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5 **IN THE COMPETITION**  
6 **APPEAL TRIBUNAL**

Case No:1590/4/12/23.

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

Monday 17<sup>th</sup> July 2023

14 Before:

15  
16 The Honourable Mr. Justice Marcus Smith  
17  
18 (Sitting as a Tribunal in England and Wales)

21 BETWEEN:

**Applicant**

24 Microsoft Corporation

26 v

**Respondent**

29 Competition and Markets Authority

31 And

**Intervener**

34 Activision Blizzard, Inc.

35  
36  
37 **A P P E A R A N C E S**

39 Daniel Beard KC, Robert Palmer KC, Nikolaus Grubeck and Stefan Kuppen (On behalf of  
40 Microsoft Corporation)

42 Lord Grabiner KC, Lord Pannick KC, Brian Kennelly KC and Douglas Paine (On behalf of  
43 Activision Blizzard Inc.)

45 David Bailey, Daisy Mackersie and Richard Howell (On behalf of Competition and Markets  
46 Authority)

48  
49  
50 Digital Transcription by Epiq Europe Ltd

6 **Monday, 17 July 2023**

7 **(2.27 pm)**

8 **Opening Remarks**

9 **THE PRESIDENT:** Good afternoon, everybody. Before we begin, I am going to make  
10 the usual live stream warning. Some of you are joining us via our website on live  
11 stream. An official recording is being made and an authorised transcript of these  
12 proceedings will be produced, but it is prohibited for anyone else to make an  
13 unauthorised recording, audio or visual, or to photograph the proceedings and  
14 a breach of that provision is punishable as a contempt. I should explain, however, that  
15 because of an application that may be made in a moment, the LiveNote may run rather  
16 more shortly than is to be expected, but those listening will, of course, be able to hear  
17 the application and my ruling in relation to it before anything happens to the stream.

18 Mr Beard, I understand there is an application to cut the live stream.

19 **MR BEARD:** Yes, there is, sir. I think we explained this in the back end of our  
20 submissions. It has obviously not rendered the proceedings non-public, but because  
21 of the sensitivity in relation to, essentially, market moving noise that occurs during the  
22 course of a hearing, it is asked that the live stream, on this occasion, be disabled.  
23 Obviously, it will mean that a transcript is available in due course. These are public  
24 proceedings and people are attending both from the public and from the press. We  
25 don't want to stop that in any way.

26 **THE PRESIDENT:** Lord Grabiner, do you have anything to add?

27 **LORD GRABINER:** My Lord, we support that application.

28 **THE PRESIDENT:** Mr Bailey?

1 **MR BAILEY:** We are neutral on the point. It is a matter for the tribunal.

2 **THE PRESIDENT:** I am grateful.

3 It seems to me that the question is whether this hearing should be in private or in  
4 public. I appreciate, of course, that Microsoft are not saying that it should go into  
5 private session, but a distinction between in public proceedings, where people are  
6 present and well able to understand what is going on, being permitted, and a live  
7 stream, where people can see what is going on, is not permitted, is not a distinction  
8 that I am prepared to draw on this occasion. So we will proceed with the live stream  
9 as it stands, but I do want to be very clear that these are important, of wide public  
10 interest proceedings and what I said on the last occasion when the LiveNote was  
11 suspended, holds in spades today. I expect people to watch and to do no more than  
12 that.

13 Thank you very much.

14 Before you begin, Mr Bailey, a few preliminary points. I think it would be as well if  
15 I said a few general things about how the tribunal is minded to approach this  
16 application.

17 I suspect that everybody's thinking will have moved on or been affected by the  
18 announcement of a deal regarding Call of Duty between Microsoft and Sony. I think it  
19 should be on the record that that is something that I have seen in the public media.

20 I have not seen anything else. But it does seem to me to be a matter that is likely to  
21 be addressed, at least in the abstract, today. And it does seem to me that we need to  
22 understand that this is a fast-moving situation, where events are changing, clearly,  
23 quite rapidly. I want also to be clear that I feel, quite rightly, very much at the end of  
24 the food chain here. I have seen what there is in the press and I am quite sure that all  
25 of the parties before me know far more and you will inform me as appropriate, what  
26 I need to know, but that much I do know.

1 It may be, in light of this, that the parties are rethinking the need for an adjournment at  
2 all. I have in mind whether the course outlined in Microsoft's skeleton at paragraph 21,  
3 what I will call the *CTS Eventim* approach, is something that is more live than it was  
4 before the weekend. But that is something we can come to in due course.

5 I make these preliminary points in relation to the question of adjournment or  
6 suspension of these proceedings, as the parties have termed it.

7 First of all, I don't want anyone before me today to be troubled about time or length of  
8 submissions. I appreciate that the CMA sought a short hearing regarding this  
9 adjournment application but for reasons that I am going to go on to, this is a troubling  
10 application and I want all of the parties to appreciate right from the beginning that I am  
11 anxious for their help and I don't want anyone feeling that they are under any time  
12 pressure. We will sit as late as is necessary.

13 Secondly, I am, to my considerable regret, hearing this matter on my own. It seemed  
14 to be necessary in the course of last week that this application come on as soon as  
15 possible, but neither Professor Neuberger nor Mr Tidswell were available for a full  
16 panel hearing either today or tomorrow or, for that matter, Wednesday.

17 I am in no doubt that I have jurisdiction to grant the application. It is more that I find  
18 the application a troubling one and one where it would have been better if we were  
19 sitting as a three rather than as a single chair.

20 Thirdly, it does seem to me that the adjournment of any matter is a judicial decision,  
21 and it can only be made for good and proper reason. A number of points specific to  
22 this case arise out of that fact.

23 First, the substantive application -- the section 120 application moved by Microsoft -- is  
24 no ordinary application. It is one that was brought on expeditiously because it is  
25 a merger case, and it was listed for 28 July 2023, over the CMA's significant  
26 opposition. I am not going to change that listing lightly and I am only going to do so

1 for good reason.

2 Secondly, there has already been one application to adjourn, as well as resistance to  
3 the original date. That application for adjournment was made on 28 June, just over  
4 a fortnight ago. It was opposed by Microsoft and was refused by the tribunal on 29  
5 June 2023, under neutral citation [2023] CAT 43. Second, applications to adjourn are  
6 rare. I appreciate that the grounds for this application, as well as Microsoft's stance,  
7 are different. Nevertheless, I am extremely surprised that the negotiations going on  
8 between the CMA and Microsoft did not feature in the first application, and I am afraid  
9 unless, Mr Bailey, you can persuade me to the contrary, that is a matter which is going  
10 to have to be explained by the CMA in evidence. Why, just over a fortnight ago, was  
11 this application, as presently framed, not made?

12 Thirdly, there is an assumption by the parties that provided they agree, there will be  
13 an adjournment granted. That is evident from the communications that both parties  
14 have had with the press, and it is evident from, for example, paragraph 24 of the CMA  
15 written submissions. I think it is appropriate that I read this out -- I know you have all  
16 read this -- but this reads:

17 "For the avoidance of doubt, the CMA does not ask the Tribunal to rule on the  
18 lawfulness or appropriateness of any of the above routes in this particular case. It is  
19 respectfully submitted that this would not be necessary in the context of a case  
20 management hearing or appropriate, given the hypothetical [and that is a word to be  
21 underlined] nature of the facts as matters stand. Rather, the CMA has set out the  
22 above routes, to seek to address the Tribunal's concern that the CMA could not  
23 consider alternative proposals from Microsoft without any change to the status of the  
24 FR. The routes above show there are several ways in which that could, in principle,  
25 be achieved."

26 Now the underlying assumption of that paragraph -- and there is a similar paragraph

1 in Microsoft's written submissions -- is that the tribunal is not concerned with the  
2 reasons for the adjournment and can grant it simply because the parties ask. Now  
3 that would absolutely not be the case in civil litigation. Indeed, I don't think anyone  
4 would be in any doubt that if this application were made in private civil litigation, it  
5 would be refused without a second thought.

6 Here, of course, the CMA is a public body, the national competition authority, and I will  
7 listen very carefully to the reasons for the CMA's conduct and for its making of this  
8 second adjournment application. But the reasons for the adjournment must, in my  
9 judgment, outweigh the public interest, on which the tribunal has already ruled twice  
10 as regards the listing of this application.

11 So, Mr Bailey, if you think that I am not concerned about the whys and wherefores of  
12 this application, then you will have to push back quite hard on that point and this is my  
13 invitation to you to do so, and I will welcome your submissions on this point. But it is  
14 only fair to you that you know where I am coming from, so that my concerns can be  
15 addressed head on.

16 So much for the preliminary points regarding this application.

17 That brings me to the final area that I want to raise before the parties before we begin  
18 the submissions. That's a framework for analysing this application. If -- and it is a big  
19 if -- I find that the parties' consent is not enough, the question has to be, what is?  
20 I have given this matter some considerable thought over the last few days. I will  
21 describe my thinking again, so that the parties can push back as advised. I would far  
22 rather that you, and in particular Mr Bailey and Mr Beard, have a target to aim your fire  
23 on, than not to know the general direction of the tribunal's thinking.

24 I have in mind a four stage process. First stage, the tribunal must be satisfied that the  
25 course proposed by the CMA viz discussions with Microsoft, necessitating an  
26 adjournment, have a proper legal foundation. By this, I do not mean to say that I have

1 to be satisfied as a matter of law that the CMA is right but I do need to satisfy myself  
2 that there is some proper jurisdictional basis for what the CMA is doing or what it is  
3 proposing to do.

4 In this regard, I find it quite troubling that I have been presented with a cornucopia of  
5 possible jurisdictional bases. Really, one is or ought to be enough. In short, as part  
6 of the first stage, I must understand the legal basis on which the CMA intends to  
7 proceed. It's not necessary for me to rule on the lawfulness of that basis, that will be  
8 a matter for separate, later proceedings but I do need to understand the prima facie  
9 thrust of the jurisdiction.

10 Secondly -- and this is the second stage -- as regards each such jurisdictional basis  
11 advanced, I must be satisfied that, at least arguably, there is a sufficient factual basis  
12 for exercising the jurisdiction. If, for example, it is said that there has been a material  
13 change of circumstance, then I need to know what that change of circumstance is.  
14 Provided, to carry on with this example, there can arguably be said to be a material  
15 change of circumstance, then it seems to me I should enquire no further. But that far,  
16 to make the enquiry and to have an answer to it, that far, it seems to me, I must go.

17 Thirdly, assuming that these two requirements are met, the legal jurisdictional basis  
18 and the factual basis satisfying it, I must be satisfied that the CMA is indeed seeking  
19 an adjournment for these reasons. In other words, not only must I be satisfied as  
20 a matter of theory that the jurisdiction might exist, I must be satisfied that the CMA has  
21 decided to go down this route. The application, in other words, cannot be hypothetical  
22 but it must be grounded in reality. I have in mind that there ought to be some evidential  
23 support for this adjournment which explains the thinking behind it and enables me,  
24 when making the judicial decision whether or not to adjourn, to have something to refer  
25 to by way of factual ammunition.

26 So it seems to me as the third stage, points one and two need to be buttressed by

1 evidence from someone in the CMA.

2 Fourthly, and finally, I must be satisfied that there is no obvious problem in the CMA's  
3 proposed course of action that would expose the CMA to an inevitable and successful  
4 judicial review, if it pursued the course it is suggesting, whatever that might be. In  
5 other words, I must not expose either the CMA nor this tribunal to justified criticism in  
6 having allowed an adjournment, in circumstances where it should not have been  
7 granted. If there is an obvious problem, an obvious defect, it must be dealt with.

8 Here, in this case, I can see only one such potential problem or defect, but I do think  
9 it needs to be addressed. The coincidence between events in the United States, the  
10 FTC's failure to obtain an interim injunction and the application here, is unfortunate. It  
11 is, I think, common ground that events in the United States are immaterial to  
12 Microsoft's and the CMA's application today. As a matter of law, that seems to me to  
13 be right. But it does seem to me also that the CMA needs to go on record that as  
14 a matter of fact, these events have not been a consideration at any point in the CMA's  
15 thinking.

16 So that's my framework, and of course, you will want to push back on it.

17 Mr Bailey, before you rise, I don't want you to be concerned that simply because you  
18 do not have, say, the evidence in place that this framework implies, I am going to  
19 refuse the application. That is not going to happen today. The furthest I would go  
20 today is to say "not today". Of course, you may be able to persuade me that the  
21 application should be acceded to today, that's the whole point of this long, preliminary  
22 excursus. So the answer may well be yes. It will not be a definitive no. I have too  
23 much respect for the CMA and for the common position of the parties to go that far. If  
24 we need to, then there will be a hearing with all three of us later on this week, to dot  
25 the Is and cross the Ts or hear further submissions. So the point of today is either to  
26 get to a yes or to articulate the problems that I have in getting to yes, because it will



1 only be a conditional no.

2 At some point in the course of your submissions, Mr Bailey, Mr Beard and to the extent  
3 relevant, Lord Grabiner, you are going to have to assist me on points one and two of  
4 my framework, even if you disagree with it. I welcome disagreement with it, but I want  
5 assistance on points one and two.

6 In other words, you are going to have to go through each jurisdictional base relied  
7 upon and identify the facts and matters relied upon to suggest that it is triggered.  
8 I have made a list of the various avenues. There are five, I think, in total, and we will  
9 have to go through them one by one, in addition to your general submissions.

10 Now, I am conscious that I have spoken for far too long but the parties do need to  
11 know the concerns that the tribunal has and has articulated. If you wish me to rise,  
12 any of you, for a certain period of time, I am very happy to do so.

13 **MR BAILEY:** We would be grateful for an opportunity just to take into consideration  
14 everything the tribunal has said.

15 **THE PRESIDENT:** Of course. I have thrown an awful lot at you. 15 minutes or half  
16 an hour?

17 **MR BAILEY:** 15 minutes.

18 **THE PRESIDENT:** That you can have. If you want more, just let me know.

19 **MR BAILEY:** I am grateful.

20 **(2.45 pm)**

21 **(A short break)**

22 **(3.13 pm)**

23 **THE PRESIDENT:** Mr Bailey.

24 **Submissions by MR BAILEY**

25 **MR BAILEY:** May it please the tribunal. I am going to structure my submissions  
26 according to the four stages that you, sir, very helpfully outlined earlier this afternoon.

1 Can I just say at the outset that the CMA respectfully agrees that, of course,  
2 an adjournment is a matter for judicial decision and we accept also that we need to  
3 convince you of there being a good, proper reason for granting that application. We  
4 do say that the parties' consent is a relevant factor in that regard, but we don't say that  
5 it is sufficient, in and of itself.

6 Can I just say in terms of a headline point -- so mindful, sir, that you said you are  
7 troubled by the application -- as things stand, the CMA's belief is that a stay for two  
8 months and the adjournment of the main hearing would enable a rapid process for  
9 considering Microsoft's restructured deal when it is notified to it, and that it offers  
10 a realistic chance of addressing the CMA's concerns.

11 Microsoft has indicated that it is prepared to put forward something that addresses  
12 those concerns. Of course, the CMA has not yet seen the final version of that deal.  
13 I am not here today to prejudge the final assessment of it. But what I can say -- and  
14 I will move on to deal with this in more detail -- is that the discussions between the  
15 parties to date have been productive and that both sides wish to see a short  
16 opportunity, in order to address the CMA's concerns. Crucially, if the restructured deal  
17 does address those concerns, then we anticipate a situation of comparative certainty  
18 being achieved more quickly than if the current litigation moves forward, as is  
19 envisaged according to the tribunal's directions.

20 So, sir, I am going to turn first to stage one of your framework. That was that the  
21 tribunal needs to be satisfied that any course that is proposed by the CMA has a proper  
22 legal foundation. Respectfully, sir, we agree with that. We agree that you do need to  
23 know that there is at least prima facie a legal basis for what the CMA is proposing to  
24 do.

25 Equally, we agree with you that you do not need to be satisfied as a matter of law that  
26 the CMA is right. Sir, that was the intention of paragraph 24 of the skeleton. It was

1 really to say today is not the moment to definitively decide what is lawful or not.  
2 Now with that in mind, I'd like to address you on each of the mechanisms or routes by  
3 which we say the CMA is entitled to consider a restructured deal whilst the final report  
4 remains in place.

5 I am going to start, as our skeleton does, by looking at the route where Microsoft  
6 notifies a restructured transaction and what the CMA would then do next. In that  
7 regard, I think it would be helpful if we turn up in the authorities, so that we can see,  
8 firstly, what the statutory provisions are, and once we've seen those, I would then like  
9 to turn to make some comments about the process. Because it seems, in my  
10 respectful submission, that I need to show you the legal basis, but also show you how  
11 it would operate in practice. While we anticipate that it is capable of delivering a swift  
12 outcome, if we turn to authorities bundle, please, tab 1, at page 14, if you are using  
13 the electronic version; it is page 16 of the PDF --

14 **THE PRESIDENT:** Yes.

15 **MR BAILEY:** So this will be familiar to the tribunal. This sets out the statutory duty in  
16 sub-section 33(1) that the CMA has, to make a reference:

17 "If the CMA reasonably believes [I interpolate reasonably because the Court of  
18 Appeal's judgment in *IBA Health* established the belief needs to be reasonable]  
19 ...(Reading to the words)... that it is or may be the case, that the arrangements will  
20 result, firstly, in the creation of a relevant merger situation [of course if that is the case]  
21 and, secondly, whether the situation may be expected to result in an SLC."

22 So, in my submission, what the CMA would do in relation to the restructured  
23 transaction is it would wish to investigate whether that duty is engaged or not. That  
24 isn't bespoke to this case or Microsoft; the CMA's doors are always open to dealing  
25 with parties that wish to restructure and seek to address the concern that it's identified.

26 **THE PRESIDENT:** Well, isn't the case though, that here, those doors have already

1 | been passed through? I mean, if one looks at section 33, and the definition of  
2 | a relevant merger situation, what we have as the relevant merger situation is what is  
3 | stated in paragraph 1.1 of the findings in the decision. That is the anticipated  
4 | acquisition by Microsoft Corporation of Activision Blizzard for further investigation and  
5 | report. Now that's what has been the case since this matter was accepted for phase  
6 | 1 reference by the CMA, pursuant to this very duty.

7 | Surely we are in a position where section 33 is engaged in relation to this transaction,  
8 | whether it is tweaked or not?

9 | **MR BAILEY:** If I may say so, that last part of the point you put to me, whether it's  
10 | tweaked --

11 | **THE PRESIDENT:** Yes.

12 | **MR BAILEY:** -- as we understand it, Microsoft is not intending to put forward a, as  
13 | Lord Justice Dillon said in *Argyll*, colourably different or tweaked transaction. The  
14 | whole premise of what is envisaged is that the restructured transaction will be  
15 | materially different.

16 | So one of the first questions that the CMA will need to consider with an open mind is  
17 | whether or not the restructured transaction does create a new relevant merger  
18 | situation within the meaning of section 33, and whether or not that is different from the  
19 | one that you, sir, referred me to in the final report. So that is a question of fact that  
20 | needs to be addressed.

21 | **THE PRESIDENT:** Okay. So what you are saying is that the events of the last period,  
22 | whenever that began and finished, but the events of the last period, are such that they  
23 | have ended the relevant merger situation that caused the decision and are creating  
24 | a new relevant merger situation, one that is so different that it can't be characterised  
25 | as falling within the reference as described in 1.1 of the decision?

26 | **MR BAILEY:** So, sir, no, I am not saying that.

1 **THE PRESIDENT:** Right.

2 **MR BAILEY:** And the reason I am not saying that is because Microsoft have not  
3 notified this transaction. So the CMA has not seen what exactly is going to be put  
4 forward to it.

5 **THE PRESIDENT:** Okay.

6 **MR BAILEY:** There have, of course, been without prejudice discussions between the  
7 parties --

8 **THE PRESIDENT:** Yes.

9 **MR BAILEY:** -- and I will obviously not trespass on that. Moreover, I will, however,  
10 deal with your factual basis, second stage, later.

11 But of course, to jump to saying the restructured transaction is necessarily or inevitably  
12 a new relevant merger situation, preempts the CMA's analysis. There are, I would  
13 agree, a number of possibilities, so that Microsoft notifies the new transaction. The  
14 first thing the CMA will want to do is to satisfy itself whether the new transaction is, as  
15 you put to me, sir, simply a variant on the existing relevant merger situation. If that is  
16 the conclusion that the CMA reaches, then of course you are right, sir, that one would  
17 be saying: there is nothing new here and, depending on the timing, whether it is  
18 relevant to the making of the final order.

19 On the other hand, it is also the case that if the restructured transaction is notified and  
20 the CMA look at it and they decide, actually, yes, there are things that are materially  
21 different, that means there is a new -- if I can use the shorthand -- RMS, and therefore,  
22 section 33 is, in my submission, legally open to the CMA to look at this, to see whether  
23 or not it would result in an SLC. So it is really important, in my submission, that it is  
24 dealt with on its merits, looking at the facts and by reference to whatever Microsoft  
25 notifies the CMA. At the moment, of course, that hasn't yet happened. We understand  
26 it will happen, but it's not for me to speculate and I obviously wouldn't wish to preempt

1 the outcome of the CMA's assessment in that regard.

2 **THE PRESIDENT:** No. Mr Beard, timing, when? If there is going to be a new  
3 notification, when is that likely to happen?

4 **MR BEARD:** In terms of the precise timing, I will take instructions as to whether I can  
5 explain the details of what is going on.

6 **THE PRESIDENT:** Right.

7 **MR BEARD:** Urgently. Because it is of the very essence of the position that we want  
8 this moved along. And so very active steps have been taken by Microsoft to put in  
9 place an arrangement that can be considered by the CMA on an urgent basis. But  
10 I am concerned not to trespass on the precise timings, you know, whether it is  
11 tomorrow, three days' time, whatever that might be.

12 **THE PRESIDENT:** Yes.

13 **MR BEARD:** Because those are the sorts of issues that are actually being discussed,  
14 because again, without wanting to trespass on without prejudice discussions,  
15 obviously we don't want to be putting forward something where the CMA looks at it  
16 and goes "Well, nah, you didn't think about the following."

17 So, obviously, there is some interaction in relation to these matters.

18 **THE PRESIDENT:** That's very helpful, Mr Beard.

19 You see, the problem with the section 33 route is that you can't actually, today,  
20 certainly, say it's likely to be engaged. You can say it is likely --

21 **MR BEARD:** I think we can say with real confidence that it is likely to be engaged.

22 **THE PRESIDENT:** Really?

23 **MR BEARD:** I don't think there is any doubt about that, sir, without trespassing into  
24 without prejudice negotiations.

25 **THE PRESIDENT:** All right.

26 **MR BEARD:** I think we can, with confidence, say that section 33 will be engaged.

1 **THE PRESIDENT:** When we say section 33, it has been engaged once.

2 **MR BEARD:** Yes.

3 **THE PRESIDENT:** But what you are saying is that you can say with confidence that  
4 what is going to come out of the Microsoft review of the transaction is something that  
5 is going to be not a variant on an old RMS, but a new RMS.

6 **MR BEARD:** Yes. I don't know whether Mr Bailey is going to come to it. We think  
7 the *Argyll* judgment is quite helpful in this regard. I don't know if you have had cause  
8 to have a look at it. We set out some of the points in the submission. Obviously, in  
9 that case, you had two competing bidders for distillers, one of whom essentially tripped  
10 the equivalent of section 33 in relation to its proposed bid but only in relation to an  
11 overlap in relation to whiskys. What was then done was that rather than Guinness  
12 having to go through the full referral process with the MMC, it said: well, look, if that's  
13 the issue, we'll make sure the deal is restructured so that whiskys -- which are the only  
14 bit of the deal and I don't know how big a bit of the deal it was -- but that bit of the deal  
15 will essentially be excised, so that before it closes, we will not be requiring that, we will  
16 not be triggering an RMS covering whiskys.

17 In so doing, it was held by the CMA that that was a different RMS, because essentially,  
18 the bit that was of concern no longer formed part of the transaction. And what the  
19 Court of Appeal and the court below emphasised, was that this was, in their language,  
20 "supremely a matter of fact and degree assessment by the CMA."

21 Of course, sir, you have already said you are not trespassing on those issues today,  
22 but I think I can say with confidence that what we have here is a situation where one  
23 can substitute the notion of whiskys for something else that is relevant to the concerns  
24 that the CMA has and you are in the territory where, without doubt, it will fall within the  
25 CMA's relevant discretion to conclude that section 33 is engaged.

26 **THE PRESIDENT:** So I don't want to put words into your mouth -- and please do spit

1 | them out if they are not palatable -- but are you saying that the likelihood of what the  
2 | outcome of Microsoft's process is going to be is that the decision that we have here is  
3 | superseded by events that have occurred after the decision was made?

4 | **MR BEARD:** Yes. That is exactly right.

5 | **THE PRESIDENT:** Right.

6 | **MR BEARD:** Then I think what Mr Bailey is talking about are the possible procedural  
7 | routes by which that is being made manifest.

8 | **THE PRESIDENT:** I understand. So that is where you are coming from. We will hear  
9 | from Mr Bailey in a moment.

10 | So the superseding by events point is actually, to my mind, quite important. It's what  
11 | I thought first when I looked at the press reports of the arrangements that Microsoft  
12 | have made with Sony, because it undercuts --

13 | **MR BEARD:** Absolutely.

14 | **THE PRESIDENT:** -- an enormous part of the reasoning in the decision, which was  
15 | right then but is wrong now, for the best of reasons, because the position has changed.  
16 | Now that being the case, I can obviously say I appreciate the CMA stand by their  
17 | decision, I said that. I appreciate that Microsoft say the decision was wrong.  
18 | I understand that. But why should I care? It seems to me that if things have moved  
19 | on, that there are new circumstances that require a fundamental revisiting of the  
20 | decision, that we are in quashing territory, not because of error but because the  
21 | decision is addressing altogether different circumstances and has become, in the  
22 | nicest possible way, historical.

23 | I mean, it may indeed have prompted this development which is to the benefit of all  
24 | concerned, but surely we need to consider the position as things stand now. What  
25 | I was rather expecting today was an identification of a statement from Microsoft,  
26 | explaining what's going on. We can keep it confidential if necessary, but a statement



1 saying "Look, this is what's changed. Here is the new landscape". That goes to the  
2 CMA. The CMA look at it and say: "Well, looking at that, we are not asking ourselves:  
3 is this a new RMS or an old RMS? What we are asking ourselves is has the landscape  
4 so changed that looking back at the decision that was made quite properly some  
5 months ago, is it now wrong to have the prohibition decision continue to hang over  
6 Microsoft, when a fresh case is being considered?" Because that, it seems to me, is  
7 verging on the oppressive.

8 **MR BEARD:** I am happy to deal with that -- could I perhaps --

9 **MR BAILEY:** Could I just address that?

10 **THE PRESIDENT:** Of course.

11 **MR BAILEY:** It's a matter that relates to the final report.

12 The CMA, as you say, sir, does stand by the final report.

13 **THE PRESIDENT:** Of course, that's not for debate today.

14 **MR BAILEY:** And subsequent events, be they as part of without prejudice discussions  
15 or subsequent contracts entered into with third parties, do not, in my submission,  
16 invalidate or warrant the quashing of the final report. The basis for the application  
17 before you today is not about how events have moved on so rapidly that they cast  
18 a shadow or a cloud of illegality over the final report, but rather, to say that there is  
19 going to be a new transaction on the table.

20 Mr Beard has helpfully clarified that the parties have real confidence that this will  
21 address the CMA's concerns, and so we are looking prospectively and we are looking  
22 at what is the most effective and expeditious way of seeking to have our concerns  
23 addressed. That is why I wanted to address you on each of the routes.

24 **THE PRESIDENT:** Mr Bailey, don't get me wrong. We will go down each of these  
25 routes. It is just that if we are going down the section 33 route, you are unable today  
26 to tell me -- you certainly can't show me any evidence -- that this is a new RMS rather

1 than an old RMS.

2 **MR BAILEY:** Precisely because it is a prospective process that has not yet been  
3 embarked upon. But, of course, both parties agree, as I understand it, that what  
4 Microsoft will notify is capable, to put it at that level, of resolving the CMA's concerns  
5 and the CMA will, of course, look at it afresh in terms of whether it creates a new,  
6 relevant merger situation. It is difficult for the CMA to go any further than that without  
7 pre-empting its assessment.

8 **THE PRESIDENT:** That, I think, is the chicken and egg problem we have. Let's take  
9 one step back. I don't understand the quashing jurisdiction to turn on there being an  
10 error in the underlying decision. Obviously, that is one reason -- and was the reason  
11 in *Eventim* -- as to why things can be quashed. But it would be a very strange state  
12 of affairs for the CMA to say "We continue to stand by a decision that is prohibiting  
13 a merger", when the circumstances regarding that merger have so changed that the  
14 CMA itself has real doubts as to whether prohibition is appropriate.

15 Now, are you telling me that a change of circumstance so significant that it actually  
16 undermines, after the event, the essence of the decision that was made, is something  
17 that does not give this tribunal the jurisdiction to quash the decision and to say, "Of  
18 course, the hearing the week after next can't take place"? Because the CMA, quite  
19 rightly, need to have questions remitted back to it, so that they can consider exactly  
20 the issues, according to a timetable which is in the public interest, so that the matter  
21 can be dealt with in a second decision. Of course informed by this but not fettered by  
22 it.

23 Because at the moment, you have this deadweight of 'the merger must not take place',  
24 around your neck, and what you are trying to do is you are trying to find little ways to  
25 sidestep a decision which I am quite prepared to accept, for sake of argument  
26 today -- despite Mr Beard's pushing against it -- I am quite prepared to accept today,

1 it was absolutely right when it was made, but that's not the point.

2 **MR BAILEY:** Sir, I think there are two different situations.

3 **THE PRESIDENT:** Yes.

4 **MR BAILEY:** There is the situation which you are referring to, which is the relevant  
5 merger situation that was notified to the CMA last year and is the subject of the final  
6 report. As you know, sir, at the moment, the final order following that report has not  
7 yet been made. So the ultimate outcome of the CMA's deliberation won't be known  
8 and a final order made until 29 August. That is because Microsoft has made  
9 submissions to the CMA about a material change of circumstance and a special  
10 reason for not imposing a final order that leads to a prohibition, and the CMA is  
11 considering those with an open mind at the moment. So the fate of the relevant merger  
12 situation that is the subject of the report, is subject to that process.

13 Sorry, just to --

14 **THE PRESIDENT:** Do go on.

15 **MR BAILEY:** The second situation is the one where Microsoft notifies a discrete,  
16 a separate transaction to the CMA and one of the questions that the CMA will need to  
17 grapple with rapidly is: hold on, is this just a variant of what we have already looked  
18 at -- in which case, sir, I see your point that it will just lead to the question of it being  
19 prohibited -- but if, on the other hand, as we understand from Microsoft, that it is  
20 capable of addressing our concerns, we say it should be looked at afresh and we  
21 should look at it under our duty under section 33.

22 The point about the prohibition order which we can come to when we look at it, is that  
23 the prohibition order in draft, currently envisages the CMA giving consent, where it is  
24 satisfied that Microsoft acquires an interest in Activision and its concerns are  
25 addressed, in which case that sort of means that the final order is also taken care of.

26 So it just seems to me that there are two separate situations. At the moment, I am

1 reluctant to say that one necessarily overlaps or is intertwined with the other.

2 **THE PRESIDENT:** We will come to the adopting of a final order that is not consistent  
3 with the decision next, I imagine. At the moment, we are on section 33.

4 **MR BAILEY:** Yes.

5 **THE PRESIDENT:** And the position, as I understand it, is that both sides are telling  
6 me that they think it's going to be a new RMS, bringing it out with the old RMS, but  
7 they don't want to kill the old RMS because that's not certain and they can't tell me  
8 anything about the new RMS because work is still in progress.

9 **MR BAILEY:** Basically, they are not quite telling you that, sir. Because I am not  
10 saying that there will be a new RMS, I am saying that the CMA will look at it afresh --

11 **THE PRESIDENT:** Yes.

12 **MR BAILEY:** -- and decide, once it has been notified, whether there is a new RMS.  
13 So I am saying that that is at least a realistic possibility, but I don't want to preempt the  
14 CMA's consideration of it. I think it's important that I preserve the CMA's right to  
15 decide, once it actually sees what is being notified.

16 So there is a little bit more in section 33 which I think, I hope, would assist in terms of  
17 the legal basis.

18 **THE PRESIDENT:** Please do. I really don't want you to be constrained for time here.

19 **MR BAILEY:** If we are back to page 14, section 33, we looked at the duty that is set  
20 out in subsection 1.

21 **THE PRESIDENT:** Yes.

22 **MR BAILEY:** There are then three enumerated exceptions in subsection 2 which  
23 allow, essentially, the CMA to switch off its duty to refer.

24 But then importantly, in my submission, Parliament has set out in subsection 3, five  
25 circumstances where no reference shall be made. The reason it's important is  
26 because you can see the variety of situations that are considered here, and in my

1 submission, not one of them says "No reference shall be made where there has been  
2 a prohibition of an alternative arrangement between the same merger parties at an  
3 earlier point".

4 If one looks at the five circumstances, they are in turn, first, that no reference shall be  
5 made if a decision is not reached within the statutory time limited. For your reference,  
6 that's 40 working days, as set out in section 34ZA.

7 **THE PRESIDENT:** Yes.

8 **MR BAILEY:** There is also no reference where either the CMA has accepted  
9 undertakings in lieu or is considering that. No reference made where an anticipated  
10 merger closes and becomes a completed merger. And, finally, where the Secretary  
11 of State intervenes.

12 So my submission is important because it reinforces our view that this is open, legally,  
13 for the CMA to look at the restructured transaction.

14 **THE PRESIDENT:** Well, yes. That is clearly right. But first of all, we don't have the  
15 new restructured transaction. And, secondly, we don't have the wherewithal, which is  
16 related, for killing off the old section 33 reference which has resulted in this decision.  
17 What you are saying is through a combination of a new section 33 reference, which  
18 can be dealt with, as you say, in section 33(3) and some way of driving a stake, if  
19 appropriate, through the heart of this decision, we get to the utopia of this transaction  
20 being allowed to proceed. So it is actually a twin track approach that you are  
21 suggesting?

22 **MR BAILEY:** I am suggesting that the CMA needs to go through the process it's doing  
23 vis-a-vis the final order. It needs to deal with what Microsoft has said about it and  
24 needs to reach a final order in relation to what -- let's call it the original RMS. I entirely  
25 agree with that. That process needs to take place.

26 **THE PRESIDENT:** Yes.

1 **MR BAILEY:** I am also saying that there will be then a subsequent separate process,  
2 where -- let's just call it the new deal -- is notified to the CMA. As part of that, the CMA  
3 will have to ask itself: is what is being proposed simply a reiteration of the earlier  
4 transaction? It will absolutely have to do that. If the answer to that is yes, sir, if the  
5 final order has been made, it will be caught by paragraph 12 and it will be prohibited,  
6 unless the CMA were to grant its consent.

7 If, on the other hand, it is new and sufficiently different, then of course, section 33 is  
8 the route forward. There is, of course, as Mr Beard was referring to, a sort of third  
9 variant which is that the transaction is notified any day now, at which point the final  
10 order has not yet been made, at which point, when the CMA looks at that restructured  
11 transaction, one of the questions it will need to satisfy itself about is whether the  
12 original RMS has been abandoned. If that's the case, then under section 37, it is under  
13 a duty to cancel the reference.

14 You are right, sir, we don't have the restructured transaction. Really, unfortunately,  
15 that's not in the CMA's gift --

16 **THE PRESIDENT:** No, I understand that.

17 **MR BAILEY:** -- that's really for the parties. But what both sides do have is  
18 a confidence, following discussions between them, that a restructured deal can  
19 address the CMA's concerns. Insofar as that is a new RMS and insofar as it does  
20 address the CMA's concerns, then as you have seen in our skeleton argument, one  
21 mechanism by which the CMA would allow that to take place is by granting consent  
22 under the terms of the final order.

23 Indeed, this is not uncharted territory. The CMA has actually had this scenario arise  
24 in previous cases, so we mentioned a couple at paragraph 15 of our skeleton  
25 argument. If it is helpful to just have that in front of us, because the decisions  
26 themselves are not actually in the bundle. You will find our skeleton argument is at

1 | tab 5 of the core bundle. We mention a couple of cases at page 18.

2 | Could I perhaps address you briefly --

3 | **THE PRESIDENT:** Sorry, which paragraph? I am sorry.

4 | **MR BAILEY:** I do apologise. It is paragraph 15.

5 | **THE PRESIDENT:** Yes, thank you.

6 | **MR BAILEY:** If I could address you, perhaps, on the one that is perhaps closer to the

7 | facts of this case.

8 | **THE PRESIDENT:** Yes.

9 | **MR BAILEY:** So this is the merger that took place -- the proposed merger -- that was

10 | notified to the Competition Commission, involving two NHS foundation trusts in the

11 | Dorset area. In 2013, the Commission analysed this and reached the conclusion that

12 | they were likely to lead to an SLC, and that the only effective and proportionate remedy

13 | would be prohibition. Ultimately, that was then implemented by way of final

14 | undertakings given by the parties under section 81.

15 | Now, several years later, the same parties approached what was now the CMA, to

16 | engage in the same merger in the same area and the CMA approached that by,

17 | essentially, a twin-track approach. It looked at it and said "We will analyse under the

18 | terms of the final undertakings that are in place that you gave to the Competition

19 | Commission, and we will decide whether we should give consent for you to proceed

20 | with this transaction."

21 | And at the same time, the CMA did a fresh analysis in accordance with section 33 and

22 | as part of a phase 1 investigation.

23 | In a nutshell, the CMA was satisfied that market conditions had changed. Indeed, the

24 | NHS policy in that area had changed. And so the transaction was cleared

25 | unconditionally. Moreover, at the very same time as that phase 1 clearance decision,

26 | consent was given under the final undertakings.

1 So that, in a sense, encapsulates what the CMA has in mind when we refer to route  
2 1.

3 Of course, I should acknowledge that there is a difference between what I have just  
4 described to you, sir, and the present situation. In that case there was, seven years,  
5 I believe, in between the original merger and the sort of the second attempt at merging.  
6 But in my submission, although that is a question of time and therefore relevant to the  
7 CMA's analysis, one shouldn't allow that temporal consideration to be decisive.

8 So that, I hope, assures you that the CMA has used this type of procedure before, and  
9 that is exactly one route by which the CMA, once it has the restructured transaction  
10 notified to it, could appraise it.

11 **THE PRESIDENT:** But let's go back to section 33. But not (2) or (3), but section 33(1),  
12 which is the trigger. So:

13 "The CMA shall make reference to its chair for the constitution of a group under  
14 [whatever it is], if the CMA believes that it is or may be the case that arrangements are  
15 in progress or in contemplation, which, if carried into effect, will result in the creation  
16 of a relevant merger situation and the creation of that situation may be expected to  
17 result in an SLC within the ... markets."

18 Now that's a very broad test of what is a relevant merger situation. The one thing  
19 I suspect one can take to the bank here is that whatever the restructuring, Microsoft  
20 will be acquiring Activision Blizzard.

21 **MR BAILEY:** This is where it becomes quite difficult for me to address you on that --

22 **THE PRESIDENT:** I agree.

23 **MR BAILEY:** -- because of the nature of the restructured transaction and whether it  
24 is a complete acquisition or a partial acquisition --

25 **THE PRESIDENT:** It is structured in a different way, of course. I understand that. But  
26 you understand my point, too, which is that there is an evidential requirement which



1 needs to be passed to satisfy me. Because the one thing that is special about this  
2 case is that we have a section 120 hearing in six days' time, which you both want to  
3 have adjourned. I am not unsympathetic to that, but it needs to be lawfully done. At  
4 the moment, I can see section 33, I have considerable doubts as to whether, even if it  
5 was a remarkably restructured transaction, it would fall out with section 33 as drafted  
6 here. But who knows. But you can't help me any further and that's not a criticism.  
7 You can't. So on what juridical basis do I say: well, fine, adjourn? How do I do that?

8 **MR BAILEY:** I wonder if we might look at the Court of Appeal authority --

9 **THE PRESIDENT:** Of course.

10 **MR BAILEY:** It is dealing, I admit, with what we regarded as route 3, that is the  
11 question of abandonment but there is a point of principle that comes, clearly, from all  
12 three judgments of the Lord Justices, in terms of how one appraises arrangements in  
13 progress, which is the wording, sir, in section 33(1)(a) and I hope it may be of  
14 assistance --

15 **THE PRESIDENT:** No, of course.

16 **MR BAILEY:** -- when one is looking at this. As my learned friend Mr Beard indicated,  
17 just to give you -- the judgment is at tab 3 of the authorities.

18 **THE PRESIDENT:** Yes.

19 **MR BAILEY:** The headnote, as one would expect, explains the basic facts. Mr Beard  
20 has already summarised them eloquently but if I could just recap: the applicant in this  
21 case was *Argyll* and they were bidding for a company called Distillers --

22 **THE PRESIDENT:** Yes.

23 **MR BAILEY:** -- which has some competition pedigree. And a rival bidder in this  
24 connection was Guinness and they put both in proposals in what the Master of the  
25 Rolls described as a "megamerger dispute", which perhaps would be apt for this case  
26 as well.

1 What happened was the relevant decision-maker at this time -- which is the Secretary  
2 of State -- referred, as Mr Beard says, Guinness' bid to the Monopolies and Mergers  
3 Commission for an acquiring report --

4 **THE PRESIDENT:** Yes.

5 **MR BAILEY:** -- but didn't refer *Argyll's*.

6 And then what happened -- which is quite important -- is that before the investigation  
7 was started, Guinness had various conversations with the chair of the then MMC,  
8 indicating that it might table a revised takeover bid, as Mr Beard said, essentially  
9 removing certain whisky activities, and the chair concluded that this meant that the  
10 arrangements referred to in the predecessor to section 37 of the Enterprise Act, meant  
11 that the transaction had been abandoned.

12 Now that's just by way of context. *Argyll* then seek judicial review of that decision,  
13 together with the Secretary of State's consent to laying aside the reference. There are  
14 just a few points that I hope it would be helpful to go through with you in relation to the  
15 judgments.

16 **THE PRESIDENT:** Yes.

17 **MR BAILEY:** It is perhaps helpful to pick up what was being said on page 181 of the  
18 bundle, 261 of the All England Law Reports. You can pick up just below letter (e) that  
19 the submission that was being made, put in another way, both the first Guinness offer  
20 and the revised Guinness offer, would, if implemented, have created merger  
21 situations. The proposal to create a situation had never been abandoned. The second  
22 bid was merely a variation on the theme of the first.

23 So that was the contention being made, that the chair of the then MMC had misdirected  
24 himself in law.

25 Now if we move to the Master of the Rolls and how he addresses that --

26 **LORD GRABINER:** (h) on which page? Merely to draw attention to the fact that the

1 parties approached Sir Godfrey Le Quesne as the chairman of the MMC and explained  
2 to him the essential difference between the arrangement that was before the MMC  
3 and the arrangement that was now proposed, which was the sale by, respectively,  
4 Guinness and Distillers of whisky interests to another company called Whyte &  
5 Mackay. And he was satisfied that if that were to happen -- and of course, it had not  
6 happened at that stage -- that was something that they were negotiating -- if that were  
7 to happen, that would produce a different arrangement. For that reason, he -- and it  
8 was a matter for him, not the court, it was a matter for him par excellence, as chairman  
9 of the MMC, to abandon the reference. That's what he decided to do, because he was  
10 satisfied that there was now a new arrangement in front of him and he was satisfied  
11 that this would not give rise to a problem, ergo the deal was allowed to proceed.

12 It was then challenged by *Argyll* as an inappropriate exercise of power and that claim  
13 failed, both at first instance and in the Court of Appeal but the description at (h) on  
14 page 180, shows you that there were mechanics going on, conversations, obviously  
15 without prejudice initially, between the parties, and then directly with the equivalent of  
16 the CMA, the chairman of the Monopolies Commission. The analogy with the present  
17 situation is exactly the same.

18 If I may be respectfully permitted to make one point: there is a risk in this conversation  
19 of not really paying regard to one key point, which is that all the discussions between  
20 the parties are without prejudice. It is not the function of this court or this hearing to  
21 be investigating what has passed in those negotiations. It's entirely inappropriate.

22 So at the end of the day, whatever proposal is made to the CMA, it will then be a matter  
23 for the CMA to make its own judgment, for example in relation to section 33. If it  
24 decides that the proposal consists of a new arrangement, that's a matter for it, not  
25 a matter for the court; if somebody subsequently wants to make a challenge to that,  
26 they are welcome to do so. But we will then be in an *Argyll* situation.

1 My Lord, I apologise to your Lordship and my friend for interrupting, but it is terribly  
2 important not to trespass on the without prejudice debate.

3 **THE PRESIDENT:** No, Lord Grabiner, that's very helpful. To be clear, I don't  
4 want -- unless the parties want to tell me -- to know anything that is best kept between  
5 the parties. That's obviously clear.

6 **LORD GRABINER:** My Lord, I quite understand that. But the problem is that when  
7 your Lordship says "Well, I'd like some certainty as to what exactly is proposed" --

8 **THE PRESIDENT:** Yes.

9 **LORD GRABINER:** -- you must realise that that can't be done.

10 **THE PRESIDENT:** The problem, and the reason why this is a helpful decision only so  
11 far, is this: if the CMA wish to see matters as a fresh section 33 reference, well, that's  
12 their business, not mine. I accept that. If they choose in due course to treat it as  
13 a new or a rehashed RMS, that's their business, not mine. I accept all that.

14 But I am concerned with the process of kicking off a trial that has been fixed, at  
15 considerable effort, in the public interest and I need to be satisfied, as the tribunal here  
16 did not have to be because that was not the case here, I have to be satisfied that  
17 I have a proper basis for kicking something off. I am not sure that the notion that in  
18 the future -- it may be in a few days -- but the notion that in the future, the short term  
19 future, the CMA may have the wherewithal to decide that there may be a new RMS,  
20 is enough to enable me to say: well, that's fine, let's just kick this old RMS which is  
21 being judicially reviewed, into the long grass, even if the long grass is two months.

22 **LORD GRABINER:** My Lord, you said there at the beginning that what has happened  
23 in the last two weeks -- because two weeks ago, the adjournment application was  
24 made and was not acceptable and in due course your Lordship rejected --

25 **THE PRESIDENT:** Yes.

26 **LORD GRABINER:** -- the adjournment application. What has happened since then

1 is obvious, that there have been further negotiations between the parties and  
2 circumstances have changed. In front of your Lordship, you are presented  
3 with -- I hope it is right to say -- three perfectly sensible parties, all very carefully  
4 advised by people who know what they are doing.

5 The implication is perfectly clear, that the parties are in the business of trying to resolve  
6 this problem. That, by itself, ought to give your Lordship sufficient succour to the effect  
7 that this is something that is being properly dealt with by responsible people. If I may  
8 respectfully say so, that's a rather important point to feed into your Lordship's  
9 discretion. As to whether your Lordship has that discretion, I completely agree with  
10 my learned friend Mr Bailey -- and I am sure that is Mr Beard's position as well -- which  
11 is your Lordship undoubtedly has that discretion. It is just that I would strongly urge  
12 your Lordship to take account of the fact that you are presented with sophisticated  
13 parties. This is a massive transaction which is heavily price-sensitive, and  
14 your Lordship ought to proceed on the assumption that we know what we are doing.

15 **THE PRESIDENT:** I certainly do that, but I think my fear and my concern is that the  
16 parties, all of them, are too concerned with shoehorning what is coming down the line  
17 in the future and categorising it as something, without paying sufficient regard to that  
18 which has already happened.

19 **LORD GRABINER:** My Lord, we have not tried to shoehorn anything, with great  
20 respect. What we have sought to do, and both sides have sought to do this, is to  
21 present your Lordship with the different legal routes which would be available if there  
22 were an agreed solution. All that has happened in the respective skeleton arguments  
23 that have been served are to indicate the different possibilities that, lawfully, might be  
24 operated. But nobody has gone further than that, because of the without prejudice  
25 limitation or inhibition.

26 That is really the state of play. As to which, if any, of those might work, that's really

1 a matter for the CMA, just as it was a matter for Sir Godfrey Le Quesne contain in the  
2 *Argyll* case, to decide whether or not he was satisfied that there were different  
3 arrangements in place which enabled him to decide that the first reference should be  
4 discarded.

5 **THE PRESIDENT:** Lord Grabiner, of course you are right. But one of the options that  
6 is articulated by Microsoft is the option in paragraph 21 of its written submissions.

7 **LORD GRABINER:** Yes. My Lord, yes, I take your point.

8 I know that it sounded as if that was the one that your Lordship favoured at the  
9 beginning --

10 **THE PRESIDENT:** It's the one that has the best fit, in these rather exceptional  
11 circumstances.

12 The reason I say that is because the parties are, quite understandably, addressing me  
13 on a forward looking basis. They are saying things are moving. There are without  
14 prejudice communications, highly sensitive. I understand that. Don't tell me about it,  
15 I understand why you are not.

16 But what we do have over the weekend is a development which is really, in my limited  
17 understanding, quite significant. Now it may be Mr Bailey will tell me it is not, but  
18 I would be interested in hearing from all the parties that something quite significant  
19 has occurred --

20 **LORD GRABINER:** Yes.

21 **THE PRESIDENT:** -- which you can certainly tell me about. I mean, if you need to  
22 protect me from the elements of confidentiality, then it can be done in a statement that  
23 I would be very happy to protect, but it has happened.

24 Now, if what has happened is something which is quite significant in terms of the  
25 decision that is to be made, in the sense that the concern was that an absence of an  
26 accommodation between the market players, including in particular Sony, with regard

1 to the jewel in the Activision crown, Call of Duty, that that has actually moved on, then  
2 that is a material circumstance not regarding future debate but regarding past events  
3 that affect the significance of another past event, namely the decision that we are  
4 reviewing next week.

5 The point I make is a perfectly simple one. Why are we going to be chasing around  
6 for six days, talking about a decision which has been superseded by events?

7 **LORD GRABINER:** My Lord, it is really a matter for Mr Beard to deal with. Can I just  
8 say this in response?

9 **THE PRESIDENT:** Of course.

10 **LORD GRABINER:** Two points. One, it is public knowledge as to what happened on  
11 the weekend. The other is the impact of that is really a matter for the CMA.

12 **THE PRESIDENT:** Yes.

13 **LORD GRABINER:** As to the CMA's reaction to that, it is not appropriate for me to  
14 comment.

15 **THE PRESIDENT:** No, indeed.

16 **LORD GRABINER:** And I wouldn't do so. That is a matter for the CMA to consider  
17 and to see themselves what impact that has. That may lead them to a paragraph 21  
18 situation, I do not know. But it is really not appropriate for discussion, I'd respectfully  
19 submit, in this hearing. This is really a matter for the CMA and the exercise of its  
20 statutory duty and power to decide what to do about it. But I acknowledge the point  
21 your Lordship makes which is it does have, obviously, a profound impact on the  
22 discussion. But it's not a matter for today, in my submission.

23 **THE PRESIDENT:** Well, it's a matter -- we may have to go off to another hearing  
24 because clearly, we are going to require evidence on certain points. But --

25 **LORD GRABINER:** My Lord, I don't want to (overspeaking)

26 **THE PRESIDENT:** Before you move on --

1 **LORD GRABINER:** -- CMA territory, not mine --

2 **THE PRESIDENT:** That's fine but just so you can assist me on this, and I will want to  
3 hear from all three of you on this, sticking with Microsoft paragraph 21, is your  
4 understanding of the quashing jurisdiction as limited as it appears the CMA's is,  
5 namely that one only quashes when there is something wrong with a decision?

6 **LORD GRABINER:** My Lord, we think it is a wider power than that.

7 **THE PRESIDENT:** That's my understanding, in that one doesn't want to go on  
8 defending a decision if something so material has happened that it makes it, you know,  
9 presumptively, a perfectly good decision in the past but just historical.

10 **LORD GRABINER:** Absolutely. No, I --

11 **THE PRESIDENT:** I am grateful.

12 **LORD GRABINER:** I respectfully agree with your Lordship.

13 **THE PRESIDENT:** Mr Beard, of course you will have to address me on this, but if one  
14 were to have an articulation, not of what is being planned for the future -- I don't want  
15 to know about that -- but the significance of what has happened in the past which  
16 moved across to the CMA, so they can say: well, look, we have to look at what we  
17 decided in relation to facts as they were; we are now being told by Microsoft what is  
18 the case now. Of course, it is for the CMA to decide what they wish to continue to  
19 defend and what they wish not to continue to defend, but if they take the view that  
20 what Microsoft says isn't enough to impair the decision prospectively, because matters  
21 have changed, well, then, that ought to be a good argument for the hearing to go  
22 ahead, for that to be tested.

23 If, on the other hand, if the change is sufficiently fundamental to require that  
24 reconsideration, then a remission, quite possibly on limited terms, purely and simply  
25 on the basis of the new facts and, obviously, without prejudice to any points about the  
26 validity of the decision -- we would be saying it's a proper decision, not examining that,



1 we are examining the new circumstances -- then one gets everything that one wants  
2 in one nice package. We get the removal of the hearing the week after next. We get  
3 the basis for the reconsideration very swiftly, as swift as the CMA can do it, and we  
4 get one set of proceedings, not two.

5 **LORD GRABINER:** Your Lordship's assumption in that question is that the only point  
6 that we would be discussing is the impact of the deal that was done on the weekend --

7 **THE PRESIDENT:** Yes.

8 **LORD GRABINER:** -- with Sony. But of course, what your Lordship is not taking  
9 account of is the possibility that there are other matters which the parties are  
10 discussing which would have, in the big picture, an additional impact on the global  
11 picture. That's why I am very concerned that we shouldn't be going down this road of  
12 what your Lordship would see as a bigger certainty, or give you more stomach for what  
13 we are inviting your Lordship to do, as that that really does involve trespassing on  
14 inappropriate matters.

15 **THE PRESIDENT:** Lord Grabiner, let me say this: I am entirely convinced, subject to  
16 what other counsel say, entirely convinced you are right about that, that I shouldn't be  
17 entertaining speculation about what is going on in the future. My point is that if past  
18 events are enough to make clear that circumstances have moved on in so fundamental  
19 a way as to make the decision, whilst once right, a thing writ in water, then let's call  
20 a spade a spade, throw it back, reconsider it, together with all the other matters that  
21 I don't need to know about, and reach a decision on the circumstances as they stand.

22 **LORD GRABINER:** That's why we need an adjournment. So that --

23 **THE PRESIDENT:** Yes, I see.

24 **LORD GRABINER:** -- we can have further discussions between the parties, with  
25 a view to making sure that the CMA understands exactly what's on the table, and it's  
26 not necessarily confined to what was discussed and done over the weekend.

1 **THE PRESIDENT:** I understand.

2 **LORD GRABINER:** I am sorry to have intervened.

3 **THE PRESIDENT:** No, Lord Grabiner, it is very, very helpful.

4 I am sorry, I will let Mr Beard intervene, if that is all right with you.

5 **Submissions by MR BEARD**

6 **MR BEARD:** According to Mr Bailey, sir, I don't think he's going to object. Just to be  
7 clear, I agree fundamentally with Lord Grabiner's punchline. Whichever way we are  
8 dealing with this, whichever way the tribunal is thinking about these issues, it is going  
9 to require an adjournment in relation to the hearing in ten days' time. But let's just  
10 unpack the process a little bit.

11 **THE PRESIDENT:** Yes.

12 **MR BEARD:** Because, sir, if this helps -- and I confess it may trespass slightly on Mr  
13 Bailey's submissions but I am going to indulge, if that is okay.  
14 The position is this, if you have a merger situation that has resulted in a final report  
15 like this one, there is a period until the final order is made. It is worth just turning up  
16 section 41, page 28 in the bundle.

17 **THE PRESIDENT:** Yes.

18 **MR BEARD:** You will see there text that if we get to a hearing, it's going to be the  
19 subject of some interesting discussion. But for today, all we need to do is look at --

20 **THE PRESIDENT:** 41(3), "Material change or special reason."

21 **MR BEARD:** Exactly. As you know -- we put it somewhat enigmatically, perhaps,  
22 under paragraph 22 in our skeleton, "Further issues" -- at the moment, before the  
23 CMA, there are submissions in relation to matters that constitute, we say, special  
24 reasons or material changes of circumstance that mean in relation to this case -- this  
25 RMS, this final report -- a final order should not be made which takes the same  
26 remedial course as the final report.

1 Now the agreement that you are talking about that occurred and was announced over  
2 the weekend, that is the sort of material that can be considered -- and, indeed, we  
3 would say must be considered -- by the CMA, in deciding those sorts of issues. The  
4 CMA, as you know, has moved out the deadline by which --

5 **THE PRESIDENT:** Yes, to the end of August.

6 **MR BEARD:** To the end of August. Mr Bailey said that a final order would be made  
7 at the end of August -- one would hope that was a slip, and that, obviously, it moves  
8 the parameter for the making of a final order to the end of August but things can  
9 happen a great deal more quickly than that.

10 What that means is that there is a mechanism already in place to feed in these issues  
11 in relation to the Sony agreement, and the range of other matters, including those to  
12 which Lord Grabiner has been adverting, so that we are not simply blindly carrying on,  
13 ignoring very significant developments that have occurred here, which is precisely the  
14 concern, as I understand it, sir, that you are articulating.

15 **THE PRESIDENT:** That is precisely right. But let's test that a little bit further.

16 **MR BEARD:** Yes.

17 **THE PRESIDENT:** So 41(3) imposes a primary duty on the CMA that the final  
18 order -- as I will call it -- is consistent with its decision. So the basic purpose of a final  
19 order is to implement the decision.

20 **MR BEARD:** Unless.

21 **THE PRESIDENT:** Unless. So unless two things: material change of circumstances  
22 or some special reason.

23 **MR BEARD:** Yes.

24 **THE PRESIDENT:** And we can obviously have a debate about what is a material  
25 circumstance and what is a special reason.

26 **MR BEARD:** Of course.

1 **THE PRESIDENT:** Now, this does seem to me the most promising route -- apart from  
2 quashing -- for the CMA. I am not sure that the section 33 route helps because the  
3 section 33 route is a way of creating a second RMS, not dealing with the first. So the  
4 two may have to be considered in tandem which is where I think Mr Bailey was taking  
5 me, but we will see how it goes.

6 **MR BEARD:** Let me deal with all of these things.

7 **THE PRESIDENT:** Okay.

8 **MR BEARD:** First of all, MCC, special-reason. It can happen quickly. That could  
9 change matters very rapidly, that could deal with the situation as it is, not as it was,  
10 that deals with the concern.

11 **THE PRESIDENT:** Yes.

12 **MR BEARD:** Those are matters with which the CMA is engaged and will be engaged  
13 in relation to the issues concerning the Sony agreement. So that is obviously one  
14 route.

15 Let me just pick up the second route which you raised with Lord Grabiner, which is in  
16 paragraph 21 which is the *CTS Eventim* --

17 **THE PRESIDENT:** Pause there. Let's stick for the moment -- I do want to hear  
18 about --

19 **MR BEARD:** Yes, let me just deal with each of the three broad categories.

20 **THE PRESIDENT:** Yes. The concern I have with 41(3) is that the discussion about  
21 the terms of the final order will proceed without any form of obligatory wider  
22 consultation with third parties. The debate will be entirely CMA/Microsoft, until the  
23 terms of the final order are published for consultation, at which point third parties will  
24 have a say. But they will be given, effectively, a *fait accompli*.

25 **MR BEARD:** It's not a *fait accompli*, because as you rightly say, there is a statutory  
26 consultation period in relation to it. Obviously, the CMA, as a public body, will

1 conscientiously take into account any third party's objections that might be made at  
2 that point.

3 **THE PRESIDENT:** So the consultation, apart from with Microsoft, will arise after the  
4 final order has been drafted and is put out for consultation, not before.

5 **MR BEARD:** There is nothing particularly unusual about that sort of process, even in  
6 relation to a non-MCC process. The parties to merger proceedings have a particular  
7 knowledge about what is going on before other third parties do, in terms of formal  
8 steps that were taken. I mean third parties don't receive, for instance, working papers.  
9 Obviously, we have protestations about what materials we are given as parties and  
10 we say it is not adequate, but undoubtedly the parties do have certain statutory roles  
11 in relation to this.

12 **THE PRESIDENT:** Yes.

13 **MR BEARD:** And the reason why the statute lays down the consultation period to  
14 which you refer, sir, is precisely to ensure that third parties do have a voice.

15 Now I have to say, given the series of deals that have been done, the idea that you  
16 are going to have interesting objections may, in practice, become more and more  
17 remote. But, of course, it's right that that opportunity is afforded. Indeed, going to the  
18 fourth step in your taxonomy, it is part of the position in Microsoft and Activision, we  
19 do not want a CMA resolution that is vulnerable to some sort of further challenge and,  
20 therefore, absolutely we will ensure that. But it can happen quickly and the  
21 consultation can be compliant with the statutory regime but need not be extensive in  
22 these circumstances.

23 And the tribunal can have confidence that all the parties will want that, because we  
24 don't want some kind of collateral challenge.

25 **THE PRESIDENT:** I can understand that. Which is, again, why the weekend's events  
26 are so significant.

1 **MR BEARD:** Potentially, sir.

2 **THE PRESIDENT:** The concern, though, is that actually, the 41(3) route was  
3 articulated last week as a route that was feasible, in circumstances where I was  
4 troubled that if you took that route, Sony would not be in the picture until a final  
5 order -- of course, the weekend's events have changed things.

6 **MR BEARD:** This is the difficulty.

7 **THE PRESIDENT:** Yes, I see the difficulty.

8 **MR BEARD:** Obviously, the discussions with Sony were not matters we could talk  
9 about.

10 **THE PRESIDENT:** No, no, not at all.

11 **MR BEARD:** Nor were we certain as to the resolution of those matters.  
12 But to take it at a very high level, the public interest consideration that applies now is  
13 different from that which applied two weeks' ago. Things, as you rightly said at the  
14 outset, sir, do move fast here. We are trying to make them move fast for precisely the  
15 reason we have articulated previously, and for which we are enormously grateful to  
16 the tribunal for moving quickly, for setting deadlines quickly, because the UK is the  
17 only impediment to closing and speed is of the essence, removing uncertainty is  
18 imperative. And that is why we have been flexible about the way we have engaged.  
19 We are engaging in relation to the MCC process but we are also engaging in relation  
20 to the alternative RMS which is being referred to as the section 33 process.

21 **THE PRESIDENT:** Yes.

22 **MR BEARD:** If you have an alternative RMS which is differently configured -- and  
23 I will take you to *Argyll* if Mr Bailey doesn't, further -- I know he was referring to it but  
24 I think we paused part way through.

25 **THE PRESIDENT:** I think we paused part way through *Argyll*.

26 **MR BEARD:** I won't trespass on what he's going to deal with in relation to *Argyll* but

1 we may need to come back to it. Because what is important is the RMS is in relation  
2 to an enterprise, it's not in relation to a badged company. What you are actually buying  
3 is a business. If the bits of the business you are buying are not the ones that give rise  
4 to any substantive concern, then of course the RMS is different, even though the  
5 headline, in terms of share acquisition, might be the same. Because that was precisely  
6 what was going on in *Argyll* and one of *Argyll's* protestations but you are still buying  
7 all the shares of Distillers, so it is still the same transaction. And the chairman said:  
8 no, that's not right, there.

9 But I think it's important to bear those factors in mind, because just to put this in  
10 context, *GBST*, *FNZ* and *CTF Eventim*, those are cases where errors were identified.  
11 Now we understand that the CMA has maintained its position, pending the hearing,  
12 that it doesn't want to accept there were any errors.

13 Sir, you have asked, is the quashing jurisdiction wider than that? Obviously, the  
14 debate about the power of a CMA to withdraw a decision, the scope of the quashing  
15 jurisdiction of this tribunal, are ones that have been aired in various decisions at  
16 various times. We don't necessarily need to resolve that now. What Microsoft were  
17 seeking to do was say:

18 "Okay, we understand your position pending the hearing, let's find another way of  
19 doing it."

20 And that's why we have explored the section 33 route, and that's why we are confident  
21 we can resolve this through the section 33 route by putting in place a modified  
22 arrangement, such that either there is a final order and we have consent to undertake  
23 that new merger situation, or that the reference is effectively abandoned which was  
24 the course in *Argyll*. But both of those are predicated on the CMA taking what we put  
25 forward to them and saying:

26 "Yes, that constitutes a new RMS."

1 The reason why we can't discuss it further, and the reason why there isn't a specific  
2 proposal, is because we don't want to be going to the CMA with a proposal that isn't  
3 going to work, which of course, is the practical process that occurs in relation to all  
4 merger interactions and that is why we can't get into, as Lord Grabiner rightly says,  
5 any of the without prejudice discussions.

6 **THE PRESIDENT:** I don't want to get into the without prejudice --

7 **MR BEARD:** Of course, I quite understand. I don't want to sound as if we are being  
8 defensive in relation to these matters. It is the way these things work but also the way  
9 they can work so much faster because those discussions can be sensibly undertaken  
10 and then the steps taken always in compliance with ensuring that there is a statutory  
11 protection for any appropriate consultation that is required under the Enterprise Act,  
12 so that we do not trip over on your stage 4 in the taxonomy. I think as Lord Grabiner  
13 says, one can have confidence that there are differing views across this bench about  
14 the status and the lawfulness and appropriateness of the final report, but there is  
15 consensus that there is a way through here, but time is of the essence.

16 We have made clear previously, the position in relation to the walk away timings. We  
17 have emphasised the uncertainty. The tribunal has understood that in the way that it  
18 has dealt with these matters. We would not be coming back before you, given all we  
19 have said previously, unless we had real confidence, because time and certainty are  
20 of primary importance to us.

21 I am sorry, I have trespassed a little on Mr Bailey's position, but that is why we say  
22 a route through on section 33 can be dealt with quickly. The MCC course can also be  
23 dealt with quickly. It is before the CMA. Yes, there might be debates about matters,  
24 what can be quashed, we recognise that. We say the final report can be quashed but  
25 in the interests of reaching certainty without the need for a remittal, reconsideration  
26 and that complexity, an agreed resolution is much faster and gives greater certainty in



1 relation to this process, which is why we are committed to asking for the stay, in order  
2 that these discussions can continue. I hope that assists.

3 **THE PRESIDENT:** It does assist, but inevitably, I have a couple of questions as well.  
4 I understand that there is a diametric opposition between Microsoft and the CMA as  
5 to the status of the decision under review, of course. That's understood.

6 **MR BEARD:** The rightness of it, I think, rather than the status of it, perhaps.

7 **THE PRESIDENT:** Yes, that's what I meant, yes.

8 There is no way that that is something that I can get into today or at all.

9 **MR BEARD:** No.

10 **THE PRESIDENT:** Until a hearing of your application, which is what you don't want.  
11 So the context of quashing on the basis of an error, is just not on the table.

12 **MR BEARD:** Of course not, and we don't seek that.

13 **THE PRESIDENT:** I understand that.

14 But are you saying that the basis for your paragraph 21 suggestion of  
15 a route -- because let's look at it. You see, paragraph 21 is unique to Microsoft's  
16 stance. It is not in the CMA's cornucopia of approaches. Obviously, it is a matter for  
17 the CMA whether it does it or doesn't, but you are not saying -- or are you -- that  
18 quashing implies an error?

19 **MR BEARD:** We don't need to. No.

20 **THE PRESIDENT:** Well, I think if the CMA were to say "We are applying to quash",  
21 I would not want there to be any kind of suggestion that it was being done for any other  
22 reason than known and articulated change of circumstances that had occurred since  
23 the decision was made and that are in the past. So I don't get into your future WP  
24 discussions at all.

25 **MR BEARD:** No, understood.

26 **THE PRESIDENT:** I do get into what has happened over the last fortnight, including

1 in particular, what has happened over the weekend, and for those reasons, do I have  
2 jurisdiction? If the CMA chooses to go down this route, which is a matter for it, I of  
3 course accept, do I have jurisdiction to say "Yes, subsequent change of circumstance,  
4 I can quash it?" I can remit on a limited basis or a wide basis, that will be for the parties  
5 to think about. That seems to me a key question.

6 **MR BEARD:** With respect, it may be a key question. But in practical terms, the key  
7 question is whether or not the CMA is actually going to impose a final order. It's not,  
8 actually, whether or not the final report stands, and therefore, there is an extent to  
9 which you don't need to get into the quashing question because you do have the  
10 section 41 avenue which is dealing with these issues.

11 The point we make about the section 41 avenue is: look, we have made it clear, we  
12 don't agree with that final report, pretty fundamentally. But if it stands there, and you,  
13 the CMA, say: "We are not going to put in place a final order that follows those remedial  
14 conclusions because of the MCC or special reason considerations under section 41",  
15 we are not here to litigate just on matters of principle and, therefore, we are not  
16 concerned about whether or not the final report formally is quashed or not, so long as  
17 the final order enables us to close our deal. That is what matters to us.

18 Therefore, sir, the reason I say: is it key, is because I am not sure one actually needs  
19 the quashing, if you are going down the route of dealing with the MCC process, which  
20 is, in a way, what, sir, you are contemplating. Now I understand that you are  
21 suggesting the possibility to the CMA that they could unilaterally accept a quashing by  
22 this tribunal on the basis of changes that have occurred in the current situation post  
23 the final reports. I leave that to the CMA.

24 Do we have to reach a view as to whether or not that is a matter within the tribunal's  
25 jurisdiction? If the CMA are willing to accede to that, we will of course consider it. It  
26 seems to us that that would make sense as a matter of law, but given that they are

1 dealing with these matters under an MCC process under section 41, the question  
2 arises: do they actually need to go that far, delightful though it may be for us?

3 **MR BAILEY:** Sir, I don't know if it would be of assistance if I clarify the CMA's position  
4 in relation to quashing. I hesitate to interrupt --

5 **THE PRESIDENT:** In a moment. You are of course, the one being interrupted,  
6 Mr Bailey, I do appreciate that.

7 So we are debating my stage 1 and stage 2: is there a legal basis for doing what the  
8 CMA want me to do, and is there evidential support to do it?

9 **MR BEARD:** Yes.

10 **THE PRESIDENT:** It is pretty clear I have concerns on both those fronts.

11 **MR BEARD:** Yes, yes.

12 **THE PRESIDENT:** So the question for you, now, is this: do you want me to put a line  
13 through the potentiality, if the CMA chooses to do it, of looking at quashing as a route?  
14 Because I want to understand what my jurisdictional options are --

15 **MR BEARD:** Understood.

16 **THE PRESIDENT:** -- if the CMA makes it. Or do you want me to put a line through it  
17 and say "I don't need to worry about it, because you say it can't be done"? Because  
18 we are at that stage now. If you want me to think about it, then we have some  
19 questions about it. I appreciate you are saying there are other better ways of doing it  
20 and I will look at those. But if you want me to consider all of the options, now is the  
21 time.

22 **MR BEARD:** I imagine we may need to rise --

23 **THE PRESIDENT:** I've just been given a note about transcriber breaks.

24 **MR BEARD:** It may be perfect timing, where I can take instructions in relation to that.  
25 But just going back to your two points, I think it is clearly that there are a range of legal  
26 options here that can properly be explored. Your first threshold is met. In relation to

1 the evidential considerations, as Lord Grabiner has explained, we cannot provide the  
2 details but we can provide you with the confidence that enables the tribunal to reach  
3 a conclusion that it is right here, in the public interest, because the public interest has  
4 moved on. And we would not be here if all of us did not think the same thing.

5 **THE PRESIDENT:** Yes. Well, the question that arises out of that is the extent to  
6 which a judicial decision like this, to adjourn a matter that has been fixed with some  
7 brutality for the 28 July, can be shunted off without any evidence at all? That's  
8 a question which underlies all of the avenues here, and something which I am sure  
9 you will all be thinking on.

10 But for my part, in order to close out -- I am gaining an understanding of what everyone  
11 is saying about the four or five routes that you say are open to me, and I want to  
12 consider all of them.

13 **MR BEARD:** Yes, of course.

14 **THE PRESIDENT:** But if it is going to be the Microsoft position that a quashing order  
15 can only be made if there is some fragility in the decision as made, then that's not  
16 going to happen --

17 **MR BEARD:** No.

18 **THE PRESIDENT:** -- whatever Microsoft says about the fragility.

19 **MR BEARD:** No --

20 **THE PRESIDENT:** So, obviously, I cannot act without the CMA deciding that is the  
21 proper course and that is a matter, of course, for the CMA and the CMA alone. But if  
22 that course is taken, I want today to be used as an opportunity, so that everyone in  
23 this courtroom and I understand that if such an order were applied for, and if it were  
24 made, it would be because of known past changes in circumstance occurring after  
25 26 April 2023 --

26 **MR BEARD:** Yes.

1 **THE PRESIDENT:** -- which have such a bearing on what was said in that decision  
2 that it is effectively something that needs to be revisited on certain terms.

3 Now there may be other ways of doing it. The question is not: are those valid or not?  
4 I will hear submissions on that, we will consider it. The question is, is that an item on  
5 the menu for this week -- I am not saying for today, but is it an item on the menu for  
6 this week? Because I am up for considering it if you are.

7 **MR BEARD:** I quite understand. I am grateful for the indication. I think it is sensible  
8 to take instructions and discuss briefly with the CMA their position in relation to it.

9 **THE PRESIDENT:** Absolutely. As I said earlier, this is not going to be a case of an  
10 absolute no, it is going to be a case of either a yes or a: not today.

11 **MR BEARD:** I quite understand the approach that the tribunal is taking, and I don't  
12 want to take any more time, but I think one does need to reflect carefully on what  
13 anything less than a yes would involve. That is consistent with the important interest  
14 that this tribunal and all courts recognise, that settlement arrangements require the  
15 absolute protection of WP and that in those circumstances, what we don't want to be  
16 doing is discussing the same issues, when we can't talk about them in detail in  
17 two days' time.

18 **THE PRESIDENT:** That is well understood. I think one of the parameters of any  
19 evidential basis for doing anything about this case is a question of how far, without  
20 invading any form of privilege, this tribunal can be informed of what is going on. That  
21 applies, I think, in any of the scenarios we are talking about.

22 Lord Grabiner's point about without prejudice communications is something which he's  
23 absolutely right on. I can't be told about that unless all consent, and I completely  
24 understand why all cannot consent, because you are in opposition in the discussions,  
25 not in collusion.

26 That is why I was so assisted by the events of the past, because it seemed to me that

1 we had been gifted a really quite significant -- not a material, something more than  
2 that -- change of circumstance which enables everyone to say: look, the game has  
3 moved on because what once may have justified a prohibition is now so different, you  
4 have Sony on a ten-year deal -- it is all over the press --

5 **MR BEARD:** Yes.

6 **THE PRESIDENT:** -- that makes a very significant difference to these events.

7 **MR BEARD:** In a way, sir, I am perhaps the wrong person to be engaging with --

8 **THE PRESIDENT:** Well --

9 **MR BEARD:** -- obviously I concur with that. It has always been Microsoft's position  
10 that it would enter into these sorts of agreements, so we are obviously very much alive  
11 to that issue. But there is an extent to which what we have been trying to do is find  
12 a route through with the CMA which didn't involve them deciding --

13 **THE PRESIDENT:** I understand that.

14 **MR BEARD:** -- and therefore we have been trying to be helpful. It may not feel like it  
15 on their side, but that is undoubtedly what we have been trying to do.

16 **THE PRESIDENT:** I will rise in a moment. I entirely get the collaborative, cooperative  
17 approach that the parties are taking. You are all pushing in the same direction. To be  
18 clear, if it was simply a matter of a non-judicial discretion, I would say fine. That's the  
19 problem --

20 **MR BEARD:** We understand the problem. We understand the public interest issue  
21 that this tribunal rightly has, particularly in circumstances where it has gone so much  
22 out of its way to accelerate matters. And as I say, Microsoft, which was in the  
23 vanguard of pushing for that, would not be standing before you offering this  
24 cooperative approach unless it considered that the public interest for consumers,  
25 gamers, developers, the UK's technology industries were not benefitted by this  
26 process which can be fast and certain.

1 **THE PRESIDENT:** Let's leave it in this way: we are balancing public interests; at the  
2 moment the public interest that is in play, because it has been directed, is a swift  
3 hearing of the application that Microsoft have made.

4 **MR BEARD:** Yes.

5 **THE PRESIDENT:** The factors that go against that are the fact that the CMA is saying  
6 we want the adjournment, the fact that Microsoft that previously opposed it is saying it  
7 should take place; what is lacking is the necessary meat on, I think, the stage two  
8 process, the evidential question. There we have the problem of chicken and egg,  
9 because you are saying I should assume the chicken and I am saying let's get the egg  
10 hatched.

11 That's a problem which Lord Grabiner has quite rightly, quite properly articulated. It is  
12 a problem we all face. Because I want to be clear again, I am not asking for  
13 information about future proposals. It would be entirely wrong for me to do so, and  
14 I am not doing so. But what I am seeing is a way out of this chicken and egg situation  
15 which is a reference back to events of the past which may be confidential but are not  
16 going to be WP, which can be articulated in a manner that the CMA and I can see,  
17 and -- which provided the quashing jurisdiction is wide enough so that no one can say  
18 "it is a frailty in the decision that is causing the quashing" -- we might have a way out  
19 of the chicken and egg situation.

20 **MR BEARD:** I would only make one final remark, which is when you talk about the  
21 balancing of public interests --

22 **THE PRESIDENT:** Yes.

23 **MR BEARD:** -- in fact the public interest made manifest in the early hearing and the  
24 acceleration was the public interest in certainty and speed in relation to a merger  
25 transaction which is being facilitated. It is in fact the same public interest that we are  
26 considering in relation to these issues now. What we are saying to you is that actually

1 that public interest can be fulfilled faster and more completely through this mechanism,  
2 so I think it's important not to see them as in opposition, even though in terms of  
3 people's diaries and availability, there may be a temptation to do so.

4 **THE PRESIDENT:** You are absolutely right. But the difficulty -- and we are really just  
5 articulating the difficulty in many different ways -- the difficulty is this: I have control  
6 over the route that is running at the moment; if the hearing takes place on the 28th,  
7 we will have certainty by the end of August one way or the other.

8 **MR BEARD:** With respect, we will have certainty in relation to the outcome of the  
9 challenge --

10 **THE PRESIDENT:** Of this decision, yes, absolutely.

11 **MR BEARD:** But let's assume in Microsoft's favour that that were to result in a remittal.

12 **THE PRESIDENT:** Yes.

13 **MR BEARD:** We then have that further process but of course we don't have any  
14 managed agreement.

15 **THE PRESIDENT:** No.

16 **MR BEARD:** The tribunal can seek to put in place directions but they will be limited.  
17 Whereas when you have an agreement between the parties and the CMA, the ability  
18 for matters to move vastly faster is so much greater and so much more certain.

19 **THE PRESIDENT:** I quite appreciate that that is right, so far as it goes. That is  
20 bringing me back to the chicken and the egg, which is at the moment all I have to  
21 justify the decision -- and I say this with all respect -- is the say so of counsel. In  
22 ordinary circumstances there would be something which I could refer to in a ruling to  
23 say: "I have been told this by A or B or C. They have given me a witness statement.  
24 I understand the parameters in which I am acting and, yes, the certainty that appears  
25 to arise out of a fixed date on 28 July is actually a bit of a mirage. For these reasons  
26 I should act in this particular way."



1 **MR BEARD:** I think perhaps --

2 **THE PRESIDENT:** We should rise, yes.

3 **MR BEARD:** I have one or two further remarks.

4 **THE PRESIDENT:** That has been very helpful, Mr Beard.

5 Mr Bailey, I am so sorry, we are approaching this in a somewhat ad hoc way, but you  
6 are all advocating for the same thing so it is probably fair enough.

7 We will rise for ten minutes and resume then.

8 **(4.42 pm)**

9 **(A short break)**

10 **(5.02 pm)**

11 **THE PRESIDENT:** Mr Beard, are you happy?

12 **MR BEARD:** I think, given the time, it is probably sensible if Mr Bailey picks up.

13 I think if the tribunal's concern is, in essence, things that have been said to the tribunal  
14 today -- or are set out, for instance, in the CMA's skeleton in relation to the speed with  
15 which things can be dealt with, then I imagine -- obviously, I will defer to  
16 Mr Bailey -- that a witness statement can briefly be provided to the tribunal to provide  
17 that confidence that whichever of these routes we are going down, it can provide  
18 certainty and speed. That may well be the sort of evidence you actually have in mind  
19 in relation to part 2, because given that one can't get into the substance of discussions,  
20 that may well be sufficient to deal with that public interest discussion that we were  
21 having before that brief adjournment.

22 Obviously, we can provide our view about how speed works here, but in a way, the  
23 points that are actually made, to be fair to the CMA, in its own skeleton argument, if  
24 they are signed off in a witness statement, that may well take us a very long way in  
25 relation to your concern, because then we have methods by which things can be dealt  
26 with legally. We would have evidence of speed being feasible and, therefore, certainty

1 being feasible. We have consensus view in relation to point 4. I am not sure that point  
2 3 necessarily, in those circumstances, adds to point 2 in your rubric.

3 That may be sufficient for you, in these circumstances.

4 If the order of the tribunal would be: yes, I will provide the indication of adjournment  
5 on the basis that that witness evidence is provided, then it may be we have a way of  
6 short cutting it in order to assist the tribunal.

7 Just dealing very briefly with the issues that were highlighted in relation to public  
8 interest more generally here, I think we have to be careful that in relation to the public  
9 interest, as I said, the public interest is in relation to process and the confidence we  
10 have in that process, not in relation to the particulars of the scheme. But I imagine  
11 also the CMA may well be in a position now to say that it does believe that a new RMS  
12 can be put forward, given what it has heard, without trespassing on any matters of  
13 without prejudice discussion.

14 If that were to be the case, Mr Bailey might want to take brief instructions, but if that  
15 were to satisfy the tribunal, without us getting into precise quashing powers, because  
16 I think there might there be a disagreement between us and the CMA -- having had  
17 a brief discussion with Mr Bailey -- we circumvent a number of these issues, to all of  
18 our benefit. We would preserve the consideration of those legal issues but we would  
19 make sure we had the relevant breathing space to deal with it.

20 **THE PRESIDENT:** Thank you very much.

21 Mr Bailey?

22 Further submissions by MR BAILEY

23 **MR BAILEY:** I am grateful. I propose to address the issues in the following order.  
24 Briefly to address the question of quashing the Final Report, since the tribunal has  
25 raised it, and as Mr Beard has rightly anticipated, we respectfully differ from my  
26 learned friends in that respect.

1 Secondly, to address you on how we say the statute does have mechanisms for  
2 properly dealing with new developments that arise after the final report. Just to trial  
3 what they are: prior to the final order being made, there is, as we discussed -- my  
4 learned friend Mr Beard took you to it -- section 41(3) which is a process which is  
5 currently underway before the CMA. There is of course, also prior to the final order,  
6 the possibility of abandonment and that is the *Argyll* case which I was taking you  
7 through. After the final order is made -- and Mr Beard is right, if one is made,  
8 ultimately, in light of the representations -- then the statute also has a mechanism in  
9 the form of section 92, which allows the CMA to take account of a change of  
10 circumstance that arises at that juncture.

11 Having briefly dealt with those issues, what I then wanted to do is just retrace our steps  
12 back to your four stage framework if I may, and in particular, to pick up a point  
13 Mr Beard was making about time of the essence. He said at the end of his  
14 submissions there that the CMA has the ability to move with deliberate speed.

15 I wanted to show you how, in the course of a phase 1 investigation, one achieves that  
16 speed, and in particular, the fast track procedure that exists for dealing with cases  
17 where it is appropriate.

18 I then wanted to move on to stage 2 and the evidential basis for the application. You  
19 do have, of course, some evidence in the form of Ms Radke's second witness  
20 statement --

21 **THE PRESIDENT:** That's about the effort and the resourcing issues that the CMA has  
22 in doing a twin track process, isn't it?

23 **MR BAILEY:** That's partly addressed. The other issue she addresses in her  
24 statement is the question of the significant, we say, unexpended costs that could be  
25 avoided if the hearing is adjourned and relisted in October.

26 She also sets out her estimates, at least for the costs that will be avoided on the CMA

1 side. We obviously have no visibility as to the nature and the extent of the costs --

2 **THE PRESIDENT:** Let me just be clear, Mr Bailey, those are two points I entirely  
3 accept, you don't need to spend very much time on those.

4 **MR BAILEY:** I am grateful. As Mr Beard was alluding to, if the tribunal wishes to have  
5 a proper evidential basis going beyond the matters addressed in her second witness  
6 statement, on instruction, I can say that the CMA would be willing to prepare a witness  
7 statement with a statement of truth that attests to various of the propositions set out in  
8 our skeleton argument. In particular at paragraph 2, which sets out the state of play  
9 as the CMA currently understands it. Of course, if there are other matters which the  
10 tribunal wishes to be reassured about, then of course I would be willing to take  
11 instructions, to see if a further statement can be prepared, to see if that can provide  
12 you with that basis.

13 Finally, I will deal with stages three and four of your framework and address the  
14 question you asked about why, when the CMA made its first application for  
15 adjournment, this matter was not addressed at the end of June.

16 If I can just start then with a momentary disagreement between the CMA and my  
17 learned friends in relation to quashing.

18 **THE PRESIDENT:** Yes.

19 **MR BAILEY:** So it is perhaps helpful to turn up the statute that deals with the tribunal's  
20 power in this respect. As the tribunal obviously knows, it is contained in section 120.

21 **THE PRESIDENT:** Yes.

22 **MR BAILEY:** That is to be found at tab 1, page 154. The relevant power which the  
23 tribunal would be exercising is to be found in subsection 5. It states that the tribunal  
24 may dismiss the application or quash the whole or part of the decision to which it  
25 relates. In my submission, one has to read subsection 5 within the context of the entire  
26 section, in particular subsection 4. And that provides that the tribunal shall apply the

1 same principles as would be applied by the Administrative Court.

2 Indeed, the tribunal, in its remittal judgment following the *Virgin Media v Competition*  
3 *Commission* [2008] CAT 32, specifically said it would exercise its power under sub-  
4 section 120(5) by reference to principles of judicial review.

5 Now we have rapidly looked to check the position as a matter of what the  
6 Administrative Court would do in this situation. In my submission, the tribunal does  
7 not have jurisdiction to quash, absent a material error of law, and moreover, the  
8 tribunal does not have jurisdiction to quash the final report by reason of facts and  
9 matters that arise after that decision was taken. The exception, of course -- well  
10 established -- relates to jurisdictional facts, where there is the possibility to take into  
11 account subsequent developments. But for those reasons, we say that the tribunal  
12 doesn't have jurisdiction, regardless of Sony's agreement with Microsoft or any other  
13 circumstances that have arisen after the final report.

14 Now that is my submission in relation to the statute and the tribunal's power. But  
15 I have a further point to make which is that the statute does have mechanisms for  
16 dealing with subsequent and material changes of circumstance. Before I move on to  
17 deal with those mechanisms, can I just pause to see if the tribunal wishes to ask me  
18 anything about section 120?

19 **THE PRESIDENT:** The only question I had was are you saying that *CTS Eventim AG*  
20 *v Competition Commission* [2010] CAT 7 was wrongly decided or just fails to  
21 appreciate that you needed to establish a ground of judicial review before you could  
22 exercise your section 120(5) jurisdiction? Because my reading of *Eventim* is that we  
23 went down that route on the basis of a mere arguable concern that existed on the part  
24 of the Competition Commission which it wanted to look at, and so without conceding  
25 that it was right, they said: we want to look at this again, please quash. And  
26 I appreciate it was not after the event facts, but it was certainly not the case that

1 section 120(5) was used as a remedy, following a successful establishment of a JR,  
2 because there was no finding in that case to that effect.

3 **MR BAILEY:** I am somewhat hindered that I don't have the tribunal's ruling and order  
4 in *CTS Eventim* in front of me. I don't actually believe it is in the bundle.

5 **THE PRESIDENT:** No, I saw that.

6 **MR BAILEY:** From memory, the Commission conceded -- I think it was the first  
7 ground that had been brought by that third party in relation to the Ticketmaster/ Live  
8 Nation merger. It was on that basis of procedural fairness -- which as you rightly say,  
9 sir, is not an after the decision fact -- the CC having conceded that, then wanted to  
10 reinvestigate and the mechanism that was chosen was to quash and to remit. But  
11 I confess I don't have the rulings. It's difficult for me to comment on whether this was  
12 wrongly decided.

13 **THE PRESIDENT:** I do, because I printed it out, because it seemed to me important.  
14 Paragraph 7 makes clear that the Commission has explained that *Eventim's* first  
15 ground of review, based on procedural fairness, was arguable, at least in the particular  
16 circumstances of the case. So all I am saying is that the ratio of this particular decision  
17 is that the quashing order was made without finding a ground of successful JR.

18 Now that may be right, that may be wrong, but that's what I think *Eventim* decided.

19 **MR BAILEY:** Rather than make submissions immediately without having looked at  
20 the ruling --

21 **THE PRESIDENT:** Mr Bailey, of course I understand the CMA's concerns, because  
22 you don't want to be -- given what you said about your standing behind the  
23 decision -- you don't want it to be tarred by an overly tight brush which suggests that  
24 the only basis for quashing is a deficiency in the decision. And, frankly, I don't think  
25 *Eventim* is going to help you very much on this, because it was dealing with what was  
26 acknowledged to be an arguable ground of judicial review, not what I would say is this

1 case, which is an unequivocal change of circumstance after the decision. The only  
2 point I would indicate a degree of interest in and push back on is your point that  
3 a subsequent change of circumstance that undermines a decision is not a material  
4 factor for quashing.

5 It seems to me that if that is the case, one is opening the way to all kinds of  
6 unnecessary defences of decisions, in circumstances where a regulator or a public  
7 decision-maker is in a situation of having made a decision perfectly properly, and is  
8 faced with late events which make that decision absurd. Let's put it as highly as that.  
9 The idea that you can't come to court and say "Look, I can't change this decision  
10 because of the way the statutory regime works, but it's a decision that just needs  
11 revisiting because of later events", that would be a very odd outcome, but it may be  
12 that's the law.

13 **MR BAILEY:** Sir, you may not be surprised to hear that the CMA would not accept  
14 that any of the subsequent developments renders the final report absurd or irrational  
15 or anything of that kind.

16 It does lead me on to the next point which is a point which actually, happily, the parties  
17 agree about --

18 **THE PRESIDENT:** Yes.

19 **MR BAILEY:** -- that there are mechanisms within the statute for dealing with the type  
20 of material change of circumstance that you rightly identify, sir.

21 Mr Beard took you to section 41(3), and it is important for me to say that, of course,  
22 this is a live issue before the group. Sir, if I may, the CMA was somewhat concerned  
23 by the observation that you made in the course of argument, about whether the  
24 agreement that has been entered into by Microsoft with Sony -- and I am in the same  
25 position as you, I have just seen the press reports about that --

26 **THE PRESIDENT:** Yes.

1 **MR BAILEY:** -- whether or not that should be regarded as either a gift of an MCC or  
2 even as an MCC at all. For the avoidance of doubt, of course, the CMA has to remain  
3 open-minded at this moment. It is considering the matter, and therefore -- well, it's not  
4 even considering the Sony/Microsoft matter because that is not part of the  
5 representations that have been made to the CMA to date.

6 Moreover, as you rightly observed, sir, there is no evidence before this tribunal and so  
7 far as I am aware, before the CMA, in relation to the entering into terms of that  
8 agreement. So just to put down a marker, because that is a live issue and one which  
9 the CMA is going to carefully consider, that is one mechanism that exists for dealing  
10 with events that arise after the final report. Parliament has said if, before you make  
11 your final order, something material happens, then one is able to address it.

12 But, sir, you raised a point with my learned friend Mr Beard about: well, hold on, this  
13 can't be just a dialogue between the parties and the CMA. If I may, I wholeheartedly  
14 agree and would like to just show you that during this process, between now and the  
15 end of August, if the tribunal group -- if the CMA group -- were to modify in any way  
16 the draft final order, it would be under an obligation by statute to consult interested  
17 third parties. So there is no way that this would just be a bilateral discussion between  
18 the CMA and the parties.

19 Just to show you and make good that point, if one looks at tab 2 of the authorities in  
20 schedule 10 --

21 **THE PRESIDENT:** Yes.

22 **MR BAILEY:** -- this sets out various procedural requirements that the CMA has to  
23 comply with when considering whether to accept undertakings or making orders.

24 **THE PRESIDENT:** Yes.

25 **MR BAILEY:** Page 171, you can see it first of all talks about the requirement  
26 when -- before accepting an undertaking, that is paragraph 1(a), or making any order,



1 here we are concerned with section 84, and then paragraph 2 sets out the obligation  
2 that the CMA has to give notice and then consider any representations.

3 Now that is talking about the process that was initiated in May. If one turns overleaf,  
4 one will see in paragraph 2(2)(f), that the period that the statute requires is not less  
5 than 30 days, starting at the date in the case of an order.

6 That's just by way of background. To come to the point about what about the CMA  
7 considering Microsoft's representations of an MCC arising after the final report, they  
8 say should result in either no final order or a material change. If one looks at  
9 paragraph 4, you will see that relevant authority -- here the CMA -- "shall not accept  
10 an undertaking", not relevant here, "but make the order with modifications", unless  
11 again, it is given notice and considers any representations.

12 Then that is spelt out in paragraph 5(c), where the period has to be not less than seven  
13 days. So it is relatively rapid, as one would hope and expect but, nonetheless, there  
14 is an opportunity for interested parties to express their views on any change of stance  
15 in relation to the final order.

16 For completeness, I should acknowledge at the end of this schedule in paragraph 9,  
17 there is the power for the relevant authority to dispense with any or all of the  
18 requirements of the schedule, if the relevant authority considers that it has special  
19 reasons for doing so. And rather wonderfully, Parliament doesn't say what a special  
20 reason is.

21 **THE PRESIDENT:** No.

22 **MR BAILEY:** But that is just to show you the complete picture in terms of the statutory  
23 flexibility that exists, but also that there are safeguards for third parties in relation to  
24 any material change of circumstance.

25 So that is one mechanism by which Parliament has, in my submission, allowed the  
26 CMA to deal with circumstances that arise after the final report that are said to be

1 material to any remedy that it ultimately imposes. But as we were adverting earlier  
2 this afternoon, there is of course, a second way in which prior to the final order again,  
3 it would be open to the CMA to take account of a change of circumstance.

4 In my submission, that is section 37(1) and the duty to cancel a reference if the CMA  
5 is satisfied that the original relevant merger situation has been abandoned. That's the  
6 *Argyll* situation. So if events move on and like in the *Argyll* case, Microsoft were to  
7 come along and say: look, here's a new, all singing, all dancing bid, it's not anything  
8 you have seen before, and we say that is a new relevant merger situation, and if the  
9 CMA were satisfied of that and no final order had been made, then it could reach the  
10 conclusion that the original RMS had been abandoned and then the references would  
11 be cancelled.

12 **THE PRESIDENT:** But Mr Bailey, aren't we moving from the ground, in reality, to the  
13 fanciful here? I mean, are we really suggesting that there is going to be an  
14 arrangement between Microsoft and Activision that isn't, in substance, carrying  
15 forward an acquisition of the latter by the former?

16 **MR BAILEY:** As Mr Beard drew your attention to, sir, in the *Argyll* case --

17 **THE PRESIDENT:** Yes.

18 **MR BAILEY:** -- actually the Guinness original bid, the original revised --

19 **THE PRESIDENT:** (Inaudible due to overspeaking). Seven years, seven years, Mr  
20 Bailey.

21 **MR BAILEY:** They were not that different. They were the same in terms of acquisition  
22 of issued share capital, it was just a change to parts of the business that were going  
23 to be acquired. And, nonetheless, the Court of Appeal held that the MMC were able  
24 to arrive at the conclusion they did on those facts.

25 **THE PRESIDENT:** On those facts?

26 **MR BAILEY:** On those facts. And, of course, I do say that the CMA would need to

1 look very carefully at the facts of the restructured transaction before it reached  
2 a conclusion that it had been genuinely abandoned.

3 **THE PRESIDENT:** Yes.

4 **MR BAILEY:** I just draw it to your attention because it's a different way -- a different  
5 route -- by which change of circumstance can be dealt with prior to the final order being  
6 made.

7 Once the final order has been made, if that is the case, having considered Microsoft's  
8 representations -- and as to that, of course, the group has to consider what's being  
9 said -- then Parliament has also provided for how a final order can be varied or  
10 revoked. That is set out in section 92 of the Enterprise Act. I don't know if you will be  
11 assisted if I briefly show you that --

12 **THE PRESIDENT:** Of course.

13 **MR BAILEY:** -- so you can see the picture of how the statutory scheme works. So  
14 section 92 is to be found at tab 1, page 93. The relevant provisions are on page 94.

15 **THE PRESIDENT:** Yes.

16 **MR BAILEY:** It is subsection (2), "The CMA shall" -- so there is a duty in particular:  
17 "... from time to time consider [and the relevant paragraph is (c)] whether by reason of  
18 any change of circumstances, an enforcement order is no longer appropriate and  
19 needs to be varied or revoked."

20 **THE PRESIDENT:** Yes.

21 **MR BAILEY:** Now change of circumstance here, again, is not defined and will be  
22 a matter of fact for the CMA to consider as and when it arose. The reason why  
23 I wouldn't press this on you at the moment, because, sir, you were asking about the  
24 factual basis for things, is that as matters stand today, there is no final order. So in  
25 a sense, this would be hypothetical. It would only arise if the final order were to be  
26 made.

1 Then the other point to draw to your attention in subsection 4 is that the CMA has  
2 a wide discretion as to the action it considers appropriate in varying or revoking any  
3 order. So, really, I am providing it to you for completeness because I accept that that  
4 particular route is, at the moment, based on a hypothetical that hasn't yet arisen.

5 **THE PRESIDENT:** Yes.

6 **MR BAILEY:** With that in mind, I would like to return if I may, briefly, just to pick up  
7 a point that Mr Beard made. Mr Beard rightly emphasised that we need to put our  
8 skates on, that time is of the essence. I wanted to show you the practical context in  
9 which the CMA would review and consider any restructured transaction.

10 The way I would like to do this is just to show you, briefly, two parts of the CMA's  
11 guidance on jurisdiction and procedure. That is to be found in tab 4 of the authorities  
12 bundle. The first is just to show you briefly what is involved in a phase 1 investigation.  
13 That is to be found at page 203. It is helpful because it shows you the process in  
14 a page.

15 We can see that, typically, it starts with pre-notification, but of course here, the parties  
16 have been engaged in discussions, they know one another very well, and therefore,  
17 there is no need for that. So we can skip straight to the beginning of a phase 1  
18 investigation which would start once Microsoft notifies the new transaction, and once  
19 the CMA is content that the notification is complete.

20 The next step in any phase 1 investigation, as one might expect -- I am now in sort of  
21 the third box -- is that the CMA would engage both with the parties but also habitually  
22 consults interested persons and that's a process that typically, according to the  
23 guidance, can take between 15 to 20 days.

24 At the end of a phase 1 process, the CMA must decide whether its duty under  
25 section 33 is engaged. As we adverted to earlier, that has to be done within a strict  
26 statutory timetable of 40 working days.

1 But there is more, because the CMA can move more quickly than the statutory  
2 timetable, and has in place that procedure that allows it to essentially operate a fast  
3 track of particular mergers. That is to be found at page 249. If this were a matter that  
4 needed to be addressed in evidence, in terms of how it works and how the CMA  
5 operates, I am sure the CMA would be happy to assist the tribunal. The point about  
6 the fast track procedure -- I know the tribunal has its own fast track procedure. Here,  
7 the way it works is it works with the parties asking the CMA to please, essentially,  
8 press the fast forward button and one can move either -- and we see this at  
9 paragraph 7.6 -- either to a reference -- I understand that no one is arguing for or  
10 wanting that to occur -- but we can also see that it can move more quickly to offering  
11 undertakings in lieu, ie remedies, with a view of obtaining a phase 1 clearance.  
12 Now of course, before one gets into the fast track, the CMA will have to satisfy itself  
13 that there is a new relevant merger situation. I am not going to go over that again.  
14 But the point I did want to draw to the tribunal's attention is that the CMA does have  
15 the ability to flex and expedite its procedures. It can truncate the time for consulting  
16 parties. It doesn't have to hold issues meetings. These are points that are made by  
17 the guidance at paragraph 7.12.  
18 I should add that the CMA does have experience of using this fast track procedure.  
19 One can see some examples in footnote 130 -- which is a rather long footnote on  
20 page 249 -- but more recently, earlier this year, various transactions moved forwards  
21 speedily to a phase 1 decision, but of course, the CMA will need to ensure that it  
22 discharges its statutory obligations properly and fairly, but nonetheless, if one needs  
23 to move with speed, this is a procedure that is available for doing that.  
24 So that's what I wanted to say in relation to the section 33 process, which we referred  
25 to as route 1.

26 **THE PRESIDENT:** Yes.

1 **MR BAILEY:** I would like, if I may, to come back to your second stage of your  
2 framework, sir. That is where you asked about the sufficient factual basis upon which  
3 the application has been made.

4 **THE PRESIDENT:** Yes.

5 **MR BAILEY:** My learned friends have already averted to the fact that part of the  
6 factual basis is cloaked by without prejudice privilege. What the CMA has sought to  
7 do in its skeleton argument in particular, at paragraph 2, is articulate that, based upon  
8 the discussions to date. Both sides -- Microsoft and the CMA -- have confidence that  
9 Microsoft notifying a restructured transaction is capable of addressing the concerns  
10 that the CMA has identified.

11 Of course, I accept the skeleton argument settled by counsel isn't the same as  
12 a witness statement sworn by a statement of truth. That is why I said earlier that the  
13 CMA is willing to set out those matters in paragraph 2 of the skeleton in the form of  
14 a witness statement, to provide that evidential basis.

15 I should also say just for completeness -- although I accept it's not an elaborate  
16 point -- sir, that there is the witness statement of Ms Radke. It is in the core bundle at  
17 tab 6. There is just the final point in paragraph 18 which I accept may not be enough,  
18 in and of itself, but is a statement at page 26 of the CMC bundle, where she sets out,  
19 essentially, the CMA's carefully considered view that the application would be in the  
20 public interest and, in particular, would be because, as she says towards the end:

21 "... to see whether there is a means by which the competition concerns set out in the  
22 report can be adequately addressed without the delay and cost of litigation."

23 And Mr Beard addressed you on that point in terms of -- the concern on this side of  
24 the court, by the tribunal's laudable proposal of having the hearing and then moving to  
25 a draft judgment towards the end of August, is that there is a critical window now, of  
26 the next three weeks, where, if the litigation goes ahead, it will inevitably be hard

1 fought, adversarial, and even with the best will in the world, that is not conducive to  
2 the parties engaging constructively with one another in relation to the restructured  
3 transaction.

4 As Ms Radke says on the CMA side -- and this is made at paragraph 16 of her  
5 statement -- there is the additional challenge that many of the key members of the  
6 CMA senior staff will be involved simultaneously in preparing for and attending the  
7 hearing and they would also be involved in considering the notification made by  
8 Microsoft. So it is perhaps self-evident that one can't be in two places at once.

9 **THE PRESIDENT:** Yes.

10 **MR BAILEY:** When you put those points together, it does mean that it is critical now,  
11 to have that opportunity, in my submission, for the parties to see if they can reach that  
12 constructive outcome, so far as the CMA is concerned, in the interests of consumers  
13 and protecting the nascent competitive process in cloud gaming.

14 So that is where matters stand at the moment in relation to the sufficient factual basis.  
15 But as you said, sir, earlier this afternoon, if one is minded to say "Yes, but on condition  
16 that we bring forward further evidence", then the CMA is very happy to seek to  
17 consider what evidence is needed for the tribunal to satisfy itself of the desirability of  
18 this application.

19 Stage three, sir, was the adequate basis for the adjournment and the basis upon which  
20 we have made this application. So in my submission, the basis is as set out both in  
21 Ms Radke's second witness statement and her skeleton argument. We do say that  
22 there is a realistic chance of our concerns being addressed if this restructured  
23 transaction is notified and reviewed.

24 You asked as a matter of concern why, if this restructured deal was under  
25 consideration, it was not mentioned in the previous application that the CMA made on  
26 28 June. My instructions are that it was not mentioned, essentially for two reasons.

1 One, at the time of that application, there were no ongoing discussions between the  
2 parties in relation to any such restructured transaction. And, two, the basis for the  
3 CMA's application was, as you will no doubt recall, sir, one of the needs for a fair  
4 hearing and the view of the First Treasury Counsel --

5 **THE PRESIDENT:** I certainly recall the basis was entirely different from this.

6 **MR BAILEY:** Yes.

7 **THE PRESIDENT:** That's understood. It's more the absence of any hint of this being  
8 a matter that was of relevance -- and it may not have been, because it may not have  
9 happened -- to the CMA, that puzzled me, given it was only two and a half weeks ago.

10 **MR BAILEY:** I understand, sir. My instructions are that it was not relevant to that  
11 application and there was no sign that this was a real prospect until the moment at  
12 which we jointly made this application.

13 Stage 4 is whether there is any other reason why the tribunal shouldn't grant the stay  
14 and adjournment. You, sir, identified one possibility. That is the coincidence in timing  
15 of the outcome of the FTC's application for a preliminary injunction and then the joint  
16 letter that was written, asking for a stay. I can only speak for the CMA of course.  
17 Mr Beard will no doubt speak for his client. But so far as the CMA is concerned, the  
18 outcome of that first instance decision formed no part of the CMA's thinking. We are  
19 squarely focused on the public interest, as you would expect. We would, if the tribunal  
20 were to grant the application, ensure that we discharged our responsibilities under  
21 the Act. If I may just, in concluding, take you back to one passage of *Argyll*. I realise  
22 it has come up several times.

23 **THE PRESIDENT:** Of course.

24 **MR BAILEY:** But it is a different passage and I hope it is a helpful one, just in terms  
25 of providing a steer of where I would like to conclude the CMA's submissions. So  
26 tab 3, page 186.



1 I am not so much concerned with the particular issue --

2 **THE PRESIDENT:** I am sorry, page?

3 **MR BAILEY:** 186, or 266 of the law reports.

4 **THE PRESIDENT:** Yes, thank you, I am obliged.

5 **MR BAILEY:** What here, the Master of the Rolls is dealing with is setting out -- we  
6 can pick it up just under (c) -- he says:

7 "We sit as a public law court, reviewing an administrative decision ...(Reading to the  
8 words)... applying judicial or quasi-judicial principles. We have to approach our duties  
9 with a proper awareness of the needs of public administration."

10 And then he sets out five propositions, all beginning with "Good public administration."

11 And I hope when one considers these, one can say that in relation to each and every  
12 one of them, so far as the CMA is concerned, our application achieves those.

13 So the first is a trite point about being concerned with substance rather than form.

14 I can say on instruction that when the restructured transaction is notified, that is  
15 squarely what the CMA will focus on. The substance of what is being proposed, is  
16 there a new RMS, has the previous one been abandoned? What is the likely effect of  
17 any RMS that's notified? So we will certainly focus on that.

18 But then this: it is concerned with the speed of the decision. This is a point that,  
19 happily, both Mr Beard and I are on the same page. We want to move forward with  
20 deliberate speed and I have shown you, sir, that there are procedures in place that  
21 allow that to happen.

22 I would like to take the third and fourth points together. They basically say:

23 "Though public administration requires a proper consideration of the public interest  
24 and moreover, legitimate interests of individual citizens, however rich and powerful  
25 they may be and whether they are natural or judicial persons."

26 And we say that has been absolutely the heart of this application. We would not have

1 made it if we didn't think that there was a realistic chance that a restructured  
2 transaction could resolve our concerns for the benefit of the consumers.

3 Lastly -- I think it is an important point -- about the requirements of decisiveness and  
4 finality. We say that if this transaction is notified, and it addresses our concerns, then  
5 we do anticipate achieving comparative certainty more quickly than this litigation will  
6 achieve. Not least, as Mr Beard was saying, that there is the prospect that the loser  
7 may appeal the tribunal's decision. If the CMA were to lose, the prospect of a remittal  
8 and a further investigation. By contrast, if one takes the counterfactual envisaged by  
9 the application, we say that it could deliver decisiveness and finality as expeditiously  
10 as one would hope for. Of course, I can't preempt the outcome of the CMA's  
11 deliberations. I can't promise that there will be a favourable outcome but what I can  
12 say on instructions is that we do consider it has a realistic chance and for those  
13 reasons, we would invite the tribunal to grant the application.

14 **THE PRESIDENT:** I am very grateful to you, Mr Bailey. Thank you very much.

15 Mr Beard?

16 Further submissions by MR BEARD

17 **MR BEARD:** I realise the tribunal said: take as long as you want, but I think I will try  
18 to be brief in dealing with two or three points. We have obviously canvassed a number  
19 of issues in exchanges already.

20 Since we are in *Argyll*, perhaps we can just stick with *Argyll* if that is okay.

21 **THE PRESIDENT:** Yes, of course.

22 **MR BEARD:** I am only picking this up. In passing, sir, you mentioned the question  
23 whether or not an abandonment and so on would be fanciful. I think it is very, very  
24 important to bear in mind that the RMS test is in relation to an enterprise, not whether  
25 or not Microsoft is acquiring Activision. It's what Microsoft would be acquiring.

26 That is precisely what was considered in *Argyll*, because Guinness would still be

1 buying Distillers, still be buying all the shareholding, and one can see that, picking it  
2 up at page 181, between D and E.

3 **THE PRESIDENT:** Yes.

4 **MR BEARD:** You are probably familiar with this passage. I won't read it all out.

5 **THE PRESIDENT:** No, no, not at all. Yes.

6 **MR BEARD:** And through to G. Because essentially, *Argyll's* precise submission was:  
7 look, Guinness is still buying Distillers; look, it is still a full share acquisition. This is  
8 just tinkering around the edges. It is fanciful to treat this as an abandonment of the  
9 previous approach.

10 What the Court of Appeal, and indeed, the court below analysed, was whether or not,  
11 in substance, there was a material change here. And I don't mean material change in  
12 the sense of section 41, I mean in terms of the business, the enterprise that was being  
13 acquired. And since the only concerns related to whiskys, if the deal didn't involve the  
14 whiskys, it was materially different. It was still Guinness buying Distillers, but it was  
15 materially different.

16 We can see this if we go over the page to 183. I won't take you through it all. But  
17 picking it up at G:

18 "Where it is said by a prospective bidder that the proposed or contemplated  
19 arrangements have been abandoned and new arrangements are proposed or  
20 contemplated, it will always be a question of fact and degree, whether this is correct  
21 or whether the so-called new arrangements are merely an amended form of the old  
22 arrangements. This is supremely a matter for the Commission. However, in defence  
23 of the conclusion which they reached on this occasion, it must be pointed out that the  
24 concept of a merger under the 1973 Act [that's the Fair Trading Act, the provisions are  
25 materially the same still] is not related to the merging of corporations but to the merging  
26 of enterprises and enterprises means activities or part of the activities of a business.

1 They therefore had to ask themselves whether the new proposal which excluded  
2 specified whisky activities from the merger and which in that form, admittedly was  
3 neither in progress nor in contemplation at the time of the reference ... "

4 And I stress "in that form":

5 "... was sufficiently different from the original proposal for a comprehensive merger of  
6 all the activities of Guinness and Distillers, for it truly to be said that the original  
7 proposal, ie the arrangements in progress or contemplation at the time of the  
8 reference, had been abandoned and a new proposal had come into existence  
9 subsequently."

10 And the court finds that the chairman had not misdirected himself. And just hiving off  
11 the whisky activity, which is what the deal structure did, meant that you had a different  
12 situation. Because you weren't pursuing the full acquisition, including the whisky  
13 activities, the RMS had been abandoned. Now, to the neutral observer you might say:  
14 that feels a bit funny in terms of language. That is the statutory scheme. It is not  
15 fanciful, therefore, to think of a situation here, in this case, where the proposal is some  
16 sort of modification of arrangements that mean we are not dealing with the elements  
17 of the Activision business which give rise to the concerns the CMA has, noting of  
18 course, that those concerns do not relate to consoles and PCs because, of course, all  
19 of that theory of harm 1 material was dropped.

20 I am just going to refer the tribunal -- if you have the notice of application available, sir.

21 **THE PRESIDENT:** Where will I find that? It's not in the bundle, is it?

22 **MR BEARD:** I am sorry, I don't know --

23 **THE PRESIDENT:** Make your point, Mr Beard.

24 **MR BEARD:** I will make the point, but I am not going to read out the passage. In 451,  
25 there is reference to the sorts of matters that Microsoft might have raised, had it been  
26 given the opportunity -- I am very grateful to the Activision team. Please ignore the

1 side marking. It is merely a line down the side. There are no special messages  
2 attached, or not that I can read, sorry.

3 **THE PRESIDENT:** Yes. Apart from saying "We would like an adjournment", I don't  
4 think it says anything at all.

5 **MR BEARD:** There are no direct threats there, sir, no.

6 **THE PRESIDENT:** Yes, I see.

7 **MR BEARD:** I am not going to discuss it further. You see the decision, sir.

8 **THE PRESIDENT:** Yes.

9 **MR BEARD:** The reason for that is I am not trespassing on anything to do with without  
10 prejudice, but you can see what the sorts of considerations would be there, without  
11 my trespassing on anything to do with without prejudice discussions. We can't provide  
12 you with evidence in relation to that. We can give you confidence that we think this  
13 will work, and we do so, having had discussions. We don't need to discuss the precise  
14 modalities. We have set out the ways in which those would work. We have explained,  
15 I hope, why speed is of the essence and we want to avoid uncertainty.

16 We recognise the difficulties that the CMA has expressed about being able to engage  
17 fully in these discussions, at the same time as engaging in litigation. And we also  
18 recognise the point that Mr Bailey makes about the realities of hearing and that they  
19 can distract and undermine negotiations.

20 But our key point here is that we can get to a point of certainty far faster through the  
21 parties cooperating in these discussions, when the CMA, as Mr Bailey has explained,  
22 does have real flexibility to deal with these processes and can deal with them speedily  
23 and can comply with the relevant requirements of consultation. That in those  
24 circumstances, we will, we believe, be able to resolve these matters, pursuing  
25 precisely the public interest that this tribunal recognised and for which we are  
26 inordinately grateful, in the way that it approached the first and second CMC and the

1 previous adjournments application. The world has moved on. We have moved on  
2 with it, in supporting the CMA's application today. It is for good reason, and we hope  
3 that assists the tribunal in reaching its conclusion in relation to these matters.

4 Unless I can assist further and there are any particular further issues we can assist  
5 with.

6 **THE PRESIDENT:** No, I have raised my concerns. I am very grateful, Mr Beard,  
7 I have no further points for you.

8 **MR BEARD:** I am grateful.

9 **THE PRESIDENT:** Lord Grabiner.

10 Submissions by LORD GRABINER

11 **LORD GRABINER:** My Lord, at the risk of repeating what's been said, I can be  
12 incredibly brief. Two points. One, it is critical that your Lordship has fully digested  
13 paragraph 1.1. Secondly, and all sides have been saying this, that speed is of  
14 absolutely critical importance. This is a massive transaction. The context is massively  
15 price-sensitive --

16 **THE PRESIDENT:** I am not unaware of the fact that today is the 17th and tomorrow  
17 is the 18th.

18 **LORD GRABINER:** My Lord, precisely. The regulator must, of course, and we are  
19 confident will, act fairly and in accordance with the rules, but there is no reason why  
20 this can't be dealt with quickly and consistently with that statutory duty. If I may  
21 respectfully say so, although of course, your Lordship is well aware of it, the market  
22 and the parties need speed and certainty of outcome.

23 My Lord, again, if I can assist you further, I am happy to do so, but that's all I wanted  
24 to say.

25 **THE PRESIDENT:** No, I am very grateful to you, Lord Grabiner.

26 Mr Bailey, you have the last word. It is your application. I don't know if you have

1 anything to reply, given you are all in violent agreement, but if there is anything you  
2 wish to say, you will have the last word.

3 Submissions in reply by MR BAILEY

4 **MR BAILEY:** I think I set out the CMA's position. It's obviously a joint application  
5 made by both sides, so in one sense, given that in every other respect in this litigation,  
6 it is adversarial, it speaks volumes, in my submission, that we are urging this as the  
7 appropriate course, as an alternative to litigation.

8 **THE PRESIDENT:** Thank you, I am very grateful.

9 Do we need another transcriber break? I don't know. We have been going for quite  
10 some time. My intention is to give a very short conditional ruling, setting out why I will  
11 be giving an adjournment, just to cut to the chase. I think it is appropriate that I do so  
12 this evening, because it is going to be a conditional adjournment on evidence coming,  
13 certainly from the CMA, which I will need to set out in some detail as to what I will need  
14 to have from someone, I think probably Mr Prevett in the CMA, regarding what is  
15 envisaged by the CMA. But I will set that out in greater detail in my provisional  
16 judgment.

17 I will therefore rise until 6 o'clock, just to give someone eight minutes break and we  
18 will resume then.

19 **(5.53 pm)**

20 **(A short break)**

21 **(6.03 pm)**

22 **THE PRESIDENT:** Before I begin properly, I want to make clear that this is  
23 a conditional ruling. It is conditional in two respects. First of all, it is effectively an  
24 extemporised ruling after a long afternoon of complex submissions, and it will, I am  
25 sure, require detailed revision when I have its transcript before me and that revision  
26 will, if it needs to be extensive, be extensive.

1 Secondly, it is conditional because there are certain evidential requirements which will  
2 have to be met before I am finally prepared to grant the adjournment that I am  
3 conditionally going to grant this evening. That evidence will have to be containing  
4 certain factors which I am going to list in the course of this ruling, and the reason I am  
5 giving this ruling this evening rather than reserving until a short period tomorrow, is so  
6 that the CMA know exactly what they need to produce and to get on with producing it.  
7 It is obviously clear that this is an urgent matter which requires an urgent, if conditional,  
8 outcome, and that is what I hope to provide this evening.

9  
10 **RULING**(extracted)

11 **Post-ruling discussion**

12 **MR BEARD:** I am most grateful. If I may make a point in clarification (several  
13 inaudible words).

14 **THE PRESIDENT:** It may be the same point.

15 **MR BAILEY:** It is point of clarification in relation to the evidence that the tribunal  
16 requires of Mr Preveett.

17 **THE PRESIDENT:** Yes.

18 **MR BAILEY:** Sir, as I understood you to be saying, that you would expect the  
19 evidence to explain with granularity, the carve-outs in section 41(3) on which the CMA  
20 relies and you referred to the material change of circumstance and/or the special  
21 reason.

22 **THE PRESIDENT:** Yes.

23 **MR BAILEY:** The point of clarification is, as I understand it, at the moment it is  
24 Microsoft that is relying on there being material change of circumstances and special  
25 reasons. That has been put forward to the group. The group has extended the  
26 deadline to then consider those representations. The CMA can obviously set out what



1 those matters are. They are not, as yet, matters upon which the CMA relies and for  
2 good reason. That is because the CMA group is considering them.

3 We can, of course, set out the process from here to the end of August and how we  
4 would involve third parties, but it is just to sort of clarify that at the moment, as I am  
5 sure you will understand, the group has to retain an open mind as to where it will  
6 ultimately conclude in relation to those matters. It may be Mr Beard was going to raise  
7 the same point but it is just about clarifying what Mr Prevett should be saying.

8 **THE PRESIDENT:** Let's be clear about that. I will deal with Mr Beard's point  
9 separately. Of course, I understand that the CMA needs to keep an open mind. But  
10 section 41(3) is triggered by the CMA's consideration. So what I am expecting is not  
11 an answer because that would be entirely wrong, that would be to prejudge matters.  
12 What I am expecting, however, is an explanation, with granularity, as to why the CMA  
13 considers there is either a material change of circumstance or a special reason that  
14 justifies making this application. In other words, I am not expecting a finality of  
15 outcome. What I am expecting is an ability to tick the box to say:

16 "I understand what the CMA are doing. Here's why we want to pause. We think that  
17 there is a necessity to consider either material change of circumstance or special  
18 reason. This is why."

19 So I hope that's clear. From the CMA's point of view --

20 **MR BAILEY:** My instructions are that the CMA would not be in a position to say now,  
21 that there is a material change of circumstances --

22 **THE PRESIDENT:** No, what I --

23 **MR BAILEY:** As I understood you, sir, what you were saying was the CMA has  
24 embarked on this process under section 41(3) and what you would like the CMA to set  
25 out is why it considers that jurisdiction is engaged.

26 **THE PRESIDENT:** Yes.

1 **MR BAILEY:** That is my understanding.

2 **THE PRESIDENT:** This is why the judgment will, I am sure, require revision. You are  
3 absolutely right. It will be wrong of me to ask -- and I am quite sure the CMA would  
4 not give it to me, for entirely right reasons -- for an outcome here, saying "Yes, we can  
5 make a final order that is different to the final report for these reasons."

6 That would be to put the cart before the horse. But what I need to be satisfied on is  
7 that I have the evidential basis for saying rule 41(3) is arguably engaged. We are at  
8 the level of grounding it in reality. Not saying that it is the case, but saying that it is  
9 prima facie the case. That is the detail that I require.

10 **MR BAILEY:** I am grateful, I understand.

11 **THE PRESIDENT:** I am very grateful for your raising it, Mr Bailey.

12 Mr Beard.

13 **MR BEARD:** A couple of things. First, just in relation to that, just so that the tribunal  
14 is aware, because of the recency of the Sony agreement, the CMA does not actually  
15 have a representation on MCC in relation to that. We will, of course, provide that in  
16 outline quickly, so that it can be available to them and we will also provide the witness  
17 statement that you have indicated, albeit it will be brief. But the CMA, equally, has to  
18 understand that in order for us to do this quickly, it may be less full initially, as  
19 a representation, than otherwise, but we will provide that material so we don't hinder  
20 their provision of evidence.

21 **THE PRESIDENT:** That's very helpful, Mr Beard. Again, what I am not looking for is  
22 the answer.

23 **MR BEARD:** No.

24 **THE PRESIDENT:** What I am looking for is the material that feeds into -- what I am  
25 doing is I am trying to lance the chicken and egg problem by identifying what comes  
26 first. To the extent that Microsoft feel that they can provide an evidential basis for what

1 they already know --

2 **MR BEARD:** Yes.

3 **THE PRESIDENT:** -- that would be of assistance.

4 **MR BEARD:** We will do our best.

5 **THE PRESIDENT:** You will do your best.

6 **MR BEARD:** It will be a compromise between speed and length and detail. But  
7 conscious of the timing issue, we will do that.

8 The clarification I wanted to sort out was slightly different. Obviously, in the judgment  
9 you have just given, you identify section 33 and the possibility of an alternative RMS  
10 and you say "I don't have the detail here". You referred to *Argyll* in the context of the  
11 good administration paragraphs but we do not take it and I don't think it was the  
12 tribunal's remote intention, to suggest that using section 33 and section 37 are matters  
13 that the parties and the CMA shouldn't be considering or anything of that sort. And  
14 that whilst you are looking for the juridical basis for this adjournment application, what  
15 goes on in relation to matters such as new RMS and so on, are entirely for the parties.

16 **THE PRESIDENT:** Again, I will look at what I said. I had hoped I made that clear.

17 **MR BEARD:** I just wanted to confirm because I think it is probably important for all  
18 concerned.

19 **THE PRESIDENT:** I will make it doubly clear. What I think I said and if I didn't say it,  
20 should have said, is that I don't regard the section 33 question as relevant to the  
21 adjournment matter, but what the parties choose to do and how they choose to --

22 **MR BEARD:** Use their time --

23 **THE PRESIDENT:** Use their time -- in other words, if you want to have two torpedoes  
24 in the water, feel free, you can have that.

25 **MR BEARD:** That is what I understood and I just wanted to check that. I think that is  
26 important for all concerned. I understand you want a juridical basis, so that there is

1 a proper basis for the adjournment, but you are not trying to, in any way, constrain  
2 how matters --

3 **THE PRESIDENT:** It would be entirely wrong for me to do so.

4 **MR BEARD:** That was entirely what we understood. Two very brief additional points.

5 **THE PRESIDENT:** Of course.

6 **MR BEARD:** FTC materials, they may be immaterial to the juridical basis for this  
7 adjournment. We'd like to stress we don't consider the FTC judgment and those  
8 matters generally immaterial but we didn't understand that to be the case.

9 Then there is one final tidying up matter which is, obviously, you have granted  
10 a conditional adjournment. Let's assume for the moment that the conditions are met.  
11 In those circumstances, I would like to ask out of time for an adjournment of the service  
12 of our skeleton argument which should have happened around three hours ago.  
13 Obviously, we didn't serve our skeleton argument. It wouldn't be appropriate in these  
14 circumstances. And I would ask the tribunal, just in those circumstances, to stay the  
15 pleadings and skeletons provisions in the order of -- I think it is dated 22 June. But we  
16 can sort that out in due course.

17 But if an indication could be given, that would be most helpful.

18 **THE PRESIDENT:** Well, so ordered. It does actually raise a slightly more  
19 fundamental point, because I don't think it will be right for the parties to be burning the  
20 oil on two tracks from here on in.

21 **MR BEARD:** Yes.

22 **THE PRESIDENT:** We have had nearly five hours of submissions on this point. I have  
23 given the parties, I hope, an appropriately hard time about why I was very troubled  
24 about this application. I would be very surprised if the parties didn't produce the  
25 material that I need to sign off on this order, and so I am prepared to take the risk, if  
26 the parties are, of saying down tools --

1 **MR BEARD:** I am grateful.

2 **THE PRESIDENT:** -- and concentrate on what matters, which is to get the transaction  
3 over the line, rather than focus on what would, I am sure, have been a very hard fought  
4 judicial review. If, of course, the statement is no good, then I will throw my toys out of  
5 my pram and say: do it again. But I would be entirely surprised if that were the case,  
6 because I have been pretty clear about what I need.

7 **MR BEARD:** Yes. I am most grateful. Obviously, I made that application on a purely  
8 selfish basis. But, obviously, there are the other elements of the application that were  
9 made for a re-listing of this hearing. You have the submissions of Microsoft and other  
10 parties in relation to that. I don't know whether that is something that can be deferred  
11 until the conditional elements are effectively met? We can deal with that subsequently.  
12 I just put that as a marker, I don't want that lost in all of this.

13 **THE PRESIDENT:** I have that well in mind. One of the concerns but it wasn't really  
14 relevant to the question of adjournment, was how we would deal with a further  
15 application, if and when it was required. We don't really have any idea of its shape.  
16 We don't have any idea of precisely when it needs to come up. So if the parties are  
17 happy, then that is something which I would be content to park for the moment.

18 **MR BEARD:** The re-listing and the reorganisation?

19 **THE PRESIDENT:** Exactly so. The moment the parties have a degree of real  
20 confidence about what they want --

21 **MR BEARD:** Yes.

22 **THE PRESIDENT:** -- of course they must approach the tribunal but there will have to  
23 be some diary juggling and quite possibly reconstituting of the tribunal --

24 **MR BEARD:** I see.

25 **THE PRESIDENT:** -- in order to make it work.

26 **MR BEARD:** I made the point really because in our submissions, we had looked at

1 the period later in October --

2 **THE PRESIDENT:** You did.

3 **MR BEARD:** -- where there was an indication that the tribunal might have availability.  
4 But I wasn't clear whether or not that was the case. If it were the case that the same  
5 constituted tribunal could be pencilled in for that period, it might be something that is  
6 more sensibly done sooner rather than later, knowing that all members of the tribunal  
7 have extensive demands on their time.

8 **THE PRESIDENT:** We will do that. We will look to see what can be done.

9 **MR BEARD:** I'm most grateful --

10 **THE PRESIDENT:** -- in that time-frame. I am bound to say, keeping track of where  
11 my diary sits at any one moment is almost as bad as this transaction.

12 **MR BEARD:** I am most grateful. We quite understand that just because things tend  
13 to get worse, not better --

14 **THE PRESIDENT:** They do. We will take it away and let the parties know what we  
15 have done on that front.

16 **MR BEARD:** Then any indication from the tribunal, we can then work backwards from  
17 that. That tends to be the best way of dealing with it.

18 **THE PRESIDENT:** That's very helpful. We will notify you in the course of tomorrow,  
19 what is going on.

20 **LORD GRABINER:** My Lord, I am sorry, I don't want to delay matters.

21 **THE PRESIDENT:** Not at all.

22 **LORD GRABINER:** I have three very, very short points. One, might I respectfully  
23 suggest that Mr Prevett be given a date by which he should be presenting his piece of  
24 paper. We shouldn't leave here without there being some agreement about that.

25 Secondly and very trivially, when your Lordship made a reference to the *Argyll*  
26 case -- and this was also in relation to the proposed content of Mr Prevett's

1 statement --

2 **THE PRESIDENT:** Yes.

3 **LORD GRABINER:** -- you referred to the relevant passage at page 266 of the  
4 judgment and you said it was Lord Justice Dillon. It is actually Sir John Donaldson.  
5 Lord Justice Dillon starts a little bit further down the page but the magic words were  
6 Sir John Donaldson.

7 **THE PRESIDENT:** It just goes to show, you shouldn't look --

8 **LORD GRABINER:** No, no, your eye caught the name, quite rightly so, but it was the  
9 next judgment then --

10 **THE PRESIDENT:** I am very grateful.

11 **LORD GRABINER:** The only other point is this, that your Lordship did say and I think  
12 my learned friend Mr Bailey did agree, that in relation to the FTC exercise, this was  
13 not something that they took into account when making this application or joining us  
14 in the application for an adjournment, and that is completely correct. But I want to  
15 echo my learned friend Mr Beard's remarks, which is that we say that there are matters  
16 in the FTC judgment which are slightly material. If, God forbid, we do have to have a  
17 substantive hearing, that's what I wanted to make sure we were clear about. But, my  
18 Lord, that's all I wanted to say.

19 **THE PRESIDENT:** Thank you very much. The correction to the judgment regarding  
20 Sir John Donaldson will be made. I think both you and Mr Beard have made enough  
21 of a marker regarding the significance of the US proceedings and all I will say is my  
22 reference to those proceedings in the context of this application was confined to this  
23 application. What the parties make of the American proceedings for the future, be it  
24 one way or the other, that is a matter for another day. I am certainly not closing anyone  
25 out from relying on it, nor am I saying that it is going to be the crown jewels in terms  
26 of evidential weight. But clearly, both Microsoft and Activision will be entitled to refer

1 to these matters, if they are so advised. Indeed, the same goes for the CMA but  
2 I suspect you will be making rather less reference.

3 The date is the only question.

4 **MR BAILEY:** If we pull out all the stops, as we have done throughout, and seek to  
5 prepare evidence, the time and date we are going to suggest was 5 o'clock tomorrow.  
6 If that could be done on a best endeavours basis, because, of course, we do need to  
7 digest what the tribunal has said, have to consult various colleagues within the CMA,  
8 the evidence has to be prepared. But we will strive and use our best efforts to prepare  
9 it by 5 o'clock tomorrow and we can, of course, also undertake to update the tribunal  
10 at midday as to the progress that we are making but we will absolutely do this in as  
11 short order as possible.

12 **THE PRESIDENT:** Mr Bailey, that is a very helpful indication. I think that even on the  
13 best endeavours basis, that is quite tight. I will see what Mr Beard and Lord Grabiner  
14 say, but it seems to me that given the business day has well and truly closed today,  
15 the idea that you should produce it in the course of, essentially, one working day, is  
16 really not right.

17 Is there any prejudice if we said it's to be produced, subject to a liberty to apply, but it  
18 is to be produced by midday on the Thursday?

19 **MR BEARD:** We have no objection to that.

20 **THE PRESIDENT:** Lord Grabiner?

21 **LORD GRABINER:** No objection, my Lord.

22 **MR BEARD:** Then I will gratefully adopt that.

23 **THE PRESIDENT:** I am very grateful.

24 Thank you all for your very helpful submissions. Is there anything more that we need  
25 to deal with tonight?

26 **MR BEARD:** Not from the CMA. It just remains to echo my learned friends in terms



1 of our gratitude to the tribunal for moving so rapidly in dealing with this application.

2 **THE PRESIDENT:** Not at all. It has been a real pleasure. Thank you very much.

3 **(6.57 pm)**

4 **(The hearing concluded)**

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