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IN THE COMPETITION
APPEAL TRIBUNAL

CaseNo:1730/12/13/25

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Friday 11th July 2025

Before:
Ben Tidswell

(Sitting as a Tribunal in England and Wales)

BETWEEN:

The New Lottery Company Ltd

Applicant

And

Gambling Commission

Respondent

And

Camelot UK Lotteries Limited

Intervener

A P P E A R A N C E S

Michael Bowsher KC & Harry Gillow on behalf of The New Lottery Company Ltd

Joanne Clement KC & Richard Howell on behalf of the Gambling Commission

Tim Johnston on behalf of the Proposed Intervener

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Friday, 11 July 2025

1 (10.30 am)

2 **THE CHAIRMAN:** Good morning, Mr Bowsher, I should just first read the live-stream
3 warning, if you just forgive me for doing that.

4 Some of you joining us live-stream on our website, so I shall start with the customary
5 warning. An official recording is being made and an authorised transcript will be
6 produced but it's strictly prohibited for anyone else to make an unauthorised recording,
7 whether audio or visual, of the proceedings and breach of that provision is punishable
8 as a contempt of court. Yes, Mr Bowsher,

9 **MR BOWSHER:** Good morning. I appear today for the applicants, with Mr Gillow.
10 The respondents are represented by Joanne Clement King's Counsel, with Richard
11 Howell, and the intervening parties are represented by Mr Tim Johnston in the middle.
12 Today is the first case management conference. You have had some material. Since
13 you had our skeletons, we have been in some discussion and you should have on
14 your desk -- I'm not sure if it has reached your desk yet -- a revised version of the draft
15 order that was in the file which now has only one point in red and blue.

16 **THE CHAIRMAN:** About experts.

17 **MR BOWSHER:** About experts. The rest is in black. I'm not sure it's 100 per cent
18 agreed, in that there may be some hawing over dates and which way round things
19 happen but broadly speaking, all the rest is agreed, subject to dates and
20 so on and so forth. I will obviously need to, therefore, open our case a little, to
21 introduce our application on expert evidence. I don't know which way round is more
22 helpful to you, whether I do that -- dive into the expert evidence point now or whether
23 we run through the order and deal with whatever's left outstanding there and then deal
24 with the matter of -- well, controversy I think probably raises it too high but yes, the
25 matter in difference.

26 **THE CHAIRMAN:** What we might do -- I wouldn't mind just catching up with where

1 | you've got to on things like the pleadings, and so what we might do is run through the
2 | agenda, subject to one point which I wonder if it might be worthwhile dealing with the
3 | intervention upfront so Mr Johnston knows where he is and we know where he is when
4 | he comes -- (Overspeaking).

5 | **MR BOWSHER:** (Inaudible words) myself, indeed. He needs to know that he is here.

6 | **THE CHAIRMAN:** Yes, well perhaps we could start -- why don't we start with forum,
7 | the first item on the agenda and just confirm I will make the order that the proceedings
8 | should be treated as proceedings in England and Wales for all purposes, on the basis
9 | that all parties agree with that and that appears to be the right answer. Then I think,
10 | Mr Johnston, why don't we deal your application for intervention and then we will know
11 | where you are.

12 | **Application by MR JOHNSTON**

13 | **MR JOHNSTON:** Sir, I'm very grateful.

14 | **THE CHAIRMAN:** So I think just to sort of cut through it a little bit, I mean I think there
15 | is no objection in principle, as I understand it.

16 | **MR JOHNSTON:** Indeed --

17 | **THE CHAIRMAN:** -- and it seems fairly obvious that your client has a sufficient
18 | interest. There is this question of discretion as to whether I should still make the order
19 | and really, I wanted just -- and that, I think, relates a little bit to the scope point that
20 | Mr Bowsher has made and no doubt will have a thing or two to say about. So maybe
21 | we could focus on, really, that question of what you are going to bring to the
22 | proceedings. No need for you to address me on the question of sufficient interest
23 | because I think that is clear. But if you could perhaps just -- if we could just run
24 | through, perhaps, the points, they may not be exhaustive, but the points on the
25 | application about what Allwyn can bring to the proceedings, that would be helpful.

26 | **MR JOHNSTON:** I'm grateful, sir. That's very helpful from my perspective. And as

1 | you say, there's two parts, as to the present(?) is sufficient interest. That's not an issue
2 | indicated. Perhaps unsurprisingly, you are persuaded in that respect -- or perhaps the
3 | starting point, I think, in terms of the exercise of your discretion is, in my submission,
4 | to pause just for a moment on the question of interest because I do submit that the
5 | weight of the interest goes to the exercise of discretion, if I could put it that way.

6 | **THE CHAIRMAN:** I understand the point, yes.

7 | **MR JOHNSTON:** So as to the interest, Allwyn's interest in the appeal, of course, or
8 | application, is rather compelling. It's quite right that the Gambling Commission is the
9 | defendant but the target, at least in one sense, in practical terms, is my client. And
10 | that's reflected in the remedies being sought. What's being sought in part is a recovery
11 | order. In practical terms, what Mr Bowsher would like is for my client, at the end of the
12 | proceedings, to write a cheque for £70 million. And so in that sense we do say that
13 | the interest is compelling and we do say the compelling nature of the interest goes to
14 | the exercise of discretion, as well as the other point that you have adverted to which
15 | is what my client will add.

16 | So turning to that question, sir, if you have the bundle, this has been addressed in the
17 | application itself. Page 3319 is where it starts but the question of what my client will
18 | add or the added value, as it were, begins really at 3322 but I think it might be easiest
19 | to start at 3324 which is paragraph 17 and 18. Because this, I think, provides one of
20 | the most obvious and straightforward examples of where and how my client will add
21 | value and that's in respect of relief.

22 | Allwyn is better placed than anybody else in these proceedings, in my respectful
23 | submission, to explain at least in part, why relief should be refused. That is because
24 | as explained there, the funds in issue, the £70 million in issue, has been expended
25 | and so both factually, in terms of what has happened, if I could put it that way, in
26 | respect of those sums and secondly, by way of legal submission, in terms of the

1 consequences of that, my client is uniquely well placed, in my respectful submission,
2 to assist the tribunal, were we to get to the question of relief because you have been
3 persuaded in some respect as regards the grounds of judicial review.

4 Turning back, maybe, into the paragraphs above, starting with paragraph 12. Another
5 simple example part of Mr Bowsher's pleaded case is that there is possibility of
6 cross-subsidy here, whereby my clients has used some of these funds to
7 cross-subsidise others companies in other jurisdictions in the Czech Republic, Italy,
8 the United States. Again, that's a question on which my client can assist as a question
9 of fact, in a way that the Gambling Commission wouldn't be in a position to do so.

10 **THE CHAIRMAN:** Just on that, my understanding, I may have misunderstood this but
11 my understanding is that we are not likely to get to that because as I understand the
12 defence, the respondent's not contesting the effect on competition within the UK, and
13 (inaudible) that is a specific concession only for the purposes of this case, as
14 I understand it. But in order, I think, to save the time and expense, it says -- if we get
15 to that, we are not going to argue it.

16 If that's the case, then that disposes of the question, doesn't it, you don't need to go
17 on and look at the effect on trade elsewhere or competition elsewhere. So will we ever
18 get to that point?

19 **MR JOHNSTON:** That's certainly right on the Gambling Commission's case as
20 pleaded. My understanding is their position is they don't concede it as a question of
21 fact in general but (inaudible words) for the purposes of these proceedings. One of
22 the questions, obviously, that my client has to resolve is whether or not it wants to join
23 issue on that point. Were it to do so, and for the avoidance of doubt, my client is not
24 saying today that it is going to do so but were it to do so, it's one of the pleaded issues
25 and it would be in a position to address that question factually in a way the Gambling
26 Commission would not. So I'm not, for the avoidance of doubt, saying my client is

1 actually going to leap into the breach on this point, I just take it as an example of one
2 of the points that's been pleaded. But you are absolutely right, sir, that it may not arise
3 on those proceedings. It's highly likely it may not.

4 **THE CHAIRMAN:** Well in (inaudible) sense it's quite a good example of where we
5 need to be careful, isn't it? Because what we don't want to do is to find that you've
6 gone off and produced a whole lot of material on this and witness statements and
7 Mr Bowsher has to cross-examine people on it, when it's actually just not -- it's not
8 really going to be an issue in the case. Now, obviously, as you say, if you want to
9 address it as an intervener and provided that is within the scope of the intervention
10 that is granted, then clearly you will have to not only address the point that's been
11 conceded by the Gambling Commission but this point, and so we see the scope of the
12 proceedings getting wider. I am sure Mr Bowsher will say that is exactly the problem
13 of allowing you in as an intervener because you are making this thing bigger and
14 bigger. Now, I'm not saying it's off limits, I'm absolutely not saying that but I'm saying
15 it is a fairly unattractive point. It's not your best point, if I can put it that way, given the
16 position taken by the Gambling Commission.

17 **MR JOHNSTON:** And I take the indication. I merely -- I hear entirely what you say.
18 There is obviously, as an intervener, a slightly peculiar duality, in that what is said is
19 both simultaneously, you must not duplicate and simultaneously, you must not widen
20 and so one finds oneself sometimes on a potentially rather narrow precipice but this
21 is indicative rather than an expression of indication, if I can put it that way. An
22 expression of intention, if I can put it that way.

23 **THE CHAIRMAN:** Yes. And just to be clear, Mr Johnston, I think this conversation is
24 more -- just so you are clear about where I am, I am not at the moment -- and so
25 obviously we will hear what Mr Bowsher has to say and Ms Clement as well, but I'm
26 not really pushing back on your preliminary point about sufficient interest and the

1 weight here. What I am, I think, trying to draw attention to is just how we frame the
2 scope of your intervention and how we make sure that, for want of a better expression,
3 forgive me for using it, but we keep you on a tight leash for the purposes of
4 the intervention, particularly because, as you will have picked up, we have earmarked
5 a trial date for this which is not that far away and what I don't want to find is that by
6 introducing you into the mix, we end up with a trial date becoming problematic. So
7 really what we are talking about here is as much scope, I think, as discretion and in
8 a way, I will have to deal with the point if you decide -- and I appreciate you may not
9 be in a position to say now but if you decide you want to address the cross-subsidy
10 point, that may be something you need to come back and ask for permission to do.

11 **MR JOHNSTON:** Absolutely. And, sir, if it assists, that was going to be one
12 suggestion, that that is something that we propose to do. Rather than catching anyone
13 unawares by doing so, it's something that we would flag and anticipate in advance.
14 Taking a step back on the question of scope, I think two or three points that I hope
15 assist. The first is that as matters stand, subject to Mr Bowsher's submissions in
16 a moment, there is at least some degree of uncertainty as to the scope of the claim
17 because we haven't yet seen Mr Bowsher's factual evidence, nor have we seen a clear
18 indication and, Ms Clement's going to address you on this in a moment, but a clear
19 indication of the expert evidence on which they propose to rely. So my client is in
20 a slightly peculiar position, in that the contours of the application aren't final and so we
21 are in a position where the core of our application, if I can put it this way, is to say we
22 obviously undertake not to duplicate. I'm assisted by a very experienced legal team
23 at Clifford Chance and led by Ms Demetriou. Very familiar with being interveners,
24 interested parties in judicial review, before this tribunal. So in my submission, the
25 proper starting point is not to start to identify a list of issues on which we may or may
26 not make representations or reduce factual evidence but rather, to recognise that my

1 clients very sensibly recognised, of course, there's a premium on not duplicating.
2 There's a logical end point to that. Where a topic arises on a skeleton argument,
3 obviously there are introductory sentences that address how the law works or
4 whatever it might be but my clients are conscious of it. They are not wildly enthusiastic
5 about seeking to take over the proceedings in any respect and in fact, you will hear
6 from Ms Clement in a moment. We've talked this morning about altering the proposed
7 order of the subsequent submissions, so that we go after the Amended Defence,
8 precisely for the purpose of avoiding a situation where my client is responding to
9 Mr Bowsher first and putting ourselves ahead of the Gambling Commission. I think
10 that's a clear indicator of how we are approaching the litigation. But it is my submission
11 that particularly given where we are now, it's very difficult and indeed, we say not really
12 appropriate, to start identifying a list of topics we will or will not address. But the spirit
13 of your question is absolutely the right one, sir, and we endorse it and it's very much,
14 if I can put it this way, where my client is at, in terms of approaching it, which is that
15 we want to be helpful, we want to add value. We are not proposing to greatly add to
16 the complexity, scope and so on and so forth of the case. We are conscious that just
17 to anticipate, we are likely to want to adduce some factual evidence but I don't expect
18 it will be inordinately long. If Mr Bowsher is granted permission to adduce expert
19 evidence, we are going to have to read it and take a view on whether we would
20 respond. It might well not be possible if the Gambling Commission is responding.
21 That is all rather a long way down the track but the spirit of the intervention, if I can put
22 it that way, is very much consistent with the questions you are asking me. And
23 I suppose at this point, the most I can do, if I can put it that way, is to say there are
24 obviously points in respect of which we can assist and we will remain, hopefully, an
25 agile and a constructive participant.

26 **THE CHAIRMAN:** Yes. That's very helpful and I suppose just to push back on

1 one -- I think what you say about submissions, I -- again, subject to anything anybody
2 else has to say but it seems to me to be very straightforward and entirely comfortable.
3 I'm sure we can expect you to have the communication with Ms Clement in particular
4 and make sure you are not duplicating and you know we don't want to hear the same
5 thing twice and so you will need to be finding something interesting to say that
6 Ms Clement hasn't or doesn't want to say and so you will work that out and I'm sure
7 we can have a lot of confidence in that.

8 The factual evidence position, and obviously, therefore, the expert position, I think is
9 different. Because these are judicial review proceedings and I think we
10 have -- certainly my message is going to be we do want to control that and we are not
11 just going to let people put evidence in because they feel like it, it needs to be clear
12 why it's going in and what it goes to. And it does seem to me when I looked at -- you
13 are right to observe that we are in a slightly odd position because we are doing this
14 before we've had a discussion about what Mr Bowsher's case really is. And
15 particularly this question as to what facts are or are not in dispute which is not
16 completely clear to me but I'm sure will be shortly. I think it did seem to me there are
17 some factual areas where it might be quite helpful to have some input from -- and of
18 course, it's a matter for your client as to whether it wants to put the evidence in but just
19 to identify one of them, I wasn't completely sure that we had a full understanding of
20 the financial -- the economic position in relation to the monies that Camelot used for
21 other marketing purposes of staff retention and so on and what the economic
22 consequences of that are and that is, I think --

23 **MR JOHNSTON:** The relationship between those and the sums in issue (inaudible
24 words).

25 **THE CHAIRMAN:** Precisely. I think Mr Bowsher is saying we need to look not
26 just -- what happened with the money that was made available, to put it that way,

1 without getting into how -- and not just also the money that Camelot then decided to
2 spend but what the consequences of the further expenditure were. I think that is, as
3 I understand it, part of his case. That at the moment, I think we have some limited
4 information on this from the Gambling Commission but it might be helpful to have, if
5 you were in a position to deliver it and your client wishes to do so, to have that fuller
6 picture laid out when we come to the economic advantage point.

7 So I can absolutely see there are points there but I would quite like them to be
8 reasonably clearly identified, so we know what we are getting and why we are getting
9 it.

10 **MR JOHNSTON:** Can I make a suggestion then which is that there's no criticism of
11 Mr Bowsher or his clients in this respect but it's almost as though we are having this
12 conversation slightly upstream of where my client is best positioned to answer your
13 question. Would it be helpful for my client -- and I'm speaking without instructions
14 here, so perhaps I should turn round in a moment but would it be helpful for my clients
15 to provide -- once we've seen the totality of Mr Bowsher's case, if I can put it that way,
16 factually, potentially, by way of expert evidence, if that's allowed in legally in
17 an amended NoA way, would it be helpful if we provided in advance of a witness
18 statement a sort of series of headings that we think our witness evidence is going to
19 address? And if you can say: look, I'm really not going to be assisted by that, that's
20 fine but I wonder whether -- I mean my concern with saying that is I feel as though we
21 are introducing another round, as it were, and then the concern is that you get another
22 round of submissions. I'm in your hands, if that is what you would like.

23 **THE CHAIRMAN:** No, I don't think it is. I wasn't really intending to go that far.
24 I certainly hadn't meant to give that impression, if I have. I'm sorry, but I am really at
25 a broader level, I think, but just want to make -- perhaps the best way to deal with this
26 is -- actually, I think you are right, we are a bit upstream with it but I think we are going

1 to have that discussion in a minute because I am going to want to understand what
2 factual evidence is going in from any party. And perhaps we -- we will have that
3 discussion after we have had a discussion about the pleadings, so why don't we at
4 least decide to deal on this basis, again subject to what anybody says. The
5 intervention, it seems to me, should allow you to put in evidence of witnesses of fact,
6 where that goes to an issue in the proceedings and is helpful, bearing in mind there
7 are judicial review proceedings and we will discuss that in a moment. And so precisely
8 what that means will be determined by the decision that I make or agreements you've
9 already made.

10 Experts, obviously you will need to apply for permission if we get to that stage and we
11 are going to have that discussion in a minute. And that disposes, I think, of the
12 relevant factual background. We've talked about making legal submissions and you
13 are clearly capable of managing that. I think the cross-subsidy point is one that if you
14 want to address, you will need to come back and I'm sure we can deal with that on the
15 papers but we will need to understand what you are doing with that. Then the relief
16 point, obviously, you have addressed and that is, I think, probably a matter not only of
17 submissions but also factual evidence. I'm sure you might want to think about that.

18 Those are the things at the moment I see being things you can bring to the party and
19 certainly, again subject to what anybody else says, they do seem to me to justify the
20 exercise of discretion, given the weight you've put but also they go quite a long way,
21 I think, to determining the scope and giving you a sense of where we think you are
22 going to be. Is that a comfortable place to leave it?

23 **MR JOHNSTON:** That's very helpful. The final point I would make, and I will turn
24 around and check that there's nothing else that I should say, but one of
25 the peculiarities, of course, is it's judicial review principles but in the Competition
26 Appeal Tribunal. Obviously, if we were in the Administrative Court, we would be

1 parties because there would be no circumstances under which Mr Bowsher would
2 have issued this claim without serving my client as an interested party and so all of the
3 ordinary consequences that would follow from that would follow.

4 It's one of the oddities, if I can put it that way, of the hybrid jurisdiction that we have,
5 that we are into rule 16, so we are into a slightly different set of questions and so I think
6 just as a sort of contextual point, I think that provides some of the backdrop to what
7 might be, in my respectful submission, a slightly forgiving position , if I can put it that
8 way, to an intervention. But I hear entirely what you say. Subject to what I'm told in
9 a moment, I'm very happy to sit down at that point. I'm very much assisted by your
10 indications, they are absolutely consistent with what we've said in our letter, the kinds
11 of areas we want to cover. We hear what you say on cross-subsidy but if I may turn
12 my back just for a moment, sir.

13 **THE CHAIRMAN:** Yes, of course. **(Pause)**

14 **MR JOHNSTON:** Total agreement from behind me, sir, that's very helpful. I'll sit down.
15 Unless Mr Bowsher wishes to object to anything you said, then I think we can proceed.

16 **THE CHAIRMAN:** Yes, thank you. Mr Bowsher, what do you think of all that?

17 **Submissions by MR BOWSHER**

18 **MR BOWSHER:** I think we are in broad agreement. I'll just sum up our position.
19 Obviously, the intervention should be relevant and not duplicative. I think we are in
20 vigorous agreement on that. The only question will be whether or not it's appropriate
21 at some point to identify what the appropriate intervention issues are, whether a list of
22 appropriate issues need to be drawn up but, to use the phrase now in vogue, we are
23 probably upstream of deciding whether or not the case is complicated enough to really
24 need listing out. It may be so blindingly obvious that we don't need to have it listed.

25 **THE CHAIRMAN:** I think to be fair to Mr Johnston, he makes a perfectly valid point,
26 I think, about the approach of the Administrative Court and obviously, the weight of the

1 (inaudible words), and in a way, I don't think, I hope it's clear, I'm not trying to regulate
2 finely the points that Mr Johnston could make. If they are valid points, he should be
3 making them and if they are points that go to his client's interest, then clearly he has
4 a duty to do so and he should do so and I will have to decide them. What I don't want
5 to do is to lose control of the proceedings, to find we have a whole lot of material that
6 is not actually helpful, doesn't really go to anything that matters, not actually helpful,
7 and at the end of the day, involves you doing a lot more work than you need to do and,
8 therefore, puts at risk not only the preparation for the hearing itself or makes it just
9 more difficult to hear. So really that's the point I'm making. I'm not trying to shut him
10 out from anything that he might validly want to raise and I don't think you are either but
11 I am very keen -- I think, consistent with the approach to all of the parties, to make
12 sure there is a measure of control as to what is going into the pool of material we have
13 in front of us.

14 **MR BOWSHER:** I don't think there is anything I can usefully add on that topic.

15 **THE CHAIRMAN:** Thank you. Ms Clement, anything you want to say?

16 **MS CLEMENT:** Sir, we're neutral on the application.

17 **THE CHAIRMAN:** Okay, thank you. In that case I will make an order
18 permitting -- sorry, I don't think there is anything you want to say further on that, Mr
19 Johnston?

20 **MR JOHNSTON:** No.

21 **THE CHAIRMAN:** I will make an order permitting the intervention, as it does seem
22 likely that Allwyn will be able to assist with the evidence and to some extent,
23 non-duplicative submissions, on the basis there will be co-operation between counsel
24 to ensure no duplication. The scope of the intervention should be directed towards
25 the relevant factual background and interpretation of the licensed conditions, as well
26 as relief. Precisely how that works will be a matter for further submission, when we

1 can get to the questions of what evidence, expert and witnesses of fact, are
2 appropriate and should be taken forward in the case.

3 **MR JOHNSTON:** I'm very grateful.

4 **THE CHAIRMAN:** Thank you.

5 Mr Bowsher.

6 **Discussion re pleadings**

7 **MR BOWSHER:** I think we are then into the rest of the order and the expert evidence
8 topic. We've set that in context.

9 **THE CHAIRMAN:** Before we do, can I just work out -- I haven't seen what you have
10 done about pleadings. Where did you end up on it? Do you want to just let me know
11 what the answer is.

12 **MR BOWSHER:** I could tell you the answer but I would like to put it a little bit in context
13 as to why the answer is the appropriate answer as it were.

14 **THE CHAIRMAN:** Yes, of course. No, exactly.

15 **MR BOWSHER:** We needed to get that done but that is what I was going to start with
16 and then go through the pleadings. Where we have ended up in the order you have
17 here is that we would file and serve an application for permission to amend by
18 29 August. That is 3(a). Then this is the bit where I think there's been some
19 discussion between the intervener and the defendant as to who goes first but there
20 will then be pleadings -- the date obviously depends on what happens to our
21 application for permission to amend but following on from either our getting permission
22 or not getting permission, there is then a pleading from the defendant and the
23 intervener and then we would reply to that.

24 **THE CHAIRMAN:** Yes. So your application for permission, you obviously -- I'm sure
25 you will not want to nail yourself down completely on this but what do you have in mind
26 here?

1 **MR BOWSHER:** Can I set the context to that. I think it's important to see how we got
2 to where have done in these proceedings. And I'm not anxious to do this in a sort of,
3 at least for today's purposes, in a sort of casting blame necessarily but the proceeding
4 has not gone in the manner in which the statute might have suggested it would, if I can
5 put it as low-key as possible. The starting point in the correspondence, if you have
6 file 1, page 97, if you are using the pdf pagination or the red pagination if you are using
7 a hard copy --

8 **THE CHAIRMAN:** Yes, what tab is it?

9 **MR BOWSHER:** Tab 7, page 97, I think.

10 **THE CHAIRMAN:** Okay. Just give me a minute. **(Pause)**

11 Yes. This is your instructing solicitors, 19 March.

12 **MR BOWSHER:** Precisely. 19 March. That is a statutory -- that was a letter in which
13 we wrote pursuant to section 76 of the Subsidy Control Act which you probably
14 remember is the statutory duty to provide pre-action information on the defendant.
15 And there's a 28 day period for providing that information. And that was where we
16 identified first, if I call it our concern because it's before you have a case, our concern
17 and the reference there is to the accounts we set out, where -- what has initiated our
18 concern. That then sets out at the bottom of 97 and on to 98, the list of documents
19 which we seek. And that was the subject-matter or would have been the
20 subject-matter of a disclosure application but for events which have taken place
21 since -- well, since our skeleton was filed. I will come to that in a moment. So that is
22 the starting point on 19 March. Our starting point is that we say we should have had
23 a response to that request with documents and that should have been the material
24 that we would have had on which to prepare our Notice of Appeal. And if we had done
25 that, we would not be where we are today, if I can put it that way, very, very loosely.

26 **THE CHAIRMAN:** And this is mainly this point about whether the money has actually

1 | gone into the fund and come back out or whether it hasn't.

2 | **MR BOWSHER:** There may be other points which I will come on to but yes. What
3 | has now arisen is that -- can I carry on through the correspondence?

4 | **THE CHAIRMAN:** Yes, of course.

5 | **MR BOWSHER:** I don't want to read through it all. There is then an exchange of
6 | correspondence. At page 99, there's a short rebuttal from Hogan Lovells. I don't know
7 | whether you have had a chance to read this material.

8 | **THE CHAIRMAN:** I've had a skim of these letters. Yes.

9 | **MR BOWSHER:** In short, the rebuttal at this point is I might loosely say, a very, very
10 | high level economic rebuttal. This couldn't be financial assistance because it all
11 | generated good returns for the purposes of the licences. It's a high level, 'it was
12 | a good thing' sort of response to which we respond at page 101, saying: well we still
13 | want to see the documents and we still want notes and analysis. Paragraph 4 on
14 | page 102 was: did the approval constitute a subsidy and so on and so forth. That
15 | letter -- sorry, I'm getting ahead of myself. We had with the earlier letter, the one thing
16 | we did have for the first time was the copy of the decision which is at page 95 and
17 | that's the one point where we move forward. The first disclosure, we do now have that
18 | decision note to work on. But our point at page 101 on 16 April is: well we still haven't
19 | had all these documents, we still don't understand how you've done what you've done.

20 | **THE CHAIRMAN:** Was the decision a public document, is that right?

21 | **MR BOWSHER:** We have not seen it publicly, we have now been told that it was on
22 | a website. We didn't see it there --

23 | **THE CHAIRMAN:** Right. But you didn't know that.

24 | **MR BOWSHER:** -- and it isn't on the website anymore, it was taken down when the
25 | Third Licence terminated. Whether it exists at Kew in some archived -- whatever they
26 | do to things at the National Archives, I don't know. I don't know. It is obviously -- it's

1 self-evidently a public document. If you go and look for it today, you won't find it but it
2 is self-evidently a public document in some sense but not necessarily publicly
3 available and not a document which we saw.

4 **THE CHAIRMAN:** You say it might have been out there but you didn't see it.

5 **MS CLEMENT:** Sir, if it helps, it was on the website, the Gambling Commission's
6 website for over seven months. It was archived when it moved from the Third Licence
7 to the Fourth Licence.

8 **THE CHAIRMAN:** Thank you, I don't think we need to get into it, I just want to --

9 **MR BOWSHER:** Obviously, there is a fun bit of the discussion to have about that in
10 due course, no doubt, on the facts there which --

11 **THE CHAIRMAN:** Yes. We don't need to get into that now.

12 **MR BOWSHER:** As I said -- from our position, from our knowledge, we derived our
13 knowledge from reading the Camelot accounts, and that is clear from the
14 correspondence.

15 The substantive discussion continues. We try to anticipate the CMO discussion. We
16 then get some holding responses on 17 April, saying that they will respond on 22 April
17 and then another one on 2 May, saying that there will be a response on 6 May. So we
18 write on 7 May saying that: you really have taken too long and we are going to have
19 to serve a Notice of Appeal and we serve our Notice of Appeal on 8 May. We file on
20 8 May and the case commences. We have not at that point had any of the disclosure
21 we've sought, other than the Decision Notice.

22 We then get a response, after we've filed, at page -- we now jump to page 3,295.

23 **THE CHAIRMAN:** Yes, 12 May.

24 **MR BOWSHER:** Which I don't have in front of me of course which is still short on
25 substance. We receive with the defence evidently, a lot of the supporting material and
26 a lot of econometric material but to flag up where we are going with this, a very large

1 proportion of that was redacted. No doubt properly, one of the topics for today was
2 going to be disclosure and/or confidentiality rings and so forth. It was unredacted. We
3 got it unredacted, I think, either on Monday or Tuesday. Anyway, after we'd filed our
4 skeleton. That rather pre-empts or -- it deals with any disclosure issue but we now
5 have a considerable amount of material to look at which we will have to consider
6 whether there is any issue that arises. And we have to be blunt, not had the statutory
7 28 days which we might otherwise have had.

8 To show you where it might go and I don't want to raise or depress expectations as to
9 what we might or might not do but so that you can see the analysis that we will have
10 to be doing to consider where it fits in, if one goes to the defence -- I'm not going to
11 show you material unless you particularly want to look at it.

12 **THE CHAIRMAN:** No.

13 **MR BOWSHER:** Go to the defence which is at tab 6. I was going to go to
14 paragraph 72 on page 85. There's limb A which is the -- we will say the form of -- the
15 form over substance point but we will come back to it.

16 Then limb (b):

17 "No financial assistance that confers an economic advantage. No economic
18 advantage to Camelot."

19 **THE CHAIRMAN:** Yes.

20 **MR BOWSHER:** And the basis to that is the factual narrative, in paragraph 72:

21 "The premise for the decision was that increased marketing expenditure, which would
22 not otherwise have been made by Camelot, would increase sales of National Lottery
23 tickets. Increased sales would result in increased payments to the NLDF under the
24 payment mechanism in Schedule 8 to 3NL, see paragraphs 54 to 56 above. However,
25 the decision was taken ..."

26 Et cetera, et cetera.

1 Sorry:

2 "However, the decision was taken expressly on the basis that Camelot did not receive
3 any additional profit as a result of the predicted increase in sales, as the additional
4 financial contributions that Camelot was required to make far exceeded any predicted
5 increase in Camelot's profits, see paragraph 57 above. As such, no economic
6 advantage was conferred on Camelot as a result of the decision."

7 So that's the argument which they make.

8 The facts on which it is based are summarised from paragraphs 54 to -- in fact up to
9 59, paragraphs 80 to 82 and what those paragraphs are is, effectively, a very, very
10 short summary of hundreds of pages of econometric analysis and conclusions drawn
11 from econometric analyses.

12 **THE CHAIRMAN:** Yes, I see. You are saying that the output of those calculations,
13 as I understand it, the output of those calculations drives the final figures, including the
14 figures that Camelot are going to be required to spend on marketing, staff retention
15 and retail encouragement, I think -- I can't remember what the expression is. So are
16 you saying you want to get into that calculation and see whether it's right or not?

17 **MR BOWSHER:** As I said, I started because I think I don't want to raise or lower
18 expectations on what should we do or do not want to do. Plainly we need to be able
19 to have a look to see whether we should go any further into that and whether there is
20 something that needs to be looked at because plainly, reliance is being made in the
21 defence upon all of that material to justify a proposition. And we need to see whether
22 that is a matter which we should be looking further at. That is the material which we
23 are were entitled to by way of disclosure which we now have.

24 **THE CHAIRMAN:** And so what would the ground of judicial review be for that?

25 **MR BOWSHER:** It involves, for example -- there are exchanges of reports between
26 Camelot and the Commission, where Camelot puts forward what one might say,

1 a business proposal. There is then some push back. The question is, is that push
2 back properly founded on the facts or is it not founded on the facts? Is the nature of
3 the analysis such that the decision was not properly informed and so will be some sort
4 of Tameside-type review that the decision is not properly informed, for example. As
5 I say, after two days, I don't want to raise -- even to raise the shadow of what we might
6 or might not want to say but plainly this was the material on which an important
7 conclusion was based which led to the decision. And that is what the decision is
8 founded on.

9 **THE CHAIRMAN:** Yes, I mean I -- yes. That is, of course, quite a different case from
10 the case you've run so far, isn't it?

11 **MR BOWSHER:** Of course it is. We didn't know that until -- you know, we're not in
12 a position -- we asked in April. I've said I don't want to get into blame but this is the
13 material which if we'd had when we asked for, we would have been in a position to
14 consider. Of course it's different. Just -- it comes again -- there's a second part of
15 the defence which goes back to the same material.

16 **THE CHAIRMAN:** Yes. So just explain that.

17 **MR BOWSHER:** In the CMO -- paragraph 73 in the CMO case, again on page 86,
18 there's the legal stuff. Now there are some legal points which we have already taken
19 and it will be open to us to take but again, they come back -- 76, 77:

20 "The Commission --

21 Leaving aside the legal question as to whether or not the CMO principle arises but in
22 77:

23 "The Commission was at all times acting to maximise returns to good causes as
24 a result of the LNIO." That is the proposal.

25 And that takes one back to the same factual analysis.

26 **THE CHAIRMAN:** (Inaudible) why did it do that? Why -- the point is being made there

1 is just simply that if you are going to -- as I understand it, the point that's being made
2 is if you are going to conduct the exercise contemplated by the Act, for financial
3 assistance, you need to have some reference point for the alternative provider. So
4 what they're saying is you are just assuming that a third party providing the investment,
5 in this case it's (inaudible), a private investor, would act to maximise (inaudible), but
6 just drawing a parallel between the two.

7 **MR BOWSHER:** Sorry, I've skipped the point but with respect, that's not what they're
8 saying. They are explicitly relying in paragraph 75 on exactly the same material,
9 paragraphs 54 to 59, as justifying the fact --

10 **THE CHAIRMAN:** Yes, that's the same point you just made.

11 **MR BOWSHER:** It's the same point but as I say, it's the same material, it plays out in
12 a different legal context. They are saying: because we did this analysis or we did this
13 economic analysis, we are able to satisfy ourselves that ..., as I say, we can have the
14 legal debate about whether or not the principles are applicable at all. But if it is
15 applicable, whether it does apply here is a question of analysis and the basis of their
16 factual conclusion is the analysis which is in paragraphs 54 to 59.

17 **THE CHAIRMAN:** I have to say I will see what Ms Clement says about that. It's not
18 entirely clear to me why that makes any difference to the Commission's market point
19 of principle.

20 **MR BOWSHER:** They are relying on the proposition that the decision did not convey
21 any economic advantage. That seems to be their --

22 **THE CHAIRMAN:** They are obviously arguing that, yes, because that's part of
23 the test, isn't it, but when you come to the commercial market operator principle, isn't
24 it just a question as to whether somebody else would have provided the money on the
25 same basis. Isn't that simply the point?

26 **MR BOWSHER:** That may be a way of phrasing it but that's not the way they've

1 | pleaded it here.

2 | **THE CHAIRMAN:** I think it is where they get to 77. I appreciate -- I understand what
3 | you are saying about the second sentence of 75 and I'm not sure why that's in there
4 | and Ms Clement may be able to help us with that but I'm just not, at the moment,
5 | buying the idea that your point goes any further. This obviously goes to the economic
6 | advantage point, I'm not contesting that, I'm just not buying it goes into this point as
7 | well.

8 | **MR BOWSHER:** We are probably, I don't know whether ships passing in the night or
9 | vigorously agreeing or whatever it is. They pleaded this economic advantage point
10 | here as well is all I'm saying.

11 | **THE CHAIRMAN:** So can we just talk a bit about the consequences of that and I
12 | appreciate you are not in a position to say whether you want to go down this path or
13 | not because you have not looked at the material and I'm not completely sure how wide
14 | the path is. Maybe you're not sure how wide the path is you're thinking of, whether you
15 | are thinking of giving into all the econometric analysis and working out whether it's
16 | right or not, for example, as opposed to working out whether the information that
17 | Camelot provided was accurate or -- I mean there are a number of different levels at
18 | which you could operate this and it seems -- so it's quite difficult, I know, to both ask
19 | and answer this question but what are the implications of this? You are effectively
20 | opening this case up to a completely different sort of case, aren't you?

21 | **MR BOWSHER:** I would not anticipate that is the case, no. I mean, obviously, it is
22 | not -- we are not challenging economic econometric evidence in the way that one
23 | would in a competition trial. It's a completely different sort of -- we would be having to
24 | look at the material which was exchanged and which is relied upon in the pleading,
25 | and see whether or not that gives rise to a proper JR-type challenge. I am going to
26 | hesitate to call the path narrow but it is certainly not a complete front on was it right or

1 wrong? Clearly it would have to be much more than that. But we, I would submit,
2 must be entitled, now that we have the material, to at least test it and see whether
3 there is any point that we would want and should make as part of our challenge, by
4 looking at that material. I could spend some time -- and I'm not sure it's very
5 helpful -- just going through some of that material which for this purpose, a layperson
6 has had a look at a few points and says: well, that might be interesting but at the
7 moment, it doesn't much amount to more than a lawyer saying: here are a few
8 interesting points which we ought to have a look at.

9 **THE CHAIRMAN:** I don't think -- I'm not sure it would be helpful. Unless you think it
10 would but at the moment I'm still struggling a little bit. I think you said it's not just
11 a question of whether the numbers are right or wrong but it is just that, isn't that? It's
12 what this is all about, isn't it? Because surely -- so the position taken by the Gambling
13 Commission is: we agreed to the proposal because the financial outcomes were of
14 a particular type and those financial outcomes are driven by the calculations that we
15 have been talking about. So either the calculations are right, in which case there's no
16 basis for challenging the decision on that ground or they were wrong, in which case it
17 really is whether the numbers are right or wrong, isn't it?

18 **MR BOWSHER:** It was a bit more nuanced than that. Essentially -- again -- someone
19 is going to read this bit of the transcript back at me later, I know. There is what I will
20 call pejoratively a marketing proposition and that --

21 **THE CHAIRMAN:** Yes.

22 **MR BOWSHER:** Which is then pushed back. Some of that push back involves some
23 material saying: we need to drill down on those figures more, we need to test those
24 figures, is that figure really right? That then produces a conclusion which is a more
25 nuanced conclusion than the marketing proposition, and raises questions about the
26 marketing proposition.

1 **THE CHAIRMAN:** When you say more nuanced, you mean it ends up with different
2 numbers?

3 **MR BOWSHER:** Different numbers and maybe it isn't quite what they -- there are
4 some -- again, I'm in danger of sort of reading in material as if it's evidence when it just
5 isn't. At the moment it's just my reading of the material. There are bits in there which
6 look as if there are questions being raised which haven't been followed through or may
7 not have been totally followed through. The conclusions being reached by the GC
8 consultants' report raise questions as to whether or not matters are as optimistic as
9 was suggested and that is all I would want to say at this stage.

10 Now if there is an error -- then it may be that in that process there has been a failure
11 to follow through on something which should have led to a decision: no, that's not
12 questionable, that is actually wrong. There should have been a follow through, that
13 should have been picked up as being an error. And if that enquiry was not adequately
14 followed through or the conclusion from the report was not correct, then that potentially
15 gives rise to a JR-able -- a brand of JR because the decision would be based on
16 an error.

17 **THE CHAIRMAN:** Well -- I'm not going to express a view on whether that's right or
18 not. Obviously, if you were in that case, that's going to be what the case is about but
19 I mean I do have some scepticism about whether you can find it on that basis. A JR
20 case that meets the test and particularly in circumstances where this was actually
21 done, as I understand it, the outcome met the projection. So it's quite difficult, isn't it,
22 to come along and say: they got this wrong and so materially wrong that it's judicially
23 reviewable, when in fact, it turns out they got it right.

24 **MR BOWSHER:** There has to be the possibility that that material is material we
25 should --

26 **THE CHAIRMAN:** The reason I'm pushing you on that, Mr Bowsher, and forgive me

1 for -- I am pushing you on that a bit and it's for this reason, that it does have a -- there's
2 a bit of a sniff here of you having access to a whole lot of material and then looking
3 very, very hard, fishing in that material for things that you might be able to hang
4 an argument on. Now I can't stop you doing that, obviously, that's part and parcel of
5 the job but at this stage in the proceedings, it's pretty unattractive. And one of
6 the things about these subsidy control cases is that they are not like ordinary bits of
7 litigation, where we can let them run -- and you know this as well as I do, we can let
8 them run and a trial next year is fine. This needs to be dealt with promptly and
9 promptly in our book means within more or less six months. And so we have given
10 you a hearing date for it and it's going to require some persuasion that we shouldn't
11 be going ahead with the hearing date. I am nervous that what you are doing is opening
12 this case up in a way which wasn't contemplated when you filed it and I understand
13 entirely the point you make about what you had and hadn't seen but it's effectively
14 a different case from the sound of it.

15 **MR BOWSHER:** You use the word unattractive and I must pick that up. Because
16 what is unattractive is that we did not get our statutory entitlement.

17 **THE CHAIRMAN:** No, I understand that point, I understand that.

18 **MR BOWSHER:** None of this -- you and I should not be having this discussion
19 because this should have been in a position -- this should have been parked months
20 ago and dealt with. Now the important control here is that we are not asking for longer
21 than 29 August to get our material. If any signal is required, we are not asking for
22 longer than till 29 August to produce this material. If we were producing
23 a full-blown -- if there was any thought that we would be producing a full-blown
24 economic analysis of all of this, we would be asking for a lot longer than 29 August.
25 And as I say, I don't want to raise any expectations that we are actually going to do
26 any of this because I simply don't have instructions to do that. What is only right

1 | though is that we have a moment and it really is only two or three weeks, to look at
2 | this material and see if there is anything here which is so obviously flagrant -- obviously
3 | challengeable that we should add it to our claim. But I do not expect it to change the
4 | shape of the claim overall. There will be -- but there may be some -- one or two
5 | additional points or some additional points arising out of this analysis. But the
6 | important control is that we are certainly not trying to move away from the end of
7 | August date which we have already discussed.

8 | **THE CHAIRMAN:** Can we go back -- section 76, isn't it, is that right? Can we just
9 | have a look at that. Are you saying that you should have had, for example, the detail
10 | that you now have, by way of that pre-action disclosure?

11 | **MR BOWSHER:** Well, yes. We made that application by that original letter and I've
12 | taken you to the correspondence. We never had an engagement with our request,
13 | other than later. Now it may have been that the right answer to our requests in April
14 | was a more nuanced list than the one in that letter but there was no substantive
15 | engagement with that request until we actually got the defence, then we get all the
16 | material but redacted. So in terms of the statute, we are doing now, as of this week,
17 | what the statute contemplates we would have done when we got a response from the
18 | section 76 --

19 | **THE CHAIRMAN:** I'm not sure that is right, is it, because section 76(3) says:
20 | "The authority is obliged to provide information that would enable or assist in the
21 | making of a determination as to whether the subsidy was given or a scheme was made
22 | in accordance with the requirements of chapters 1 and 2 of Part II."

23 | Does that extend to whether or not there was a mistake of fact? Is that really what --

24 | **MR BOWSHER:** That provision in 2(b), that is only about the limitations of the use of
25 | the material, that's not a scope --

26 | **THE CHAIRMAN:** No, I'm looking at 76(3).

1 **MR BOWSHER:** They now rely upon this material in their defence.

2 **THE CHAIRMAN:** Of course, that's right but --

3 **MR BOWSHER:** One would have expected -- this is -- they are now saying that it
4 wasn't -- they are relying upon this material for one of their grounds for saying there
5 isn't a subsidy. So one would have thought that it responds to the request. I'm not
6 coming here to fight out the disclosure application which we thought had been
7 resolved.

8 **THE CHAIRMAN:** Can you give me the reference. Where is your letter where you
9 ask for disclosure?

10 **MR BOWSHER:** 97. If there was reliance, for example, on the subsidy control
11 principles, you would certainly need this material, in order to understand how they
12 reconcile themselves with the subsidy control principles. We are now told they didn't
13 do that but ...

14 **THE CHAIRMAN:** Yes. I understand the point.

15 **MR BOWSHER:** Sorry, did you -- **(overspeaking)** --

16 **THE CHAIRMAN:** Just looking at your letter of 19 March.

17 **MR BOWSHER:** That is where we first ask for it. The only -- we reiterated it on
18 16 April, page 101.

19 **THE CHAIRMAN:** Yes. It's effectively the same list that was in your disclosure
20 application, isn't it?

21 **MR BOWSHER:** Yes.

22 **THE CHAIRMAN:** Okay. We'll have to see what Ms Clement says about all that but
23 at the moment, all you are doing is you are just saying you want the opportunity to
24 apply for permission.

25 **MR BOWSHER:** Our original proposal was that we would look at this and then make
26 an application once we'd filed the pleading. The tribunal very helpfully wrote to us this

1 week, so we've adapted our request. We would ask for around the tribunal's request
2 that we address this today, and in order to do that, we would ask that there would be
3 permission to rely upon economic expert evidence but we would incorporate that and
4 whatever additional part of the claim followed on from that, as part of our amended
5 Notice of Appeal on 29 August.

6 **THE CHAIRMAN:** I see. So that would roll up your expert evidence as well.

7 **MR BOWSHER:** We would produce -- we would ask -- our intention would be, as we
8 said, we would indicate the issues on which the evidence will relate in the amended
9 Notice of Appeal. So we would by then have decided what it addresses. In our
10 application we ask for four further weeks for the report itself, simply because we have
11 to get an economist to write a report.

12 **THE CHAIRMAN:** That does seem like quite -- I appreciate it's August and I hesitate
13 to raise this point, particularly for those behind you who are no doubt not happy if I do
14 but that is quite a long time to produce an amended Notice of Appeal if you are not
15 actually exhibiting your expert reports to it. So why do you need so long? You have
16 the material, you have had it for a week now.

17 **MR BOWSHER:** We are all quite heavily committed in the other proceedings, is the
18 first answer. There is the August factor. If we are going to also engage with an expert
19 at least to verify that there is nothing more that we want to deal with -- even the process
20 of getting a nil return would involve some work. We will have to find an expert to
21 engage with during August. That will take up some time. It is already, I fear, nearly
22 mid-July. We will have to have someone who is prepared to look at that material in
23 August and sign off. But we are all -- it's not that we are not working in August, if I can
24 put it that way.

25 **THE CHAIRMAN:** No, no, I understand. So is it helpful -- I'm just thinking about the
26 best way of dealing with this -- is it helpful for you to go on and talk about the expert

1 evidence then, before I ask Ms Clement to respond? Because are you clear about
2 what expert evidence you think you want? Subject, of course, to finding anything you
3 want to put in, I understand that point but at the moment, it just seems to me --

4 **MR BOWSHER:** I'm not in a position -- as I say, all I'm in a position to do today is ask
5 permission for an economic expert because I don't know what, if anything, the grounds
6 would be that that expert would be directed at.

7 **THE CHAIRMAN:** I mean that surely is not sufficient basis to give permission, is it.
8 I can't give you permission for an expert if we don't know what they are going to be
9 doing. The best I think we can do is you have to renew your application.

10 **MR BOWSHER:** That was our original proposal.

11 **THE CHAIRMAN:** Yes.

12 **MR BOWSHER:** Our original proposal was that we would make an application for
13 an expert.

14 **THE CHAIRMAN:** I see and I bounced you into (inaudible words).

15 **MR BOWSHER:** You asked us to turn up.

16 **THE CHAIRMAN:** That's because I didn't know you were going to talk about
17 amending your case. That does change the complexion somewhat.

18 **MR BOWSHER:** Maybe we are at cross-purposes. Our intention was if and insofar
19 as there was any economic issue we wanted to raise in support with the economic
20 expert evidence, we would raise that by way of -- in the application to amend and then
21 make an application to rely upon supporting evidence with that application.

22 **THE CHAIRMAN:** The reason for writing the letter was that when I looked at your
23 skeleton, I thought that it wasn't at all clear -- I appreciate that's before you'd seen the
24 material. So put the material to one side because that may or may not change the
25 position. But just on the basis of the argument which I think is a construction point
26 largely, but obviously, there are some questions, some of the things we just talked

1 about, some questions about what amount of money went where and what the return
2 on investment for the fund was as a result. Now all of those things are pretty
3 straightforward and it wasn't obvious to me that we needed expert evidence for them.
4 So that was all I was trying to push you on which is why do you need an expert to deal
5 with those arguments? You are saying things have moved on from there and
6 I understand that.

7 **MR BOWSHER:** The short answer is on those points not at all.

8 **THE CHAIRMAN:** That was my conclusion as well.

9 **MR BOWSHER:** Sorry -- yes.

10 **THE CHAIRMAN:** If you decide you are not going to get into the models and whatever
11 it is --

12 **MR BOWSHER:** Some of the level of analysis, yes. No. There is no other economic
13 case to be run, it is simply an analysis of this new -- I call it the new material. It's the
14 material which we are now reading.

15 **THE CHAIRMAN:** And I am still -- I don't want to -- I'm still not clear whether you are
16 talking about economic models or whether you are just talking about information that's
17 been provided about higher level numbers.

18 **MR BOWSHER:** I expect it's the latter. Again, I don't want to -- the only reason for
19 getting into the model would be if there is something in the latter which makes one
20 raise a question about the model. For example, if we wanted to do remodelling, we
21 would have had to have asked for more disclosure about the contents of the model
22 today which we are not.

23 **THE CHAIRMAN:** Right. So you are not going to do that.

24 **MR BOWSHER:** No. I mean that's --

25 **THE CHAIRMAN:** So is it really -- aren't we then talking just about the presentation
26 of numbers. Do we need an economic expert. Do we need an expert at all? Perhaps

1 | you don't know because you don't know what it's going to look like.

2 | **MR BOWSHER:** I think we are getting -- there's a danger I'm getting way ahead of
3 | myself here. It's more than just a few lawyers sitting around reading some interesting
4 | numbers because there is clearly analysis and economic analysis being done on
5 | a number of -- on some econometric activities.

6 | **THE CHAIRMAN:** Economic analysis in the sense of?

7 | **MR BOWSHER:** Conclusions being drawn from material in the file.

8 | **THE CHAIRMAN:** I think the point I'm making is if you need somebody to assemble
9 | some numbers and explain them, is that not actually a forensic accountant rather than
10 | an economist? I would be surprised if there were so many numbers on this that you
11 | needed anybody at all. Hopefully, we are all numerate enough to manage this level
12 | of numbers. Perhaps I shouldn't say that but --

13 | **MR BOWSHER:** You would be surprised. There's an awful lot of it in the material.
14 | The exercises were conducted by economic consultants, by both the GC and Camelot.
15 | I infer, therefore, that that is the correct discipline. But I can see what -- all I would say
16 | is I can see why you might think it was a forensic accountant but I --

17 | **THE CHAIRMAN:** Why don't we just leave it there.

18 | **MR BOWSHER:** One last thing.

19 | **THE CHAIRMAN:** Yes, sorry, go on.

20 | **MR BOWSHER:** As we may have ended up back where we started sort of seven days
21 | ago on our side, can I just briefly just check with those instructing me that --

22 | **THE CHAIRMAN:** Yes, of course. Just one last question. Is your expectation that
23 | we are going to be able to have the timetable that leads us to an 8 December hearing?

24 | **MR BOWSHER:** There are issues with the 8 December hearing but not on this side
25 | of the courtroom but yes, we are planning to be ready by 8 December. Others have
26 | issues with 8 December as a hearing date but --

1 **THE CHAIRMAN:** So you're not suggesting that any of this -- at the moment you are
2 not suggesting any of this should lead to a longer timeframe to get this thing to
3 hearing?

4 **MR BOWSHER:** I think it may be we are going to let -- others are going to be asking
5 for different dates but that's --

6 **THE CHAIRMAN:** Yes, okay. Good. Do you want to just check behind you, yes.

7 **(Pause)**

8 **MR BOWSHER:** I think we are fine. Just to make clear, if we were to end up in
9 a situation, it may be that it cuts through all this, that we amend by the requisite date,
10 29 August, and make any application for expert evidence, if and insofar as required to
11 support any amendment by that same date, then I think it's all addressed and it
12 probably -- well, I leave it to my learned friend but it might be better to have that fight
13 when there is something to fight about.

14 **THE CHAIRMAN:** Yes, thank you. Ms Clement, we should probably take a break for
15 the transcriber. I will rise for ten minutes. We will start again at 10 to.

16 **(11.42 am)**

17 **(A short break)**

18 **(11.50 am)**

19 **Submissions by MS CLEMENT**

20 **(recording switched off at the start of submissions)**

21 **MS CLEMENT:** ... what has been proposed this morning is that we switch around (c)
22 and (b), so that once we get the amended Notice of Appeal and a decision on
23 permission on that from Mr Bowsher, my clients then go next and file the Amended
24 Defence.

25 **THE CHAIRMAN:** Yes.

26 **MS CLEMENT:** And after that, so once the intervener has seen how both main parties

1 put their case, then the interveners file and serve their statement of intervention.

2 **THE CHAIRMAN:** Yes.

3 **MS CLEMENT:** So that would be 28 days after our Amended Defence. And then (d)
4 and (e) will happen together, so the applicants can file a reply and a response to the
5 intervener's statement of intervention, and if we need to, we will file and serve
6 a response to the intervener's statement of intervention.

7 **THE CHAIRMAN:** Yes. My quick arithmetic suggests that that all gets done at the
8 end of November. Is that really realistic for a hearing date in December?

9 **MS CLEMENT:** We'd say not.

10 **THE CHAIRMAN:** No, I'd say not too.

11 **MS CLEMENT:** Particularly as we don't know how long it will take to determine
12 Mr Bowsher's application for permission to amend. We don't know what it's going to
13 say, we don't know if we'd object to it. We don't know if the tribunal would need to
14 have submissions on that.

15 **THE CHAIRMAN:** Yes. I mean it all seems to me to be somewhat leisurely and as
16 I said to Mr Bowsher and I'm sure your client would, I hope, support, the whole regime
17 is designed to move quickly.

18 **MS CLEMENT:** Absolutely.

19 **THE CHAIRMAN:** And I don't want to get into the whys and wherefores of why we
20 are where we are, I'm sure there's plenty to be said about -- maybe you feel you need
21 to say, in which case that's fine but without getting into it now, if we are going to make
22 this work, and you are not -- I mean the impression I'm getting is you are not pushing
23 back on the proposal for Mr Bowsher that he should have the opportunity to conduct
24 the review he's discussing, he's suggesting, and to amend as a consequence of that.

25 **MS CLEMENT:** He needs to amend his application. We have said that from the
26 outset.

1 **THE CHAIRMAN:** Yes.

2 **MS CLEMENT:** Because as presently pleaded, it is drafted on the basis of
3 a fundamental misunderstanding. Now that has to be corrected. How he puts his
4 case after that, we do not know. But we don't object to him having that time that he's
5 asked for, in order to formulate that. So 29 August.

6 We do object, as I'll develop in a moment, to his proposal for expert evidence but in
7 terms of, in principle, being able to amend, we don't object to that.

8 **THE CHAIRMAN:** Yes. I suppose I'm just -- well, that's presumably because you get
9 a second bite of it when he comes to his application for permission. But if he turns up
10 with a critique of all the economic modelling that's been conducted by your clients, one
11 assumes that's not something that you would readily agree to. Is that --

12 **MS CLEMENT:** Absolutely, sir, you can see where I'm going with that. First, we would
13 say it wouldn't be admissible at all but if it is, then my clients would need an opportunity
14 to consider and respond to that, presumably instructing additional experts in order to
15 do that. So one can see that one is then going on to an ever increasing delay in
16 actually getting this matter resolved.

17 **THE CHAIRMAN:** Yes.

18 **MS CLEMENT:** So this timetable in the pleadings is on the basis that there is not
19 going to be any expert evidence that we need to have time to consider, review, take
20 instructions on and possibly respond to. If that is what my learned friend gets
21 permission to file at some point, then we are into a different ball game in terms of
22 timing and how long everyone would need to deal with matters.

23 **THE CHAIRMAN:** Yes. Just to come back to this question of the realism of it, let's
24 work on the assumption just for now, and I appreciate that may not be Mr Bowsher's
25 final position but if we work on the assumption that not much changes in his case -- and
26 he is running what I think he calls the substance over form argument in relation to the

1 question of who's actually funding -- where the money's come from, put it that way.
2 So as I understand it, he's not running a case -- and he may be, he may tell me I'm
3 wrong about this but he's not running a case that says Mr Holdaway is wrong and the
4 money came from the fund. There is no factual dispute, it's just about what the
5 consequences of that are and whether -- I think your description of it or your clients'
6 description of the decision is "investment from the fund." I think Mr Bowsher mostly
7 uses the words "contribution from the fund" or "grants from the fund." All those things,
8 you know -- I guess begs the question as to, as Mr Bowsher puts it, what is the
9 substance of what's happening here. Obviously, the context of the licence, and that,
10 as I understood it, was going to be the point of argument for the trial. Now if that's all
11 it is, we have given Mr Bowsher some time, possibly not until 29 August, but we have
12 given him some time to go away and work out whether he wants to add anything more
13 and he has decided not to, then surely after that, it all moves pretty quickly, doesn't it?
14 Do you need 28 days?

15 **MS CLEMENT:** If what comes back from the notice of amendment is striking through
16 ground 3 because there's no factual premise for it, striking through ground 4 because
17 there's no factual premise for that either, amending ground 1 to remove all references
18 to payment being made -- to the subsidy being a payment of £70-point something
19 million out of the National Lottery distribution fund, then that will take very little for us
20 to respond by way of a defence because our current defence deals with it, it sets out
21 the correct position.

22 **THE CHAIRMAN:** Yes. In a sense all you're really doing is taking out the response
23 to grounds 3 and 4 because you don't need to do it any more.

24 **MS CLEMENT:** Exactly. But if what comes back is a fundamental and full frontal
25 attack on the economic analysis that's being carried out not just by us but by Camelot
26 and reviewed by our experts, then that is an entirely different ball game because that

1 will require a review of whatever Mr Bowsher produces, debates/discussions with our
2 experts, consideration of whether we need to put in a responsive expert evidence and
3 a consideration of the impact that has on our pleaded defence.

4 **THE CHAIRMAN:** I suppose I'm just a little bit surprised that you are prepared to give
5 him until the end of August to find out the answer to that question. I'm just a little bit
6 surprised that you are being quite gentle on him.

7 **MS CLEMENT:** So I'm rarely criticised for being too reasonable on behalf of my
8 clients, so if Mr Bowsher can do it more quickly, we would certainly encourage that but
9 we are conscious that we are nearly at the end of July and it is going to be August and
10 we assumed he wanted more time for that reason. If Mr Bowsher is prepared to do
11 the work in August, and he can do it more quickly, then of course he should do.

12 **THE CHAIRMAN:** I suppose the problem is that -- and put aside August for a minute,
13 I appreciate it is a complicated factor but the problem is, as we stand today, we don't
14 know what this case is about.

15 **MS CLEMENT:** Quite.

16 **THE CHAIRMAN:** And I think we need to find out more quickly than the end of August
17 what it's about. Now as you say, there may be two quite different streams (inaudible
18 words). It might be for something in the middle and we need to deal with that because
19 it's going to go one way or the other. If it goes the way we discussed earlier, then
20 that's a very straightforward process to get from here to the hearing because I think
21 Mr Bowsher accepted there wouldn't be any expert evidence on the case as it's
22 currently pleaded. The case has actually got smaller rather than larger and we have
23 clearly some work from Mr Johnston to do a little bit of reply evidence and no doubt
24 some material in reply but basically, it's all pretty straightforward and you would
25 wonder why anybody needed anything like the lengths of time set out in here and we
26 could have -- I think, you know, if you look at section 6, and you look at section 3 of

1 the order, there is a disconnect, isn't there, because it's not possible, I would have
2 thought, to have 56 days before the date of the substantive hearing, an agreed
3 statement of facts, when we still have pleadings being filed in November.

4 **MS CLEMENT:** Yes.

5 **THE CHAIRMAN:** So I think track A which is the case as it more or less is, without
6 some of the bits that you've complained about, I would have thought fits quite neatly
7 into section 6 and it works perfectly well. Track B which is a materially more
8 complicated case, doesn't. And I think subject to anything else you have to say about
9 it, I think I'm going have to press Mr Bowsher to give us a faster answer on that but
10 you are not really encouraging me to do that, as I understand it.

11 **MS CLEMENT:** Well, what we say is those dates were in there because we have no
12 idea what Mr Bowsher's reformulated case is going to be. We could have applied to
13 strike out his claim as it is currently drafted because it is based on his fundamental
14 misconceptions. We didn't think that would be right, we didn't think that would be the
15 reasonable way of approaching it, so we've invited them for a number of weeks now
16 to amend their application. They resisted that all the way along, including in the
17 skeleton argument, and it was only yesterday that Mr Bowsher finally accepted that he
18 needed to amend the application.

19 So we just don't know what he's going to do with that. And it would have been helpful
20 if his client had come along today with an idea of what that was going to be. Indeed,
21 with a draft of the amended application would have been ideal. Unfortunately, we are
22 not there.

23 **THE CHAIRMAN:** Yes. Okay. Thank you. What about the experts? It's quite difficult
24 to address this because I don't have an application before me, as I understand it.

25 **MS CLEMENT:** Yes. So before we get to that, can I just deal with the point on
26 chronology.

1 **THE CHAIRMAN:** Yes, of course.

2 **MS CLEMENT:** I do have to come back to that.

3 **THE CHAIRMAN:** No, no, absolutely.

4 **MS CLEMENT:** Mr Bowsher started by saying he wasn't making any criticisms of
5 anyone and then proceeded to make extensive criticisms, so I do have to respond to
6 it. Could we start -- the start of this was at page 97 of the bundle which was the
7 request that Mr Bowsher's clients made for pre-action information under section 76.

8 **THE CHAIRMAN:** Yes.

9 **MS CLEMENT:** And, sir, you made the point that when we look at section 76, that's
10 the authorities bundle page 36, we pick up on the point, sir, that you put to my learned
11 friend, about what does this section actually mean and what does it entitle an applicant
12 to? And what it is, we say, is it is a duty, it's a request -- it's permission -- an ability for
13 an interested party to make a request for information about a subsidy that the authority
14 has given or made. That's subsection (1).

15 And then subsection (2) says what that request must do and (2) (b) says:

16 "It must state it's being made only for the purpose of deciding whether to apply for a
17 review of a subsidy decision on the ground that the decision did not comply with the
18 requirement of chapter 1 or 2 of Part II."

19 So it didn't comply with the subsidy control principles or the other statutory duties.

20 Then (3):

21 "Where a public authority receives a request under subsection (1), the authority must
22 provide such information as would enable or assist in the making of a determination
23 as to whether the subsidy was given or the scheme was made in accordance with
24 those requirements."

25 So what this duty is about is where there has been a subsidy, the obligation is to
26 provide that information to understand whether the requirements of the Act have been

1 | complied with. But, sir, what we have here is a scenario where we say no subsidy
2 | was given. So there is no duty under section 76 to provide the information that
3 | Mr Bowsher says should have been provided.

4 | **THE CHAIRMAN:** Yes. So he says that under subsection (3), he should have given
5 | the information about the financial economic consequences because that's material
6 | he should have included in the subsidy assessment but you say you never made a
7 | subsidy assessment and so that point can't be right.

8 | **MS CLEMENT:** There's no subsidy, there was never a subsidy assessment.

9 | **THE CHAIRMAN:** Do you accept -- so your position is that if the public authority takes
10 | the position there is no subsidy, it has no obligations under 76 at all?

11 | **MS CLEMENT:** Yes.

12 | **THE CHAIRMAN:** That seems quite a -- seems quite an unhelpful outcome for
13 | somebody who -- I mean we -- the situation no doubt -- plenty of other situations where
14 | the authority has taken a view -- the public authority has taken a view and someone
15 | else takes a different view, the public authority may or may not turn out to be right. If
16 | it turns out to be wrong, then the whole process of pre-action discussion has been
17 | torpedoed, hasn't it?

18 | **MS CLEMENT:** There's pre-action discussion, there was disclosure of the key
19 | decision document. I will show you that in a moment, sir, but my point is simply my
20 | learned friend relies on section 76 and alleges that we have breached it. My point is
21 | section 76 does not apply to a situation where the public authority says there is no
22 | subsidy.

23 | **THE CHAIRMAN:** So you would accept that there is a -- maybe duty is putting it too
24 | high, but you accept that the public authority should be engaging, providing information
25 | that it thinks is relevant to the request but you are saying that's not a duty under section
26 | 76.

1 **MS CLEMENT:** There is not a duty under 76 and we did engage with the applicant in
2 terms of the information and I will show you, sir, in a moment, where we say to the
3 applicant: what is your legal basis for seeking this information? To which either no
4 response came or it was a reiteration of section 76.

5 **THE CHAIRMAN:** Yes.

6 **MS CLEMENT:** Sir, just to complete that trail of documents, you see our response to
7 that initial letter from 97 is at page 99 in the bundle.

8 **THE CHAIRMAN:** Yes.

9 **MS CLEMENT:** That's the 11 April letter. It explains the point I've just made to you,
10 sir, as to the view of section 76. There is no subsidy, therefore it doesn't apply. It
11 goes on to explain and outline what happened. It goes on to explain why we say that
12 these approvals didn't constitute financial assistance that could distort a market. It
13 goes on to explain the statutory duties. It refers to the commercial objective in
14 improving the investments. That's over the page, top of the page, page 100. Sets out
15 the Commission's objective. It explains where that is consistent with the objectives of
16 any commercial market operator. It refers to the points in Camelot's annual reports.
17 And it includes and provides to the applicant the Decision Notice in respect of the
18 decision under challenge. That's the notice of 19 July.

19 **THE CHAIRMAN:** The last paragraph does seem to suggest that an acceptance to
20 the section 76 applies, doesn't it? But I appreciate that may not be the position now,
21 I understand you may take a different view now.

22 **MS CLEMENT:** The start of the letter says section 76 doesn't apply. The third
23 paragraph:

24 "Your clients request is misconceived since no subsidy could or did arise from the
25 Commission's approval, as referred to in the report."

26 Et cetera. I think the last paragraph is an abundance of caution:

1 "The information we have given you can only be used for one purpose."

2 **THE CHAIRMAN:** Yes.

3 **MS CLEMENT:** So after that, there was the further letter on 16 April which you see in
4 the bundle, over the page at 101. The response to that is at page 104, where we
5 explain:

6 "You've asked for this in the middle of the Easter public holidays. We won't be able to
7 get instructions. We anticipate a response the following week."

8 Over the page, an explanation that it will take a little longer because of the Bank
9 Holidays.

10 And then the application is issued on 8 May, without waiting for the response.

11 There are then further requests for disclosure. That then jumps to the end of the
12 bundle but just to short-circuit this, the letter at page 3302 is a response from those
13 instructing me, again saying:

14 "You are making certain requests for disclosure without stating any legal basis for the
15 requests. Please explain on what basis the requests are made."

16 It then comes back. The only response to that is at page 3303 on 18 June which again
17 is referring to section 76.

18 And by that point, sir, the notice of application had been filed and this was only a week
19 before we filed our defence and evidence.

20 **THE CHAIRMAN:** Yes.

21 **MS CLEMENT:** So, sir, the defence and evidence was filed on 25 June. Some of it
22 was redacted because of concerns that it may have been confidential, it may contain
23 confidential information belonging to Allwyn. We liaised with Allwyn for confirmation
24 of Allwyn's position as to whether it was confidential. That was difficult for Allwyn to
25 do because the applicants didn't provide them with a Notice of Appeal until quite late
26 on in the process but on 4 July, Allwyn confirmed to those instructing me that the

1 material did not contain any confidential information. That was on the Friday at
2 5.00 pm.

3 On the Monday at 9.30 am, the full unredacted version of the documents were
4 provided to the applicant.

5 Sir, I did just have to deal with that chronology, for reasons that you will understand.

6 **THE CHAIRMAN:** Yes.

7 **MS CLEMENT:** Coming back then to the point in dispute between us, which remains
8 the expert evidence point, we do object to the applicant's proposal for expert evidence.
9 We objected both in terms of the carte blanche permission that my learned friend was
10 seeking in his original draft of the order at 5(b). In other words, he is seeking
11 permission today to adduce expert economic evidence without telling us what issue it
12 goes to, who he is going to instruct or anything of those rather crucial matters. He
13 now seems to have moved on from that and seems to be seeking permission to file
14 an application at the same time as he files his amended Notice of Appeal.

15 **THE CHAIRMAN:** Yes. I think to be fair to Mr Bowsher, I think he probably felt he
16 had to comply with my direction that he turn up with some proposals in circumstances
17 where he metaphysically hasn't got any proposals to make. So I think he probably has
18 rightly accepted that the question of permission will have to wait until he's decided
19 whether he wants it or not, and he is able to articulate what it is. I think we can probably
20 park it but subject, really, to the -- it's part of the same discussion, isn't it, about
21 knowing what his case is and where we are, that the longer that goes on, the more
22 complicated this all gets, I think.

23 **MS CLEMENT:** So we do also have a point of principle -- a principled objection to it.

24 **THE CHAIRMAN:** Yes.

25 **MS CLEMENT:** Which is that whatever material Mr Bowsher manages to produce, it
26 would not be admissible in judicial review proceedings, in any event. I wonder if I can

1 hand up to you a copy of the judgment of the Divisional Court in Law
2 Society v Lord Chancellor. Mr Bowsher and Mr Johnston both have a copy of this
3 **(Handed).**

4 **THE CHAIRMAN:** Thank you.

5 **MS CLEMENT:** Sir, I know I don't have to remind you that we are in a judicial review
6 jurisdiction here and so the test for the admissibility of expert evidence is the same as
7 that applies in judicial review in the Administrative Court. If I need any authority for
8 that -- I don't think it's in dispute but if I do need any authority for that, that is the
9 judgment of Mr Justice Sales, as he then was, in BAA v Competition Commission.
10 That is in the bundle. I know you will be familiar with that, sir. But this judgment is the
11 development, essentially, of where expert evidence -- the admissibility of expert
12 evidence has got to in judicial review proceedings.

13 If I can start by looking at the headnote, just to put this into context, it's a challenge to
14 the Lord Chancellor's decision to reduce the amount payable to criminal defence
15 solicitors under the litigators graduated fees scheme. It's all about the payment for
16 Legal Aid, essentially, and the Lord Chancellor had carried out some analysis,
17 conducted -- he relied on analysis conducted by the Legal Aid Agency which hadn't
18 been disclosed to participants in the consultation process. And that analysis became
19 central to the issues in the case, essentially.

20 Just under the holding element, we see:

21 "The court would seldom grant permission for expert evidence to be relied on in judicial
22 review proceedings pursuant to CPR rule 35 and 54 because it follows from the very
23 nature of a judicial review claim that such evidence was seldom reasonably required
24 to resolve the proceedings within the meaning of Part 35 but expert evidence could be
25 admissible in judicial review proceedings where the impugned decision was
26 challenged on the grounds it was irrational because it had been reached by a process

1 of reasoning which involved a serious technical error of a kind which, while not obvious
2 to an untutored layperson [which includes the judge], could be demonstrated by
3 a person with the relevant technical expertise [and the important point though is], once
4 explained it was incontrovertible."

5 So if the expert evidence is contradicted by a rational opinion expressed by another
6 qualified expert, the technical error would not be incontrovertible and the expert
7 evidence could not be admitted. That is the key point. I will take you to some
8 paragraphs in a moment but as I said, it's a decision of the Divisional Court, it's
9 Lord Justice Leggatt and Mrs Justice Carr, so it's a very strong Divisional Court. We
10 see the analysis on expert evidence starting at section C, paragraph 35, page 1659 of
11 the report.

12 **THE CHAIRMAN:** Yes.

13 **MS CLEMENT:** And we see a heading there, "The applicable principles". It's making
14 the point about the nature of a claim for judicial review and that is because:
15 "It is not the function of the court in deciding the claim to assess the merits of the
16 decision of which judicial review is sought."

17 And it refers to the basic constitutional theory on which the jurisdiction rests:

18 "... confining the court to determining whether the decision was a lawful exercise of
19 the relevant public function."

20 Then paragraph 37 refers to the Powis case and the full categories that applied in the
21 1980s. Paragraph 38 goes on to discuss something of an extension to those
22 principles. So we see Lynch, the case of Lynch. There was some extension where a
23 decision is challenged on the grounds of irrationality. I'll come back to that in
24 a moment, sir, but we do say that is important too:

25 "...and the acceptance that when understanding of technical matters is needed, expert
26 evidence may be required to explain it."

1 We then see at paragraph 39, the extension of that principle to a situation:
2 "... where it is alleged that the decision under challenge was reached by a process of
3 reasoning which involved a serious technical error."
4 And, sir, you will see the similarity to what my learned friend is suggesting this morning.
5 The court goes on to say:
6 "It would be glib to suppose that, if an error in reasoning requires expert evidence to
7 explain it, a challenge to the decision on the ground of irrationality cannot succeed."
8 And the authority is cited there for that. Then over the page, paragraphs 40 and 41
9 are the crucial paragraphs:
10 "The same point applies to a challenge based on irrationality. A decision may be
11 irrational because the reasoning which led to it is vitiated by a technical error of
12 the kind which is not obvious to an untutored layperson but can be demonstrated by
13 a person with relevant technical expertise."
14 But the absolutely crucial sentence:
15 "What matters for this purpose is not whether the alleged error is readily apparent but
16 whether, once explained, it is incontrovertible."
17 So then the court goes on in paragraph 41:
18 "As was recognised in the Lynch case, if the alleged technical error is not
19 incontrovertible but is a matter on which there is room for reasonable differences of
20 expert opinion, any irrationality argument will not succeed. This places a substantial
21 limit on the scope for expert evidence. In practice, it means that if an expert report
22 relied on by the claimant to support an irrationality challenge of this kind is contradicted
23 by a rational opinion expressed by another qualified expert, the justification for
24 admitting any expert evidence will fall away."
25 **THE CHAIRMAN:** Yes.
26 **MS CLEMENT:** Now, sir, I'm sure you can see where I'm going with this. We have

1 extensive expert evidence from not just one but two experts. The Camelot economic
2 experts, their approach was reviewed by the experts instructed by the Commission,
3 Europe Economics and, sir, you have not one but two rational experts who have
4 expressed the view, given their opinion on the transactions that -- the investment
5 opportunity was produced.

6 **THE CHAIRMAN:** Does that dispose of it though? Because presumably it is possible
7 for them to have made a serious technical error, isn't it? I hope they haven't, for your
8 clients' sake, but if they had done, then clearly Mr Bowsher was entitled to point that
9 out, isn't he, and if he needs an expert to do that, the question then becomes can your
10 clients produce a responsive expert report which disagrees with that. Isn't that the
11 question?

12 **MS CLEMENT:** Sir, with respect, it's not, because the points to which Mr Bowsher
13 proposes to put this material are rationality challenges. So the way he put it was he
14 would want to make a -- envisage he could make a Tameside-type challenge.

15 **MR BOWSHER:** Sorry to cut across. One should -- I'm responding to questions on
16 the hoof. The question is what might I want to say. I have not sketched out
17 an exhaustive list of what the grounds of a challenge might or might not be, so
18 I mean -- it gets a little bit ahead of ourselves if one's going to assume that I pleaded
19 out what I might say.

20 **THE CHAIRMAN:** Yes. I think that is -- in a way, Ms Clement, you made your point
21 and I think it's all very clear. I do wonder whether we can take it much further, can we,
22 because don't we have to see what Mr Bowsher is going to say and at that stage we
23 will know what ground he is advancing and, therefore, what ambit, if any, he has to
24 support it with expert evidence. And, obviously, all your arguments will be -- but I don't
25 think I can deal with that in advance, can I? Apart from, obviously, agreeing that the
26 Law Society case says what it says which is very clear, it's very plain.

1 **MS CLEMENT:** I think, sir, it would be uncontroversial. What I would say is this: what
2 the issue cannot be is whether the economic analysis that has been carried out by
3 Camelot, by Europe Economics and relied on by my clients in making the decision
4 under challenge, the issue cannot be whether that analysis was right. And that is
5 because we are in a judicial review jurisdiction. Now, of course, I say it was right, but
6 that's not the issue. That's not the point. We are in a judicial review jurisdiction. What
7 we are talking about here is whether there is any error of law in terms of what has
8 actually happened.

9 **THE CHAIRMAN:** So you are saying that if -- let's just say for argument's sake that
10 the economic consultants did get it wrong and made a serious technical error, they got
11 something completely wrong and when -- actually, I don't think Mr Bowsher is
12 necessarily going to be looking for that because I think he's suggested it doesn't have
13 the models and isn't seeking them.

14 **MS CLEMENT:** One has to say we can spend months -- when Mr Bowsher goes
15 away, commissions an expert report. We all spend a long time and lot of money
16 reviewing that. We go to our experts, we ask for their comments -- I assume my
17 learned friend will probably want to do the same -- we then come back before
18 the tribunal. We take up a lot of time arguing about whether it's admissible, on
19 a line-by-line analysis. We say it's just so much simpler than that. This type of
20 evidence in this type of challenge is not admissible as a matter of principle. So we
21 can short-circuit all of that, saving both the tribunal's time and money because it can
22 never be admissible.

23 **THE CHAIRMAN:** Just so I'm clear about why you are saying that. Are you saying
24 that is because it doesn't matter if the consultancy made a serious technical error,
25 because the Gambling Commission was entitled to rely on it and they did rely on it and
26 that isn't an error in its own right. Is that what you are saying?

1 **MS CLEMENT:** Sir, what you have is you have the question of -- you have the test,
2 not just is there a serious technical error but is it incontrovertible. Where you have
3 another expert -- so even with all the ingenuity of the expert that Mr Bowsher might
4 instruct, they could come up with some argument or some point that they say had been
5 missed or some error in reasoning or something of that nature. But the point that he
6 can't get away from is that there is not just one but two experts that have already
7 looked at the modelling, already looked at the predictions, already looked at the
8 predicted rate of return and reached a rational view that that was the correct way or
9 that was the permissible way of approaching that.

10 **THE CHAIRMAN:** But if they had made a serious technical error in doing that, and if
11 Mr Bowsher's expert were to identify that and point it out and they were then forced to
12 accept they made that error, then it wouldn't be incontrovertible, would it? That point
13 would be incontrovertible because they would have accepted that. Sorry, I'm getting
14 myself mixed up.

15 **MS CLEMENT:** We just don't know. What I do say is given the expert evidence that
16 we have, no matter what argument Mr Bowsher comes up with, because the argument
17 can't be: your modelling is wrong, he's accepted that, so then we come to what can
18 this expert look at in principle. If it's not that the modelling is wrong, what is the expert
19 looking at? It will be looking at was there some flaw in the process or some factor that
20 they should have considered that they didn't. But we say not only have Camelot
21 looked at that but so too has the expert instructed by the Gambling Commission. So
22 the prospect that this third tier of review that Mr Bowsher wants to embark upon is
23 going to ever satisfy the test for admissibility, we say is just impossible.

24 **THE CHAIRMAN:** I absolutely understand. I think you are clearly putting down
25 a marker and I am sure Mr Bowsher is listening to the marker and understands it.
26 I think I was just pushing back on -- I think you were inviting, I may be wrong, I think

1 | you were inviting me to say there's no circumstances in which Mr Bowsher's expert
2 | could identify something which turned out to be admissible. I just don't think I can
3 | accept that proposition because it seems to me that presupposes that somehow,
4 | the -- I don't think that's what it means when it talks about a rational -- opinion of
5 | experts by another qualified expert. I don't think that is what it means. What it means
6 | is that if Mr Bowsher turns up in these proceedings and says: there's a horrible mistake
7 | there and you aren't able to find anybody who says: no, that's not a horrible mistake,
8 | that's what it mean. But I think --

9 | **MS CLEMENT:** The experts have already said there's no horrible mistake.

10 | **THE CHAIRMAN:** They have.

11 | **MS CLEMENT:** They've already reviewed it.

12 | **THE CHAIRMAN:** They haven't done that in the context of these proceedings though.
13 | I'm not sure -- it seems to me they are not experts in the way I think the Law Society
14 | case suggests. That's not how I read it.

15 | **MS CLEMENT:** I think they were econometric experts. It's in the same field. It was
16 | a modelling based on --

17 | **THE CHAIRMAN:** I see, so that was the --

18 | **MS CLEMENT:** That was the context, yes.

19 | **THE CHAIRMAN:** So you are saying that -- yes, can we identify that. I'm sorry to ask
20 | you to do that. It's just I think that is important. Because if that's right, then I think it is
21 | going to cause some difficulty for Mr Bowsher. I think he's already got the difficulties
22 | you present him.

23 | **MS CLEMENT:** Paragraph 45, right at the top:

24 | "Once the Law Society had decided to instruct an expert in econometrics to prepare a
25 | report, notice of that should have been given to the Lord Chancellor ..."

26 | Et cetera.

1 **THE CHAIRMAN:** But that's in the proceedings, isn't it?

2 **MS CLEMENT:** Yes. So my point is it's simply the same type of expert, it's
3 an econometrics expert.

4 **THE CHAIRMAN:** Yes, I see. No, I think the point I am making is that there is
5 a distinction between somebody who might be considered an expert in their field,
6 producing material for the purposes of administrative decision making and an expert
7 who was willing and able to give evidence in proceedings, as to whether or not there's
8 a legitimate and rational way of looking at something which was said to be irrational.
9 I think they are different things. In other words, I don't think --

10 **MS CLEMENT:** I'm not sure I'd agree with that, it tends to be that it's the same --

11 **THE CHAIRMAN:** No. Well maybe we don't need to -- I'm anxious not to argue about
12 things we don't need to disagree with and maybe it's my fault for becoming interested
13 in it, but the point -- maybe we should leave it on the point that you've put your marker
14 down very firmly for Mr Bowsher. He's going to have to go away and think about
15 whether and to what extent he can have a prospect of getting permission. He needs
16 permission in order to put down a case on that and, obviously, at that stage, you will
17 be able to revisit these points if Mr Bowsher decides he wants to have a go at it.

18 **MS CLEMENT:** I see where you are with that, sir. What I would say as my fall-back
19 position is that to ensure that before granting any application to admit the expert report,
20 the parties and the tribunal need to see it. Because you could only possibly determine
21 whether it's necessary to admit the evidence once you know what it is. So we would
22 all need to see it. We may at that stage, depending on what it says, need to instruct
23 our own experts. I simply don't know. And so there will need to be time. If this is the
24 route, sir, that you are going to go down, there will need to be time built into the
25 directions to address that and deal with that.

26 **THE CHAIRMAN:** When you say the route I'm going to go down, I'm not sure I have

1 any choice, have I? You are not seriously inviting me to say he can't have an expert
2 now, are you? He hasn't even made an application so I don't think I can pre-emptively
3 refuse an application he hasn't made, can I?

4 **MS CLEMENT:** So then it's a most unfortunate situation that we are in.

5 **THE CHAIRMAN:** It is. I agree with that. Just maybe to deal with this practicality
6 point. What I think we might have to do is I think we are going to have to crystallise
7 this issue sooner rather than later and so -- I am sure Mr Bowsher is not going to be
8 happy with this but I think I am going to have to ask him to be a lot prompter than
9 29 August to tell us what he's doing and on what basis he's doing it. So the question
10 is really whether that requirement is to produce a Notice of Appeal, an application for
11 permission to amend with an expert report attached to it in draft, whether that should
12 be the requirement and if so, that no doubt will have to come at a later stage, or
13 whether we simply get him back to tell us what it is he's going to do and we can have
14 that discussion then as to whether or not he is going to be allowed to do it, particularly
15 the expert piece of it.

16 **MS CLEMENT:** Instinctively -- I'll turn my back in a moment but instinctively it seems
17 to me it has to be the latter because if he's drafting an amended Notice of Appeal
18 based on evidence that's simply not admissible, we've wasted yet further time.

19 **THE CHAIRMAN:** Yes. So there will be something to be said. Your preference would
20 be to flush all this out earlier rather than later, even if it means that we then have to go
21 through some further steps to deal with it.

22 **MS CLEMENT:** Can I turn my back just for a moment?

23 **THE CHAIRMAN:** Yes, of course. **(Pause)**

24 **MS CLEMENT:** Yes. Confirmation that my instinctive response is the one that we'd
25 like to adopt, simply because we will waste more time otherwise. We might end up
26 with a third or fourth version of a Notice of Appeal before we can even get started.

1 **THE CHAIRMAN:** Yes. Fine, okay, thank you.

2 **MS CLEMENT:** That then will have consequences for -- well everything else in the
3 order. It will mean all you can do today, sir, is simply set up a timetable for dealing
4 with the application for expert evidence, a response to that and then whether that
5 needs to be -- I strongly suspect it will need to be dealt with at a further CMC.

6 **THE CHAIRMAN:** Yes, I think that probably is right, isn't it? Yes. Okay.

7 **MS CLEMENT:** Sir, I don't think on that basis, I don't think there is anything I can
8 really help you with because the timetable will -- the provisional hearing dates that you
9 mention, sir, are never going to be workable on that basis. I also confess I have
10 a problem with that week. I have two days in the Administrative Court that week that
11 you had suggested and so we would have been asking for a later hearing date if that
12 is possible.

13 **THE CHAIRMAN:** There is very little flexibility on this, I'm afraid. We do do our best
14 to accommodate counsel but because the president is chairing this tribunal when -- the
15 plan is for the president to chair the tribunal for the hearing and her availability is really
16 very limited and bearing in mind we just need to get on with this case, I'm afraid there
17 is very little flexibility. We do have flexibility as to what days that week, if that's helpful.
18 Rather depends, I suspect, for you, on whether it's still a two-day hearing or a three or
19 more day hearing. It's not ideal, I appreciate.

20 **MS CLEMENT:** My commitment is the 9th and 10th that week which is the Tuesday
21 and the Wednesday. I don't know if the tribunal would sit for a substantive hearing on
22 the Friday.

23 **THE CHAIRMAN:** Yes, we would do that.

24 **MS CLEMENT:** We would have to see. It would be far from ideal.

25 **THE CHAIRMAN:** No, it isn't ideal.

26 **MS CLEMENT:** I think my concern would be whether we would get there anyway,

1 given how far delayed we are going to be even starting the process that we had
2 envisaged.

3 **THE CHAIRMAN:** I think it depends whether we are going down track A or track B,
4 doesn't it? If we are going down track A which is things pretty much as they are but
5 with no expert evidence (inaudible words), then actually, I would have thought it's, at
6 most, a two day-hearing, possibly less. Whereas if we're going down track B,
7 I appreciate I think that may be more difficult but -- okay, I think -- it may be, I'm afraid,
8 particularly if we are going down track A, that (inaudible) will have to -- we will do our
9 best to accommodate your availability that week but it may be that if it doesn't work for
10 you, then I'm afraid it is the sort of matter which somebody else could pick up.

11 **MS CLEMENT:** One would hope in an ideal world that the Administrative Court and
12 this tribunal could perhaps liaise for a sensible solution but I have hoped that in vain
13 before, but we will do our best.

14 **THE CHAIRMAN:** Yes. We're happy to do whatever we -- at the moment I think that
15 week is available in the president's diary and I think I will be sitting with the president
16 and it's available in my diary, so if that is a possibility, then we can be flexible about
17 which dates we sit. But we can come back to that when we know where we are going
18 and which --

19 **MS CLEMENT:** I think it would be premature at this point, sir, because we just don't
20 know if that's a remote possibility.

21 **THE CHAIRMAN:** Yes. Thank you.

22 **MS CLEMENT:** Thank you.

23 **THE CHAIRMAN:** Mr Johnston.

24 **Submissions by MR JOHNSTON**

25 **MR JOHNSTON:** Sir, I'll be very brief. Perhaps to the point Ms Clement was putting
26 in a slightly different way but on the basis of the same proposition and legal authority.

1 To the extent that it's not possible to say that there is no jurisdiction to adduce expert
2 evidence in this case, I think the way I might put it in the alternative, whilst adopting
3 Ms Clement's submission, is that it seems vanishingly unlikely that it would be possible
4 and the reason for that is the reason given which is, in effect, this field is occupied
5 already by two sets of experts and what is suggested is that we might have a third and
6 then worst-case scenario, a fourth and a fifth and we say experts have already pored
7 over this question.

8 The only other point I was going to make is a practical one. Where I understood
9 Ms Clement had got to was the suggestion that in the same way that one would not
10 ordinarily grant permission to amend without seeing the draft amendment, one
11 wouldn't ordinarily grant permission for expert evidence without seeing at least a draft
12 of that. My suggestion was simply a practical one. I don't wish to put Mr Bowsher or
13 his experts in difficulty at all but it strikes me that probably the easiest way to do this
14 is to put all of those together at one point. So we have a date by which Mr Bowsher
15 comes back and says: I wish to adduce this expert evidence. Here is what it is, at
16 least in draft. Pursuant to that, I want that make these amendments to my NoA.
17 Because otherwise, we get a disjuncture where there's an amended NoA but we don't
18 know whether there's expert evidence to underpin it. So it strikes me that we are going
19 to need to pull this together in some way or at least it would be most efficient, let me
20 put it that it way, to pull it together. Obviously, you can't give permission to amend
21 a Notice of Appeal without seeing the amendment because you can't give permission
22 to amend a pleading at large. And so we can have a discussion about the most
23 appropriate date for that kind of circling of the wagons but I do wonder whether the
24 most appropriate approach is for Mr Bowsher to take a view, go away and then come
25 back with the full extent of the amendments that he wants to make. And then to the
26 extent they are resisted, the parties would resist them. I know there is something

1 slightly unattractive about that because that requires certain work to be done in
2 advance, so I can see the counterpoint to it and I recognise there are questions of
3 timing.

4 **THE CHAIRMAN:** I think your timing point is probably the more difficult one. The
5 problem we have, it's an August problem, isn't it, because if we park all of this until
6 September, then we are almost by default vacating the December date and that is
7 something I am very unwilling to do at the moment. So in a way, it's either -- as I say,
8 thrash it out earlier, in which case it's probably going to be less than perfect or doing
9 something in the middle of August. As it happens I have availability in August which
10 will probably sent a shudder round the room but I'm very reluctant to start asking
11 people to turn up at hearings in August and to be doing substantive work. I'm sure
12 that's not going to be on anybody's wish list.

13 **MR JOHNSTON:** Let me just test that for a moment this way. If Mr Bowsher comes
14 back at the end of August and says: here is my much more modestly amended Notice
15 of Appeal, I'm not seeking to rely on the expert evidence, or he come backs and says:
16 here is the expert evidence that I want to rely on and it's rejected, then we are on what
17 I think you have been referring to as track A and we can play a little bit with the
18 timetable we have here, we can work towards December. I should say as regards
19 December, that unfortunately, December causes counsel availability problems for this
20 team as well. Both for Ms Demetriou, who could in principle, be there but only in very
21 challenging circumstances and I have a three day Court of Appeal floating that week.
22 It could either be then or in January.

23 But if Mr Bowsher comes back and says: I'm not looking to amend very broadly or it's
24 rejected at the beginning of September, then we are on track A and we get to
25 8 December, if that's where we are sticking. And I hear what you say on that. You
26 hear the pleas from counsel on that. If Mr Bowsher does have permission to amend

1 and in particular, permission to amend broadly, bringing in the expert evidence, then
2 8 December just isn't going to work anyway because the timing in here isn't long
3 enough, actually. Rather than potentially truncating a little to fit ourselves into
4 December, the Gambling Commission's going to need to read that expert evidence,
5 go away, consider getting its own expert. There's no way they are going to, I would
6 anticipate, be able to file their responsive evidence within 28 days. So there's
7 almost -- the two tracks, in my suggestion, still work, if I can put it that way, so long as
8 everything gets flushed out together, right at the beginning of September. And then
9 we know basically, we crack the hearing dates or we don't. But it does have the
10 advantage of meaning that rather than granting permission as regards expert reports
11 that you haven't seen, or granting permission as regards pleadings that you haven't
12 seen which, as I say, I don't think you actually would have jurisdiction to do, obviously,
13 anyway, we can kind of take a considered view.

14 Now that's my -- it's a practical suggestion rather than a submission. Put it that way.

15 **THE CHAIRMAN:** I see what you are saying. I think you are effectively saying what
16 is the point of coming back in two weeks' time if I can't make any orders that are
17 determinative.

18 **MR JOHNSTON:** So that's my concern, sir, is that you will have back before you, very
19 vigorous resistance on this side of the court, middle of the court, Mr Bowsher saying
20 he wants to adduce evidence on a particular topic, but it won't be before you and the
21 concern is that we are still -- at levels of relative generality. So we may be going back
22 around the houses, if I can put it that way and I don't know -- obviously, you can't grant
23 permission to amend, so there still has to be that application later but if what we are
24 being told is it's either accounting or econometric evidence and it's kind of in relation
25 to this data or these data, I just wonder whether we won't be that far forward. That's
26 my practical submission.

1 **THE CHAIRMAN:** Yes. I understand. That's helpful. Thank you.

2 Mr Bowsher, yes.

3 **MR BOWSHER:** Can I take two minutes just to respond, to make -- I have a thought

4 about how we might deal -- but I need to discuss --

5 **THE CHAIRMAN:** Of course.

6 **MR BOWSHER:** I don't know whether --

7 **THE CHAIRMAN:** We're going to go past the short adjournment, aren't we, I think,

8 inevitably.

9 **MR BOWSHER:** I was going to say might it be sensible if we --

10 **THE CHAIRMAN:** I'm happy to rise earlier.

11 **MR BOWSHER:** Rise earlier. Five minutes would help me come up with a plan.

12 **THE CHAIRMAN:** Just before we do that -- let me just sort of hold your feet to the fire

13 a little bit and you can come back and give me --

14 Mr Johnston was quite persuasive about giving you the extra time but I have to say

15 I'm deeply uneasy about it. And the reason is that I understand there are all sorts of

16 other demands and so on but I don't like the idea that we don't know where you are in

17 this case. We are far enough into it, and given it's a subsidy control case and given

18 the nature of it, we should know where you are, and I would like to crystallise that

19 sooner rather than later.

20 **MR BOWSHER:** Can I cut across -- I'm trying to think of a plan which brings into

21 (inaudible) because I'm keen to keep the December date and to keep momentum

22 going during August, and I'm trying to work out -- it's a question of the team's

23 availability. That is, as you'll understand, as much a question of activities in other

24 proceedings.

25 **THE CHAIRMAN:** Because of people being on holiday. I understand.

26 **MR BOWSHER:** And I need to make sure I don't agree to do something on the same

1 day we have a two-day hearing with many of the same people involved. I would like
2 to come back with a proposal which makes it possible for us to keep the December
3 hearing.

4 **THE CHAIRMAN:** Yes. Certainly what I want to know, sooner rather than later, is
5 whether we are track A or track B and I appreciate track B might take all sorts of
6 different permutations, but I think -- basically, I think the short message is you are
7 going to have to make your mind up sooner rather than later about whether you want
8 to get --

9 **MR BOWSHER:** That's what I need to --

10 **THE CHAIRMAN:** The question is -- I can give you a date for that which
11 I was -- you've had these documents for a week now; is that right?

12 **MR BOWSHER:** Not since Monday.

13 **THE CHAIRMAN:** Since Monday. There are about 400 of them, something like that?

14 **MR BOWSHER:** It feels like...about two lever arch files.

15 **THE CHAIRMAN:** Yes. I don't think you need six weeks to work out whether there is
16 something in there you want to have a crack at. I would have thought a couple of
17 weeks. So if we gave you till the end of the month -- just to give you a sense of my
18 thinking, you come back and push back --

19 **MR BOWSHER:** That's exactly what I'm thinking of, the sort of thing -- I know a couple
20 of weeks will not work for reasons not to do with it being a couple of weeks, just
21 because of where that falls. I need to work out --

22 **THE CHAIRMAN:** And then if we are on track A, then we can have our timetable -- we
23 can actually work that out pretty smartly, I would have thought. I appreciate it's August
24 but --

25 **MR BOWSHER:** That is -- I will come back with. I have your point. We
26 need -- **(overspeaking)** -- just to make it work.

1 **THE CHAIRMAN:** What would you like to do?

2 **MR BOWSHER:** If we rise now and we come back -- have the short adjournment
3 now, if that makes sense.

4 **THE CHAIRMAN:** Yes, and come back at what time? Do you want an hour? I could
5 come back at 1.30 if that is convenient.

6 **MR BOWSHER:** 1.30.

7 **THE CHAIRMAN:** I will just check if the transcriber is available to do that. **(Pause)**
8 I will rise now, if that suits everybody, at 1.30, and perhaps it would be helpful, I think
9 if you had the opportunity, to discuss with your learned friends the answer, so we can
10 see if everybody is comfortable.

11 **(12.47 pm)**

12 **(The short adjournment)**

13 **(1.30 am)**

14 **Submissions in reply by MR BOWSHER**

15 **THE CHAIRMAN:** Yes, Mr Bowsher.

16 **MR BOWSHER:** Sir, can I --

17 **THE CHAIRMAN:** Fire away, I'm ready.

18 **MR BOWSHER:** Can I just start with two preliminary remarks and then I will set out
19 my proposal. Firstly, there is a -- I'm sure this morning's discussion about the expert
20 evidence is useful but as I think we were getting to by the end of the debate, it's a little
21 bit premature or upstream or whatever. We would not want it to be thought that we
22 are diverting from the core of our case. The core of our case remains, as far as we
23 were concerned, as was confirmed by the Decision Notice which we got in disclosure
24 and you will recall paragraph 2 of that says:

25 "The proposal [which proposal we are talking about] requested an investment in
26 marketing from the National Lottery distribution fund for the relevant financial year."

1 Investment in marketing from the NLDF. We read that and read that as saying that
2 funds for good causes were diverted to marketing and therefore, presumably, the
3 marketing activity of a commercial operator. And there is an argument being made
4 now which we say seems to put form above substance, (inaudible) that wrong. But
5 that is the core of the point that we are making and continuing to make.

6 **THE CHAIRMAN:** Yes.

7 **MR BOWSHER:** All this other discussion, it is very much in the realms of us
8 preserving our position because we have only just seen the underlying material.

9 **THE CHAIRMAN:** Yes, I understand. Just so I'm clear about that, so that is the
10 substance rather than the form point.

11 **MR BOWSHER:** Yes.

12 **THE CHAIRMAN:** You don't dispute that the mechanics of the payment, at least not
13 as far as you -- you are not advancing a positive case on that at the moment, as
14 I understand it.

15 **MR BOWSHER:** Not today. We haven't yet -- there is obviously a time when we will
16 plead our case on that and we obviously need a bit more investigation on that but our
17 current position is that it's a form over substance point (inaudible words).

18 **THE CHAIRMAN:** Yes, so it doesn't matter whether it went into the fund or not, you
19 say diversion of funds.

20 **MR BOWSHER:** It's plain and it's what the decision says.

21 **THE CHAIRMAN:** Yes. So that's your central argument, yes, I understand.

22 **MR BOWSHER:** That's our central point. That is a matter of public -- that is a matter
23 of importance.

24 **THE CHAIRMAN:** Yes. I mean subject to anything you find that made you think that
25 the factual position is not as was being said, and I assume that is most unlikely
26 because Mr Holdaway has been very clear about what happened, on the assumption

1 that money didn't come back out of the fund. I mean that really is a -- it comes back
2 to a construction of the licensing, construction of the Act point. It's really a legal point,
3 isn't it?

4 **MR BOWSHER:** Probably, yes. We haven't got -- obviously, we are still looking at
5 that but yes, it probably is. The question is there is funds -- it is plain that funds which
6 would otherwise have ended up in the NLDF did not. And would have gone to good
7 causes, did not. And how that is characterised under the Subsidy Control Act would
8 be something for the court.

9 **THE CHAIRMAN:** Yes.

10 **MS CLEMENT:** We say that just what follows from that is that that is why ground 3
11 has to be removed --

12 **THE CHAIRMAN:** I was just going to ask --

13 **MS CLEMENT:** -- because it never went into the fund.

14 **THE CHAIRMAN:** Yes, exactly. Exactly, Ms Clement, thank you, I was just going to
15 ask you about that. On that basis, I mean -- you are still hedging your position because
16 you say you haven't looked at it at all but on the assumption that Mr Holdaway has
17 accurately described the position, then ground 3 is presumably gone, is it?

18 **MR BOWSHER:** I'm not going to commit myself today to that, we will have to look as
19 to whether or not, on a proper analysis of the Act, it remains applicable. But --

20 **THE CHAIRMAN:** Because you say -- because that's about whether the Secretary of
21 State is the only person who can make a payment --

22 **MR BOWSHER:** I still have to think about -- we still have to think about whether or
23 not there is -- whether there remains some point to be made. I'm not going to commit
24 today on that.

25 **THE CHAIRMAN:** Yes. And on ground 4, which was about whether the licence
26 conditions provided a mechanism --

1 **MR BOWSHER:** That is somewhat ancillary to -- if it's a link to the first but --

2 **THE CHAIRMAN:** It is not -- there is a slightly different point, isn't there? It's not
3 entirely the same because ground 4, as I understand it, you are saying there's nothing
4 in the licence conditions that allows for this but in fact, we've been told that there was
5 an amendment in 2012 that does allow for this, so are you still persisting with that
6 ground?

7 **MR BOWSHER:** As of today, yes. I mean I'm pleading -- we will be producing an
8 amendment -- an amended Notice of Appeal, once we've considered our position on
9 all of those points. But ground 1 is the core of our case. That is the core. And it is
10 that there is a -- diversion of funds.

11 **THE CHAIRMAN:** Yes. I understand that but I just -- I have to say, it seems quite
12 difficult, on the basis of what's said in the defence and by Mr Holdaway, to maintain
13 either ground 3 or 4. I mean maybe you have an argument about what payment means
14 in terms of the Act, I don't know, I haven't looked at that. And I don't want to push you
15 any further but just to put down a marker. You might want to think very carefully about
16 those grounds, I would imagine.

17 **MR BOWSHER:** Every part of the pleading will be carefully thought about.

18 **THE CHAIRMAN:** Yes.

19 **MR BOWSHER:** But I don't think it's right that I should be giving up points --

20 **THE CHAIRMAN:** No, no, I understand-- **(overspeaking)** -- no, I understand.

21 **MR BOWSHER:** Because there may yet be -- we --

22 **THE CHAIRMAN:** If you can find a basis to keep them going, then of course that's
23 a matter for you but just to reiterate. Certainly the way that they've been pleaded does
24 seem somewhat inconsistent with facts as we now know them but you may have a way
25 of dealing with that.

26 **MR BOWSHER:** The core point is that we don't think -- whatever the facts are or are

1 not, we don't think it diverts from our ground 1.

2 **THE CHAIRMAN:** I understand that point.

3 **MR BOWSHER:** Our diversion point.

4 **THE CHAIRMAN:** Yes, I understand that point.

5 **MR BOWSHER:** Diversion to a commercial operator or (inaudible words) for good
6 causes. However, whichever preposition one ends up using but then --

7 **THE CHAIRMAN:** Yes, exactly.

8 **MR BOWSHER:** That's the point of substance that we will be wanting to focus on,
9 come what may.

10 **THE CHAIRMAN:** Yes.

11 **MR BOWSHER:** Then following on from that, just -- and this may not now be
12 necessary or controversial, but we would resist the notion that it is impossible, in
13 principle, for any expert evidence to be admissible in support of a case in this matter.
14 I would note, for example, that in the case as referred to you, some expert evidence
15 was relied upon. On a process point, for example, in the Law Society case. So that
16 case was focused very much on the rationality challenge there. There were other
17 challenges on which there was expert evidence so I'm not saying it's -- what we would
18 or wouldn't do but I'm just saying now is not the time to try and put a sort of principled
19 decision in the abstract on an application which we haven't yet made and which we
20 said in our skeleton we didn't want to make yet. We have been over that track before.
21 Thirdly, I should correct a point that was made. It is not correct to say that we did not
22 give the Notice of Appeal to Allwyn. At the time of filing we provided the pleadings to
23 the solicitors on the record in the High Court proceedings and asked them to confirm
24 that they had instructions. We didn't get a response to that. We were then contacted
25 by solicitors in this case, Clifford Chance, I believe just after the tribunal notice went
26 up on the website, so I don't have -- I can't remember how long that gap was between

1 filing but there was that gap. But in that period, no one had told us that there was
2 different representation for these two proceedings. For various reasons we will
3 indeed -- one might suppose that the solicitors in the High Court proceedings were
4 engaged on the matter. But I don't need to get into that.

5 Those are the three points I just wanted to make by sort of introduction.

6 So our proposal to get on with things, because we are very keen to do so, is that if you
7 have the timetable, that -- and it would require more than a rewording of 3(a), that it
8 would be that either, one:

9 "The applicants shall file and serve any application for permission to amend their
10 Notice of Appeal, together with evidence in support of that application, by no later than
11 1 August 2025."

12 Unless that evidence is to include expert evidence. Because that will be factual
13 evidence on the delay point which is now raised:

14 "Unless the applicants are instructed to make an application to admit expert evidence,
15 in which case they will notify the parties and the tribunal on 1 August of their intention
16 so to do and will file their amended Notice of Appeal and draft report on 8 August."

17 **THE CHAIRMAN:** You said the draft report on the 8th, not the notice of --

18 **MR BOWSHER:** Draft amended notice and draft report.

19 **THE CHAIRMAN:** Both documents come on the 8th.

20 **MR BOWSHER:** Both documents on the 8th. If we are not relying on expert evidence
21 the amendment goes in on the 1st, the application to amend goes in on the 1st. If we
22 are going to make that application it all goes in on the 8th but we will have given
23 everyone a week's notice that that's what we are going to do.

24 **THE CHAIRMAN:** So strand A, the current position, it will be fixed on the 1st and off
25 we go down the timetable based off that.

26 **MR BOWSHER:** Yes.

1 **THE CHAIRMAN:** Strand B, we then get fixed off a timetable running off the 8th, but
2 then of course that requires permission to be dealt with and so on.

3 **MR BOWSHER:** What I was going to propose is that the timetable would be set up
4 on strand A, to lead to the tribunal's requirements. Strand B is more complicated
5 because it may involve variables which I don't think any of us can necessarily entirely
6 control today. We are going to do what we can do on the 8th, it's really how that is
7 dealt with responsibly. But in my submission the timetable should stay in place leading
8 to December 8 and if the tribunal can deal with the matters as quickly as possible
9 thereafter maybe we can still keep December 8. There's a danger that we spend an
10 awful lot of time worrying about a hypothetical timetable.

11 **THE CHAIRMAN:** Yes, exactly. That makes sense. So basically we are setting
12 a timetable for strand A, but you have an opt out for strand B if you choose to take
13 up -- you have to tell us on the 1st and then you have to produce the goods on the 8th.

14 **MR BOWSHER:** Yes.

15 **THE CHAIRMAN:** We are now actually in the middle of August, which is obviously
16 unfortunate, but I could deal with an application on the papers in August if the parties
17 were in a position to respond to that application.

18 **MR BOWSHER:** We can deal with it in the usual (inaudible words).

19 **THE CHAIRMAN:** You've done the hard work by that stage so I'm just -- I don't know
20 whether you've discussed this and -- the resolution of the application if we go down
21 strand B.

22 **MS CLEMENT:** Sir, I thought this was under strand A. If it's strand A and we get the
23 application to amend on 1 August, strand A is on the assumption that there will not be
24 any substantial change, in essence, to Mr Bowsher's case. It's simply giving him more
25 time to consider the matters that frankly we think should already have been
26 considered, but we are where we are.

1 **THE CHAIRMAN:** Yes.

2 **MS CLEMENT:** So if that comes in on 1 August, we will then obviously have to review
3 it, we will have to reach a deal on whether we oppose it or whether we consent to it,
4 and then that application to amend will have to be determined, sir, by you. If we
5 consent to it then that may be relatively straightforward; if we object to it then there'll
6 need to be a period for those objections to be formulated and considered. I'm not
7 envisaging that we would, if it is as simple as Mr Bowsher has suggested.

8 There then need to be a period for us to file an Amended Defence, and again how
9 quickly that happens depends on how significant the amendments are. If they are very
10 straightforward, as we've been inviting them to do for a number of weeks, then that
11 Amended Defence would be very simple to produce; if they are more significant
12 changes then we may need a longer period of time to do that.

13 **THE CHAIRMAN:** Yes.

14 **MS CLEMENT:** And then we would suggest after that short period thereafter there
15 would then be the statement of intervention and then there would be provision for
16 a reply and a response to the statement of intervention. And we would hope, if matters
17 were simple and straightforward, that that could complete the pleadings by, say, the
18 middle of September. While I'm agreeing to that I would hope there would be some
19 sort of liberty to apply provision if matters do not proceed or do not -- if the amended
20 Notice of Appeal that we get is rather more significantly different --

21 **THE CHAIRMAN:** I understand.

22 **MS CLEMENT:** -- than we are anticipating.

23 **THE CHAIRMAN:** Yes.

24 **MS CLEMENT:** So that is the very straightforward, gets us to 8 December in good
25 time, timetable on track A.

26 Track B is considerably more difficult. It obviously would help if Mr Bowsher could

1 confirm by 1 August if he wants expert evidence. By the 8th he would have to produce,
2 we say, not just a draft of the report but actually an application for permission to
3 adduce it.

4 **THE CHAIRMAN:** I think he's assuming that.

5 **MS CLEMENT:** That would address the test that we have been discussing. And then,
6 sir, what happens next very much depends on what we get and we just don't know.
7 So we will obviously need a period of time to review that expert report. We may, I just
8 don't know, need to instruct our own expert. It may be a contested application. If it is
9 we would say that would need to be dealt with at a CMC so we would need to list
10 another hearing in order to deal with that. And it's very difficult at this stage to even
11 set up a timetable for that because until we see it we don't know how long we'll need.

12 **THE CHAIRMAN:** Yes. It will be a minimum. I think we need to set some sort of date
13 for you to come back and say what you think of it.

14 **MS CLEMENT:** Yes.

15 **THE CHAIRMAN:** And it may well be that what follows depends, I can see that.
16 I suppose the question really is, and I'm conscious of arriving in the middle of August,
17 how quickly do you think you are going to be able to form a view as to whether or not
18 you are going to want to challenge it or not. That's the question I --

19 **MS CLEMENT:** It depends on what it says, sir.

20 **THE CHAIRMAN:** I don't think that's right. I'm not asking you to commit to
21 a substantive response, just to know whether you consent or not. Are you going to be
22 able to make that decision fairly quickly? That is my question.

23 **MS CLEMENT:** Can I just turn my back --

24 **THE CHAIRMAN:** Yes, I'm inviting you to do that, yes. **(Pause)** .

25 **MS CLEMENT:** Sir, yes, I'm grateful for that. What we would suggest, sir, is that by
26 22 August we are able to confirm to the tribunal our view on a way forward, so we will

1 have viewed it by then and we would be in a position to say what we think then
2 happens, either whether we consent to it going in, whether we object in principle to it
3 going in or whether we need our own expert to review it to determine what happens.

4 So we think realistically if, sir, you did want to fix the CMC at this point on a sort of
5 provisional basis where we can agree to vacate it if it's not required, that would be
6 towards the middle or end of September.

7 **THE CHAIRMAN:** Yes. That is going to be difficult because my availability is quite
8 limited. It's possible I can do something in the week of 22nd September.

9 **MS CLEMENT:** I'm sorry, sir, I missed that date.

10 **THE CHAIRMAN:** I'm sorry, it's possible I could do something in the week of the 22nd,
11 perhaps the 24th. It's very late at that stage, isn't it? At that stage we've blown the
12 timetable for December. I'm just -- **(Pause)**

13 I think the probably we are not going to be able to take it much further out, I think we
14 are going to have to give you some time to have a look at them and decide. I think --

15 **MS CLEMENT:** Sir, would it perhaps be sensible to at least list that as in a worst-case
16 scenario so that we don't lose that possible date?

17 **THE CHAIRMAN:** Yes.

18 **MS CLEMENT:** And then once we get the report and once we confirm our position on
19 22 August we can set directions to get there if we need to get there.

20 **THE CHAIRMAN:** Yes. Let's see what availability is for everybody else because that
21 sounds like a good idea. Just to be clear, you are just talking about track B at the
22 moment, aren't you? Track A -- I have forgotten already what you said about track
23 A -- what did you say about track A? You would consent or not consent --

24 **MS CLEMENT:** My learned friend putting in his amended notice of application on
25 1 August. We would have a period to consider whether we consent or object to that
26 within, we would hope, seven days, and if it is as straightforward as we hope that can

1 be accompanied by an Amended Defence very shortly thereafter. I think we had said
2 the -- well, sir, I suppose putting cart before horse, we would then inform the tribunal
3 whether we object to it. I think that was 8 August. The tribunal will then need a period
4 to consider it.

5 **THE CHAIRMAN:** Yes.

6 **MS CLEMENT:** I don't know, sir, when you --

7 **THE CHAIRMAN:** I'm available in August.

8 **MS CLEMENT:** You are available then. So as soon as we get your decision we
9 could -- if it is as straightforward as we hope, we would then be able to file the
10 Amended Defence. Sir, it depends when you can consider it but within seven days.

11 **THE CHAIRMAN:** I think probably it's going to be slightly more complicated if you
12 don't consent, and there is a point to be resolved, in which case I would like to be able
13 to deal with it in August. However, we do get -- I would like to deal with it on the papers
14 unless anybody feels the need to have a hearing, we will have to wait and see what it
15 is. But on the assumption it's not too awful, then it might be something we can deal
16 with on the papers and I can give you an answer on -- so you would know during
17 August what the answer was, if that's possible.

18 **MS CLEMENT:** And again if it is as straightforward as we hope it will be producing
19 the Amended Defence will be a straightforward process; if it's more difficult that's the
20 point at which we write to the tribunal and apply to vary the directions.

21 **THE CHAIRMAN:** Yes.

22 **MS CLEMENT:** At which point we would explain why.

23 **THE CHAIRMAN:** Okay.

24 **MS CLEMENT:** But we hope that track A would be simple, straightforward, very easy
25 to do with the amended notice of application and we would have the pleadings
26 completed. I think the dates I have written down would be completed by

1 19 September. So I would envisage we would file an Amended Defence by 22 August,
2 my learned friend would then have 14 days to file his statement of intervention,
3 5 September, and then there would be a reply and a response to the statement of
4 intervention by my learned friend Mr Bowsher and response to the statement of
5 intervention by us on 19 September.

6 **THE CHAIRMAN:** Yes. If you want a rejoinder you could apply -- you probably won't
7 need one but if you want one you could apply for permission.

8 **MS CLEMENT:** Yes. Sir, I very much hope we don't need one.

9 **THE CHAIRMAN:** No, one would hope not.

10 **MS CLEMENT:** Yes.

11 **THE CHAIRMAN:** Okay, thank you. That's helpful, thank you.

12 Mr Johnston

13 **MR JOHNSTON:** Sir, not an enormous amount to add. I think we have reached some
14 fairly helpful common ground. I think the only tweak I might suggest to Ms Clement's
15 proposed timetable is to push back slightly the date for our statement intervention
16 would be on 5 September, I was going to suggest one more week, the reason for that
17 being the practicalities as you anticipate of things happening in August, plus the
18 degree of uncertainty about precisely when we would get a decision even if I'm
19 opposed. And also mindful of, I think the critical point, which is that if our statement of
20 intervention is going in on 12 September, then the only remaining substantive step
21 before trial would be the reply, and that would be two, maybe Mr Bowsher will want
22 three, I'm not sure, weeks later, but we would be finished with pleading late
23 September/early October and that leaves us with two months of decent headroom.

24 The reason I ask is I just worry that if the application -- if we are in a position where
25 you were deciding the application in middle of August and then we get pushed back,
26 conscious also of availability. I think the extra week would be firstly, much

1 appreciated; secondly, in practical terms absolutely fine. I anticipate Mr Bowsher may
2 want two or three weeks, I don't know, but even if he wanted three from the 12th we
3 would still be well in time for the trial.

4 That was the only suggested tweak that I had.

5 **THE CHAIRMAN:** I tell you what, I think in a way -- I think those timings all assume
6 that it's a vanilla amendment, in which case --

7 **MR JOHNSTON:** (Inaudible words).

8 **THE CHAIRMAN:** In which case you presumably are able, more or less, don't
9 you -- you have that more or less on the stocks or will be able to have it more or less
10 on the stocks, in which case I would quite like to keep to the timetable but if you needed
11 the extra time you can ask for it. I am sure there wouldn't be a difficulty with that. But
12 if we are in a more complicated world where it's not vanilla then it seems to me that
13 even Ms Clement getting her defence in on 22 August, that's going to be in doubt,
14 because if there's some issues about the scope of the Notice of Appeal then I'm going
15 to have to resolve those before any defence can be formulated. So I think we will have
16 to -- in that sort of intermediate world we are going to have to look at the timetable
17 anyway. I think we might leave you on 5 September, but it's not a date that if you did
18 need extra time for any reason you could come back and ask.

19 **MR JOHNSTON:** I'm very grateful, sir. The only other thing that struck me of course
20 is that Mr Bowsher may well be adducing factual evidence -- **(overspeaking)** --

21 **THE CHAIRMAN:** I was going to ask him about that actually.

22 **MR JOHNSTON:** However vanilla the amendments to the pleadings, to the extent
23 there's factual evidence that then puts us into taking instructions and so on and so
24 forth. So the factual evidence will deal with the timing point. If it only deals with the
25 state of knowledge timing point that is one thing; if it goes any wider then again we are
26 into what you are calling the intermediate world, which --

1 **THE CHAIRMAN:** It's difficult to see what -- I will ask Mr Bowsher and see whether
2 he has any ideas -- it's quite difficult to see what factual evidence he could submit.

3 **MR JOHNSTON:** That may well be -- if I could turn my back just for a moment just to
4 check that the 5th isn't -- if I know now that the 5th is going to leave us in difficulties
5 then I will come back to you. I will take instructions now. **(Pause)**

6 Sir, the 5th is not impossible as of today, are my instructions. If that position changes
7 we will --

8 **THE CHAIRMAN:** You will let us know, yes.

9 **MR JOHNSTON:** I'm very grateful.

10 **THE CHAIRMAN:** Thank you very much.

11 Mr Bowsher, I don't know how much of that was agreed beforehand and how much of
12 it has just come out now. Is there anything you want to say about any of those dates
13 and times?

14 **MR BOWSHER:** It's consistent with where I think we were going. I think that will all
15 work for us.

16 **THE CHAIRMAN:** Yes. I mean it's not ideal. I have to say it's a complicated situation
17 and it has lots of facility to go wrong. And in some ways we are in your hands a little
18 bit and you have the ability to make this complicated and make it go wrong if you go
19 (inaudible words) and I'm sure that's not what you want to happen but of course you
20 have to do what you have to do, I understand that.

21 **MR BOWSHER:** My (inaudible words). I don't know what you ask for.

22 **THE CHAIRMAN:** Just on the question of factual evidence, I mean again, I'm
23 not -- obviously, if you are repleading, effectively repleading your case, I don't think
24 I can say to you, you can't put anything in but I'm certainly not, as I sit here today,
25 expecting you to be putting in lots of factual evidence about other things apart from
26 the timing decision because I can't think of anything --

1 **MR BOWSHER:** At the moment I can't think what we would have factual evidence
2 about -- grounds 1 to 4 as they currently stand are not things we would have --

3 **THE CHAIRMAN:** Expert evidence.

4 **MR BOWSHER:** Knowledge of but, you know, it seems unlikely. I've certainly
5 indicated we know what -- we intend to put factual evidence in and I have already said
6 that.

7 **THE CHAIRMAN:** Sorry, just so I'm clear about that, that is the material about timing
8 of the decision.

9 **MR BOWSHER:** The material about knowledge and the timing of these proceedings.

10 **THE CHAIRMAN:** Yes, but nothing else you have on your radar at the moment.

11 **MR BOWSHER:** That is all we have on our radar at the moment.

12 **THE CHAIRMAN:** I'm sure I don't need to remind you but it is sometimes a little bit
13 easy to forget we are talking about judicial review proceedings. There's going to be,
14 I think, quite a lot of scrutiny about anything that sits outside their world. It's not going
15 to be an (inaudible) is the short point. So I'm sure you will be cutting your cloth on that
16 basis.

17 Does somebody have a note of all those dates?

18 **MR BOWSHER:** I think I roughly have the dates right.

19 **THE CHAIRMAN:** I think it might be quite helpful. I don't think we necessarily
20 need -- or do you want an order? Maybe we should have an order for -- I think we
21 probably should. So perhaps can I leave it to somebody to draw up an order.

22 **MR BOWSHER:** We will try and get one pulled together.

23 **THE CHAIRMAN:** Yes. Is there anything else we need to deal with today?

24 **MR BOWSHER:** I don't think there's anything controversial today. I think we sort of
25 assumed -- you made the tribunal's views about the hearing date very clear. And we
26 have sort of not -- no-one's come back on that, so I'm taking it that that is the current

1 listing, until it's not the current listing.

2 **THE CHAIRMAN:** Yes. I think so. I understand there's some difficulties of counsel
3 availability. There is some flexibility in that week, so we can try and manage that.
4 Mr Johnston, I'm afraid to say, I think it might not be possible to move it from that week.

5 **MR JOHNSTON:** So my date is floating so it may be (inaudible words) out the window
6 in any event.

7 **THE CHAIRMAN:** You may be fine anyway. So I think we should proceed on the
8 basis it's happening that week. I think, Ms Clement, if your clerks have any ability to
9 firm up the position with the Administrative Court, we can accommodate that, I'm sure.
10 So if you want to let us know through your instructing solicitors which dates would suit
11 you best.

12 **MS CLEMENT:** Yes. Sir, I suspect doing two hearings back-to-back is extraordinarily
13 difficult. I suspect the option would be to try and move the other one and explore with
14 the Administrative Court if that is possible.

15 **THE CHAIRMAN:** Yes.

16 **MS CLEMENT:** To which extent I would need to say that it has been fixed that week
17 without reference to counsel availability, before they will even consider that
18 application.

19 **THE CHAIRMAN:** This has been.

20 **MS CLEMENT:** Yes.

21 **THE CHAIRMAN:** I mean I will leave it to you to say whatever it is you think you can
22 properly say to them but the position, I think, is clear, that that is the week that the
23 president and I are both available and really there's not much other availability, I'm
24 afraid.

25 **MS CLEMENT:** Sir, in terms of what the order looks like, is it envisaged that we have
26 a track A order and a track B follows it, so we have: if track A, these are the directions;

1 if track B, these are the directions and track B will include the fixture for a CMC on that
2 date in September. I can't remember which date it was now. Was it the 24th or 25th?

3 **THE CHAIRMAN:** Twenty-fourth.

4 **MS CLEMENT:** And then that will have "the parties to notify the tribunal if that date is
5 no longer required", or something to that effect.

6 **THE CHAIRMAN:** I think what we should do is I think we should -- I think the short
7 answer is yes. Let's put the date in the diary anyway, just because if -- if there's
8 anything going on that needs any review, then we can make use of it. But I'm hoping
9 that we won't need it unless we're firmly in track B and that's not straightforward.

10 **MS CLEMENT:** That is very much my hope as well, sir, but I know if we don't fix a date
11 now, we will have no chance of fixing one in September.

12 **THE CHAIRMAN:** I think on the track A and track B, in some ways it really isn't a track
13 B, other than, you know, the option open to Mr Bowsher's clients and then your
14 commitment to come back on the 22nd. So I think that is all that needs to be recorded
15 and the hearing can sit on the back of that. The provisional hearing can sit on the
16 back of that.

17 **MS CLEMENT:** Thank you, sir, I'm grateful.

18 **MR BOWSHER:** Sorry to have -- (inaudible) gone backwards and forwards. The
19 issue on the hearing was the thrilling dichotomy in the colours between two and three
20 days which the interested party and the defendant were at loggerheads over. I was
21 going to suggest we list it for three days for the moment, if that's convenient with the
22 tribunal, as it's the tribunal's convenience, and then we can come back to that maybe
23 in September, when we know what we really need but I --

24 **MR JOHNSTON:** That is exactly the point, so it's simply a question of if there was
25 going to be expert evidence and that changes the complexion of it, then -- there's
26 nothing worse than underlisting. We can always lose a day but that was the origin of

1 the suggestion, it's not --

2 **THE CHAIRMAN:** Yes.

3 **MR JOHNSTON:** (Inaudible words) but we just wondered whether if -- we thought two
4 days -- we're facing the prospect of expert evidence, we're better to reserve a window
5 for three and then lose one.

6 **THE CHAIRMAN:** We can certainly keep a day in reserve. I mean I think the
7 complication comes with Ms Clement, is she's --

8 **MR JOHNSTON:** And I hear that entirely.

9 **THE CHAIRMAN:** And I would like to try and accommodate that but if it's a three-day
10 hearing then, obviously, we are not going to be able to do that, so let's work on the
11 assumption that it's track A, and at the moment it's a two-day hearing which from the
12 sound of things, may well be -- did I say a Friday? But that could change, depending
13 on your fortunes with the Administrative Court. But we are reasonably fixed. If it turns
14 out to be three days, we will have to obviously use the Wednesday or indeed, possibly
15 Monday, Tuesday and Wednesday, depending on the president's preference, I expect.
16 Good.

17 **MR BOWSHER:** Sorry, on that, Mr Richard (inaudible) seems fairly -- it's better to
18 raise it now rather than not.

19 **THE CHAIRMAN:** Yes, so -- well I think we probably -- I think we probably aren't
20 going to know the answer to that until we get to 1 August and then we will be able to
21 firm that up. Good. Okay, thank you very much. Thank you for all your assistance
22 and we look forward to hearing further.

23 **(2.10 pm)**

24 **(The hearing concluded)**