24 what they've given is not enough of a reason, in which case you have what you have.
25 But if ... that's part of the problem.

26 MR KENNELLY: The problem really isn't a classic Ecolab/Tobii problem. We're not

1 in a situation, in my respectful submission, where we're making this application from
2 scratch. The real problem is the CMA has acknowledged the need to give us
3 disclosure: they said they would give us all relevant documents --

4 THE CHAIRMAN: I understand that.

5 MR KENNELLY: -- and they acknowledge the importance of that.

6 THE CHAIRMAN: I have that. Your point is that whether or not I would have made
7 an order for specific disclosure in the terms that they've agreed, they have agreed,
8 and you're saying that they haven't done what they said they would do; and that if
9 there are documents which are, let's say, significant -- I'm not talking about documents
10 which say the same thing as other documents that you already have -- but if there's
11 anything significant out there that may undermine the authority's case or may assist
12 your case, I'd expect that to be disclosed under the duty of candour.

13 So if what you're saying is that ... It may be enough for me to say that to Mr Palmer,
14 that that's what I expect to happen now. Now that they've agreed to give the category,
15 and if there's anything out there that sheds light on that -- I understand your point,
16 which is that there may be a note that someone else took, that wasn't seen by the
17 members of the group, which actually records the reasons or something like that. And
18 of course that should be disclosed, on the basis that they've agreed to disclose
19 anything that basically evidences the reasons for the extension. So I would expect to
20 see that.

21 MR KENNELLY: Well, I'm grateful for that indication, sir, because the letter that you
22 just read from the CMA said they would not search for --

23 THE CHAIRMAN: But they have a duty of candour. Look, there's two stages. One
24 is: should they search? And subject to what Mr Palmer says, I've already said what
25 I've said. But two is that, having done the search, what they should disclose, that may
26 be a different issue.

1 But if they do the search and they say, "We've looked and actually there's nothing
2 within" what I've just said -- I can't repeat what I've just said, but what I've just
3 said -- then that's the end of it. If they say, "Actually there are documents within what
4 Mr Malek was indicating", then we can have the debate and come back.

5 But I do expect them to do what they said they would do, but it has to be something
6 that is not just merely repeating what you've already been told. So if there's
7 a document that replicates what some other document says, that's not going to help
8 anyone. On the other hand, if there's a document that casts light on what the decision
9 was and the reason for the decision, and let's say it's a record by someone who's not
10 a member of the group of what the group was deciding or the considerations for the
11 group, then that clearly should be produced, probably under the duty of candour, but
12 in any event under what they've already agreed to give you.

13 Mr Palmer, does that cause you any problem?

14 MR PALMER: No, I don't dissent from anything that you've said. We would
15 understand the duty of candour to mean precisely what you have outlined. What we
16 have indicated in correspondence is that all documents relevant to the group's decision
17 will be exhibited to the statement: that would cover such a document as you have just
18 posited. But --

19 THE CHAIRMAN: What I'm envisaging --

20 MR PALMER: -- we're not going beyond that.

21 THE CHAIRMAN: I'm not sure if they're asking any more beyond that. But what I'm
22 envisaging -- and Mr Kennelly will correct me -- but if you have a document that, even
23 if it wasn't shown to the group, does evidence the reasons for the group's decision,
24 then that should be disclosed.

25 MR PALMER: Yes.

26 THE CHAIRMAN: As long as that's what you're going to do, I'm sure Mr Kennelly is

1 happy with that --

2 MR PALMER: If there's something which --

3 THE CHAIRMAN: -- subject to getting any further instructions.

4 MR PALMER: -- differs in any material way from those which have been explained by

5 Ms Daly, it will fall under the duty of candour.

6 THE CHAIRMAN: Exactly. Okay.

7 MR PALMER: But beyond that, there's nothing to produce.

8 THE CHAIRMAN: We'll come back to that if there's an issue later. But everyone

9 understands what --

10 MR KENNELLY: We're very grateful. Because what you, sir, have described is

11 precisely what we have been asking for: it's documents to evidence the material that

12 was put to the inquiry group and evidence the decision of the inquiry group.

13 THE CHAIRMAN: Well, no, wait, you've gone a bit further than what I'm saying. Look,

14 you'll have a transcript, you'll see what I've said, and Mr Palmer will go back and see

15 what else is within what I've described. They will do a search within what I've

16 described. They will write back to you and say, "This is the search we've done". And

17 if you're not happy and you want more than that, you can come back to me in writing.

18 MR KENNELLY: I'm grateful. I wasn't trying to slip something in. If something was

19 put to the inquiry group, presumably it goes to the inquiry group's reasons and

20 analysis.

21 THE CHAIRMAN: Well, if it's something that goes to the reasons for the extension,

22 then it should be disclosed. But if -- let's see what comes out of this and then we can

23 revisit it. You know, I don't want to make a mistake. I've said what I've said, which

24 I think represents what should happen.

25 MR KENNELLY: We're content.

26 THE CHAIRMAN: If Mr Palmer is happy with that, then --

1 MR PALMER: I'm entirely happy. I make two things perfectly clear, in light of what
2 you've been told by Mr Kennelly.

3 The first thing is that our letter said nothing about refusing to search for anything.
4 We're fully aware of the duty to search to fulfil the duty of candour, and the letter
5 doesn't say anything different from that.

6 The second thing is that the real issue on the correspondence between us has been
7 this suggestion that we should go beyond what is relevant to the group's decision. And
8 what I think, with respect, the Applicants --

9 THE CHAIRMAN: Well, you don't have to go beyond what's relevant to the group's
10 decision. But what you've understood from what I've said is that it is at least
11 theoretically possible that there be material that wasn't actually shown to the group
12 that is evidence of the reasons for the decision.

13 MR PALMER: Ms Daly has covered that. But we'll of course confirm again in light of
14 what you have said, so that it's on the record expressly, having heard your remarks.

15 THE CHAIRMAN: Yes. Mr Palmer, on this issue you raise a point about what is the
16 test on a challenge, and that's quite a fundamental point.

17 MR PALMER: Yes, it's one we addressed in our defence; it's not addressed at all in
18 the notice of application.

19 THE CHAIRMAN: Yes.

20 Mr Kennelly, on that, if you are going to file a reply, it's fine; but if you're not going to
21 file a reply, it would be helpful if you could indicate in a letter to the Tribunal, and copied
22 to Mr Palmer, what your position is on what is the test. You've seen what they've said
23 in their defence as to what the test is.

24 MR KENNELLY: The standard of your review of the special reasons --

25 THE CHAIRMAN: That's right.

26 MR KENNELLY: Yes.

1 THE CHAIRMAN: They say it's a subjective matter for the authority. You may or may
2 not agree with that. But if you're going to file a reply, it's going to be in your reply
3 anyway; but if you're not going to file a reply, it would be helpful just to know what your
4 position is on that part of the defence.

5 MR KENNELLY: Yes, of course. We will do that. Because it's not clear whether we'll
6 file a reply at the moment but we do need to make provision in the timetable for an
7 amended notice of application. Because when we've reviewed the substantial
8 disclosure -- and it is substantial disclosure -- which the CMA has provided to us, it will
9 be necessary to re-plead for clarity and the CMA will need an opportunity to plead
10 back to that.

11 We suggest that we put our amended notice of application in on 19 May, and the CMA
12 will have until 2 June for their amended --

13 THE CHAIRMAN: That assumes you get permission. I need to see that before you
14 can amend a pleading.

15 MR KENNELLY: We're not pleading anything new -- that is simply to amplify our
16 particulars by reference to the documents given to us; that's what we're envisaging.
17 So in the ordinary course, that kind of amendment would normally -- you, sir, and
18 others have given permission in advance for that kind of amendment. We're not
19 proposing to change our grounds of review; it's simply to particularise what we've
20 pleaded already by reference to the disclosure that the CMA has given us.

21 I'm sure we can file a draft -- if the Tribunal is not happy --

22 THE CHAIRMAN: I'm just trying to figure out what's the best way of doing it. Is it to
23 amend your notice of application or to prepare a document headed "Voluntary
24 particulars" as a separate document?

25 MR KENNELLY: We're content with either, sir. It's really just to make sure that the
26 Tribunal and the CMA have clarity as to the four corners of our case before they do

1 their skeleton argument.

2 THE CHAIRMAN: Mr Palmer.

3 MR PALMER: We would be grateful for it in either form, but substantially in advance
4 of the dates which have just been proposed, 19 May and 2 June, just a week before
5 the skeleton arguments begin coming. That would be some two months after this
6 disclosure was provided. Nothing like that long is required, given that it's just
7 supplementary filling out. I would bring those dates forward by a month in each case
8 and have it 19 April and 2 May, subject to the day of the week working.

9 We really do need to know sooner rather than later what the case is. And to have
10 another two months, which is the original application period, following the decision is
11 completely disproportionate.

12 THE CHAIRMAN: Are you going to be deleting anything or changing the wording of
13 a paragraph? Or is it just merely to add particulars?

14 MR KENNELLY: I can't say with certainty, it's unlikely we'll be deleting much, we'll
15 certainly be adding, yes. But the problem we have with Mr Palmer's suggestion is that
16 that deadline he proposes is about three weeks away, and we have just received,
17 I think a day or two ago, approximately 1500 documents from the CMA -- pages,
18 sorry -- which are familiar for the CMA but not to us at all. So we need longer to
19 understand them, to digest them and plead to them and the CMA needs to respond.

20 THE CHAIRMAN: So look, it's probably better to amend your notice, okay. When
21 I look at the number of people behind you, you are pretty well-resourced. Your team
22 will be able to identify for you pretty quickly what the key documents are. I wouldn't
23 expect you necessarily to be the one who sort of goes through the 1500 pages to
24 identify which points to dig out of it, you have other people and a junior to help you.
25 I don't think you need as long as you've indicated originally to do an amended notice
26 of appeal, but on the other hand we have a hearing in July and so there's no point

1 getting you to rush anything when we do in fact have enough time to get things done.
2 So what's your proposal as to timing for your amended --
3 MR KENNELLY: I'm looking at Ms Berridge and my solicitors because they are the
4 ones who have to do it.
5 THE CHAIRMAN: Exactly, they have to get everything together for you.
6 MR KENNELLY: So I'm looking at the dates. I suggested our amended notice
7 application on 19 May. I'll bring that --
8 THE CHAIRMAN: Bring it forward a couple of weeks. Bring it forward to the beginning
9 of May.
10 MR KENNELLY: We'll say 5 May, sir.
11 THE CHAIRMAN: Five May, that's fine. Mr Palmer, your amended defence?
12 MR KENNELLY: The 19th.
13 THE CHAIRMAN: As long as it has a May date, I don't really mind.
14 MR PALMER: We think two weeks, so that would be 19 May.
15 THE CHAIRMAN: Yes. Okay.
16 MR KENNELLY: The point that you make to me about needing to respond to the CMA
17 on the proper standard of review on our ground 4 we can address in our amended
18 application.
19 THE CHAIRMAN: You can do that, yes. That's absolutely fine. So the amended
20 application can deal with the point -- you don't need to put this in an order, with what
21 the test is. So you're not sure whether you need to file a reply. Probably not now.
22 MR KENNELLY: Indeed.
23 THE CHAIRMAN: Now you are going to amend the notices you can amend that in the
24 light of what you've seen in the defence.
25 MR KENNELLY: Yes.
26 THE CHAIRMAN: But that's absolutely fine.

1 Okay. Any other issues that we have?

2 MR KENNELLY: There's nothing from me, unless I'm told.

3 THE CHAIRMAN: Mr Palmer?

4 MR PALMER: One other, which is that the Applicant has reserved its position as to
5 whether it's going to make any further requests for disclosure once it has reviewed
6 what it has. I would propose that a date be put in by which any further application for
7 disclosure is to be made, so that that is done in good time before the case is
8 re-pleaded.

9 MR KENNELLY: May I respond? It is obvious that if we need to make any follow-up
10 requests we would have to do so extremely quickly, and in making a request one of
11 the facts the Tribunal takes into account is any delay on the part of the applicant. So
12 the point that Mr Palmer makes is understood, but in my respectful submission
13 unnecessary. It's very much in our interests to make any applications as quickly as
14 possible. Our application is weakened by any delay on our part and so that kind of
15 provision is unnecessary.

16 THE CHAIRMAN: We'll get to it when we get to it. I think that if you are going to make
17 an application, you put it in writing, and then say whether you want it to be heard on
18 paper or do you want to have it like the equivalent of a Friday hearing in the Trucks
19 case where we have an hour or two, just get it resolved there and then. Mr Palmer
20 can indicate which way he prefers. If both sides want an oral hearing, it's going to be
21 an oral hearing; if one objects, then I'll make a decision as to whether it's going to be
22 on paper. But the other way we have dealt with things is -- and Trucks -- is simply to
23 send the application through and say -- indicate a provisional view, and then if either
24 party are not happy with the provisional view then we have a hearing. But there's so
25 many different ways of doing it, but it's up to you to figure out what is appropriate. If
26 you are dealing with, you know, something that is complicated and there's a big issue

1 of principle then you'll want an oral hearing; if it's just one minor thing and you say "We
2 can't agree on this one thing" it's just best to just do it on paper and you get a reply
3 quickly.

4 MR KENNELLY: And that's worked well in other cases.

5 THE CHAIRMAN: Exactly. Well, thank you very much gentlemen. I'll rise.

6 (11.11 am)

7 (The hearing concluded)

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