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**IN THE COMPETITION**  
**APPEAL TRIBUNAL**

CaseNo:1730/12/13/25

Salisbury Square House  
8 Salisbury Square  
London EC4Y 8AP

Wednesday 24<sup>th</sup> September 2025

Before:  
Ben Tidswell

(Sitting as a Tribunal in England and Wales)

**BETWEEN:**

**Applicant**

**The New Lottery Company Ltd**  
**Northern & Shell PLC**  
**The Health Lottery Elm Limited**

And

**Respondent**

**The Gambling Commission**

And

**Camelot UK Lotteries Limited**  
**Allwyn UK Holding B Ltd**  
**Allwyn Entertainment 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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Wednesday, 24 September 2025

1 (10.30 am)

2 Housekeeping

3 THE CHAIR: Yes. Good morning, Mr Bowsher.

4 I had better just read the live stream warning.

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

10 Mr Bowsher.

11 MR BOWSHER: Good morning, sir.

12 I am here today again for the applicants in this matter with Harry Gillow,  
13 Joanne Clement KC, and Richard Howell for the Gambling Commission.  
14 Richard Howell is unfortunately unwell, but he is apparently joining us remotely, so  
15 he's here, as it were. Tim Johnston is for the interveners.

16 You have an agenda for today. The key issues are our application for the admission  
17 of expert evidence and then depending on that, on the conclusions of that, the question  
18 of our application to amend our notice of appeal, and then the future shape of  
19 proceedings up to trial.

20 I wasn't going to introduce the case in great detail. It isn't so long since we were  
21 debating that in some detail, and you've had quite a lot from us in terms of written  
22 material. Just in terms of housekeeping on the written material, you should have the  
23 documents bundle, which has our application with an amended notice of appeal in and  
24 so forth, and you should have an authorities bundle.

25 THE CHAIR: Yes.

26 MR BOWSHER: Just to clarify on the authorities bundle, there were, in the end, two

1 | electronic versions.

2 | THE CHAIR: (Overspeaking). Yes.

3 | MR BOWSHER: I'm hoping that -- the agreement (overspeaking) counsel, if we went  
4 | backwards to the old one, and there's one additional authority that will be handed up  
5 | in hard copy because that seemed more sensible for everyone's noting.

6 | THE CHAIR: I've got an authorities bundle which says it's updated, and then I've got,  
7 | separately, British Standards Institute, and the Medicines and Healthcare  
8 | Regulatory Agency.

9 | MR BOWSHER: I think that's right, because the original one was updated, because it  
10 | was updated from the last CMC, if you see what I mean. It won't be the end of the  
11 | world -- if we realise that we're in the wrong bundle, no doubt it'll become obvious fairly  
12 | quickly and we'll be able to sort that one out.

13 | There is an addition to that, what we've called an alternative amended notice of appeal.  
14 | It is --

15 | THE CHAIR: Ah. There is a different document from --

16 | MR BOWSHER: -- which is that which you have in hard copy, which is what we would  
17 | be asking for permission to amend to if we didn't succeed on our application to adduce  
18 | expert evidence. I will refer to that a little, just to illustrate what we can and can't do.

19 | THE CHAIR: In terms of the differences between this and -- so what do we call this?  
20 | Should we call this the alternative amended?

21 | MR BOWSHER: Yes.

22 | THE CHAIR: So, the difference between the alternative amended and the  
23 | amended -- is that anything more than removing the references to Mr Williams?

24 | MR BOWSHER: Not really, no. I think there are a couple of textual bits where, to  
25 | make sense of it, you need to do some (overspeaking) --

26 | THE CHAIR: Yes, of course. Yes, because of the cross-references (overspeaking).

1 Yes.

2 MR BOWSHER: -- as a pleading, but it is essentially just taking the pleading as is, but  
3 putting Mr Williams's words in pleading form.

4 THE CHAIR: Yes, I see. Yes, I see. That's interesting. One of the things that this  
5 does clarify that I was going to ask you about -- maybe you'll come to it -- is that you  
6 haven't actually taken out what Mr Williams says from here. You've just removed the  
7 references to Mr Williams, is that right?

8 MR BOWSHER: (Inaudible) yes.

9 THE CHAIR: So, yes. You're going to come back to that.

10 MR BOWSHER: Certainly, we'll come back to that. That is obviously a point we need  
11 to come back to.

12 THE CHAIR: Yes.

13 MR BOWSHER: Sorry. Just while I'm doing, in my head, housekeeping.  
14 The other thing that I'm not sure -- can I just hand up? Sorry. Apologies.  
15 There have been some exchanges about what the timetable will be were you to admit  
16 expert evidence. You've seen that attached to my learned friend Mr Johnston's  
17 skeleton. There is a timetable. There's been some discussion about that. Again, I  
18 don't think we need to worry about it just for the moment, but we've sketched out what  
19 we say is a timetable which would enable expert evidence to be adduced and are still  
20 to reach an 8th December trial date. I'm sure that it is contentious.

21 THE CHAIR: So this is if Williams is permitted and you're still saying you can get to  
22 the hearing in the week of 8 December?

23 MR BOWSHER: That's what we're saying, yes. I'm sure that there will be discussion  
24 about that.

25 THE CHAIR: Yes.

26 MR BOWSHER: Open for discussion.

1 THE CHAIR: Yes.

2 MR BOWSHER: Although we have the separate agenda items for today -- sorry, have  
3 I switched this on? Yes, I think I have, sorry.

4 It isn't really possible to break them down because the three points, expert evidence,  
5 amendment and timetable, are all quite closely linked. We end up having to discuss  
6 them all. So I was proposing to bat on -- sort of make our points on all three, albeit  
7 that you, sir, will have to decide the points serially, if you see what I mean. But I will  
8 have largely made my points on all of them in one go, as it were. We may then need  
9 to course correct as the case management conference proceeds, if that's all right.

10 THE CHAIR: Yes. I'm anticipating that at some stage I should give a ruling on whether  
11 the expert evidence should be admitted. Presumably we'll then talk about the  
12 consequences of that for amendment and timetable. But I can see why it's quite  
13 difficult to detach all three from each other. So I understand that.

14 MR BOWSHER: We will have foreshadowed much of what we would have been  
15 saying already.

16 THE CHAIR: Yes.

17 MR BOWSHER: But there may have to be some course correction at that point.

18 THE CHAIR: Yes.

19 Application to adduce expert evidence

20 Submissions by MR BOWSHER

21 MR BOWSHER: You will of course have had the draft expert report of Mr Williams  
22 and the report produced by Dr John Spicer for the Gambling Commission. They are  
23 in the electronic bundle. They are referred to in the skeletons. I'm hoping that you will  
24 have had an opportunity to have a look at them.

25 THE CHAIR: I have.

26 MR BOWSHER: For the moment, when I refer to the amended notice of claim, I mean

1 the original notice, the amendment with Mr Williams' references in.

2 So far as the amendments are concerned, it appears to be GC and Allwyn's position  
3 that, if the expert evidence application is granted, they don't oppose the proposed  
4 amendments in that draft, but of course they make a number of points about whether  
5 or not the evidence should be admitted.

6 The amendments themselves, of course, fall into three categories. The issue is  
7 around the timing of the claim, and I don't think our pleading on those points is  
8 contentious. You'll have seen, we've added in some material which deals with the  
9 point in the defence about why the claim was brought when it was brought.

10 Then there is some amendment made to meet the case made in the defence,  
11 which -- and you'll recall this point that in the defence, they say that our case was  
12 wrong. We picked up the language from the decision notice, which referenced monies  
13 going from the National Lottery Fund. It's been pointed out that that is not strictly  
14 speaking how it happened, and we've made amendments to reflect that.

15 I don't think either of those two categories of amendment are controversial. When  
16 I refer to the amendments, unless insofar as necessary, as it were, I'm referring to the  
17 econometric issues, the errors around econometric analysis, which underpinned the  
18 Gambling Commission's decision.

19 THE CHAIR: Yes. I think you were suggesting that there was agreement about the  
20 amendments save for the position of Mr Williams and his expert evidence, but I wasn't  
21 sure whether you were saying that, for example, your alternative amended pleading  
22 would be accepted by the other parties. Because it seemed to me that there was at  
23 least some doubt being expressed about whether I think the Intervener, and possibly  
24 both the Commission and the Intervener, were prepared to accept a pleading in the  
25 form of the alternative. In other words, I'm going to be interested to explore -- useful  
26 to get this resolved earlier rather than later, I think, so we all know where we stand.

1 But I got the impression that whereas removing paragraphs 35 (g) to (i), I think are the  
2 particular -- I think I've got that right, the particular Williams references -- if they came  
3 out entirely there would be no objection. But leaving them in the way you have may  
4 not be something that is agreed by the other parties.

5 MR BOWSHER: I'll be corrected if I'm wrong, but the correspondence last night, which  
6 may not have got to the tribunal, my understanding was that Gambling Commission  
7 were content with the alternative amendments. You're right. The Allwyn's position  
8 was a little more nuanced. Perhaps it was broadly content, but interested to see how  
9 we put it.

10 THE CHAIR: Yes. Mr Johnston. Yes. It would be helpful, thank you.

11 MR JOHNSTON: Briefly on the point now, if that helps, by way of clearing the land at  
12 the beginning.

13 Yes, I do. Sir, have you got copies of the correspondence from last night?

14 THE CHAIR: I have it somewhere. If they're in the bundle, I will. But otherwise --

15 MR JOHNSTON: We may not have these two letters.

16 MS CLEMENT: There was some more recent correspondence. So we have  
17 correspondence from yesterday, so two letters from 23 September, from both those  
18 who instruct me and those who instruct Mr Johnston.

19 MR BOWSHER: They are just being handed up now. (Handed)

20 THE CHAIR: Thank you. So these are --

21 MR JOHNSTON: It might be easier if you read this, and then I'll address you briefly.

22 (Pause)

23 THE CHAIR: Yes. So the point here is that your -- I mean, your submission is that  
24 the Williams material isn't relevant to the rationality application anyway, the rationality  
25 challenge anyway. So is this effectively preserving that position?

26 MR JOHNSTON: So our position is this. I think three points, really, pretty briefly.

1 Firstly, we've been mindful throughout we're the interested party. We're not the  
2 defendant. You'll recall in our letter in August, we agreed with the  
3 Gambling Commission, and we also sort of set out a pragmatic position where we tried  
4 to suggest which paragraphs we thought could work without Williams or might work  
5 without Williams in a spirit of being constructive.

6 Second, NLC has told us just in the last couple of days it wants to effectively run  
7 everything, just removing the name Williams. If that is their position, we are not  
8 resisting it, but we are concerned by it, let me put it that way. We said this in our  
9 skeleton and we said it in our letter of last night: we don't currently understand how  
10 the applicant proposes to run some of its pleaded points at trial by way of pure  
11 submission.

12 So in particular, Allwyn is keen to understand how Mr Bowsher intends to substantiate  
13 his case in relation to errors 1, 2 and 3 at trial, and we really do want some assistance  
14 on that point at this hearing. Ultimately, of course, how they put their case at trial is  
15 a question for them. I'm not seeking some kind of a sneak preview. What matters,  
16 though, is we need to know what is being said and how it will be substantiated in order  
17 to know how to meet it. Because on this premise, we're potentially in a compressed  
18 timetable to December, and it has consequences for Allwyn's factual evidence.

19 So, you'll recall a good part of the focus of these alleged errors relates to what Allwyn  
20 has done. If those arguments are going to trial, we're going to have to address at least  
21 some of them by way of factual evidence, so there's a timetabling point.

22 But there's a rather more substantive point, because we need to know today the case  
23 that we're meeting. As it stands, the applicant has no factual evidence. They haven't  
24 put in a factual witness statement. The premise of this conversation is that Mr Williams  
25 is out. So, at trial, NLC, it's case closed. Yes, it can reply if it's properly reply evidence,  
26 but it obviously can't, by way of reply evidence, introduce material that's completely

1 novel or widens the scope of it. So the premise from our perspective, if we're in this  
2 world, is that NLC is going to make this case from the contemporaneous documents.  
3 So that's the case we would be meeting. That's the way we would be responding to  
4 it.

5 Now, if Mr Bowsher is proposing to do it differently then the invitation to him today,  
6 either now or at a later point in his submissions, wherever convenient, is to explain if  
7 that's not the case, if there is an alternative strategy. Because as it stands at the  
8 moment, as I say, he doesn't actually have any evidence, factual or expert in this  
9 world. And so his case must be he's going to run error one, error two, error three from  
10 the contemporaneous documents, and we'll meet that.

11 But what we're cautious about is the possibility that we might meet that, then we get  
12 to the reply and suddenly there are whole other vistas in how this is being done, and  
13 we're into a chaotic scenario before trial. So, we're putting down a marker. We are  
14 not opposing; we are just unclear how it would be put and we're making clear our  
15 understanding of how it would be put. If that's a false premise, Mr Bowsher can assist  
16 us this morning. So I hope that's helpful in terms of understanding where we are.

17 THE CHAIR: Yes, thank you very much. Mr Bowsher.

18 MR BOWSHER: It may be that much of what I'm going to say today is, in a more  
19 extended version, addressing Mr Johnston's concerns. They are concerns we share  
20 because, to some extent, that's the very reason why we say expert evidence is  
21 reasonably required. And I'll come on and spell that out; I'm not going to spell out all  
22 of that in -- but can I just --

23 THE CHAIR: Give me a sense of where you're going with that?

24 MR BOWSHER: Just to give you a sense of where we're going with this. It is, of  
25 course the situation to try and take a snapshot at the moment to frame our remarks.  
26 If we were proceeding on the basis of -- as you rightly say, it's the lettered 35

1 paragraphs -- at the moment there is no responsive pleading to them so we don't know  
2 what the factual landscape will be at the close of pleadings.

3 Having seen what Dr Spicer has to say -- and again, this is getting way ahead of  
4 ourselves in many ways but it's trying to address what Mr Johnston's saying -- what  
5 I would anticipate the case is going to be is that the documents are the documents.  
6 As he says, we have quite a lot of contemporaneous documentation to look at now.

7 Presumably, the case is going to be along the lines of what Dr Spicer has said, which  
8 is not that Mr Williams is factually wrong that these things weren't done or  
9 whatever -- again, this is a very broad brush point -- but that a view had been taken  
10 about the modelling which had been done on behalf of Camelot over many years.  
11 I don't want to be too pejorative at this stage, but it had been along the lines of, "Well,  
12 this isn't as good as we would like to have seen, but maybe it isn't worth pushing them  
13 too hard. It's the last year of the franchise. We're not going to get much better".

14 Now, that's a very, very, very loose way of putting it. But if that is where we are, we  
15 are definitely in a position that we can run a case simply on the basis of the pleaded  
16 case, which will be, "Well, we agree the facts; we just don't think they matter".

17 Now, to foreshadow what we say, we say at that point, expert evidence is reasonably  
18 required, because what we can do on this case, on the documents, is identify errors.  
19 Because there may be some word play here, but the errors, there's actually quite a lot  
20 of agreement between Mr Williams and Dr Spicer about what did or didn't happen in  
21 broad terms, and the documents say what they say.

22 What is much more difficult for us to do, and we say that the tribunal will need help  
23 with, is as to the consequence of that. How significant are these? Is it fair to simply  
24 say, "Well, this wasn't very good, but it doesn't really matter" or "This wasn't very good  
25 and this has a serious consequence". That is where the tribunal, given its specialist  
26 expertise, will want to will want to drill down into that. Now, it will have its own

1 expertise, but it is right, or we say it is right and proper, that the tribunal should have  
2 the benefit of Mr Williams's assessment as to why those errors do matter.

3 We can make that case without it; it's just we're, I think in my notes it says, in due  
4 course we're running that case with one hand behind our back because we're having  
5 to do it simply as a sort of legal submission to the expert tribunal saying, "Well, read  
6 what they said themselves. This isn't very good. How can they have based their  
7 decision, a rational decision, on the basis of what they've assessed as being not very  
8 good?"

9 THE CHAIR: Yes, I suspect that this is all going to wash out, isn't it, as we get into the  
10 question of Mr Williams's evidence. Maybe the best thing to do is to get into that, and  
11 we'll see where we end up with that. But I think that two questions are quite closely  
12 related, aren't they? Because the justification for putting Mr Williams's evidence, and  
13 the extent to which you should be able to run a case which is based on the areas that  
14 he identifies, they are obviously more or less the same thing. So I imagine that dealing  
15 with one is going to help somewhat with the other.

16 MR BOWSHER: Well, we will say we can identify the errors because they're on the  
17 documents. But what we can't do is -- what we will be limited in what we can do is  
18 identifying what their consequences were, what their significance is. We will have to  
19 make the best of the case that that we're able to make at the end of the day.

20 THE CHAIR: When you talk about the errors, though, just to be clear, you're talking  
21 about errors made by Camelot, not necessarily by the Gambling Commission or its ...

22 MR BOWSHER: Errors in the material made -- in the econometrics assurance reports  
23 on behalf of Camelot, on the basis of that --

24 THE CHAIR: Yes.

25 MR BOWSHER: -- and then in the assessment by those by the Gambling  
26 Commission's experts, Europe Economics in essentially allowing those errors to be

1 brushed aside.

2 THE CHAIR: Well, I think -- yes, I think it's worth just being really clear about the  
3 distinction between those two things because they are quite different, aren't they?

4 MR BOWSHER: Yes.

5 THE CHAIR: And no doubt you'll come to this, but the basis on which the relevance  
6 of the underlying errors, for example, errors that weren't apparent to either  
7 Europe Economics or the Gambling Commission might be quite different from errors  
8 that were apparent. So, I think it is worth keeping that distinction in mind between  
9 things that Camelot has or hasn't done and the econometric assurance and things that  
10 Europe Economics and the Gambling Commission might or might have done that they  
11 didn't, if I can put it that way.

12 MR BOWSHER: Let me come -- let's see where we get --

13 THE CHAIR: Let's see how that comes out.

14 MR BOWSHER: But I think, as you said, there's two stages to this. There's the errors  
15 in the original analysis, and then there's the consequences of that which is assessing  
16 that analysis and saying, "We can proceed regardless of those errors". It's that second  
17 stage which is more difficult for us to do without economic evidence, because it  
18 involves a judgment as to how -- a judgment -- yes, the errors are there, but are they  
19 serious or not serious? Do they go to the decision-making or not?

20 THE CHAIR: Why don't you get on with your application and we'll see how that comes  
21 out.

22 MR BOWSHER: Exactly. And much of this may -- and again, there's a danger one  
23 gets ahead of oneself -- much of this may become, loosely speaking, academic,  
24 depending on how the pleadings -- what ends up being in issue in the pleadings. So,  
25 worth just sort of seeing what the nature of the high level challenge is to the decisions  
26 and the material that justified it. And I'm not going to go through all of the material in

1 the various reports, but it is worth just identifying what the challenge is to. To remind  
2 you, the decision itself, or the notice of the decision, is in the correspondence bundle,  
3 PDF page 2011.

4 THE CHAIR: By correspondence bundle, you mean the main bundle?

5 MR BOWSHER: Yes.

6 THE CHAIR: Yes.

7 MR BOWSHER: 2011. That's the minute of the decision.

8 THE CHAIR: Yes. So ... this is the meeting of 22 March. Yes.

9 MR BOWSHER: Obviously there's a number of other things obviously happened at  
10 this meeting, and it's item 4.

11 THE CHAIR: Yes.

12 MR BOWSHER: And you can see that this is all based -- this decision notes the  
13 recommendations paper and highlighted, if I can jump ahead to 4.2.2:

14 "External advisers support reduced levels of recommended investment, recognising  
15 and concurring with our risk averse approach in our role as regulator, particularly over  
16 a ten month period."

17 There's a discussion then and that then becomes the basis in 4.3.3 of the  
18 recommendation that the proposal be accepted. Not a lot of content in that, but that  
19 is the reasoned bit of the decision.

20 That itself is based on the recommendations, which are at 2004. That, again, is based  
21 on, you can see, paragraph 3. This is the internal view.

22 "Our view, supported by external advice, is that Camelot's rationale for continued  
23 marketing ... is justified and necessary, particularly considering the current economic  
24 situation and impending transition ... We ... are content that the financial assumptions  
25 related to the investment are broadly underpinned by an appropriate rationale and  
26 evidence base."

1 And there's a bit more discussion here. The conclusion of the recommendations in  
2 terms of the level of recommendation, level of investment, is at paragraph 21.

3 What this is all based on, or what -- this chronologically comes later -- but what where  
4 the review of the material which this recommendation is based on is in the  
5 Europe Economics review at 2361, which is in fact later. But it summarises material  
6 in a number of previous documents. And this is a document which --

7 THE CHAIR: Yes, I wondered about this because it actually happened quite a long  
8 time after the decision is made, doesn't it?

9 MR BOWSHER: It does.

10 THE CHAIR: So this is a -- because there is a preliminary report, I can't quite  
11 remember the dates, but there's a preliminary report in 2022 and then there's  
12 something from Europe Economics in March 2023 and then there's this document. So  
13 this is sort of the wash up at the end.

14 MR BOWSHER: It appears to be the wash up document reviewing the quality of  
15 modelling, not just for the final --

16 MS CLEMENT: (Inaudible) for a moment. There's been a bit of confusion here on  
17 Mr Bowsher's part. So it's all set out in Mr Holdaway's witness statement.

18 THE CHAIR: Yes.

19 MS CLEMENT: You have the recommendation that's made to the National Lottery  
20 Committee in March. You then have recommendations and analysis by  
21 Europe Economics before that recommendation is made. There's then delegated  
22 authority given to an officer, the director, to take the decision. Further work is done in  
23 that intervening period. And the decision, as Mr Bowsher well knows because it's  
24 annexed as the decision in his own document, was taken on 19 July 2023. That's at  
25 page 28 of the bundle.

26 THE CHAIR: So that's different from what we looked at before --

1 MS CLEMENT: That's different from what Mr Bowsher is saying --

2 THE CHAIR: -- which was the medium in which the (inaudible).

3 MS CLEMENT: Yes, so it's all part of a process. But the actual decision that he's  
4 challenging is 19 July decision, page 28 of the bundle.

5 THE CHAIR: Yes.

6 MS CLEMENT: So the document he's taken you to now at 2361 is an overarching  
7 review by Europe Economics. It's headed -- you can see it's a file note:

8 "Subject: Final Econometrics Report Assurance for 3NL."

9 So it's an overview of the entirety of the process. So there is in the bundle -- I'll find  
10 the page reference in a moment -- of the various analysis and advice that  
11 Europe Economics gave to the Gambling Commission before the decision was made.

12 THE CHAIR: So just -- can you help me? So what is the purpose of this document  
13 that Mr Bowsher just referred to in January 2024? Obviously, that's after everything.

14 MS CLEMENT: After everything, sir. Yes.

15 THE CHAIR: So what is the purpose of it?

16 MS CLEMENT: It's an overview of the process throughout 3NL. So if we see the --

17 THE CHAIR: So it's like a --

18 MS CLEMENT: Throughout the third licence.

19 THE CHAIR: -- post-mortem exercise, effectively.

20 MS CLEMENT: Yes. So if we look at the sort of pink heading towards the bottom of  
21 the page:

22 "Have returns to Good Causes been enhanced since 2018?"

23 So it's looking at it over the entirety of the process.

24 THE CHAIR: Yes.

25 MS CLEMENT: Obviously -- so the chronology means this document wasn't before  
26 the decision maker at the relevant time.

1 THE CHAIR: No. I mean, I suppose it's evidence of the context, isn't it, in which the  
2 decision was made because there's no doubt all sorts of material in there that tells you  
3 about what everybody knew at the time of the decision.

4 MS CLEMENT: Exactly. It's drawing on the analysis and advice that  
5 Europe Economics have given throughout the process.

6 THE CHAIR: But it's not the analysis on the basis of which the decision was made.

7 MS CLEMENT: So it couldn't have been, because it wasn't created until six months  
8 afterwards.

9 THE CHAIR: Yes. Thank you.

10 Yes, Mr Bowsher.

11 MR BOWSHER: It is exactly that. I'm not today going to take you through all of the  
12 material, some of which is referred to expressly in our draft pleading in the various  
13 analyses. This is the end point, which is a useful summary. It reflects the various  
14 points and must presumably reflect Europe Economics' own internal assessment of  
15 what has happened, and provides a useful overview for today's purposes of what  
16 Europe Economics thought about the process that had gone on, not just for the  
17 decision that we're talking about today, but over previous years.

18 And that's important. That has become important because we now know from what  
19 Dr Spicer has said in his report: that to some extent, the previous context is part of  
20 what they're looking at when they're looking at the decision itself. But I don't think for  
21 today's purposes, it's helpful to unpick the archaeology of what we'd have to do at trial  
22 to get into the guts of that decision.

23 This is a useful, high-level summary assessment by Europe Economics of the  
24 problems which they have seen with the evidence supporting the decisions, including  
25 the decision which is challenged.

26 At paragraph 3 -- and this is in our pleading -- "The evidence ...". Sorry, it's not

1 | numbered. The third paragraph, it's PDF 2361:

2 | "The evidence presented is not decisive in demonstrating that good causes have been  
3 | enhanced by the amounts claimed by Camelot. Some of this uncertainty is probably  
4 | unavoidable. Furthermore, even though Camelot may not always have provided  
5 | convincing statistical evidence to reject the null hypothesis that marketing spend did  
6 | not contribute to enhanced returns, the evidence provided is generally consistent with  
7 | the alternative hypothesis that returns have been enhanced."

8 | Which is again, at the very least, hardly a resounding approbation for what has  
9 | happened.

10 | There's then, on the following page, 2362, a lengthy passage, which goes through the  
11 | estimated returns on investment. A lot of this is about what they, Europe Economics,  
12 | do not have visibility of. A number of the points which are picked up by Mr Williams,  
13 | including problems with, for example, multicollinearity are picked up here.

14 | That leads on to page -- again, this will be highly relevant to what we would be saying  
15 | about the quality of the material that had been relied upon. Without going through all  
16 | of that line by line today, page 2364 in the conclusions:

17 | "The evidence Camelot has provided does not demonstrate conclusively that good  
18 | causes have been enhanced by the amounts claimed. However the evidence  
19 | provided is generally consistent with the alternative hypothesis [a repeat of what's just  
20 | been said] ...

21 | "Some of the uncertainty is probably unavoidable. We have previously recommended  
22 | that the econometric evidence on the returns from media investments should be  
23 | treated cautiously. There is considerable model uncertainty, and depending on the  
24 | preferred model (which reasonable econometricians may disagree about) the findings  
25 | could have implications for the estimate ROI from media investments."

26 | Then it goes on to further conclusions.

1 MS CLEMENT: (Inaudible) the last sentence (inaudible) important, "That  
2 recommendation remains", which was Europe Economics' view at the time in  
3 January 2024, and remains Dr Spicer's view today.

4 THE CHAIR: Yes, I think Mr Bowsher read that out. So I don't think you need to rise,  
5 Ms Clement.

6 MR BOWSHER: I've read it out before.

7 THE CHAIR: Yes.

8 MR BOWSHER: Exactly. I wasn't -- sorry. I think we've already seen that bit.

9 This is all quoted in 35(e), (f) and (g) as a useful conclusory summary, which is drawn  
10 effectively from Europe -- by Mr Williams and then into our case of what seem to us to  
11 be defects in the material which based the decision. That is material which we say is  
12 properly for trial.

13 One can see immediately, though, that there's the possibility of a dispute about what  
14 the real significance of these shortcomings, or whether or not they are sufficient to  
15 make good the rationality attack.

16 THE CHAIR: So just to unpack that a little bit. So what do you mean by that? We're  
17 talking here, aren't we, about the rationality of the Gambling Commission's decision  
18 on the basis of the advice that it had?

19 MR BOWSHER: Yes.

20 THE CHAIR: And it's being told that there's uncertainty about the models and  
21 effectively that they're not terribly reliable.

22 MR BOWSHER: And there is material -- I'm not taking you to it at all now, but there is  
23 prior contemporaneous material to similar effect (overspeaking).

24 THE CHAIR: Yes, and Dr Spicer refers to some of this in his draft report as well. So  
25 all of that's out. That's all there, isn't it? But just help me with why one brings into the  
26 equation a further dive into the material that Europe Economics didn't get in order to

1 decide whether or not there was a rationality problem. Putting aside the Tameside  
2 point for a minute; we'll come back to the Tameside point.

3 I mean, your case is, as I understand it, effectively that it was made plain to the  
4 Gambling Commission that there were problems with the data and yet they really  
5 relied on the data in a way that was inappropriate in those circumstances.

6 Why does it matter how bad the data was for that purpose? Or rather -- sorry, let me  
7 put it -- why does it matter beyond what they were being told by Europe Economics?  
8 In other words, if they didn't know about that and they weren't being told about it,  
9 absent the Tameside point, where does it come into the analysis?

10 MR BOWSHER: Well, this is somewhat anticipated in where one expects the case to  
11 go. I mean, as I say, that's why I started with the snapshot I did of where we are on  
12 the pleading. Because what one can see from Dr Spicer is what's going to be said is:  
13 well, yes, these analyses were flawed in the ways that we described, but we took the  
14 view that they were good enough because we were looking in the context of reports  
15 over a number of years and they were good enough to form a basis of the decision.  
16 That does involve a degree of econometric expertise, to take a view as to whether the  
17 flaws are not so significant to go to the root of the decision, or they are.

18 THE CHAIR: But isn't that a merits challenge? Aren't you just talking about a merits  
19 challenge based on whether or not Europe Economics got it right?

20 MR BOWSHER: Well, we --

21 THE CHAIR: We are putting aside the Tameside point, because obviously you're  
22 going to come back to that, I understand that. Because I understand there's  
23 a separate question as to whether there was sufficient notice for the  
24 Gambling Commission to have concluded it didn't have proper evidence, and it should  
25 have gone looking for more. That's a different point.

26 But just on the, sort of, pure rationality point, I don't understand at the moment why

1 anything that Mr Williams says is of any relevance, given that the  
2 Gambling Commission only saw what was given to it by Europe Economics, and that's  
3 the basis on which it made the decision. Either that decision was -- it stands or falls  
4 on the Europe Economics information, doesn't it?

5 MR BOWSHER: Well, Europe Economics and the econometrics assurance material  
6 which Europe Economics were analysing. So they had both levels: they had the  
7 Camelot material and --

8 THE CHAIR: Well, yes, and I --

9 MR BOWSHER: (Overspeaking).

10 THE CHAIR: Yes, and to be fair to you, I think, as I understand it, the  
11 Gambling Commission had visibility of the econometric material as well and may have  
12 had some views on it themselves, I don't know.

13 But I mean, that's not really the point, is it? The point is why are we concerned with  
14 things that the Gambling Commission wasn't aware of? That's the point I'm putting to  
15 you. Why does it matter? If they weren't aware of things, if those things -- why do  
16 those things matter if they never came to their attention and weren't part of their  
17 decision-making process?

18 MR BOWSHER: Well, they were aware. Europe Economics were acting with their  
19 advisers on these matters.

20 THE CHAIR: Yes.

21 MR BOWSHER: They were described as their experts.

22 THE CHAIR: And they gave them advice.

23 MR BOWSHER: And they gave them that advice. That advice --

24 THE CHAIR: Are you saying the advice was wrong? Is that what you're saying?

25 MR BOWSHER: Well, what we're saying is wrong is to rely upon the econometric  
26 reports, given that what the experts themselves were saying was that this is not very

1 | reliable material. That's what we --

2 | THE CHAIR: Well, okay, but that's all there on the papers, isn't it? Just show me that.

3 | Why do we have to get into what Mr Williams said about any of this? Why does it  
4 | matter?

5 | This is the bit I'm really struggling with. In a rationality challenge, we're not interested  
6 | in things that the decision maker didn't see or didn't know. It seems to me you've got  
7 | here material -- plenty of material -- from these documents, which obviously Dr Spicer  
8 | summarised, but they're all in the documents, which take you precisely to the point  
9 | you're trying to make, which is that the Gambling Commission were told there were  
10 | problems with the data, and they went ahead and made a decision on it. That doesn't  
11 | really matter that there were problems that Europe Economics hadn't identified. If that  
12 | was the message, why does it matter?

13 | MR BOWSHER: It matters -- well, as I say, I don't want to get into unpicking what's in  
14 | Dr Spicer's report because at the moment it's just a draft. But what is plainly being  
15 | said in order to understand why Europe Economics thought it was appropriate to go  
16 | forward anyway, you have to look to their previous experience and understanding of  
17 | the previous reports, and they took a view that these matters did not -- well, this was  
18 | sufficient.

19 | THE CHAIR: And you're running a case, effectively -- you want to run a case that says  
20 | they were wrong.

21 | MR BOWSHER: We want to run a case that says they were wrong to do that.

22 | THE CHAIR: But it's a merits challenge, isn't it? Why is that not a merits challenge?

23 | MR BOWSHER: Well, we can run it. It is not rational to conclude that the matter  
24 | is -- these errors are there, and -- then.

25 | THE CHAIR: But hang on. When you talk about these errors, the errors they  
26 | identified --

1 MR BOWSHER: They've identified.

2 THE CHAIR: Yes. So they're all there. You don't need Mr Williams to do that, do  
3 you?

4 MR BOWSHER: They're on the document. They're there -- exactly. They're in the  
5 documents. We can point out what is there in the documents, indeed. That's what  
6 we've done in the alternative draft.

7 THE CHAIR: But the question -- what I'm asking you is how Mr Williams fits into this  
8 rationality analysis. That's the bit I'm not clear about, because it seems to me  
9 you're -- the only basis on which I understand you to be saying that Mr Williams is  
10 relevant to this is that Europe Economics got their analysis wrong, because they  
11 should have reached a different conclusion, presumably on your case a much more  
12 negative conclusion about the models and made that plain to the  
13 Gambling Commission. It does seem to me to be a merits challenge, and it draws us  
14 precisely into -- I mean, you say you don't want to unpick Dr Spicer, but surely the path  
15 you're encouraging me to go down involves you doing exactly that, and how you're  
16 going to do that in a three-day subsidy control judicial review is not clear to me. Isn't  
17 it precisely the sort of thing that we're being repeatedly told in the authorities we  
18 shouldn't be doing, which is setting up a clash of experts? Because ultimately what  
19 you're saying is that Mr Williams is in a position to contradict Dr Spicer's view that on  
20 the basis of whatever it is Dr Spicer knew, he gave the advice to the  
21 Gambling Commission. I don't think that's a rationality challenge. It's not, as far as  
22 I can see.

23 MR BOWSHER: Well, again, it may be that this is where pure -- rationality and  
24 Tameside rationality may sit next to each other, because we would say it is a rationality  
25 question, because it goes to whether or not it was rational simply to take the view that  
26 it is sufficient to work with the material you've got and that it is rational not to go further,

1 when you've reached a conclusion to say, well, this material is not strong, is not strong  
2 evidence to support the decision, should one not go back and see whether or not some  
3 other evidence supports it, or look at some other route to support the decisions.

4 THE CHAIR: Well, yes, but, I mean --

5 MR BOWSHER: Econometrics is not the holy cow. It's not the only way one could do  
6 this.

7 THE CHAIR: No, of course. But then the same question arises, doesn't it? Why does  
8 Mr Williams help you? I mean, there's certainly occasions where one goes down the  
9 Tameside path and it is important to understand whether the investigation would have  
10 resulted in anything different. I can understand that that may lend itself to it. But here  
11 the problem with that is that Mr Williams doesn't tell us the answer. He doesn't know.  
12 So all he can do is say, "I don't know whether they've done this or not, but if they  
13 haven't, it's a problem". Save for some limited examples, which -- I think Dr Spicer  
14 agrees with the point about statistically insignificant variables, in which case it's there  
15 in the papers anyway. Again, I'm struggling a bit to see why Mr Williams's evidence  
16 helps us make any decision about whether the Gambling Commission should have  
17 decided to investigate further in order to substantiate its decision.

18 MR BOWSHER: Well, let me go on to the authorities. We would suggest that what  
19 the evidence goes on to -- I mean, I've tried to identify it in terms of a rationality  
20 challenge, but the other way in which he assists is simply in assisting the  
21 understanding of the technical detail, and econometrics is not straightforward. And  
22 he --

23 THE CHAIR: The Powis points.

24 MR BOWSHER: The Powis points.

25 THE CHAIR: Just before you do get to that, I mean -- obviously you can deal with  
26 those in due course, but I want to just be -- in a sense, this is giving you the opportunity

1 to give me your best answer as to why Mr Williams helps with the rationality challenge.  
2 At the moment, I'm struggling to see how it fits into the analysis, because it's not  
3 material that's in front of the decision maker that had any influence on their decision.  
4 Much of it is reflected, of course, in the Europe Economics material, which is there and  
5 is very plain. There's no ambiguity about it. In terms of its recommendations, it's very  
6 clear about what they're saying and why they're saying it. You may say there are other  
7 reasons why they should have reached a different, perhaps more trenchant  
8 conclusion, but that does strike me as being a challenge on the merits rather than  
9 a challenge to rationality, because this is all really about whether the  
10 Gambling Commission had -- whether their decision is consistent with the information  
11 in front of them, isn't it? That's what this is about.

12 MR BOWSHER: I'm not sure that I'm going to be able to take the matter very  
13 much -- because to some extent we agree with you. That's why we are able to put  
14 forward the alternative amendment the way we do, because we say we can identify  
15 the errors and indeed run the case the way you suggest.

16 THE CHAIR: Yes. And obviously not making any indication as to the merits of that.  
17 It's not for today. But it's clearly a coherent case, partly because Dr Spicer has given  
18 you the materials on the documents that make it plain that the Gambling Commission  
19 was told there were issues with the data. So, I mean, that's all there for you and you  
20 have put it coherently, at least as far as I can see. Maybe others will say. Whether  
21 it's right or not is a different question, obviously. It's a completely different question  
22 for the hearings. I'm not suggesting anything about the merits of it. But it does rather  
23 suggest, doesn't it, that Mr Williams is not actually properly part of this consideration?

24 MR BOWSHER: Well, let me put it -- we can plead the case in the way we suggest,  
25 but what I would --

26 THE CHAIR: I'm sorry to interrupt you. It's not so much about pleading the case. It's

1 not just about articulating it. It's that, actually, it is your case. As I understand it, the  
2 essence of your case is that faced with a clear indication about uncertainty, about the  
3 econometric modelling, they were unreliable and shouldn't have been used as the  
4 basis for the decision, whether that's because no reasonable public authority would  
5 have reached the conclusion that they were a proper basis for a commercial market  
6 operator decision, or whether it's because they gave rise to a Tameside duty to  
7 conduct further investigations, it doesn't really matter. But that's the case you're  
8 making, and it is articulated, as I understand it, perfectly plainly, on the basis of what  
9 you've just shown me, without going anywhere near what Mr Williams says. Then  
10 when you look at what Mr Williams says, I don't see how it fits into the analysis,  
11 because it's not something -- beyond the points that are just repeated from the  
12 Europe Economics papers, it's not something that the Gambling Commission knew  
13 about. If there are points that Europe Economics didn't point out to them, then how  
14 do they fit into the rationality challenge? If they are points that were pointed out to  
15 them, then why do you need Mr Williams? That's the short point of it.

16 MR BOWSHER: Insofar as they are errors, and errors which we say are, when you  
17 look at -- we'll end up being seen to be, to use the language of the Law Society,  
18 incontrovertible errors, because they will be errors which Dr Spicer and  
19 Europe Economics were seeing as -- they may not have used the word "error", but  
20 they were seeing them as shortcomings or failings. It is appropriate and helpful for the  
21 tribunal to have our expert evidence that identifies what we say are those errors, which  
22 as shortcomings are agreed. The only difference between Mr Williams and  
23 Europe Economics on this seems to be what one draws from those errors. It's the  
24 consequence of that which is where he can go beyond what we've already put in our  
25 alternative draft.

26 THE CHAIR: Yes, but to be absolutely clear, the Law Society is not determining what

1 the grounds of rationality challenge are. The Law Society is a procedural decision  
2 about whether or not expert evidence should be allowed in certain circumstances,  
3 extending, if you like, the Powis criteria.

4 So it's not changing the law on what a rationality challenge is. I'm not interested in  
5 that at the moment. Obviously it's an important point in the argument, but as  
6 a completely separate point, you've got to persuade me that the evidence is  
7 necessary. It's reasonable and necessary to allow it in. In order to do that, you've got  
8 to show why it's important to the rationality challenge. I don't at the moment see why  
9 Mr Williams is important to the rationality challenge, given the material you've got that  
10 you've just shown me, that allows you to make the argument that essentially  
11 I understand you want to make, and which I don't see as being affected by arguments  
12 about whether Europe Economics got this exactly right. In other words, if they miss  
13 some errors and should they have been more trenchant. That's a merits point about  
14 the analysis.

15 MR BOWSHER: But what --

16 THE CHAIR: So I don't think Law Society helps you. Law Society doesn't give you an  
17 extra angle to get this material in. Just because you tick the box, it doesn't mean that  
18 it's relevant to the rationality challenge.

19 MR BOWSHER: Well, what Law Society does -- slightly out of order here, but that's  
20 fine.

21 THE CHAIR: Well, before you jump into the Law Society, but, I mean -- by all means,  
22 do push back, but are you pushing back on the point that this is -- I'm not making  
23 a point about the procedure and the jurisdiction, if you like, for admission of the  
24 evidence. I'm asking you about the relevance of it to your case on rationality, which is  
25 a different thing, I think. So if you think I'm wrong on that, you should push back on  
26 that. But I don't really see -- the Law Society may well recite some of the law on this,

1 but the law on rationality comes from lots of other cases.

2 MR BOWSHER: Lots of other cases (inaudible).

3 THE CHAIR: And it's pretty clear, isn't it? It's pretty well developed. We think we  
4 understand what we're doing with it. At the moment, I'm not sure how an argument  
5 about the integrity of the Camelot models fits into this beyond what is already recorded  
6 in the Europe Economics paper.

7 MR BOWSHER: Well, it may be that we're agreed on --maybe I can't push back any  
8 further on what you've suggested about the rationality, but there is rationality and the  
9 Tameside rationality is a separate point. But what the expert evidence goes to -- I can  
10 put this in a number of different ways, but it is about the significance and context of  
11 those errors, and what the expert evidence does is explain the context and significance  
12 of those errors so as to understand why they aren't just trivial errors -- they aren't errors  
13 that one could ignore in the decision-making process -- that they are errors which  
14 reach the level of irrationality. It's not whether or not we need the evidence to identify  
15 the errors. The errors are there in the documents. The question is, what's the  
16 appropriate response to them, and is it right to treat those errors as reaching the level  
17 of irrationality? That involves a question of judgment.

18 THE CHAIR: This is where you -- I'm sorry to interrupt you again, but this is where  
19 mixing up the errors in the Camelot material and the error you say that the  
20 Gambling Commission has made. They're quite different. You've got a whole lot of  
21 material which has been looked at by Europe Economics, and they have formed an  
22 assessment of its reliability. In fact, they've said it's not very reliable. There may well  
23 be other errors there that Europe Economics haven't spotted. Indeed, Mr Williams  
24 says there are and Dr Spicer says there aren't. That, no doubt, is a very complicated  
25 and messy argument about -- which is a very good reason not to bring it into these  
26 proceedings.

1 So, in order to show that they that it should be in here, you really do need to satisfy  
2 me that somehow it fits into the question of the error you say the  
3 Gambling Commission has made which is, as I understand it, that it's placed too much  
4 weight on these models given the advice it was receiving about the inadequacy of  
5 them.

6 Now, at that stage, that's not about whether there might be more defects than  
7 Europe Economics has spotted; it's about whether the advice Europe Economics gave  
8 is consistent with the decision that was made. It's quite a different thing.

9 MR BOWSHER: But it is also --

10 THE CHAIR: Sorry, so just to be clear, the significance of the errors is not that -- we're  
11 talking about different errors. We're talking about the significance of the errors in the  
12 Camelot material, which may or may not have been spotted by Europe Economics;  
13 largely have because they're picked up, as you say, by this document by Dr Spicer.  
14 But then there's quite a different question about the weight that the  
15 Gambling Commission has given that advice from Europe Economics.

16 Now, we come back to the point that I think what you're really trying to do is to say that  
17 Europe Economics got it wrong and should have been more trenchant in giving advice  
18 that the material was unreliable and shouldn't be used. But I mean, that does seem  
19 to me to be straying into a merits appeal.

20 MR BOWSHER: But when we are looking at what Europe Economics did or didn't do,  
21 they are assessing the material which we've loosely referred to in our pleading as  
22 being material done by Camelot, although presumably done by econometrics  
23 assurance. So if one looks at the errors, I don't know whether you -- if you have them  
24 in the pleading, I would -- maybe you could take one of the hard copies which we  
25 handed up this morning.

26 THE CHAIR: Yes.

1 MR BOWSHER: And you have the errors from page 25 and 35(h).

2 THE CHAIR: Yes.

3 MR BOWSHER: Now, we refer to all of the Europe Economics comment, which is  
4 comment in the various Europe Economics reports. They are referring to the  
5 econometric analysis which has been provided to them, Europe Economics, for  
6 assessment. What we then do in 35(h) is identify errors in that material which have  
7 been made which, to a large degree, are consistent with errors picked up by  
8 Europe Economics; some are, some aren't. But they are errors in the material which  
9 has been given to Europe Economics so as to identify what it is that  
10 Europe Economics are talking about. That requires -- that is a classic part of the  
11 material, referred to both in Law Society and in Powis, that the explanation of the  
12 underlying material, which was --

13 THE CHAIR: Well, sorry, before, before you get into the Powis analysis, I do -- and  
14 by all means, move on if you want to move on, but that's not what I was asking you  
15 about. I'm not asking you about the Powis analysis, because we're talking here about  
16 a different question about whether -- about why this is necessary in order to resolve  
17 a rationality challenge. So it's just -- all these gateways that you might have to get this  
18 evidence and don't help with this. They're not -- they don't give jurisdiction, if you like.  
19 They don't alter the analysis of the rationality. I'm asking you a different question. I'm  
20 asking you about which gateway you get through to get there; I'm asking you about  
21 why we need the stuff at all. It's just a different, broader question.

22 MR BOWSHER: Because in order to understand Europe Economics in the -- if we're  
23 relying upon the Europe Economics assessments, as you say, in order to found the  
24 rationality challenge because they characterise these shortcomings in their reports,  
25 what they are looking at is the material submitted to them. They identify some  
26 problems in general terms. They don't drill down into what they are. What we have

1 sought to do is identify those problems in the Camelot material. We plead them out in  
2 35(h). And those are problems with the Camelot material which was before  
3 Europe Economics. And that is explaining to the tribunal why we say that the material  
4 which Europe Economics, as the experts for Gambling Commission, were assessing  
5 material which was plainly based on errors which we identify.

6 THE CHAIR: Yes. So do you -- is it part of your argument that Europe Economics  
7 should have given different advice to --

8 MR BOWSHER: Yes.

9 THE CHAIR: So you are saying they got it wrong?

10 MR BOWSHER: Yes, that is -- because there were errors. The errors -- the  
11 advice -- whether it's the GC -- the GC acted on the Europe Economics advice that  
12 there wasn't any other material, there was nothing else to be done, in effect. We are  
13 identifying errors which we say illustrate the points which Europe Economics were  
14 making, but they go to the point that this is not the decision Europe Economics should  
15 have been advising GC to be taking. As their experts in econometric matters, they  
16 should have been advising a different outcome. And we identify some errors -- there  
17 may well be very many more, but these are errors which are apparent from the  
18 documents which we have. They're in 35(h) here. As I say, many of them are in fact  
19 alluded to by Europe Economics in different places in their material, but they're on their  
20 face in the documents, but they need, in our submission, economic expertise to fully  
21 develop them and explain to the tribunal why the expert advice which the GC was  
22 getting was not giving them the right advice.

23 THE CHAIR: And that's a rationality challenge, not --

24 MR BOWSHER: We say is a rationality challenge because --

25 THE CHAIR: But not a merits challenge?

26 MR BOWSHER: It's a rationality challenge because how -- if the GC is dependent

1 upon its experts on these matters of econometrics, it is taking a view about whether  
2 or not to allow £70 or 80 million to be redeployed in this way. And the rationality of its  
3 decision is dependent upon the rationality of the advice that it is getting from its own  
4 expert.

5 THE CHAIR: And of course, the Gambling Commission didn't know about these.  
6 You're not suggesting the Gambling Commission knew about these beyond the extent  
7 to which they were pointed out? It's not information the Gambling Commission had at  
8 the time? (Pause)

9 Presumably --

10 MR BOWSHER: Because the Gambling Commission had them -- I mean, the material  
11 was available to the Gambling Commission and it was before the experts --

12 THE CHAIR: When you said the material, do you mean the Europe Economics  
13 material, or do you mean the underlying material?

14 MR BOWSHER: The underlying material. It was available to them and it had  
15 been -- that is what had been assessed, that's what was being assessed by  
16 Europe Economics.

17 THE CHAIR: Because your pleading is, I think, based on, as I understand it, what they  
18 did know. So if you look at, for example, 66(a) -- sorry, no, 52(a):

19 "... Econometric evidence ... was fundamentally flawed, as the Gambling Commission  
20 was or ought to have been aware of and/or as was made clear to it by its ... economic  
21 advisers ..."

22 So, are you saying that from the material the Gambling Commission had, it should  
23 have appreciated the points that Mr Williams made?

24 MR BOWSHER: It should have been appreciated by the Gambling Commission, yes.  
25 Because we say, if one goes in the pleading, just going on that same pleading, if you  
26 go back to where we set all the material out, going back to 35. I mean, without going

1 through reading all of the extracts, the assessment is carried out by  
2 Europe Economics. Those assessments have been carried out over time; it's not the  
3 first time they've looked at this material. They pick up a number of problems with the  
4 material and the question will be whether or not Europe Economics regarded the  
5 Camelot approach, that was the approach that it is assessing, followed best practice.  
6 And the conclusion -- that's what we say in 35(g) -- we identify the errors which we  
7 say, after a quick look, identified that they had failed adequately to follow -- they were  
8 taking an irrational decision because they were relying on an econometric analysis  
9 which they knew to be flawed. And 35(j), knowing those flaws exist, in 35(j), they failed  
10 to make any or any proper inquiry into those errors, which ought to have been obvious  
11 to the Gambling Commission in its own right, or were pointed out by its expert advisers.  
12 THE CHAIR: Yes, but that's the point, isn't it? Because there's a distinction, isn't  
13 there, between the errors, using your terminology, which are pointed out by  
14 Europe Economics and the ones that have now been pointed out by Mr Williams.  
15 I mean, to the extent they overlap, it's neither here nor there because it's all in the  
16 Europe Economics material. So if there are points that Mr Williams is now making,  
17 which I think there are, that weren't highlighted by Europe Economics to the  
18 Gambling Commission, I don't understand and I don't really understand how that fits  
19 into your pleading that says that the Gambling Commission was or ought to have been  
20 aware of the defects. How are they supposed to know about the points that  
21 Mr Williams has now identified if Europe Economics didn't tell them?

22 MR BOWSHER: Well, their decision-making is conditioned by what their expert tells  
23 them, and their decision-making is flawed or the failures of their expert must infect  
24 their decision-making. If their expert has failed to sufficiently or rationally to investigate  
25 that material, that must affect their decision-making.

26 THE CHAIR: Well, that's your Tameside point; I understand that. But in a way, you

1 know, as we've discussed, I don't really see how Mr Williams helps with that anyway.  
2 But just sticking with the pure rationality point, it's really this point that why is material  
3 that wasn't available to them at the time, given that they had instructed an expert to  
4 advise them, relevant to an assessment of their rationality? How are they supposed  
5 to -- given that your pleading, which I think seems to me to be perfectly sensible, that  
6 the Gambling Commission was or ought to have been aware, and you go on to add,  
7 as made clear to it by its economic advisers, how -- on what basis do you say that they  
8 should have been aware of things that Mr Williams has identified that  
9 Europe Economics didn't?

10 MR BOWSHER: Well, to a large extent, because those are, what Mr Williams has  
11 picked up and we've identified as errors, points which are reflected in  
12 Europe Economics's own assessments.

13 THE CHAIR: Yes. But of course we're only talking -- in order for you to get over the  
14 reasonably necessary hurdle, you're going to have to show that there's something that  
15 isn't in the documents that you've already got access to. Anyway, why are we  
16 introducing Mr Williams into all of this when you've got all this stuff in the documents?  
17 That's the problem, isn't it?

18 MR BOWSHER: There's a danger ...

19 THE CHAIR: I'll leave it, unless you've -- I think we've --

20 MR BOWSHER: I think we've probably taken it as far as we can.

21 THE CHAIR: We have, and I've pushed you on.

22 MR BOWSHER: You have our point.

23 THE CHAIR: Yes.

24 MR BOWSHER: I mean, our point is that obviously, if one treats the GC itself on its  
25 own, separately from Europe Economics, then it had its own material which it either  
26 did or did not have. Our focus is on the analysis by Europe Economics of that

1 | econometrics material. We say that is flawed and they plainly knew it was flawed and  
2 | should have followed up on the material.

3 | THE CHAIR: Sorry, the economic material was flawed or the analysis was flawed?

4 | MR BOWSHER: The analysis was flawed.

5 | THE CHAIR: Europe Economics' analysis was.

6 | MR BOWSHER: Europe Economics' analysis was flawed, because they knew -- and  
7 | we can see that from -- about a number of these errors. They decided that they were  
8 | not matters which would -- they did not take those matters forward into the conclusions  
9 | which they advised to the GC, and the GC's decision is adversely affected by the  
10 | failures in the Europe Economics advice. That is based on a failure by them to pick  
11 | up failings and act properly upon the failings which were in the econometric assurance  
12 | reports and the underlying material. But I don't think -- I think you (inaudible). (Pause)

13 | THE CHAIR: I'm just conscious that, firstly, I've taken you out of your way, quite a long  
14 | way.

15 | MR BOWSHER: No, not at all, that's --

16 | THE CHAIR: But secondly, we're due a break. Would it be helpful to take the break  
17 | now?

18 | MR BOWSHER: Well, if now's a good time for the usual break, that would be --

19 | THE CHAIR: And that'll give you a chance just to work out what we've covered and  
20 | what we haven't.

21 | MR BOWSHER: Yes, indeed. That would be helpful.

22 | THE CHAIR: Yes. Good. Well, we'll take ten minutes. Thank you.

23 | (11.39 am)

24 | (A short break)

25 | (11.52 am)

26 | (Transcription delayed)

1 MR BOWSHER: ... move on and cover some more ground. But just to sort of walk in  
2 where we were.

3 THE CHAIR: Yes.

4 MR BOWSHER: There is a danger in -- and it'll become very relevant when we come  
5 on to looking at this through a Tameside lens as well. One can't slice out the different  
6 stages of this decision-making; it is the whole package from the Camelot material, the  
7 Europe Economics material, and the GC's decision. Is, one process -- the  
8 Commission has effectively said as much in its own defence. Para 52 of its defence,  
9 it says it carefully considered the LNIO -- it's page 860 of the bundle.

10 THE CHAIR: Sorry?

11 MR BOWSHER: 860, para 52.

12 THE CHAIR: Yes.

13 MR BOWSHER: "The Commission [not anyone else] ... considered the LNIO  
14 presented by Camelot, as well as the expert Econometrics Assurance Report  
15 submitted by Camelot in support of its proposal, predicting a strong positive  
16 Return on Investment ('ROI') for Good Causes. The Commission instructed its ...  
17 experts ... to review Camelot's expert report ... [and] instructed its marketing experts ...  
18 to review the LNIO and to provide advice ..."

19 But in this case, they're relying upon the economic expertise, which is their own  
20 analysis of the Camelot material which they themselves say they rely upon for the  
21 decision.

22 THE CHAIR: Yes. I think -- and just to be clear, I'm not suggesting that you draw  
23 a bright line between the Commission and Europe Economics. I mean, that clearly  
24 would be wrong, because they are obviously the people they've instructed to help them  
25 make the decision.

26 What I'm saying is that there is a line between, on the one hand, the

1 Gambling Commission and Europe Economics, and on the other hand, the material  
2 that Camelot's putting to them. Because that's the material that's been put by the  
3 person making the proposal, and the decision has been made by reference to analysis  
4 of that material.

5 You can't impute to the Gambling Commission the errors that happened in Camelot's  
6 assurance exercise, because that's not something in their control. They haven't  
7 asked -- they're not instructing Camelot's econometric experts to do that.

8 So that's the point I'm making, that an error that has been made by Camelot's  
9 econometricians is different from an error that's been made by, in this instance,  
10 Europe Economics.

11 MR BOWSHER: Well, it may be that, from a rationality point of view, whether we  
12 would end up characterising that as a Tameside error. We would say it is so clear  
13 here, looking at the material, that Camelot make an error. That error is so obvious.  
14 I mean, it was obvious to Mr Williams after just looking at the material. We haven't  
15 dug down at any underlying material; we've simply looked at the material which was  
16 presented to Europe Economics, which Europe Economics, as we see, then used as  
17 the basis for their advice to the GC?

18 THE CHAIR: Yeah, and I can see -- just to be clear -- I mean, it doesn't make any  
19 difference. You know, I put to you: are you saying that Europe Economics got it  
20 wrong? And obviously, if, in a rationality sense, there was some factual material or  
21 their analysis was so wrong -- I understand the point that you make about that; that it's  
22 so wrong that no rational decision maker could have relied on it. It doesn't matter  
23 whether it was Europe Economics or the Gambling Commission whose fault that was.  
24 I suspect -- I mean, maybe Ms Clement would have something to say about that.

25 But that's not the point I'm putting to you. The point I'm putting to you is that that's not  
26 this case. This case is: you've got Europe Economics coming on, saying there's

1 a problem with this stuff and it is unreliable, and it's giving a judgment as to the  
2 unreliability.

3 You're trying to test that judgment, which seems to me to be quite a different thing  
4 altogether. It's not saying that there was sort of a catastrophic failure of factual  
5 material that gives rise to a rationality challenge. This is really about a nuance of  
6 judgment, and you're trying to challenge the judgment of, you know, whether you  
7 characterise it as a decision maker or their expert, it doesn't really matter. That seems  
8 to me to be quite a difficult position for you to be doing in an irrationality challenge.

9 MR BOWSHER: Well, what we are saying is that you look at the material -- the  
10 Camelot material, the Europe Economics' comment on the Camelot material -- and  
11 that ought to have led Europe Economics, GC, to pause for thought and go back and  
12 look again for other --

13 THE CHAIR: I understand that argument, yes.

14 MR BOWSHER: And it was irrational not to do so.

15 THE CHAIR: Yes.

16 MR BOWSHER: That ends up being an assessment based on the robustness of the  
17 econometric analysis which came from Camelot. What should have been -- what  
18 a rational assessment of the Camelot material, given what was known about it and  
19 was plainly obvious to Europe Economics, the robustness of that assessment and the  
20 assessment of that material will involve some consideration of that material. Now, we  
21 can do that without -- we've pleaded a case which involves doing that without expert  
22 evidence.

23 THE CHAIR: But isn't that looking at it the wrong way round? It's not about -- you  
24 don't start with the material that was given and try and work out whether it's got more  
25 problems than were indicated. Don't you start with the analysis that was actually  
26 done? That's what you should do, isn't it?

1 Shouldn't you start by looking at what the Gambling Commission and what  
2 Europe Economics actually did make of it? Then, by all means, if you say it's  
3 catastrophically wrong, then that's what then might give you a foothold, and that's why  
4 the Law Society says: well, that sort of material you can get in.

5 But, as I say to you, that's not really what appears to be going on in this case. We've  
6 got a situation where the Europe Economics are saying there's a problem with this  
7 material, and what you're doing with Mr Williams is, you know, trying to push that  
8 problem a little bit further out and make it a bit more extreme. But it's not saying that  
9 the Gambling Commission proceeded on a completely false set of advice, which was  
10 that the material was robust. That's not this case.

11 MR BOWSHER: But let me move on to what you've already labelled -- not a helpful  
12 label -- as the Powis approach, which is, to look at this differently, if insofar as what  
13 we are looking at is a Tameside attack, attack on the process and on the decision, the  
14 rationality of what was done, that involves an assessment, we say, of the material  
15 which Europe Economics had before it.

16 In order to make the best of that case -- we can go through the documents and put the  
17 material before the documents, but in order to make the best of that case, we ought to  
18 be entitled, and to make that case we would reasonably require to have some further  
19 economic explanation to be able to put before the tribunal to explain the significance  
20 of the errors which are identified in that analysis.

21 THE CHAIR: I can't remember which number of the four it is, but this is the technicality  
22 point.

23 MR BOWSHER: Yes. I mean, one can take that in a number of different ways.  
24 I wasn't going to go back to Powis as such, but in page 500 of the authorities bundle  
25 is an extract from the Law Society.

26 THE CHAIR: Yes.

1 MR BOWSHER: Para 38. That copy is ... (Pause)

2 THE CHAIR: Page 5 ...?

3 MR BOWSHER: 508.

4 MS CLEMENT: It doesn't match the electronic copy. Page 500 in the hard copy. It's

5 508.

6 MR BOWSHER: 508, PDF.

7 THE CHAIR: Yes. 508. I have it. 38.

8 MR BOWSHER: 508 is the PDF.

9 THE CHAIR: Yes.

10 MR BOWSHER: And that copies out -- that repeats Powis and Lynch -- I'll come back

11 to Lynch in a moment. In 37, it repeats Powis, and then 38:

12 "Although these categories are a useful and well-established list, it would be wrong to

13 treat them as if they were embodied in statute or as necessarily exhaustive."

14 Then there's a reference to Lynch, which I'll come back to. Well, maybe picking up

15 the summary of Lynch is useful:

16 "38. The judge accepted that, where an understanding of technical matters is needed

17 to enable the court to understand the reasons relied on in making the decision in the

18 context of a challenge to its rationality, expert evidence may be required ...

19 "39. We would extend this principle to a situation where ... it is alleged that the decision

20 under challenge was reached by a process of reasoning which involved a serious

21 technical error. It would be glib to suppose that, if an error in reasoning requires expert

22 evidence to explain it, a challenge ... [on] irrationality cannot succeed."

23 Then there's one quotation from Gibraltar. Then:

24 "40. The same point in principle applies, in our view, to a challenge based on

25 irrationality. A decision may be irrational because the reasoning which led to it is

26 vitiated by a technical error of a kind which is not obvious to an untutored lay person

1 (in which description we include a judge) but can be demonstrated by a person with  
2 relevant technical expertise. What matters for this purpose is not whether the alleged  
3 error is readily apparent but whether, once explained, it is incontrovertible."

4 To take this case, we would reasonably require, the sort of evidence that we have from  
5 Mr Williams, which picks up errors which are largely referred to, either directly with  
6 exactly the same words or under general headings in Europe Economics's material,  
7 and shows how those actually correspond to the material which was before  
8 Europe Economics. They explain what it is that Europe Economics must have been  
9 commenting on when they say: there's a problem with multicollinearity; there's  
10 a problem with the way the Durbin-Watson scores have been dealt with; there's  
11 a problem with this.

12 THE CHAIR: Sorry, Mr Bowsher, I'm afraid you're just -- maybe it's my fault, but it  
13 seems to me you're bundling up all these things and they're actually all quite different.  
14 You started off, I think -- so you've just been referring to what I think is A in Powis,  
15 showing what material was before available to the decision maker. But you were  
16 bundling that up, as far as I could tell, with the technical exception from Lynch and  
17 then bundling that up with the extension of that in the Law Society. I mean, they're all  
18 different gateways, aren't they? Don't we have to look at them separately?

19 MR BOWSHER: Well, firstly, I think you get from this, the Law Society, is they're not  
20 gateways; these are not fixed gateways.

21 THE CHAIR: Well, let's not treat it as a technical term, but they're bases on which  
22 you're going to be able to turn up here and say, "I should be able to get this evidence  
23 in", as I understand it. If you're not able to do that, then you're advancing a novel one,  
24 and I don't understand you to be suggesting there's a novel one.

25 So the question is, which of these are you trying to get in under? As I understand it,  
26 there are four established categories in Powis, and then there's an extension which,

1 really effectively, is the Law Society extension. You've got to tick the box for one of  
2 those.

3 MR BOWSHER: Well, it's -- plus there's Law Society/Lynch, which is using the  
4 evidence to explain the technical material; to explain why an error is an error.

5 THE CHAIR: Well, so just to be clear, you're not suggesting that -- that doesn't mean  
6 just because you can do that. I mean, coming back to our previous discussion, I just  
7 want to make sure we're clear. You're just talking about now whether you satisfy -- I'm  
8 going to continue to use the word "gateways", as we've just discussed them. But this  
9 isn't about whether it's necessary and reasonable for the evidence to go in, is it? It's  
10 a different point. Are we agreed on that? I mean, we're not going back to the previous  
11 discussion we've had, are we? You've still got to satisfy whether the evidence should  
12 be allowed in. This doesn't give you a basis to tick that box. That's a different box.  
13 Just because you could, notionally -- well, let me put it a different way.

14 The point about the Law Society is it's addressing a situation where, under a rationality  
15 challenge, there is, as I think is put in here, "a challenge was reached by process of  
16 reasoning which involved a serious technical error". [as read]

17 Now, that challenge is obviously a rationality challenge, one which, as you see in 40:  
18 "A decision may be irrational because the reasoning which led to it is vitiated by  
19 a technical error of a kind which is not obvious to an untutored lay person ..."

20 Now, you know, you have to establish that we've got a situation like that and the  
21 evidence goes to it before we even get into the Law Society. Law Society just makes  
22 it plain that where you've got a situation like that, where your challenge is of irrationality  
23 because the reason is vitiated by technical error, then you're entitled to put the  
24 evidence in to support that. That's all the Law Society is saying. As I was saying to  
25 you earlier, it's not changing the law on irrationality.

26 MR BOWSHER: No, but --

1 THE CHAIR: Or indeed addressing the question as to whether the evidence is  
2 reasonably necessary in order for you to bring the case.

3 MR BOWSHER: But what the evidence -- the reason why we would reasonably  
4 require it is because it is a Powis category of explaining the material.

5 THE CHAIR: Sorry, sorry. When you say "it" -- sorry. Are you saying the Law Society  
6 is -- I had understood the Law Society to be an extension of Powis. Is that not your  
7 position?

8 MR BOWSHER: Yes. It's a comment upon an extension of -- but it is illustrating a way  
9 in which one comes within those guidelines.

10 THE CHAIR: Well, is that right? Isn't it saying that Powis is all very interesting and  
11 helpful, but it's not a closed list.

12 MR BOWSHER: Yes.

13 THE CHAIR: So it's another example. It's, if you like, a subparagraph 5, or (e), to add  
14 to the list of Powis. Is that not right?

15 MR BOWSHER: Yes. Paragraph 38 is essentially allowing an extension to the  
16 admission of expert evidence beyond those categories, in irrationality grounds, where  
17 an understanding of technical matters is needed to enable the court to understand the  
18 reasons relied in making the decision.

19 THE CHAIR: Well, it's a different basis from (a) to (d) in 37.

20 MR BOWSHER: Well, it's an extension of those. It's a deliberate extension.

21 THE CHAIR: Yes. Well, you wouldn't need it if you fitted in with an (a) to (d), let me  
22 put it that way.

23 MR BOWSHER: Well, there may be semantics whether it's "in" or whether -- it is an  
24 elaboration of a way of expressing why expert evidence would be needed. It is one  
25 way of putting the point that technical evidence, understanding of technical matters,  
26 may be needed to enable the court to understand the reasons relied upon. Given the

1 way in which this case is brought in order, in understanding the errors which we rely  
2 upon, which have been identified, and understanding how they figure their significance  
3 in the decision-making, that is material which we ought to be entitled to put forward in  
4 order to properly pursue our claim, because that is precisely what Mr Williams does in  
5 his report, without going through each and every one of those errors, you'll recall.  
6 I mean, by all means, it's at page 880 of the main bundle. One can see from the  
7 contents page, but one sees it more developed. In each case, he explains what the  
8 error is, how it relates to the documents, and how it relates to the decision-making in  
9 this case.

10 That technical explanation is a typical classical use of expert evidence to enable  
11 a technical case to be developed before the tribunal and to give the tribunal the  
12 material for it to do whatever it regards as appropriate to test the material at trial. It's  
13 another way of looking at perhaps a broader -- I'm not sure whether it's the same  
14 category or a similar category which is identified in Lynch at page 256. That's the PDF  
15 pagination.

16 THE CHAIR: Yes.

17 MR BOWSHER: Paragraph 22:

18 " ... it is and has always been recognised that irrationality is an error of law which can  
19 lead to a decision being quashed. If the decision in question is made by an expert  
20 tribunal or indeed by anyone dealing in a field involving consideration of matters which  
21 would not obviously be fully understood by a layman without some assistance from an  
22 expert in that field, it may be necessary at the very least to have some explanation of  
23 any technical terms. Mr Garnham accepted that expert evidence could be adduced to  
24 provide such explanations. Without it, the court might well be unable to consider  
25 properly any irrationality argument. When I use the word 'irrationality' I am intending  
26 to include not only perversity but also a failure to have regard to a material matter or

1 a taking into account of an immaterial matter".

2 We say, exactly what we're addressing here.

3 THE CHAIR: Just help me. Why -- I thought you were relying on the Law Society  
4 because of the serious technical error. Just tell me how you fit into irrationality as  
5 expressed by the judge here.

6 MR BOWSHER: Well, it's a more broad -- I mean, he's not fixing it on a particular  
7 irrationality.

8 THE CHAIR: Well, I think he just says at the end:

9 " ... include not only perversity but also a failure to have regard to a material matter or  
10 a taking into account of an immaterial matter."

11 I mean, you're not arguing (inaudible), are you?

12 MR BOWSHER: I mean, he's making a broader point that however one is  
13 characterising the irrationality, it may be necessary and appropriate to bring forward  
14 technical evidence to explain technical matters.

15 THE CHAIR: Well, the only reason I'm asking the question is that I don't understand  
16 what this adds to the Law Society. The Law Society deals with the point, doesn't it?  
17 Why is the Law Society not good enough for your purposes? Do I need to have any  
18 regard to Lynch? Does it make any difference?

19 I mean, as I understand it, you're relying on the Law Society because you say it is  
20 a serious technical error and because you say it's incontrovertible. Is that not the  
21 position?

22 MR BOWSHER: I mean, that is a reasonable proposition. (Overspeaking)

23 THE CHAIR: In which case, it's all about paragraph 40 of the Law Society, isn't it?

24 MR BOWSHER: I mean, it's slightly broader because it goes into making it necessary.  
25 It looks at the need for technical evidence to understand the context and background,  
26 but maybe one reads that from the Law Society as well. When I read Lynch, I read it

1 as a slightly broader test than the Law Society. I'm not sure. But they're similar.

2 THE CHAIR: The reason I'm just a little wary of it is that obviously Lynch talks about  
3 a layman, and we're not a lay tribunal. At the moment we haven't constituted the  
4 tribunal, but I think given where this discussion is going, where your appealing is going,  
5 it's pretty obvious we're going to need some econometric expertise on the panel.

6 So I'm just not sure, really, I want to get into the question of how Lynch applies to the  
7 decisions of the tribunal. It seems to me the point about the Law Society is different  
8 precisely because it isn't, if you like, predicated by that requirement.

9 MR BOWSHER: But in a sense -- I mean, indeed, one hesitates with the word  
10 "assumed". The tribunal is capable and it seems likely that it will have appropriate  
11 economic expertise on the tribunal.

12 THE CHAIR: You've got no basis to know exactly what we will do, and neither in fact  
13 have I.

14 MR BOWSHER: It's not for me to assume or otherwise.

15 THE CHAIR: Nor me. But I think you could probably take it as a fairly likely bet that --

16 MR BOWSHER: But let's assume for current purposes that a member of the tribunal  
17 is able to deal with some of this stuff other than as a layman. Even then, that person  
18 will -- the tribunal will want, as a specialist tribunal, to have the material before it to be  
19 able to do more than just follow our submissions, written and otherwise, and just  
20 tracking through what we say on the documents, but to follow our expert explanation  
21 which puts that into context and explains, as an economist would, why we say that is  
22 a problem.

23 THE CHAIR: Just to be clear, I'm not pushing back on the Law Society point.  
24 Obviously, there are questions as to whether it is a serious technical error which is  
25 incontrovertible, and that is in dispute. But I'm not pushing back on the general  
26 proposition that the Law Society advances, as it applies here.

1 MR BOWSHER: And what we say Mr Williams does in his report, taking the  
2 errors -- error 1 at page PDF 894.

3 THE CHAIR: That's the CMC bundle, is it?

4 MR BOWSHER: That's the PDF page.

5 THE CHAIR: In the core bundle for the hearing?

6 MR BOWSHER: Yes.

7 THE CHAIR: Yes. 894.

8 MR BOWSHER: It's actually -- in that bundle, they're the same, fortunately, as they  
9 should be.

10 THE CHAIR: Yes.

11 MR BOWSHER: The structure for each of these errors is to explain why he treats that  
12 as an error.

13 THE CHAIR: Yes.

14 MR BOWSHER: That's, again, something which we could do as mere submission.  
15 But it is an error judged by reference to econometrics and it is right that we be able to  
16 frame that evaluation within an econometric assessment.

17 He then identifies the material that evidences that error. That is material largely that  
18 simply goes back to the Camelot material. That's the material which GC said they  
19 relied upon, and explains why he says that is an error. That's the structure for each  
20 and every one of these. They get a bit more technical as they go on, but in each case  
21 that is his approach. However skilled the tribunal is in these matters, one would expect  
22 that they would -- indeed, almost particularly so if the tribunal has its own ability to  
23 assess these matters, it will want to have the material before it to test what as a matter  
24 of economics is the way of framing this as an error. Because this is framed as an error  
25 not in the way that a layman frames. It's not just a question of knowledge; it's  
26 a question of what is the framework for understanding that this is or is not an error.

1 That is something which comes from a framework of understanding within economics,  
2 rather than purely as a matter of -- some of it is just common sense, but it isn't purely  
3 common sense.

4 In order to make those points as explaining our case, whether that case is put as pure  
5 irrationality or what I'll loosely call Tameside irrationality, it is right that we be able to  
6 explain why, following the sequence of documents through, this was an error, that we'd  
7 be able to put to make that case as strongly as possible. Because without it, we're not  
8 able to fully deploy the strength of the case that we would plead. We can plead it, but  
9 we can't put before, let's say, a tribunal member who is himself or herself an  
10 econometric expert and say, "Here's a way of framing this as an econometric expert  
11 would to understand why this is or is not a failing, whether it's a process failing or an  
12 irrationality failing". That's, at its heart, why we say this evidence is reasonably  
13 required so as to enable us to fully deploy our case.

14 THE CHAIR: Okay. So you're now going back to the reasonably required point well.

15 MR BOWSHER: That is the ultimate test in that all expert evidence has to be  
16 reasonably required.

17 THE CHAIR: Well, exactly. I -- yes.

18 MR BOWSHER: I mean, the Powis guide that -- they're just circumstances in which  
19 evidence may be treated as being reasonably required.

20 THE CHAIR: Yes.

21 MR BOWSHER: And this is -- what we would be doing is explaining technical material  
22 in technical terms that is capable of being understood both by the whole tribunal  
23 and -- but to do so in a way that also draws out the technical issues which need  
24 drawing out in order to fully develop why the matters are indeed errors.

25 THE CHAIR: What about where there's disagreement about those? So if, for  
26 example, just take Dr Spicer when there's some things he disagrees with Mr Williams

1 on. Now, let's not get into the detail of all that; we don't need to litigate those points  
2 here now. But the fact that they are capable of disagreement, how's that going to be  
3 dealt with at the hearing?

4 MR BOWSHER: If -- as I said at the very beginning, it's a little difficult for me to  
5 anticipate the detail of that.

6 THE CHAIR: Well, let's just assume, because it doesn't seem unlikely. We've got  
7 Dr Spicer's report and he says, for example, that there's a reasonable range of  
8 different views in relation to the use of variables such as seasonality. So he says,  
9 actually what Camelot's done could be argued to be within a range of reasonable  
10 econometric best practice. Now, if that turns out to be the position that is somehow  
11 put into evidence by the Gambling Commission, then how is that going to play out?

12 MR BOWSHER: Where that plays out -- where not the same but some issues played  
13 out will be in deciding what is properly a matter of disagreement and what is not. That  
14 is where the list of issues will become important to work out what is properly before  
15 the tribunal or not.

16 THE CHAIR: Well, that, with respect, is rather dodging my question. I mean, it seems  
17 to be highly likely that some of the points made by Mr Williams are not going to be  
18 agreed to. If Mr Williams goes in, then surely, whether it's Dr Spicer or somebody  
19 else, the Gambling Commission are going to be entitled to put in an expert and Allwyn  
20 will want to as well. And if they disagree with what Mr Williams says, which seems, at  
21 least in one respect, that Dr Spicer has already identified to be a real possibility, then  
22 how is the tribunal to deal with that?

23 MR BOWSHER: But it's not whether or not there's any disagreement; it is -- where  
24 the tribunal is constrained in a judicial review context is in terms of finding error. But  
25 the explanation of that -- the consequences of that error as to whether or not that leads  
26 to relief or not, there may be a number of different shades of view. But what seems to

1 us likely is that, given that these errors are largely drawn from the documents  
2 themselves, the best that GC will be able to say is, "Well, yes, that is true, that didn't  
3 happen and, as we have said, it should have happened, but it didn't. Our explanation  
4 for it being okay is, well, it never happened and we didn't think anything better could  
5 happen".

6 THE CHAIR: Dr Spicer already says that he doesn't agree with Mr Williams in relation  
7 to variables like seasonality, and he says that. So I think it's a reasonable assumption  
8 that is a problem we're going to have. At the moment, I'm not clear how you think we  
9 deal with that. Do we have cross-examination of the experts? How is the tribunal  
10 going to resolve the disputes between them as to whether or not the treatment of  
11 variables is a --

12 MR BOWSHER: Even in judicial review, it is an option to cross-examine on those  
13 points. But I -- at the moment, Dr Spicer doesn't put up, for example, his alternative.  
14 It can't be the case that there is no seasonality. I mean, he's just --

15 THE CHAIR: Well, he does. As I understood his draft report, he says it's entirely  
16 reasonable to approach the variables in the way they have. Maybe income is a better  
17 one, because he says, well, actually, just look, I can't remember precisely what the  
18 different variables are, but the variable that Camelot has used is actually a perfectly  
19 good proxy for income.

20 Now, Mr Williams takes a different view. I have no idea which of those is right or  
21 wrong, but they clearly are disagreeing about that. And I think the path that we're  
22 going down that you're advancing leads to inevitably having to have cross-examination  
23 on that. I mean, how else are we going to resolve that issue?

24 MR BOWSHER: Well, if it is as crisp as, "It is or is not a factor", I --

25 THE CHAIR: Well, we can look and see what they say, I mean, if it's helpful. I think  
26 it's -- I can't remember which it is -- 2(a) or 2(b) and we see what they say about it.

1 But my understanding is that, when you look at what Dr Spicer says, he says, "I don't  
2 agree". He says, "I do not think you can say that no reasonable econometrician would  
3 have proceeded to deal with income and seasonality in the way that Camelot did".

4 Surely that's a disagreement which is right on point. I mean, this is quite aside from  
5 the point as to whether you pass the Law Society test, because I'm sure Ms Clement  
6 is going to be submitting that you don't because it's not an incontrovertible error. Now,  
7 I know there's an argument about whether Dr Spicer's an expert and all that, how that  
8 fits in, but the simple point and really the point I'm trying to put to you is, as a matter  
9 of practicality, where's all this going?

10 Because if you're saying to me, what you're really saying, I think, is it would be helpful  
11 to your case to have this material in. And if I'm trying to answer the question as to  
12 whether it's reasonably necessary to have it in, then I've got to take into account the  
13 consequences of it. One of the consequences at the moment seems to be that  
14 wherever there's disagreement from either the Gambling Commission or from Allwyn  
15 about what Mr Williams said, there's going to be a dispute between experts that can  
16 only really be resolved by cross-examination by the parties. If there's not  
17 disagreement, then obviously -- I rather suspect the reason for that is because it's what  
18 Europe Economics has identified in its material already and we don't need Mr Williams  
19 to help us with it, because all he's doing is repeating what Europe Economics have  
20 stated.

21 MR BOWSHER: Well, as I say, it's premature now to say that that is an issue which  
22 should or shouldn't be the subject of cross-examination, because we simply don't know  
23 the contours of that --

24 THE CHAIR: Well, I don't think it's premature because I think part of the balancing  
25 exercise I have to undertake is whether it's reasonable in what ought to otherwise be  
26 quite a constrained judicial review application which can be dealt with in a couple of

1 days, possibly three, because of the extension that the material that's uncontested  
2 you've added. But the moment we start adding days of cross-examination, we're  
3 talking about a completely different proceeding. Surely, if that is a reasonable  
4 likelihood, that has to go into the balancing exercise to determine whether what you  
5 want is reasonable.

6 MR BOWSHER: The shape of that dispute is not going to be, as I understand it  
7 from -- again, I'm trying to infer from what Dr Spicer says about just taking error 2(b)  
8 as the one you've just taken -- it's not that he's going to be saying that there shouldn't  
9 have been some variable that modelled that sort of topic, that he may be saying, "Well,  
10 there may be other ways of dealing with the same matter". I mean, if we look at the  
11 conclusion itself in his own --

12 THE CHAIR: I think Mr Williams is saying that it was entirely, as I understand it, he's  
13 saying it was unreasonable to deal with income and seasonality in the way that  
14 Camelot did. And Dr Spicer is saying, "No, it's not". I mean, there's an absolute clear  
15 conflict in their views. I mean, by all means, show me if you think that's not right, but  
16 that's certainly how I've read them. (Pause)

17 MR BOWSHER: But the conclusion -- if one has -- I mean, he doesn't get into the  
18 detail of that in his note, but at para 2.28 where he goes back to the -- on page 1053.

19 THE CHAIR: Which, sorry? Say it again.

20 MR BOWSHER: Dr Spicer, at 1053.

21 THE CHAIR: Yes. Which paragraph?

22 MR BOWSHER: 2.28. This is a quotation from the Europe Economics assessment  
23 in March 2023.

24 THE CHAIR: These are the extended models, aren't they?

25 MR BOWSHER: And it's --

26 THE CHAIR: This is not about -- is this about the choice of variables?

1 MR BOWSHER: Yes. Under error 2(b).

2 THE CHAIR: Well, I think we're talking -- I was talking about 2(a). 2(b)'s the  
3 statistically insignificant variables. I was talking about 2(a) which is the relevant  
4 explanatory variables. That's where this issue about seasonality and income comes  
5 up. And it's actually, it's 2.23. There it is:

6 "Even if it were accepted that any model of national lottery demand should have regard  
7 to income, unemployment and seasonality ... as suggested ... I do not think we can  
8 conclude that Camelot had made an incontrovertible error."

9 MR BOWSHER: It may be -- once one sees --

10 THE CHAIR: I'm sorry, and then just to go back to 2.22:

11 "Different econometricians will disagree on the relative weight they attach to these  
12 different sources when determining which variables ... Just because one  
13 econometrician believes a certain variable should be considered does not establish  
14 that a technical error has been made."

15 So he does disagree.

16 MR BOWSHER: On that point, the disagreement -- it may be that there will have to  
17 be a decision as to what can properly be taken forward to trial as -- but it's premature  
18 to decide that without knowing what the pleaded case is going to be.

19 THE CHAIR: But I mean, in a sense, isn't that just a really rather hopeless position,  
20 Mr Bowsher? Because what you're really saying is, if there's any chance that  
21 Dr Spicer is going to disagree with it, then we won't let it in. But if Dr Spicer is going  
22 to agree with that, and indeed therefore presumably it's in the material already, why  
23 do we need Mr Williams? I mean, it just doesn't make any sense.

24 The whole point of the argument you're advancing, you've said to me before that  
25 Europe Economics got it wrong. In order to do that, you're going to have to argue that  
26 they should have done things or analyse things in a different way. And it's pretty

1 obvious, isn't it, that that is going to be responded to by people saying, "No, that's not  
2 right". And this is where we see it most obviously, it seems to me, and what's already  
3 been appeared and what's already appearing in the draft report.

4 MR BOWSHER: But, and there are other ways in which we attack error 2(a) in any  
5 event.

6 THE CHAIR: Well, that's not really the point of putting it to you. The point I'm putting  
7 to you is that the way you are attacking it is going to lead inevitably, it seems, to  
8 a response that's going to require a different way of resolving this hearing than I think  
9 any of us had been expecting.

10 But I think this -- I'm conscious of the time, too, and it's my fault because I've taken  
11 you up hill and down dale on all sorts of points, but we are at some stage going to  
12 have to hear from the Gambling Commission and from Allwyn. So I'm just -- I don't  
13 want to hold you up any longer, unless you've got anything else to say on that. How  
14 much longer do you think you've got?

15 MR BOWSHER: Well ...

16 THE CHAIR: I don't want to hurry you. I'm just conscious that I've distracted you a lot  
17 and we've taken up a lot of time doing it. So just whatever you think you sensibly  
18 need, you should have, but, I'll try and stop interrupting you.

19 MR BOWSHER: Then insofar as there are specific elements of our expert evidence  
20 that can't properly be taken forward, that should not be a reason why we should not  
21 be permitted to admit -- why the evidence should not be admitted.

22 It may be that some of it has to be positively excluded as a question of case  
23 management. If it's determined later that that's not a matter that can properly be  
24 determined by the tribunal --

25 THE CHAIR: If we're excluding the material which is contested, if the reason we're  
26 excluding it is because people disagree with it, then what's the point of the evidence?

1 If all Mr Williams is going to end up doing is putting forward evidence which is  
2 accepted, then why are we doing all of this?

3 MR BOWSHER: Back to what I just said, the explanatory -- this is explained -- if it's  
4 explaining the errors and the explanatory reasons for having expert evidence in  
5 technical cases. That is what it's for.

6 THE CHAIR: Well, that's not -- that is now a departure from the Law Society, I think,  
7 because we're no longer talking about serious technical errors that are  
8 incontrovertible, because obviously they are controverted. So under which  
9 category -- what's the other gateway you say it gets in?

10 MR BOWSHER: But the evidence should not be refused, admission of the evidence  
11 should not be refused simply because one element of it is determined to be  
12 inappropriate for trial. The way of dealing with that is to find out what, in fact, the  
13 issues are for trial, and if there are parts of it which cannot properly be dealt with at  
14 trial that they then can be ruled to be inadmissible, and we can deal with that  
15 procedurally before the hearing.

16 THE CHAIR: But we can't start the process now that nobody knows what's going to  
17 be in the hearing. I mean, surely the other parties need to understand -- we've already  
18 had Mr Johnston telling us that he doesn't understand what you're pleading -- your  
19 alternative amended pleading -- requires of him. I don't think we can run a case where  
20 nobody knows what the evidence is going to be. But today's the day, isn't it? I mean,  
21 we have to decide today what's in and what's out.

22 The problem that we're focusing on at the moment is that there do seem to be some  
23 points that not only fail the Law Society test, because Dr Spicer seems to be saying,  
24 "Well, actually, that's not right. There's room for argument on this; it's not  
25 incontrovertible". But perhaps more significantly, that exposes the likelihood that we're  
26 going to have to deal with this by way of cross-examination, which is obviously highly

1 | unsatisfactory. We need to resolve that today, I think.

2 | MR BOWSHER: Well, let me ... (Pause)

3 | I would submit that the evidence, as it is, ought to be admitted, and if there is -- it may  
4 | be that particular points cannot be taken forward if they're ruled to be differences of  
5 | opinion between experts which can't be resolved by the tribunal.

6 | But the bulk of the evidence is evidence identifying errors which are largely  
7 | conceded -- it may be that Dr Spicer doesn't use the word "error"; he may find  
8 | a different way of expressing his view of the point, but he agrees that this is a point.

9 | The question then becomes: well, how good or bad it is -- what does one do with it?

10 | And that is very relevant to the --

11 | THE CHAIR: Well, I think there were three things he does, as I understand it.

12 | One, is he says, "Yes, there are some points here and actually they're points that  
13 | we've pointed out". So everybody's aware of them; they're in the documentation.

14 | There's some things he says, "I don't really know, because we don't know exactly what  
15 | Camelot did and it's complicated by the fact that this is a multiyear process. And so  
16 | we just don't know, and neither does Mr Williams".

17 | And there's the third category where he says, "I don't agree", which is actually fairly  
18 | limited.

19 | Perhaps that's unfair. There's a fourth category where, in relation to 2(b), he does say,  
20 | "I agree in principle that it should be consistent and robust", but he says it only applies  
21 | to one of the models which they said they didn't think was very useful anyway. So I'm  
22 | not quite sure where that goes to.

23 | So that's what I understand Dr Spicer to say. Now, it's a draft report. You've got all  
24 | your points about whether we should or shouldn't be giving that sort of evidence, but  
25 | it seems to be a pretty good roadmap of where we're going to end up with all this.

26 | It seems to me -- if we're thinking about, quite apart from whether you pass the

1 Law Society test on any of these points, is does it seem to undermine the need to have  
2 them in there and the benefit you get, that either they end up being heavily contested  
3 and problematic or they're not contested at all, in which case, what's the point of the  
4 evidence?

5 MR BOWSHER: Well --

6 THE CHAIR: So I don't want to go back around the circle again, but I think that's the  
7 conundrum that we're --

8 MR BOWSHER: Well, I'll address what's the point of the evidence. There are other  
9 points of the evidence about -- if I loosely use the Powis explanation, technical  
10 explanation category, but there's a lot of point of the evidence, we say, in --

11 THE CHAIR: Well, there isn't a Powis technical explanation. Do you mean Lynch?

12 MR BOWSHER: Lynch, Lynch.

13 THE CHAIR: I mean, do you want to move on and talk about Powis? Because I think  
14 you have suggested that you fall within one of -- or two of the Powis categories as  
15 well.

16 MR BOWSHER: Yes. Just going back to what you just -- of the categories you've  
17 identified, we don't really know categories very much relevant to the Tameside  
18 rationality, because it goes into: well, we don't know what happened at the time when  
19 we didn't pursue it.

20 So there is a question for the tribunal as to whether or not -- in that state of not having  
21 any other material to go forward or not knowing what happened -- more inquiry should  
22 have been done.

23 THE CHAIR: Well, that's got nothing to do with Dr Williams's evidence, has it? It is  
24 really about the evidence of Dr Spicer, because he's the one who says, "I don't really  
25 know", and then we're into this question as to what's going to happen when Allwyn  
26 puts in its intervention statement, and obviously, there is a duty of candour point in

1 relation to the Gambling Commission.

2 So all of that one can see might unfold perfectly naturally from the way you've pleaded  
3 your case, even without the -- what may be the contested elements of it. But I don't  
4 see how Mr Williams helps us with any of that.

5 MR BOWSHER: Well, Mr Williams identifies those points and explains why there is  
6 an error in technical terms and what might have been done --

7 THE CHAIR: Well, why there would have been an error if the work hadn't been done --

8 MR BOWSHER: Yes.

9 THE CHAIR: -- I think, on the premise of the working.

10 MR BOWSHER: I mean, the short answer to your concern is that it would be open to  
11 the tribunal today to order that we be permitted to put in expert evidence, but with an  
12 excision. It may be that we have to go away and take a day just to agree what the  
13 excisions would be for the errors which the tribunal could not deal with as errors.

14 I'm not conceding that, but I think that would be a route to dealing with the matter.

15 THE CHAIR: I certainly have that submission. Do you want to move on? I'm  
16 conscious of the time.

17 MR BOWSHER: I mean, I think ... (Pause)

18 Can I just ...?

19 THE CHAIR: Yes, of course. (Pause)

20 MR BOWSHER: I mean, I'm not sure I can take our submission very much further.

21 I mean, I've taken you to the authorities. What we say is there are a number of ways  
22 in which that expert evidence comes to bite, and it is necessary to have that technical  
23 explanation to explain either why the error is irrational or why a failure to deal with  
24 a lack of material, some of which may include that "We don't know what happened but  
25 we, Europe Economics, didn't chase it down", isn't a satisfactory answer to the  
26 situation, why something more should have been done.

1 All of that is, we say, properly material to be explained by expert evidence. Whichever  
2 category one chooses to look at it, it's plainly that contemplated by Lynch and it is  
3 explaining the material before the tribunal in the first category of Powis.

4 So we say that is all material which is useful and reasonably required for us in order  
5 to be able to develop our case. But we can take the case forward without it, but we  
6 say the right answer would be for us to have the evidence admitted. If there are  
7 specific points which it is said cannot possibly be dealt with at trial, then it may be that  
8 that permission has to be qualified to some limited extent.

9 But in fact, there are very few -- and I think possibly the tribunal may have identified  
10 the only one where Dr Spicer actually positively says, "This isn't an error".

11 THE CHAIR: Well, I mean, the difficulty, of course, is that in the category where he  
12 says, "I don't know because we don't know what Camelot did", there may be all sorts  
13 of other things that -- if we go down the path of getting expert evidence, then we  
14 suddenly are into the world of what Camelot did actually do, which I think is what your  
15 expert report invites. It's the only way we'd really be able to resolve whether  
16 Mr Williams was right or wrong. Then we could end up with a very long list of things  
17 that Allwyn's expert disagreed, if not the Gambling Commission. So I don't think one  
18 can conclude it's the only area that's likely to be disputed.

19 And we won't know the answer for that. I mean, as you rightly say, we won't know the  
20 answer to that until we see what's in dispute. So we're sort of shooting blind a bit on  
21 it, aren't we?

22 MR BOWSHER: Well, I'm not sure I can take that --

23 THE CHAIR: No, no, I understand what you're saying.

24 MR BOWSHER: I've made our submissions, and it seems to us that -- I'm not sure  
25 I can take that any further.

26 We would ask for permission to admit the expert evidence and for the permission to

1 amend the notice of appeal in the terms that corresponds with that evidence, failing  
2 which we'd ask for permission to amend the notice of appeal in the alternative form,  
3 which provides for us to run the same points but on the basis of the material as it  
4 currently is before the tribunal.

5 THE CHAIR: On that amendment point, if that's where we get to, obviously we'll need  
6 to have a discussion about that.

7 MR BOWSHER: Yes, and then where that goes.

8 THE CHAIR: Yes. So no doubt you'll have some further things to say when you get  
9 to that point.

10 MR BOWSHER: Yes. I'm not sure I can take that --

11 THE CHAIR: Thank you. That's been very helpful.

12 Ms Clement.

13 Submissions by MS CLEMENT

14 MS CLEMENT: Sir, I'm conscious of the time. Do you want me to start now or after  
15 lunch?

16 THE CHAIR: Yes, well, I don't mind. Whatever you would prefer. If you would like to  
17 make a start. Why don't you get going and -- unless you would prefer to have extra  
18 time. But I think it'd be helpful if you were happy to get going.

19 MS CLEMENT: Yes, so I'm happy to make a start. Could I just acquire the lectern  
20 from Mr Bowsher, please?

21 THE CHAIR: Yes. (Pause)

22 MS CLEMENT: Thank you. (Pause)

23 So in terms of the application to admit the Williams report, as you know, sir, we say  
24 it's not admissible, and in any event, it's not necessary or reasonably required in order  
25 to resolve the issues before the tribunal.

26 But before I get into admissibility, I really do have to emphasise the unusual position

1 that the tribunal is in this case. The applicants have been clear that they do not need  
2 the expert report to maintain their amended grounds of claim and their pleaded case.  
3 They say they pursue the application to amend, even if permission to admit the  
4 Williams report is refused.

5 So you've seen the, sort of, conditional amended pleading that you have. It's exactly  
6 the same pleading, save that all they do is delete any reference to the Williams report  
7 and they remove the quotations. They simply plead the allegations without a source.

8 So it's rather unusual for an applicant to then say it is necessary to admit the expert  
9 report, because Mr Bowsher's fundamental submission is he can make his case  
10 without it; he can identify the errors, he says, from the contemporaneous documents.  
11 So therefore, sir, we say it is a very novel submission to say that the expert evidence  
12 is nevertheless admissible. If he can advance the grounds of claim he wishes to make  
13 without it, it's not necessary to admit it.

14 So turning, then, to the question of whether the Williams report is admissible at all, we  
15 have seven key points from the authorities. I hope that most of these are not  
16 controversial, and these will then form the framework for your decision.

17 The first of those points is an obvious one, in that in determining this application, the  
18 tribunal is applying judicial review principles.

19 The second is that in judicial review proceedings, the tribunal is considering whether  
20 the decision under challenge was lawful in light of the material before the decision  
21 maker. This is trite, but it is not the function of a tribunal, applying judicial review  
22 principles to assess the merits of the decision of which judicial review is sought. It is  
23 equally trite that a tribunal applying judicial review principles does not usually resolve  
24 disputes of fact. It doesn't have cross-examination, save in highly exceptional cases,  
25 and all evidence is usually in writing. (Pause)

26 Third, sir, a court or tribunal applying judicial review principles will not resolve disputes

1 between experts. This is particularly so where the claim is an irrationality claim. I'll  
2 show you the authority for that in a moment, but for your note, we would say that  
3 comes from Sky Blue, tab 17, paragraph 42, page 383. I'll take you to it in a moment,  
4 sir.

5 THE CHAIR: Sorry. Just give me that paragraph number again.

6 MS CLEMENT: Paragraph 42.

7 So, sir, it is not for the tribunal to determine whether the Camelot's econometric  
8 analysis was correct. It is not for the tribunal to determine whether Europe Economics'  
9 advice was correct. That is simply not and never can be the question in judicial review  
10 proceedings.

11 The fourth point is that fresh evidence of any kind, i.e. evidence that was not before  
12 the decision maker, is not admitted in judicial review proceedings unless certain  
13 conditions are met. Those traditional conditions were set out in Powis. That is in the  
14 authorities bundle, tab 9, page 215. We see the four categories at page 226 of the  
15 electronic bundle.

16 THE CHAIR: Yes.

17 MS CLEMENT: Those are the categories that are well known. So, category (1): "The  
18 court can receive evidence to show what material was before the minister or inferior  
19 tribunal".

20 That's not to explain it. That's not to put a spin on it. That's not to give analysis of it.

21 It's a factual question: what material was before the minister or the inferior tribunal?

22 The second is where the jurisdiction of the decision maker depends on a question of  
23 fact. That's the jurisdictional issue, not relied on by my learned friend.

24 The third element is where the question is whether essential procedural requirements  
25 were observed. So that's looking at procedural fairness and breach of natural justice.

26 Then the fourth is where proceedings are tainted by misconduct on the part of the

1 decision maker or the parties before it, and the court goes on there to say examples  
2 of bias or fraud or perjury or anything of that nature.

3 Now, my learned friend made a valiant attempt at the end of his submissions to  
4 squeeze this application into one or possibly more of those categories, but I'll come  
5 back in a moment, sir, to show why that attempt is hopeless.

6 THE CHAIR: Of course, Powis is about all evidence, isn't it? It's not just about expert  
7 evidence. It's about any evidence.

8 MS CLEMENT: Any evidence that was not before the decision maker.

9 So my fifth point is that there was then a limited extension to the Powis categories in  
10 Lynch, which is in the authorities bundle at tab 12, at electronic page 248.

11 Essentially, the issue in Lynch was whether you can get fresh expert evidence,  
12 whether that can be admitted if it's outside the Powis categories. You can see it's  
13 a judicial review of a decision of the General Dental Council. So it was all about how  
14 specialist a particular dentist's expertise was. He sought to admit expert evidence that  
15 he hadn't put before the decision maker, that the procedures he'd been carrying out  
16 were particularly difficult and complex. That's the context for this.

17 But the important point of principle, sir, if I can show you a few paragraphs.

18 Paragraph 18 at page 255. (Pause)

19 Do you have that, sir?

20 THE CHAIR: Yes, I do.

21 MS CLEMENT: Yes. So we see there what's being admitted. It's:

22 "In support of his claim based on irrationality, the claimant sought to rely on the  
23 evidence of two experts which showed that the tests of equivalent expertise had been  
24 met and the panel was wrong to find it was not".

25 Then it goes through the history that that was found to be inadmissible. There was  
26 then an appeal. Paragraph 19 sets out the appeal and Lady Justice Hale endorsing

1 that decision that it was inadmissible.

2 But towards the end of paragraph 18, we see there Mr Havers recognised:

3 "I could not decide between experts on issues of fact and so if the defendant produced  
4 a report from a reputable expert which contradicted those of the claimant's experts any  
5 irrationality argument could not succeed in so far as it depended on any matter in issue  
6 between the experts. The defendant did produce such a report from a reputable  
7 expert. In those circumstances, the admissibility of the claimant's experts' report was  
8 not of great importance ..."

9 But nevertheless, the next paragraph: "The point is ... of general importance".

10 We see it explained, then, at the end of paragraph 24. The narrow extension that the  
11 court was making is to say, at the top of page 257 of the electronic numbering:

12 "However, it seems to me that in a truly technical field, where the significance of  
13 a particular process is in issue expert evidence can be admitted to explain the process  
14 and its significance. Cases where this can be permitted will be very rare and [this]  
15 should not be regarded as opening the door to the admissibility of experts' reports  
16 [et cetera] ... the court must be careful to recognise and to apply the distinction".

17 Then paragraph 25. This is where the distinction is really summarised:

18 "This is ... some extension beyond that recognised by Ex p Powis ... But its purpose is  
19 in reality to explain to the court matters which it needs to understand in order to reach  
20 a just conclusion. [If that is required, then it can be admitted.] But a word of caution  
21 is appropriate. Where the tribunal or body is itself composed of experts [applicable  
22 here] or has been advised by an expert assessor [that's the Gambling Commission] ...  
23 it will be virtually impossible to justify the submission of expert evidence which goes  
24 beyond explanation of technical terms since it will almost inevitably involve an attempt  
25 to challenge the factual conclusions and judgment of an expert. That is something  
26 which is inappropriate for a reviewing court".

1 So that is what Lynch establishes, not some general open-ended "if it might be helpful,  
2 you can make it admissible just".

3 To show how that approach has been applied in this tribunal, could I ask you to turn  
4 to Dye & Durham, which is at tab 28, page 635. This is a relatively recent decision of  
5 Hodge Malek KC, and at paragraph 27 and 28, this is at page 646.

6 THE CHAIR: Yes.

7 MS CLEMENT: Do you see the heading "Expert Evidence"?

8 THE CHAIR: Yes.

9 MS CLEMENT: The chair concludes that:

10 "The general approach ... permission to adduce new expert evidence is not granted  
11 unless the Powis test is met and, given that it is a specialist Tribunal, it is not likely to  
12 be common that the Lynch principle would apply. Permission to adduce expert  
13 evidence is granted only in 'exceptional circumstances' ... The Tribunal has made clear  
14 that expert evidence should be 'strongly discouraged and disallowed other than in very  
15 clear cases'".

16 Then paragraph 28, underneath the quotations from HCA and Lafarge:

17 "The Tribunal reminded the parties that the admission of expert evidence in judicial  
18 review proceedings is 'exceptional' and, as the Tribunal is a body which itself has  
19 technical expertise and an ability to understand technical economic points without  
20 external assistance, 'the sort of situation in which technical assistance is required  
21 under the Lynch principle is not likely to be a common one in this Tribunal'".

22 THE CHAIR: Yes.

23 MS CLEMENT: That's the end of my fifth point.

24 6 and 7 concerned the Law Society and subsidy control cases. But given that it's 1.00,  
25 I wonder if we pause there and I continue at 2.00.

26 THE CHAIR: Yes. Thank you. I will rise and we'll start again. But just in terms of

1 | how long you think you're going to be ...

2 | MS CLEMENT: No more than 45 minutes, I would hope.

3 | THE CHAIR: Thank you. Mr Johnston, just a rough idea?

4 | MR JOHNSTON: I've told my assistants I'm playing submissions bingo. I'm currently  
5 | striking through points that have been taken by Ms Clement. The answer is, I'm not  
6 | 100 per cent sure, but certainly no more than half an hour maximum. Maybe less.

7 | THE CHAIR: I'm just conscious of wherever we get to, I'm going to have to produce  
8 | an answer for you, and then we're going to have to talk about consequences. That  
9 | should give us plenty of time to deal with it today, shouldn't it, I think. Good. We'll rise  
10 | until 2.00 pm. Thank you.

11 | (12.59 pm)

12 | (The short adjournment)

13 | (2.01 pm)

14 | THE CHAIR: Yes. Ms Clement.

15 | MS CLEMENT: Before the short adjournment, I had gone through the first five of my  
16 | points. I have two left.

17 | My sixth point is that outside of the ex parte Powis and ex parte Lynch categories, the  
18 | only other circumstance where fresh expert evidence could possibly be admissible is  
19 | that set out by Mrs Justice Carr, as she then was, in the Law Society case.

20 | I know we've looked at it on a number of occasions, but it is important that we, turn it  
21 | up. That is at tab 23, page 497. We can see at paragraph 1, page 500 of the  
22 | electronic bundle what was actually being challenged. That was a challenge to  
23 | reducing fees that were payable under the litigated graduated fees scheme, and that  
24 | was set in the rate of the fixed fee dependent on a formula. We see at paragraph 4  
25 | what the grounds of challenge were.

26 | Ground 1 was a procedural fairness challenge, because that was arguing that the

1 consultation process was unfair. Then ground 2 is on all fours with this case, namely,  
2 it was said that the decision was irrational because it was allegedly based on some  
3 manifestly erroneous assumptions, including a misunderstanding of the effect of  
4 a particular case, and the analysis, which was said by the Law Society to have used  
5 a flawed statistical method, which is essentially what's being said here.

6 Paragraph 5, we see the Lord Chancellor's response, which is that he took the  
7 decision on the basis of a careful quantitative analysis by officials, and there was  
8 nothing procedurally unfair or irrational or otherwise unlawful about the decision.

9 Then, sir, at paragraph 7 we see what evidence both parties sought to have admitted  
10 in the proceedings, and that was an expert report from a Professor Adams, who is an  
11 expert in econometrics. So, the same type of evidence we're looking at here. The  
12 Lord Chancellor responded by serving expert evidence on which he would seek to  
13 rely, and then there were a further round of expert reports. So it wasn't just the one  
14 round. You had the second round, as well.

15 Then, sir, the treatment of the expert evidence starts at section C at page 507 of the  
16 electronic bundle. We see at paragraph 36, the judge essentially reiterates the first of  
17 my three principles about the nature of judicial review and why expert evidence is  
18 unlikely or seldom reasonably required in order to resolve it.

19 We then see at paragraph 37, the judge referring to the classic statement of admissible  
20 evidence in *ex parte Powis*. So that's the four elements there. Paragraph 38: she  
21 refers to the extension in *Lynch*, which I showed you, sir, before, the short  
22 adjournment, and what exactly it is that *Lynch* is permitting. Then paragraphs 39  
23 through to 41, we have the extension, extending the principle to the situation in the  
24 Law Society case, where it is alleged that the decision under challenge was reached  
25 by a process of reasoning which involved a serious technical error and that that  
26 serious technical error was incontrovertible.

1 What's important here is that it's still a challenge to the decision taken by the  
2 Gambling Commission, and it is that decision that has to have been reached by  
3 a process of reasoning that was vitiated by this serious technical error. So the  
4 question is not, as I said at the outset, whether Camelot's econometric analysis is  
5 correct. The question is not whether Europe Economics' advice is correct. The  
6 question is, and the focus is on, the Gambling Commission's decision.

7 THE CHAIR: Yes. Just on that point, I mean, you would have heard my discussion  
8 with Mr Bowsher about this. I suppose the question of -- I think you heard me say to  
9 him that the errors that might or might not exist in the model are different from the  
10 decision. So I think thus far we're on the same page.

11 MS CLEMENT: Yes.

12 THE CHAIR: Just in relation to the expert appointed by the Gambling Commission,  
13 so Europe Economics, if one is -- and let's just posit that we're looking at a situation  
14 where there is a sufficient serious technical error that it gives rise to an irrationality  
15 problem, if the expert makes that error, do you say that it doesn't matter as long as the  
16 Gambling Commission wasn't aware of it? Is that the point you're making? In other  
17 words, is the Gambling Commission not stuck with the errors that its expert makes in  
18 providing the advice to it?

19 MS CLEMENT: Well, the way we look at it is this way: if you've got a decision maker  
20 that takes a decision having regard to expert advice, now, that is the expert advice.  
21 So in the ordinary course of events, it would be reasonable to rely on the advice of the  
22 expert that you engaged to give you that advice. There may be an alternative expert  
23 who says, "I disagree with that advice; I think you should have done something  
24 different in that situation". But what you have then is a straightforward difference of  
25 view between two experts. And that's exactly the situation that all of the authorities  
26 I've shown you, sir, say this court, applying judicial review principles, cannot resolve.

1 THE CHAIR: Yes. I think I'm asking a slightly different question. In a way, it's perhaps  
2 it's more out of curiosity than any particular relevance to the point. It's just that, let's  
3 just hypothetically say that, Europe Economics have done a terrible job and it's very  
4 evident that their work falls woefully short. Now, I don't think you're saying in those  
5 circumstances the Gambling Commission can escape an irrationality based on  
6 a serious misunderstanding of the factual position that the decision's based on just  
7 simply because it instructed the expert and the expert made a mess of it. Otherwise  
8 that doesn't -- they're distancing from the problem; it still has to own the problem as  
9 long as it's aware of them. I think that's the point I'm putting to you.

10 MS CLEMENT: Yes. I think, sir, there needs to be a public law error.

11 THE CHAIR: Yes.

12 MS CLEMENT: So, the fact that something might be wrong or would be done  
13 differently by someone else or someone else reaches a different judgment about what  
14 should have happened does not establish a public law error. So there could perhaps  
15 be a public law error, I don't know, if there was some standard technique, some  
16 universally accepted only technique by which one did something, and that had been  
17 ignored by an expert, perhaps you could see a scenario where that might occur.

18 But if what you've got is a question of judgment by one expert, and the judgment being,  
19 can you have any regard to the work that Camelot has done; and one expert says,  
20 "Yes, you can, subject to the caveats I've identified" and another expert says, "In my  
21 judgment, no, you can't", that doesn't get anywhere near establishing a public law  
22 error. And that's why the courts then say this expert evidence is not admissible.

23 THE CHAIR: Yes, precisely. That's why the Law Society creates the window, but only  
24 if you can meet that requirement. Because if you hadn't met that requirement then, in  
25 other words, putting it the other way round, as again I put to Mr Bowsher, the  
26 Law Society is not determining what is or isn't judicially reviewable, it's just providing

1 the template for when the evidence is allowed in. But you've still got to go back and  
2 ask yourself the question what's the public law error that you're identifying?

3 MS CLEMENT: Yes.

4 THE CHAIR: Yes.

5 MS CLEMENT: So that's the right way, we submit -- well, we say that's the only way  
6 that any court or tribunal could approach it. That's because these are matters of expert  
7 judgment. In my experience, there are frequently disagreements of this nature and it's  
8 not for a court on a judicial review claim to try and step into the middle and work out  
9 who's right, if indeed anyone can be said to be right. Objective correctness is  
10 something that one looks for in vain in many of these types of cases.

11 So, that's why we say Mrs Justice Carr laid down the principle she did in paragraph 40  
12 through to 41, saying that if you've got a challenge based on irrationality, if you've got  
13 an expert who -- or if the view of the expert that you want to put in is contradicted by  
14 a rational opinion of another expert, it's just not admissible. We say that, frankly, that  
15 is squarely on all fours with this case and that is the end of the matter.

16 So we say from those paragraphs, there are two points that are absolutely crucial for  
17 your determination here. The first, I think I've touched on this, is that what's being  
18 focused on is that it's the reasoning of the decision maker that has to be vitiated by  
19 the serious technical error, not Camelot have made a mistake, not Europe Economics  
20 have made a mistake. And if it's a modelling error, for example, that would make  
21 absolutely no difference to the decision, then the reasoning is not vitiated by that  
22 modelling error. That's why the significance of any error that's been identified is so  
23 important, and it's that matter that's in dispute between Dr Spicer and Mr Williams.

24 Then the second key point we take from that, as I said, paragraph 41, page 509, if  
25 you've got that reasonable difference of expert opinion, an irrationality claim can't  
26 succeed. That's precisely why it is not admissible.

1 Then, my Lord, the last of my points of principle, number 7. This wasn't actually  
2 pursued orally by my learned friend, but it's in his skeleton and I just need to deal with  
3 it briefly. He's wrong to contend that there's some sort of special rule or special  
4 exemption for state aid or subsidy cases, particularly so when what is at issue is the  
5 irrationality aspect of the commercial market operator test.

6 We made the point in our skeleton that none of the cases that have considered the old  
7 MEOP or the current commercial market operator principle have relied on expert  
8 evidence. So that's Sky Blue, that's Bulb, that's Weis. And it might help just to look at  
9 that Sky Blue case that I mentioned to you before the short adjournment. It's in the  
10 bundle at tab 17, and this is a decision of Mr Justice Hickinbottom, who is refusing the  
11 application for expert evidence in circumstances that are remarkably similar to ours.  
12 We see at paragraph 7, page 376, what the grounds of claim were. One is that you  
13 couldn't rely on the MEOP in those days:

14 " ...given the risk involved, the low rate of interest, the poor security and the capital  
15 repayment ... a private investor ... would not have entered into the transaction."

16 Then over the page, we see they were also advancing irrationality arguments.

17 Paragraph 9 is the application that was before Mr Justice Hickinbottom included an  
18 order permitting them to adduce expert evidence, and then the expert evidence  
19 application starts at paragraph 41, page 383, where he rejects that application. So 41  
20 is the report description of the report that sought to be adduced. His report conducts  
21 a forensic exercise concluding it's deficient in a number of ways and giving his view  
22 about the private investor.

23 Then paragraph 42, the point right at the end of that paragraph -- there's a paragraph  
24 there about the standard of review that's been overtaken by subsequent case law; it's  
25 clear it's now rationality. But the crucial point here is that:

26 "This court consequently will not enter into a conflict of evidence between experts as

1 to whether the decision was in fact justified."

2 Then at the end, paragraph 45, a further point that I'll come back to later, the judge  
3 was influenced by the fact that if the expert evidence is allowed in, then the defendant  
4 would be entitled to respond to it, which was conceded, and in the circumstances, it  
5 was almost certain that the hearing date would be lost. That was a further factor for  
6 refusing the application. So the similarities are obvious.

7 So, sir, I've set out the principles. How then do we say those principles are applied to  
8 this application? My learned friend first sought to argue that his evidence is admissible  
9 because he satisfied the Law Society test. We say that's simply wrong. This is classic  
10 Law Society territory. Williams has produced a report. That report is contradicted by  
11 the rational opinion of another qualified expert -- that is Dr Spicer, obviously -- and so,  
12 applying judicial review principles, this tribunal simply can't resolve that conflict and  
13 will not attempt to do so.

14 THE CHAIR: Can I just ask you -- and this ties back to one of the points you made  
15 a bit earlier -- earlier, you said something about the significance of the errors.

16 MS CLEMENT: Yes.

17 THE CHAIR: And I think you were making that observation in the context of the Law  
18 Society case, because I think you're saying it needs to be a serious technical error  
19 that's uncontroverted just in terms of the relevance of the significance of the errors to  
20 the rationality challenge generally.

21 MS CLEMENT: Yes.

22 THE CHAIR: Because of course, Mr Bowsher says, well, it's important that the tribunal  
23 understands whether the points that Mr Williams is making are serious points or not.  
24 How does that fit into the analysis more generally? Because, of course, inevitably, as  
25 you point out, once you get into a conflict of experts about whether something is  
26 significant or not, it becomes problematic. But is the significance, if you're looking at

1 | this analysis, but it's really back to the judgment point, if your economists have  
2 | exercised their judgment and in doing so, they've overlooked the significance and the  
3 | judgment might have been different if they had thought about the significance in  
4 | a different way, how does that fit into the rationality challenge?

5 | MS CLEMENT: Well, sir, I think we almost go back a step, if I might respectfully  
6 | suggest.

7 | THE CHAIR: Yes.

8 | MS CLEMENT: The starting point is, what is the legal issue in the claim that the  
9 | evidence is said to go to?

10 | THE CHAIR: Yes.

11 | MS CLEMENT: My learned friend says it's rationality. So that goes to both the  
12 | commercial market operator principle, that's a rationality test; he says it's Tameside,  
13 | that's a rationality test. So it's all about is this evidence admissible to go to the  
14 | rationality issue? And where we're at in this case is, as I said, you've got those two  
15 | conflicting expert opinions. Because the question is not, as I said, was there an error  
16 | in the analysis; the question is not, "Was there an error in Europe Economics advice".  
17 | It's, "Was there a serious technical error that vitiates the reasoning in the  
18 | Gambling Commission's decision?

19 | So, if it's an error that doesn't vitiate the reasoning in any way, shape or form, it's  
20 | simply not anywhere near the test that we're looking at in Law Society. So it's got to  
21 | look at the end result and the connection with the actual decision that's under  
22 | challenge.

23 | THE CHAIR: So if -- yes, so I suppose if you just assume for present purposes that  
24 | Mr Williams doesn't come in, we don't have Mr Williams, and we're left with the  
25 | alternative pleading -- and there may be an argument about what that looks like, but  
26 | let's just broadly say that in that is a set of criticisms of the modelling, some of which

1 are picked up by the Europe Economics material, some of which isn't -- are we going  
2 to need to get into the question of the significance of that? Tameside is no longer  
3 relevant because we're not talking about admissibility; we've got just this issue of, as  
4 you say, how does one make an assessment as to whether the decision's vitiated by  
5 the error and, and so significance is apart of that, is it?

6 MS CLEMENT: I think we're maybe confusing two things here. I'm not explaining it  
7 very clearly.

8 THE CHAIR: It's my fault, not yours.

9 MS CLEMENT: The first question is, the vitiation point is a question about the  
10 admissibility of the evidence.

11 THE CHAIR: Well, except that I think we all accept that Mr Bowsher can run his case  
12 about there being defects in the model that lead to the Gambling Commission making  
13 the wrong decision about the funding. So --

14 MS CLEMENT: So he can plead his case how he sees fit, yes.

15 THE CHAIR: So just assume that there is no evidence from Mr Williams -- I mean,  
16 he's running this case that says there are errors on the model, and either  
17 because -- and let's just assume they're errors that your economics have picked up.  
18 But do we then need to get into the question as to how serious those errors are in  
19 order to decide whether or not, for example, the decision about the commercial market  
20 operator is a valid decision?

21 MS CLEMENT: Well, so what you then have is you apply the legal test to the issue  
22 that my learned friend is running. So if he's saying that you conferred economic  
23 advantage on Camelot as a result of the decision under challenge, he has to establish  
24 that no rational private investor, in the place of the Commission, would ever have made  
25 that investment. So that's where the irrationality test comes in. So you look at the  
26 evidence then that will be before the tribunal --

1 THE CHAIR: And let's say the evidence is that there are a whole lot of things wrong  
2 with the model and the Gambling Commission is aware that there are things wrong  
3 with the model. Mr Bowsher is going to be saying: well, in the real world, a private  
4 sector investor wouldn't have accepted those defects and would either have refused  
5 to fund or would have made some further enquiries. I think that's, broadly speaking,  
6 his case.

7 So at that stage, are we going to have to get into the question as to how significant  
8 those errors are, assuming, let's just say, that they're the ones that are highlighted in  
9 the Europe Economics paper? That's the question.

10 MS CLEMENT: Well, so the question at that point when the tribunal is determining  
11 the legal issue is: was it irrational? Would a rational private investor have made that  
12 investment? In light of all of the evidence that they had in front of them, including the  
13 historic investments, including the Camelot econometric analysis, including  
14 Europe Economics' advice on that, including the expert marketing advice that the  
15 Commission took, would a private investor manifestly not have made that investment?  
16 So it's a case of looking at all the material in the round and working out whether the  
17 irrationality standard has been reached. That's not an unusual exercise for a tribunal  
18 or a court to embark upon. Irrationality is a very high threshold, and we say it's obvious  
19 this decision wasn't irrational.

20 THE CHAIR: Because you rely on what Europe Economics say in their documentation  
21 about the significance of the defects in the models.

22 MS CLEMENT: Yes, because --

23 THE CHAIR: And because of the part the models played in the wider decision.

24 MS CLEMENT: The wider evidence base that is there and Dr Spicer certainly not  
25 saying there were, you know, a huge number of errors, he said: I pointed out these  
26 things at the time. There were some things that he might have done differently. But

1 the key point is, would it have led to a different decision on the part of the  
2 Gambling Commission? To which the answer is no. So that will be the evidence that  
3 is before the tribunal, but we did --

4 THE CHAIR: Because you say that the view from Europe Economics was that the  
5 models were generally fairly unreliable anyway.

6 MS CLEMENT: Yes. Well, because Europe Economics say that you approach them  
7 with caution, but nevertheless there's enough material there for you to have regard to  
8 this modelling.

9 THE CHAIR: Yes, to relate some -- an indication of directional relationship or  
10 whatever.

11 MS CLEMENT: Yes.

12 THE CHAIR: Yes.

13 MS CLEMENT: And so that will be the test -- that will be the question for the tribunal  
14 in light of all the evidence that was before the Gambling Commission. The question  
15 is simply, then, was the Gambling Commission's decision irrational?

16 THE CHAIR: So Mr Bowsher's saying that if Europe Economics had looked into this  
17 more closely, they would have realised that actually there were a lot more things wrong  
18 with the model than they perhaps appreciated. I think that's what he's saying. So how  
19 does that fit into the analysis?

20 MS CLEMENT: So again, it's the two separate stages of the analysis stage. One is,  
21 is Williams admissible?

22 THE CHAIR: Yes. Let's assume he's not, so we haven't got Williams complicating  
23 things.

24 MS CLEMENT: So if Williams is not admissible, then the tribunal makes that decision  
25 about irrationality based on the evidence that is admissible, based on the evidence  
26 that is before the tribunal. That involves considering all of the matters before the

1 Gambling Commission and whether the high threshold of irrationality is met.

2 THE CHAIR: Does that involve considering all the matters before Europe Economics  
3 as well, or just what they tell the Gambling Commission?

4 MS CLEMENT: Well, it the focus is -- again, it's not whether Europe Economics gave  
5 the correct, assuming there is an objectively correct advice --

6 THE CHAIR: Yes, well, I think that's where it -- it comes back to the same point,  
7 doesn't it?

8 MS CLEMENT: It comes back to the same point, it's: was the decision of the  
9 Gambling Commission irrational, or would no rational private investor have made the  
10 investment in light of all of the material that was before it at that relevant time, which  
11 included the advice from Europe Economics? So we --

12 THE CHAIR: Do you say we shouldn't be going behind unless there's an obvious  
13 manifest problem with it, which would take it beyond a question of judgment?

14 MS CLEMENT: So again, the question is -- irrationality of the decision by the  
15 Gambling Commission. It will look at all of those factors, and that will include looking  
16 at the advice given by Europe Economics.

17 THE CHAIR: Yes, perhaps I didn't put it very well. If the Gambling Commission knew  
18 that Europe Economics had done no work at all and then still relied on their advice,  
19 then that would be a problem.

20 MS CLEMENT: Yes.

21 THE CHAIR: But if they'd known that Europe Economics had done some work and,  
22 you know, of course they may have got everything right or they may not have got  
23 everything right, but that's not the Gambling Commission's problem.

24 MS CLEMENT: Well, it's not that it's not the Gambling Commission's problem, it's that  
25 it doesn't make the Gambling Commission's decision irrational.

26 THE CHAIR: Yes, that's what I mean. Yes.

1 MS CLEMENT: So that's a fairly standard approach: if you've got a public authority  
2 that takes expert advice, has regard to that expert advice and makes a decision having  
3 had regard to it, that is a classic case where that decision is not irrational.

4 THE CHAIR: Yes.

5 MS CLEMENT: The fact that that is the obvious answer doesn't mean that my learned  
6 friend can, sort of, ride a coach and horses through the test for admissibility of expert  
7 evidence to try and bolster his very difficult case.

8 The fact is, a huge amount of material was considered by the Gambling Commission  
9 here, all of it was carefully analysed and taken into account, and that decision, we say,  
10 was entirely rational. The fact that that's quite an obvious conclusion, based on the  
11 evidence before the Gambling Commission, doesn't help Mr Bowsher on this  
12 application.

13 THE CHAIR: Yes. That's helpful. Thank you.

14 MS CLEMENT: So just going back to the point I was making about the legal issue.  
15 We've said that that's rationality. We have talked about the significance of the expert  
16 judgment.

17 But the way my learned friend put his case I think is very instructive or very illustrative,  
18 because the way he put it, or what he accepted, was that the significance or  
19 seriousness of the so-called errors that were identified, he says that's absolutely  
20 critical to admissibility.

21 He says that goes to whether there is an incontrovertible error that vitiates the  
22 Commission's reasoning. But he accepted that the significance of any error is  
23 a question of expert judgement. So he says he needs expert evidence so that he can  
24 address that, but that just illustrates the point that there are two expert judgements  
25 here. There are two different expert judgements: you have Europe Economics' view;  
26 you have Mr Williams' view that is different.

1 Ultimately, what my learned friend's submission boiled down to is that  
2 Europe Economics didn't give the right advice. I wrote that down because I was struck  
3 by that. That's what he wants to establish in these proceedings.

4 THE CHAIR: Well, that's really the point I was just trying to traverse with you and  
5 make sure I was clear about what you say about that.

6 MS CLEMENT: Yes, and so we say that's a classic merits argument: who is right.  
7 That's a classic dispute between experts, classic inadmissibility.

8 So, sir, outside the Law Society, in his skeleton argument, my learned friend  
9 contended that the Williams report was admissible on three further bases.

10 The first was the first of the Powis heads, so that it shows what material was before  
11 the decision maker. So we say that's hopeless. Williams is not showing what  
12 material -- it's not telling anyone what material was before the decision maker. It's  
13 entirely fresh evidence. That kind of category applies if you have a report that says:  
14 before the decision maker there was X, Y, and Z. So it's late after the event evidence,  
15 but it's necessary to tell the court what the decision maker actually considered. It's  
16 a million miles away from this.

17 The second point he made in his skeleton argument was that Williams demonstrates  
18 that there were procedural flaws in the decision. So you may have noted that  
19 Mr Bowsher didn't advance this point orally. He was right to abandon it. There's no  
20 pleaded case of procedural unfairness, and Williams says absolutely nothing about it.  
21 This is based on a mistaken analysis in the skeleton argument, that essentially the  
22 decision process is unfair if there were errors in the econometric analysis. We say  
23 that's simply not procedural unfairness at all. That is a substantive unfairness  
24 argument; that's irrationality.

25 The third head is that he needs it for his Tameside point, but, sir, the key response to  
26 that is Tameside is simply a species of irrationality. I don't know if I need any authority

1 for that, but if I do, it's the Balajigari case in the Court of Appeal. That is at tab 24 of  
2 the authorities bundle, and the relevant paragraph is paragraph 70 at 557. (Pause)

3 So what the Court of Appeal is saying there, they're approving the general principles  
4 from Plantagenet Alliance:

5 "... the obligation on the decision-maker is only to take such steps to inform himself as  
6 are reasonable ... subject to Wednesbury challenge, it is for the public body and not  
7 the court to decide upon the manner and intensity of enquiry to be undertaken ... the  
8 court should not intervene merely because it considers that further enquiries would  
9 have been sensible or desirable. It should intervene only if no reasonable authority  
10 could have been satisfied on the basis of the enquiries made that it possessed the  
11 information necessary for the decision. Fourthly, the court should establish what  
12 material was before the authority and should only strike down a decision not to make  
13 further enquiries if no reasonable authority possessed of that material could suppose  
14 that the enquiries they had made were sufficient."

15 So the principles based on rationality, it's all Wednesbury. (Pause)

16 Because it's a rationality, because it's a Wednesbury aspect, it is the Law Society test,  
17 we say, for admissibility. So paragraphs 39 to 41 of Law Society apply equally here.

18 In a nutshell, sir, what the evidence says is -- Dr Spicer giving his expert opinion that  
19 there was no need to do further work or make further enquiries because it wouldn't  
20 change the advice that was being given, Mr Williams saying he thinks more work was  
21 needed. Again, that is a classic dispute between two experts, that is a matter of  
22 judgement, that makes it not admissible.

23 So the final throw of the dice from Mr Bowsher was one he made on his feet that  
24 appears nowhere in his skeleton argument, where he attempts to squeeze this  
25 application into the Lynch category. He says that the tribunal, the expert tribunal,  
26 needs this 100-page expert report of Mr Williams so that it can understand the issues.

1 So I showed you before the short adjournment what the Lynch exception actually is,  
2 and that was paragraph 25, page 257 of the authorities bundle. So anything that goes  
3 beyond an explanation of technical terms is not admissible. That is particularly so  
4 where you have expert advice being given to the decision maker -- we have that  
5 here -- and where the tribunal is itself an expert or has its own expertise. I showed  
6 you the case of Dye. The tribunal is not going to need help to understand basic  
7 technical terms.

8 Even if the tribunal did need that help, then the only thing that is admissible is  
9 a description or an explanation of those technical terms. So you could perhaps have  
10 an expert that says, "This is what return on investment means", or, "This is what  
11 multicollinearity means". But once you go beyond that and once the expert is saying,  
12 "This is an error. This is why I think it was an error. This is why I think the decision  
13 was flawed", you're squarely into irrationality; you're squarely into the Law Society test.  
14 So my learned friend can't try and rely on Lynch to get around the Law Society test;  
15 they are two different bases for admissibility. You can't say, "We don't need to meet  
16 the Law Society test because I can do it all through Lynch". That would simply be to  
17 ride a coach and horses through the Law Society test. Once you're into a scenario  
18 where what the tribunal would be needing to deal with is the opinion of one expert  
19 compared to the opinion of another expert, it is Law Society only if there's no serious,  
20 technical, irrevocable error.

21 Finally, sir, where we got to was Mr Bowsher saying, "Well, even if I can't get the whole  
22 of the report in, I must be able to get some of it in and so we need to do a paragraph  
23 by paragraph analysis to find the bits that I can get in". Sir, I've got it printed out  
24 because it was too big to go through on my machine. This is how thick it is, this is the  
25 full 100 pages. (Indicated)

26 The applicant has given us no indication before today of what they say could be

1 admissible under this new "let's excise part of it" test. And I think, sir, the point that  
2 you put to my learned friend is absolutely right, if I may say so. It's that it boils down  
3 to if there's nothing controversial in the report, then it can pass the Law Society test.  
4 But if it's nothing controversial, then it's accepted by Spicer so you don't need it  
5 anyway; it's in the contemporaneous document. But if you've got a difference of  
6 opinion in the expert reports, then it's not admissible. So what are we supposed to do  
7 with that today? As you say, sir, it's absolutely imperative that everyone has clarity  
8 from today going forward about what the case is, what the evidence is and what we  
9 have to address.

10 So, sir, those are the points on admissibility in principle. But then even if Mr Williams's  
11 report does satisfy one of those tests, the applicant still has to go on to demonstrate  
12 that the expert evidence is reasonably required to resolve the claim, and that is the  
13 PCSU case. We cite that in our skeleton. For your note, it's at tab 27, page 614. The  
14 test by Mr Justice Lewis is set out at paragraph 22 through to 29.

15 But essentially what the court is saying there is, if it is truly necessary for there to be  
16 expert evidence, then, if it's admissible, it can be admitted. It will satisfy the test. We  
17 say it's not necessary in light of the concessions that my learned friend made earlier,  
18 that he doesn't need the expert evidence to make out his case.

19 Then, if it's not necessary but it might be of some assistance, then the court has to  
20 look at a whole range of factors as to whether it would grant permission for the expert  
21 report. That includes things such as the value of the claim, the effect of admitting it on  
22 the parties, who's going to pay for the expert evidence and the costs that are going to  
23 be incurred by that and, most importantly, the delay that production of expert evidence  
24 would entail, particularly delay which might result in vacating the trial date.

25 Sir, in terms of all those factors, what we say is the delay is going to be absolutely  
26 crucial here. And I think, sir, you quite properly made the point on the last occasion

1 that admitting the expert evidence inevitably means that the hearing date of  
2 8 December is going to be lost. I'll come on to the route to hearing in a moment.

3 It will inevitably add considerably to the cost and complexity of the proceedings.

4 There's going to be costs of further expert reports, because if Mr Williams report is  
5 admitted, then the Gambling Commission are likely to need a further report.

6 I understand my learned friend will say that Allwyn will need a further expert report and  
7 from our side at least, sir, we're then considering the cost to the taxpayers because of  
8 course, we are publicly funded.

9 Not only will there be a delay to the hearing, but it is also going to add considerably to  
10 the length of the hearing. If we are going to have to go through every single one of  
11 however many expert reports we end up with, and try and embark on the exercise that  
12 my learned friend invites the tribunal to embark upon, that is not something that is  
13 going to take an hour and can be squeezed in at the end of the hearing; that is going  
14 to be an extensive and detailed analysis, and indeed, one is left with the reason why  
15 it's not admissible in the first place: how is the tribunal to resolve those disputes on  
16 paper between those experts?

17 So, sir, in terms of then directions to trial, obviously there are the two routes that we  
18 will end up taking, depending on whether the tribunal decides to admit Mr Williams or  
19 not. I mention this now rather than parking it and coming back to it once you've made  
20 the decision because it does feature in the admissibility decision that you make  
21 whether we would lose the hearing date and the delay, et cetera, that would factor into  
22 that.

23 Sir, we've dealt with the points that would be important in our skeleton argument. But  
24 what might be helpful is if we look at the draft timetables that my learned friend  
25 Mr Johnston has produced at the back of his skeleton argument. That is at page 2582  
26 of the hearing bundle, if you have it electronically.

1 THE CHAIR: Yes.

2 MS CLEMENT: And where Mr Johnston and I are agreed is that, if permission is  
3 refused to rely on Mr Williams, it will be tight, but it will be possible to get to the hearing  
4 date of 8 December. And so the proposed dates -- we're not particularly wedded to  
5 any of these, but this is just a helpful timetable that will get us to the hearing date from  
6 today if the tribunal refuses permission to adduce Mr Williams's expert report.

7 Just to run through those, my learned friend or the applicants can file their re-amended  
8 notice of appeal. They've drafted it already; we know what it looks like if Mr Williams  
9 is not admitted. They could probably do that later on today; it may not even need  
10 26 September. There would then be a period for us to file an amended defence,  
11 because of course the claim as pleaded has changed fairly significantly. We would  
12 have to give some consideration in that period as to whether we need to file any further  
13 factual evidence to deal with the new points. That's a very tight timetable, but we think  
14 we could make that work. There is then a period for Allwyn to file their statement in  
15 intervention and any factual evidence they may need. There's then a further period  
16 for reply and reply evidence and then we're into skeleton arguments and the various  
17 pre-hearing documents that we would hope to agree.

18 But sir, under annex 2, this is the timetable if permission is granted today to rely on  
19 Mr Williams. We think what would probably have to happen is the amended pleadings  
20 and the further factual evidence to deal with the amended pleadings would need to  
21 happen first so that we are all clear on what the claim actually is and what the scope  
22 of the expert evidence is. But we will then need a period, as I indicated, to consider  
23 and obtain further expert evidence, a full expert report, from the  
24 Gambling Commission and I understand Mr Johnston would seek permission to  
25 adduce the same on behalf of Allwyn. Realistically, we've set out likely timeframes for  
26 that in this annex 2 indicator, and we would then realistically be looking at a hearing

1 date hopefully before Easter 2026, but that's roughly the timeframe that we would be  
2 looking at. Those are the consequences if Mr Williams is admitted.

3 Now, Mr Bowsher handed me this morning what we say is a wholly unrealistic  
4 proposal to both admit the expert evidence, allow everyone else to obtain expert  
5 evidence in response to it, deal with the pleadings, and still somehow get to a trial in  
6 less than -- I haven't counted up the number of weeks, but it is not very many. So  
7 I think that was -- about two and a half months, about a ten-week period. Sir, we say  
8 that's wholly unrealistic given the timeframes involved in obtaining an expert report.  
9 I think Allwyn would have to start from scratch, but consideration would certainly have  
10 to be given to all the factual material that's come in, what expert then would have to  
11 consider that and all the further research that the expert might want to do. Because,  
12 as you saw from Dr Spicer's report, that was very much prepared for the purposes of  
13 admissibility and for today. It was nothing like the full report that he would be producing  
14 or any expert would be producing for admissibility at trial.

15 So, sir, we say with respect, of course it's obvious why Mr Bowsher has put forward  
16 this proposed timetable but we do say that is wholly unrealistic if we're all going to be  
17 instructing experts and the round of expert reports that would be needed. So, sir, in  
18 short, we say if you admit Mr Williams, the hearing date of 8 December is impossible  
19 and that is a further factor as to why you should refuse to admit his evidence.

20 May I just turn my back for a moment, sir. Sir, those are our submissions on the  
21 application. I haven't dealt with the amendment because I think that's just all been  
22 sorted out by correspondence.

23 THE CHAIR: No, we'll come back to that. Yes.

24 MS CLEMENT: Thank you, sir.

25 THE CHAIR: Thank you.

26 Submissions by MR JOHNSTON

1 MR JOHNSTON: Sir, I'm acutely mindful of the time, conscious that you may want to  
2 give some kind of judgment or at least an indication today, so I will try to cut my cloth.  
3 If I may, two, maybe three authorities and five submissions and I will try to be terse.  
4 If I could start by taking you briefly back, hopefully for the last time today, to the  
5 Law Society case, and to a paragraph that you haven't looked at that yet today. It's  
6 authorities tab 23, and it's page 511 electronically, 503 hard copy. It's paragraph 53  
7 and 54. The reason I think it's worth looking at this point is because it's instructive to  
8 see what was not admitted in the Law Society case. In the Law Society case, some  
9 of the evidence was admitted and the gravamen of that evidence was, had this  
10 information been before consultees, then consultees would have been in a position to  
11 make different representations.

12 But what we have in paragraph 53 and 54 is an explanation of what is being kept out.  
13 Now for context, the Napper decision is a judgment which changes the way in which  
14 legal aid fees are paid, in effect. But it might be easiest, rather than me reading it out  
15 to you, if you read paragraphs 53 and 54, and then I'll make one brief submission on  
16 it. (Pause)

17 THE CHAIR: Yes.

18 MR JOHNSTON: The submission, you'll anticipate, is a straightforward one and  
19 you've heard iterations of it before. The critical words we rely on: first is simply the  
20 question of whether or not the Napper decision caused an increase in the cost of the  
21 scheme is not a question for the court to decide. This is a judicial review. That's  
22 simply not something they can decide. Nor does the fact that Professor Adams has  
23 reached different conclusions using different methods show that the methods used to  
24 perform the LAA analysis were improper. So again, coming back to the same point,  
25 in any event, Professor Adams's methods and conclusions are heavily contested by  
26 the Lord Chancellor's expert and the court is in no position to resolve that dispute.

1 This comes to the question that you asked Mr Bowsher. Well, are we going to need  
2 cross-examination, Mr Bowsher? In my submission, the answer to that is no, we're  
3 not going to need cross-examination because to the extent that there is a difference  
4 of opinion between competent, well-advised experts, then you have your answer  
5 already. You don't cross-examine them and put them in a box and try to resolve it  
6 yourself as the tribunal. The answer is that the law -- sorry, not the Law Society. I'm  
7 mixing my public authorities -- the Gambling Commission was entitled to proceed as  
8 it did.

9 If I can put it this way, if it's a score draw, then the Gambling Commission wins. So  
10 you don't get into the dispute about, how do I pick a way through this and choose  
11 between these different experts? The outcome is simply that the  
12 Gambling Commission could lawfully and rationally proceed on that basis. So that's  
13 the answer to your question: you don't have cross-examination, and that's why, even  
14 in the very rare cases when expert evidence is admitted in judicial review, there is  
15 almost never cross-examination of any type because it's simply not the court's task to  
16 pick between the different evidential positions before it. So that's the first authority,  
17 and the submission attaching to it.

18 Secondly, I won't take you to it, but the authority of Rea is the key submission in  
19 relation to Mr Bowsher's submission, not pressed with any vigour today, that he can  
20 get this through the Powis category of proper procedure. You've already heard  
21 submissions on this. It's at paragraphs 27 and 28 of our skeleton. I'm not going to  
22 take you to it, but the simple point is that the applicants have misunderstood that  
23 gateway altogether. It's about procedural unfairness. It's about saying, "I wasn't given  
24 a fair opportunity to make representations at the relevant stage", or whatever it might  
25 be. It is not this case. I won't take you to it because it's not being pressed today, but  
26 we do say that that's a legal error underlying that submission.

1 The third authority that I will take you to briefly if I may, sir, is the Dye & Durham case  
2 and again to a paragraph that you haven't seen. The purpose for going there is to  
3 meet Mr Bowsher's submission that he pursued at one point today, that: really, this is  
4 a Lynch case; this is a case about explaining difficult, technical econometric points  
5 that you, as a tribunal, otherwise might not apprehend or understand.

6 So if I could ask you to turn within the authorities, it's tab 28 and page 663,  
7 electronically. So this is again, within Dye & Durham. This is a case in which one of  
8 the parties -- it's a merger control case, judicial review standard in this tribunal.

9 One of the parties wanted to adduce expert evidence on Canadian law, and the  
10 Canadian law evidence was allowed in, because that is a question of fact and it's  
11 a question of fact in which the tribunal doesn't have any expertise. You'll see that  
12 that's what's being addressed in paragraph 83.

13 But paragraph 84 is important, and I'm going to take you to a paragraph of  
14 Mr Williams's report to say that, in my submission, it clearly falls foul of this and clearly  
15 doesn't fall within Lynch. What we have in 84 is the tribunal refusing permission to  
16 rely on certain paragraphs of Mr Soliman, as these appear to apply the principles of  
17 Canadian law on the facts.

18 This is the point that Ms Clement was making to some extent earlier as well. There's  
19 a difference between saying, "Well, if you want to know what collinearity, here's what  
20 collinearity is". That's something that might, in principle, be admissible, albeit you  
21 squarely have the submission you don't need it and you shouldn't be admitting it for  
22 that purpose.

23 But here, there's an attempt to:

24 "... apply the principles of Canadian law on the facts, provide argument and comment  
25 [on matters that] are likely to be contentious. The Tribunal will not be assisted in its  
26 task by such evidence."

1 We do say that Mr Williams goes a very long way beyond simply explaining  
2 econometric questions.

3 Now, there are a number of places that I could take you to make that proposition good,  
4 but I think possibly the easiest way to do this is to take you to page 943 of the hearing  
5 bundle, and to Mr Williams's conclusions.

6 THE CHAIR: Yes.

7 MR JOHNSTON: It's 6.11. I won't read all the way through it, but 6.9, 6.10 and 6.11  
8 are setting out Mr Williams's assessment of whether or not there has been compliance  
9 with the CMO principle in this case. This is Mr Williams purporting to answer the  
10 precise question that this tribunal needs to answer. So he's not purporting here to  
11 assist you by telling you what collinearity is or some other complicated question of  
12 econometrics, he's doing precisely what was deprecated in Dye & Durham. He is  
13 going way beyond that, and he's effectively trying to answer the question before the  
14 tribunal.

15 So we do say that this is a case that is a very long way from Lynch, and indeed, this  
16 itself is a further reason why this expert report should not be admitted, because it goes  
17 beyond the purview of what should properly be done by way of expert evidence in  
18 a judicial review. I won't repeat anything Ms Clement has said, we wholeheartedly  
19 adopt what she said. The target of the JR is the Gambling Commission's decision. If  
20 you read Mr Williams's instructions, he says, "I am instructed to give my opinion on  
21 the econometric analysis produced by Camelot".

22 We say that's telling, because it's addressed to the wrong question. I won't turn that  
23 up for you. If you want it, I can give you the reference in a moment.

24 So briefly, five submissions, if I can.

25 Firstly, we say there are two complete and total answers to this application. The first  
26 of those is rather late in the day, but the applicants have made clear that they say they

1 can maintain the entire amended case without reference to Mr Williams. We say that's  
2 dispositive. If that's the case, it's not reasonably necessary to admit Mr Williams. That  
3 itself, as a submission alone, is a sufficient reason to reject it.

4 Secondly, you've heard Mr Clement on this; I won't develop it. The premise, the  
5 primary premise, for its submission is the existence of supposed incontrovertible  
6 errors, and they have already been controverted by Dr Spicer's report in the form that  
7 it is, and you yourself, sir, have pointed out that it's likely that we're going to engage in  
8 a process, ultimately, where more and more elements of Williams may well be met in  
9 the same way. We say that's a second total answer to the application. If this is an  
10 application on the Law Society basis, it doesn't meet the Law Society test, then those  
11 two reasons on their own are enough to reject it independently.

12 Thirdly, Mr Bowsher hasn't returned today to one of the key themes of his skeleton  
13 argument, which is that expert evidence, he says, is likely to be necessary in Subsidy  
14 Control Act cases. That's paragraph 16 of his skeleton argument.

15 We say that submission is wrong in principle, and also, were it to be accepted by this  
16 tribunal, would set a very bad precedent. Not only is it not consistent with the existing  
17 Subsidy Control Act cases that we've had, but it's also wrong in principle because you  
18 know -- and I'm not going to take you back through it -- that expert evidence is very  
19 rarely, scarcely adduced, and only in particular circumstances, whether we describe  
20 them as gateways or overall principles, whatever we call them, specific circumstances  
21 in judicial review.

22 So we do say there's no special feature of Subsidy Control Act cases, and we do say  
23 this tribunal should be very slow before it goes anywhere near adopting or approving  
24 a rule of that kind.

25 Fourth, Mr Bowsher has maintained his submission today that he can admit  
26 Mr Williams's evidence and maintain the December hearing date. Here, I'll duplicate

1 Ms Clement, if I may, for a moment. We say that's a wholly implausible submission;  
2 it's utterly inconceivable that the parties would be able to complete the necessary  
3 factual and expert evidence in order to meet that deadline. Just to underscore part of  
4 the reason for that -- I won't take you to it because we've cited it in our skeleton  
5 argument, unless it would assist you, but my client has quite properly not begun the  
6 process of engaging an expert and preparing responsive expert evidence. The reason  
7 for that -- and we take this from the Banks Renewables case. Perhaps it is worth  
8 turning it up, actually. It's at page 599 electronically of the authorities at paragraph 16.  
9 (Pause)

10 THE CHAIR: Yes.

11 MR JOHNSTON: Maybe if you just read that, sir, to yourself and then I'll tell you what  
12 we take from it. (Pause)

13 THE CHAIR: Yes.

14 MR JOHNSTON: Quite properly -- this is no criticism at all, of course, to the  
15 Gambling Commission in what they've done as regards Dr Spicer, but quite properly,  
16 my client has not gone to the cost, expense and time of preparing expert evidence in  
17 advance of today in circumstances where it has no idea whether it's going to be  
18 admitted.

19 The key reason given here by Mr Justice Lewis, as he then was, is all of that's going  
20 to be unrecoverable if it doesn't come in. So it puts a party in an invidious position,  
21 and that is part of the reason why we say that the timetable is completely implausible;  
22 to have expert evidence come in over ten weeks, just -- we're at the NoA stage, in  
23 effect. We now need to go through all of the pleading, factual evidence and expert  
24 evidence as well and prepare the judicial review for trial. So that's the fourth  
25 submission.

26 The fifth, which is a connected point, is that Allwyn submits it absolutely must be

1 granted permission to adduce responsive expert evidence if Mr Williams comes in.  
2 That's for five reasons, and I'll be as brief as I can.

3 The first is it's a question of simple fairness. If it's right that Mr Williams is necessary  
4 for the applicants to make their case, then by parity of reasoning, it must be necessary  
5 for Allwyn to be in a position to adduce expert evidence of its own to meet that case,  
6 put it the other way, or we will be put in an impossible and unfair position if it can't  
7 meet what Mr Bowsher says is the central plank and elements of his case.

8 Secondly, put bluntly, this claim is targeted materially at Allwyn, in the sense that if the  
9 Gambling Commission loses, it's going to sound in costs. From Allwyn's perspective,  
10 it'll sound in £70 million, or at least that's the remedy that Mr Bowsher's seeking. For  
11 the avoidance of doubt, I don't concede for a moment that would be the proper  
12 remedy, but that is the ultimate target of his notice of appeal. It's not an ordinary set  
13 of circumstances, as regards a party with an interest in a claim, a judicial review claim.

14 Thirdly, the target in some sense is -- and we can see that from the expert report -- the  
15 analysis that Allwyn has done. In those circumstances, we say it would be highly  
16 peculiar for Allwyn to be told, "You just can't respond to this; you can't put an expert  
17 evidence that's responsive to it".

18 You've already heard what I say about the fact that we haven't begun the process of  
19 preparing, but what Mr Bowsher has done, he's been admirably candid about the way  
20 he proposes to argue his case at trial. He's going to say at trial, "I have Mr Williams,  
21 and Dr Spicer is not expert evidence because he's not independent", and so the  
22 submission that you've been hearing today about parity between experts, well, he's  
23 going to say that doesn't apply to Dr Spicer. Therefore, he's going to say, "I win,  
24 because this is uncontroverted expert evidence".

25 That's the way Mr Bowsher has put his case at this hearing. We apprehend that's the  
26 way he's going to put his case at trial, and in those circumstances, it must be right, we

1 say, that my client is in a position to adduce its own independent expert evidence, not  
2 relying on its regulator -- which for other reasons is awkward, let me put it that way at  
3 least. But relying on its regulator to do that work for it.

4 So we do say that it is absolutely essential if Mr Williams comes in, that Allwyn has  
5 a chance to put in expert evidence. I can address you on the precise mechanics of  
6 that and the process of that, but we say it would be deeply, deeply unfair for it to be  
7 put in a position where it has no expert evidence, and indeed, subject to what another  
8 party does, it may be that it goes to trial, potentially for £70 million, on the strength of  
9 an expert report that we know is going to be criticised as not an expert report at all.

10 So in those circumstances, we do say that it's absolutely critical that we're entitled to  
11 adduce our own report.

12 Now, sir, I don't propose to address any further at all on the application to amend, that  
13 comes at a later point. As regards the timetable, I'm very squarely in agreement with  
14 what you've heard from Ms Clement. I think annex 1 is agreed. What we haven't  
15 heard yet -- unless I've missed it, and apologies if I have -- from the applicants, is if  
16 Williams doesn't come in, are they content with annex 1?

17 We've had their alternative this morning in hard copy, which was: Williams is going to  
18 come in and this is what happens. We haven't yet heard what they say would be  
19 a timetable that they would be content with. So I reserve the right, if I may, or if I need  
20 to, to pop up again in response to anything Mr Bowsher says, but I don't make any  
21 specific submissions in relation to annex 1. I say it's a very sensible timetable. And it  
22 is tight, it is a really tight timetable, but -- and there will be some tooth sucking behind  
23 me, candidly, sir -- I do say it's doable, but it's in the category of only just.

24 Unless I can assist any further. I've tried to be as terse as I can. Those are my  
25 submissions.

26 Reply submissions by MR BOWSHER

1 MR BOWSHER: So I think the only point I was going to come back on is just to pick  
2 up the dialogue about where you picked up, as it were, the nub of one of our points  
3 around the significance of the error. I don't have a reference back to the transcript of  
4 the dialogue, but really to underline and endorse what the importance of that point.  
5 This is a situation -- I won't go through the mechanics all again. But this is a situation  
6 where the Gambling Commission has to justify its decision on modelling. That's what  
7 it's pleaded in its defence. It's a public body. It can't refer to something extraneous.  
8 It has to rely on a proper expert basis for its decision. We say that the evidence  
9 identifies errors, but where we will be particularly constrained in the case that we put  
10 forward is the way in which we can demonstrate the significance of those areas, to  
11 pick up the way in which my learned friend put it, the importance of the errors, to  
12 consider whether or not they do, in fact, vitiate the ultimate decision to proceed in  
13 a particular way. That sort of context, whichever -- going back to the legal analysis,  
14 whichever route one is looking at, that, we would say, at the very least is a clear Lynch  
15 route to the admissibility of this evidence because it enables us properly to put before  
16 the tribunal material that explains why we say these errors, established errors, are  
17 sufficiently significant to vitiate the decision. I think that's probably the only point I was  
18 going to comment on.

19 THE CHAIR: Right. How does that sit with the Law Society requirement that it not be  
20 that there not be any challenge to it? Maybe I'll leave it at that. The Law Society case  
21 is, in order to be able to bring in evidence of the sort, you're going to have to show that  
22 it's incontrovertible, which means that it's not challenged. We talked a little bit about  
23 something that is challenged.

24 So where does that leave you? How do you square that with the Law Society case?

25 MR BOWSHER: Well, I don't think one squares it with -- that consideration in the  
26 Law Society case is about looking at simply the finding of error. I'm looking at Lynch

1 as looking beyond that, at how the --

2 THE CHAIR: You're basing that on Lynch.

3 MR BOWSHER: -- how the tribunal takes those errors, assuming they are found, and

4 applies them to a decision.

5 THE CHAIR: If you're not in the Lynch box, then --

6 MR BOWSHER: It probably doesn't help, because I'm looking at consequences and

7 it is about "what is the nature of this error". Because obviously there could be any

8 number of trivial errors or errors which do not vitiate the decision. It is in that

9 judgment --

10 THE CHAIR: Hang on a second. We're back to this question of whose errors. I mean,

11 the errors in the model are different from the errors in the decision, aren't they?

12 They're different things.

13 MR BOWSHER: Indeed. But that's why I'm saying if one identifies -- that's where the

14 expert evidence which can look at the errors and explain why they are sufficiently

15 significant to vitiate the overall decision. That is an area which, in our submission, is

16 material that expert evidence can assist and should be admitted to assist the tribunal

17 in reaching a final decision.

18 THE CHAIR: But if you're not entitled to rely on Lynch for the reasons that your learned

19 friends have advanced, then you're back to the Law Society, and the Law Society is

20 problematic then, isn't it?

21 MR BOWSHER: Law Society might be problematic at that point.

22 THE CHAIR: Yes. Yes. Okay. Thank you.

23 MR BOWSHER: Do you want me to address timetable now?

24 THE CHAIR: Well, not unless there's anything you want to say that's relevant to the

25 expert issue.

26 So what I propose we do is that I will rise. If I could ask you to be back here by

1 3.20 pm. I will be as quick as I can to give you a view after that. I will deliver  
2 a judgment. Then we can discuss amendments and timetable after that. I think that  
3 will give us enough time. I don't think it will take very long to deliver the judgment.  
4 Thank you. So, 3.20 pm.

5 (3.06 pm)

6 (A short break)

7 (3.26 pm)

8 Judgment (submitted to the Chair for approval)

9 (3.38 pm)

10 Application to amend notice of appeal

11 Submissions by MR BOWSHER

12 THE CHAIR: Mr Bowsher.

13 MR BOWSHER: The next step would be for me to pursue my application to amend in  
14 the terms of the amended notice of appeal.

15 THE CHAIR: Yes, the alternative. Yes. I think, as I understand it, the real issue there,  
16 if there is an issue at all, is, what ... well, I think Mr Johnston put it as what he was to  
17 understand and expect should be done in relation to 35(h). In other words, where  
18 you've set out all the errors that Mr Williams identified, what should be the expectation  
19 about how you're going to make that good and therefore, what is the appropriate way  
20 for Mr Johnston to respond to that?

21 I should just, in relation to a point made by Mr Johnston about the risk of these things  
22 opening up on reply, make it very clear from the start that I'm not anticipating you will  
23 put in any further evidence on this matter without permission. So while of course I'm  
24 sure you're going to seek to have a reply, it seems to me we do want to be clear about  
25 is that there is a constraint on the way evidence is put into these proceedings. That's  
26 not to say that you wouldn't be entitled to put in more evidence; it's just to say that you

1 don't get it as of right, whether it's factual or expert evidence.

2 So, Mr Johnston, I think, was expressing an anxiety that, once Allwyn or the  
3 Gambling Commission had responded to your amended pleading on these points, he  
4 might be surprised by you running a different case, or at least a case with a different  
5 evidential base in the reply. I just want to make it clear that that's not something that  
6 is going to happen without first being canvased with the tribunal.

7 MR BOWSHER: Understood. Well, the evidential base is the base, presumably, that  
8 the other two parties have and, in many cases, have had for months and years. So,  
9 I mean, it's for them to bring it forward. I think it's more likely there may be questions  
10 about what more -- what does indeed come forward.

11 THE CHAIR: So, does that mean you are anticipating that somebody, presumably  
12 more likely Allwyn than the Gambling Commission, is going to produce evidence about  
13 the design of the models and all the work that was done on the strategy that goes back  
14 several years? Is that the proposition?

15 MR BOWSHER: It's not for me to tell Allwyn what evidence they -- how they should  
16 run their case. I mean --

17 THE CHAIR: Well, let's just -- absolutely, but if they were to put nothing in at all, where  
18 does that leave you?

19 MR BOWSHER: Well --

20 THE CHAIR: I mean, they don't have to put any evidence at all. They're not under  
21 a duty of candour, obviously.

22 MR JOHNSTON: Sir, just to be clear, all the parties in the judicial review, including  
23 interveners, are --

24 THE CHAIR: Ah, you are.

25 MR JOHNSTON: -- subject to a duty of candour.

26 THE CHAIR: Well, that's helpful. Thank you. I'm corrected. They are under a duty

1 of candour.

2 MR BOWSHER: I mean -- I don't --

3 THE CHAIR: I suppose the point, Mr Bowsher -- sorry, I'm perhaps thrashing around  
4 a little bit -- the point I'm trying to land with you is that if you want to get this in, we  
5 need to understand the significance of it and what's likely to happen with it. If your  
6 expectation is that it's going to be responded to with detailed evidence about what's  
7 happened in relation to all these things you've listed, we need to, I think, think about  
8 the implications of that, because that could be a very significant exercise.

9 MR BOWSHER: Really not -- my difficulty, the reason why I'm hesitating is it's really  
10 not for me to say. It may very well be that the evidence that comes back is, "No, you're  
11 wrong -- no, we are wrong. We did the right thing because this, this, this, this, this",  
12 and it's a relatively simple answer. Or maybe that the intervener, on considering what  
13 evidence it can and should put forward, decides that it needs to put forward a situation  
14 which explains a more complicated situation. I don't know, it's simply not in my gift to  
15 be able to prejudge that. I simply can't -- it may be very simple; it may not be. But  
16 I can't at the moment imagine what evidence we could be putting forward as a matter  
17 of fact, because we weren't involved in any of this.

18 THE CHAIR: I suppose, you see, it's different, isn't it, from the material that precedes  
19 it, because all of that is, if you like, in the clear box of material that was before the  
20 Gambling Commission. What you're seeking to do effectively with this is bring into  
21 consideration a whole lot of material that the Gambling Commission had no visibility  
22 of at the time in making its decision. So, the question really is, is that a helpful way to  
23 proceed with this case? If you do that, then where does it leave particularly  
24 Mr Johnston, who's the person who might at least be able to provide some of the  
25 answers to these points? But if they, again, are somewhat the same as the Williams  
26 analysis and they are no help whatsoever, really, to the ultimate decision which is, was

1 the Gambling Commission's decision rational, then should we be going down that  
2 path? That's the point.

3 MR BOWSHER: Well, that may be right, but it's not for me on my feet to sort of  
4 prejudice how the other parties see their duty to produce material. What we're saying  
5 is it should have been clear to them that there were mistakes, that there was Allwyn  
6 material before, you've seen how it's been pleaded, we've been there; and there  
7 was -- sorry, there was Camelot material. Confusing myself. There was Camelot  
8 material before the GC, packaged up by Europe Economics. The GC have pleaded  
9 that they relied upon that in some sense and they've said that in their defence. It's  
10 a matter for them now to explain what else they what they need to put forward to meet  
11 this.

12 To take an example, what is foreshadowed? I don't know what's there, so it's not for  
13 me to -- but what is foreshadowed, for example, in Dr Spicer's material is that there is  
14 reference at the beginning of his note to prior analysis which is relevant to the  
15 consideration as to whether or not these models work or not. It's in the first couple of  
16 pages, he refers to a note which he annexes to his report. It isn't in evidence anywhere  
17 at the moment, and that itself refers back to previous model analysis. Now, I'm not at  
18 this moment going to -- that may be a debate that those instructing us need to have at  
19 some point or other about what the scope of their evidence production, material  
20 production is. But it's going to be within the zone of what it is that was properly part of  
21 that decision.

22 THE CHAIR: Very well. I entirely take the point that you can't speculate about what  
23 they're going to do, but I am interested in your expectations. So are you saying that  
24 your expectation is not that we're going to be delving into material that the  
25 Gambling Commission never saw? Is that -- or indeed, Europe Economics? I mean,  
26 maybe --

1 MR BOWSHER: "Never saw" might not be quite the right term. The material which  
2 the Gambling Commission did not rely upon. Because it said it relied upon  
3 Europe Economics and Camelot. I mean, we may have to analyse what it is that --

4 THE CHAIR: Well, yes, but that's the point, isn't it? So let's take a concrete example,  
5 just to work it through. If, somewhere, Camelot had a very -- it might be a good or  
6 a very bad bit of paper in which they've written down their strategy, which Mr Williams  
7 says they should have done, and it was done in a prior year, then it may be that -- for  
8 example, let's just postulate that that exists and it was never shown to  
9 Europe Economics.

10 Now, it seems to me that that -- it's hard to see how that has any relevance to the  
11 decision the tribunal is going to make about the rationality of the decision made by the  
12 Gambling Commission. So if they never saw it and Europe Economics never saw it,  
13 then how does it fit into that --

14 MR BOWSHER: If it was a purely internal GC consideration which never got -- sorry,  
15 purely internal Camelot consideration which never got outside Camelot, that may not  
16 affect the decision, but what -- the errors that are in 35(h) are points which we say  
17 should have been obvious from a review of the Camelot report, which was a report  
18 that went outside Camelot to Europe Economics and is a report which is relied -- and  
19 the surrounding supporting material. It's not just the three pages; the supporting  
20 material was relied upon by Europe Economics.

21 So if it's material that is part of or supports that and is therefore material which is being  
22 relied upon by Europe Economics, either because it did look at it or it was available  
23 for Europe Economics to check, it was being put forward as, "Here's the material for  
24 you to check and validate that we're doing the right thing", then that seems to us it's  
25 material which GC has already said it is relying upon as part of the decision.

26 If it's an internal document within Camelot -- I'm not saying this happened but this is

1 just a fictional document which says, "We haven't got an answer to this. We don't  
2 know what we're doing. Let's just put this in". That's in a purely internal document  
3 which never comes out -- is not a document which necessarily affects the  
4 decision-making. It might raise other questions, but it doesn't -- it's not part of the GC's  
5 decision-making.

6 THE CHAIR: Yes, okay. I think that's helpful. Why don't we see where that goes?  
7 I don't know who wants to go first on that.

8 Submissions by MR JOHNSON

9 MR JOHNSTON: So let me just be clear what I think I hear Mr Bowsher saying, and  
10 then he can correct me if I'm wrong. Because obviously, the concern is that we have  
11 Mr Williams by the back door, if I can put it that way, and that we have all these  
12 criticisms, but no Mr Williams.

13 So error 1 is a really good example of this, and maybe use that as a launchpad for the  
14 discussion. Error 1 -- unless I'm corrected, and maybe I will be corrected -- is  
15 something that Mr Williams, as I understand it, has largely identified himself. It's not  
16 something that Europe Economics, in the material before the decision maker,  
17 identified as something that they were concerned about, or at least not the full width  
18 of it.

19 I suppose my -- this is why I raised the question before: how is Mr Bowsher putting his  
20 case? He's signed the pleading. So he says that these are pleadings that he can  
21 advance, and to the extent that they rely on the contemporaneous documents, in effect  
22 Europe Economics' assessment of what was before it and therefore its advice to the  
23 Gambling Commission, that makes perfect sense to me. But to the extent that within  
24 error 1, the suggestion is now that my client should produce some kind of deep history  
25 of LNIOs going back over several years, I don't think that is properly something that  
26 my client should be put to, nor is it properly something that Mr Bowsher can plead

1 a case that he says is inadequate because, as he himself says, he doesn't know. So  
2 we're then in the realms of, candidly, a wholly speculative pleading.

3 So my position, just to be clear -- and perhaps I'm not being as clear as I would like to  
4 be -- is that we will respond to Mr Bowsher's pleading on the premise that the sole  
5 basis for it is what he has, which is the Europe Economics reports and the Camelot  
6 material that scaffolds around that, rather than this case now being a kind of unpicking  
7 and opening up of all of the analysis that's been done in respect of LNIOs, in some  
8 respects, going back over multiple years, in order to kind of assess the adequacy of  
9 all of that. Because then if that were the case, we'd be back in the Mr Williams world.

10 So that's how we're going to -- and the difficulty is that this pleading doesn't recognise  
11 the fact that Mr Williams isn't here; it doesn't tie -- it doesn't say in clear terms,  
12 "Ground 1: Irrationality". There are four subheadings of irrationality, and the  
13 subheadings of irrationality are, "See this document; see that document; see that  
14 document". You either couldn't proceed on that basis -- on a Tameside basis -- or it  
15 was irrational to accept that when you should have known more.

16 It's Williams without the Williams, and so that's why I put down my marker earlier. Our  
17 position is that -- I mean, I'll turn around and take instructions, but our position is that  
18 we're not going to be doing a deep history of LNIOs, but we're going to be meeting the  
19 challenge, such as it is, by reference to the contemporaneous documents.

20 THE CHAIR: Yes. Well, I think, as I understood it from Mr Bowsher, he was accepting  
21 that unless it is in the collection of material that found its way to Europe Economics at  
22 the very least -- and I think Ms Clement would probably say that that actually should  
23 be the Gambling Commission, in fact. But we can have that discussion.

24 But I think at least as far as you're concerned, are you saying if it hasn't got over that  
25 wall --

26 MR JOHNSTON: Threshold, yes.

1 THE CHAIR: That threshold, then actually it's not something he expects that you  
2 should be providing. Because he's accepting, I think, that we're only interested in what  
3 was before the Gambling Commission, he would say including Europe Economics.  
4 So if that's helpful, I think clearly you're entitled to take that. It does leave me  
5 somewhat wondering what it is that you are going to be able to say or indeed want to  
6 say by way of the evidence at all. I mean, it's not entirely clear to me how that's helpful  
7 if we're going to have -- but, I mean, that is a matter for you.

8 Again, Ms Clement no doubt is thinking about what this sort of -- and the whole  
9 discussion we've had -- what the implications are for the material and then whether  
10 Mr Holdaway's statement needs to be supplemented in some way or not. I don't know  
11 the answer to that. Again, that's a matter for the Gambling Commission. But I'm not  
12 sure there's -- I suppose the point is I'm not sure there's an awful lot of point in both of  
13 you doing the same thing from different directions, if that makes any sense.

14 MR JOHNSTON: No, agreed. I mean, I suppose my -- let me put my concern in  
15 another way. Take error 1. The pleading is:  
16 "Camelot has failed to ensure [and] provide evidence that an adequate or robust  
17 modelling design was adopted ..."

18 Now, my client can respond to that in one of two ways. It can say: actually the real  
19 pleading we think here is -- though it's never quite tied this way -- that in light of what  
20 was before the Gambling Commission, through the aegis of Europe Economics, the  
21 Gambling Commission was not in a position properly to satisfy itself that it had  
22 sufficient information about -- the Tameside point -- or it was irrational to proceed  
23 without.

24 Now, if that is what this case is, what I don't want at trial is to hear, "Well, we pleaded  
25 that Camelot had failed to provide this, and they haven't addressed it by way of  
26 evidence". That's the nub of my concern, and that's the nub of the point that I want to

1 flush out today, if I possibly can.

2 Now, I recognise Mr Bowsher can put his case the way he wants to at trial, but this is  
3 why the difficulty we have with the pleading, as is, is that we have lots of factual  
4 pleading and lots of alleged errors, and then we just have very short pleadings that  
5 say, "It's all irrational; it's all Tameside".

6 So what I would be very grateful if Mr Bowsher could clarify for me is, taking that very  
7 simple example, that this pleading as to Camelot's failure is actually a pleading that  
8 the Gambling Commission has irrationally decided in the absence of this information  
9 and/or Tameside fail properly to appraise itself of relevant information.

10 Because if that's the case, my client doesn't need to meet this evidentially, because  
11 actually it's not the target. But the problem is, it's pleaded as the target Camelot has  
12 failed too. So do you see my -- the nub of the concern on my client's part is we could  
13 do a sort of -- I mean, I sort of glibly called it a deep history of LNIOs, but we could.  
14 This is partly because of Camelot's models Camelot failed to implement, in particular  
15 in relation to error 2: Camelot failed the test.

16 Now, if this is just all commentary to a punchline, which is: well, you know, really the  
17 question is, the Gambling Commission -- and maybe this is what Mr Bowsher's going  
18 to say, 52(a):

19 "... the Gambling Commission was or ought to have been aware of and/or was and  
20 [had it] made clear to it by its ... economic advisers [that it was fundamentally flawed]."

21 I read that to mean, albeit it doesn't say it, that it was irrational to proceed on the basis  
22 of that information. Now, if that is 52(a) and 52(b) is more tolerably and clearly  
23 a Tameside point. If that's the case, that has quite significant implications for what my  
24 client has or doesn't have to.

25 But if actually what's being said is, "We've got loads of things to say about Camelot  
26 and they have to be met in order to meet our case", that's a different point. That's why

1 52(a) -- and maybe Mr Bowsher can help me, but it would be extremely helpful for my  
2 client to understand the importance of 52(a) as it attaches to 35, because it changes  
3 the scope of our evidence, potentially rather a lot.

4 Ms Clement, is that helpful?

5 Submissions by MS CLEMENT

6 MS CLEMENT: So I think -- perhaps I'm just being a pedant here, but to go back to  
7 what this is, this is a judicial review challenge. Judicial review challenges advance  
8 grounds of claim. There are four grounds of claim here.

9 The first is that the Gambling Commission awarded a subsidy other than in  
10 accordance with the subsidy control principles. There's a lot of factual pleading around  
11 that ground 1, there's a lot of assertions in respect of, for example, 52(a) and 52(b),  
12 but ground 1: is Camelot awarded a -- sorry, the Gambling Commission awarded  
13 a subsidy? That is the question the tribunal needs to determine under ground 1.  
14 Anything else is not part of that ground.

15 You then have ground 2, which is you couldn't have met the requirements of the  
16 subsidy control principles, anyway.

17 Ground 3 is a new ground, which is a Tameside public law error ground.

18 Then ground 4 is a slight tweaking of the original ground 4 about there was a failure  
19 to comply with the conditions of the licence.

20 Now, those are the grounds of challenge. In a judicial review claim, we don't have  
21 standard disclosure; we have duty of candour obligations on public authorities. Those  
22 duties -- oh, and the intervener, as Mr Johnston says. But it's duty of candour  
23 obligations. So it's looking at: what is it necessary to disclose? What information is it  
24 necessary to put before the tribunal in order to address the claim that's being  
25 advanced?

26 Now, what we need to do, from the Gambling Commission's perspective, is look at the

1 amended claim, the amended grounds of claim. There's no onus on anyone to  
2 respond to any factual parts of the pleading. It's looking at the grounds of claim and  
3 saying, "Has the Gambling Commission complied with the duty of candour in respect  
4 of those matters?".

5 Now, we've already put a huge amount of material before the tribunal. You've seen it  
6 in the witness statement and the exhibits. What I don't know is -- because we haven't  
7 done that exercise yet and we couldn't do it until today -- is there anything in addition  
8 that may need to be put before the tribunal? Is there possibly a need for another  
9 witness statement? Is there a need for any further documents to be exhibited to that?

10 THE CHAIR: Just to understand, an example of that -- it may or may not be the case  
11 because I can't quite remember what Mr Holdaway says about this, but it may be that  
12 there's more focus now on what happened in previous years and maybe that's  
13 something that the Gambling Commission feels it needs to say something about. Is  
14 that the sort of thing? I mean, I'm not saying that is necessarily the case --

15 MS CLEMENT: It may be, so it depends --

16 THE CHAIR: -- but that is something that's emerged as perhaps being more important  
17 than was appreciated at the time.

18 MS CLEMENT: Yes, or perhaps the Tameside challenge was not there before, so  
19 there may need to be some evidence that addresses why the Gambling Commission  
20 did not do the things that Mr Bowsher alleges they should have done.

21 THE CHAIR: Yes.

22 MS CLEMENT: But it's very much it has to be tied to how the claim is put; it has to be  
23 tied to the decision that is actually being challenged. There's no challenge to decisions  
24 going back to 2018; there couldn't be in this tribunal. So if there's going to be an  
25 expectation that there's going to be mass disclosure going back to 2018 --

26 THE CHAIR: No, I think --

1 MS CLEMENT: -- and I think that's very unlikely to happen.

2 THE CHAIR: No, and I think the only reason I raise that point is because it seems to  
3 me that one of the things that's being said is that you didn't understand fully the defect  
4 in the model, flaws in the model. And it may well be that you and, as I understand,  
5 Dr Spicer, he's saying, well, actually, because the model has operated for a number  
6 of years, it's been the subject of a number of discussions and it may be that some of  
7 the points that are raised by Mr Williams are dealt with at an earlier stage. Now, if we  
8 end up with all this stuff still in 35(h), then it may be you feel you want to say something  
9 about that. I don't know.

10 MS CLEMENT: Sir, what we'll do is we'll take a view on the case as pleaded, as I said,  
11 to meet the grounds of challenge as advanced. We will take a view as to what is  
12 necessary to comply with the duty of candour in that situation.

13 THE CHAIR: Just to be clear, I think Mr Bowsher has clarified and we'll hear just  
14 again, in response to what Mr Johnston said but certainly, as I understood it,  
15 Mr Bowsher is not expecting to see material that didn't come to the  
16 Gambling Commission or Europe Economics. Is that your position as well? Would  
17 you say it's simply --

18 MS CLEMENT: Sir, if we didn't -- my client has put before the court the material that  
19 it considered when it took the decision.

20 THE CHAIR: Yes.

21 MS CLEMENT: If my client didn't consider material --

22 THE CHAIR: Then it doesn't matter if Europe Economics had it or not.

23 MS CLEMENT: -- that's not something that we can address by way of evidence.

24 THE CHAIR: Yes. So, you would take you would actually take the point one step  
25 further, which is that Mr Bowsher shouldn't expect anything in response to this unless  
26 it falls within material which the Gambling Commission itself actually saw?

1 MS CLEMENT: Yes.

2 THE CHAIR: Yes.

3 MS CLEMENT: Well, we probably wouldn't even have it anyway. But that's the focus.  
4 It's what's required to comply with the duty of candour to address the claims, the  
5 challenge as it is now being put. That requires an analysis of what are the grounds of  
6 claim that are actually being advanced. What is the decision that's being challenged?  
7 It is the decision of 19 July 2023. It's not decisions in 2022, 2021, 2020, et cetera,  
8 et cetera. So that's where obviously the focus of the evidence is going to be.

9 THE CHAIR: And your position is, I think, the same as Mr Johnston's, that you've got  
10 no principled objection to this staying in, provided that everybody understands what  
11 we've just discussed, which is what the implications are.

12 MS CLEMENT: Exactly. So it's a matter for Mr Bowsher how he pleads his case --

13 THE CHAIR: Well, subject to one point, which is he's actually applying to amend, isn't  
14 he? In circumstances we're on a tight timeline, I'm not sure it does follow that he's  
15 entitled to plead it however he wishes.

16 MS CLEMENT: No. Obviously, it's a matter for the tribunal whether to accept the  
17 application to amend. We haven't raised any objection to it, but nevertheless, simply  
18 because he's pleaded it doesn't mean it's a point that's good in law or needs to be  
19 addressed by way of factual evidence. He's pleaded it; we will respond to it on the  
20 merits in our amended defence. There are many, many things that we can say about  
21 whether there's any merit in the grounds or the amendments that Mr Bowsher has  
22 adduced. But for the purposes of today, we didn't object in principle to the way the  
23 pleading is put. That's very much a matter for him.

24 THE CHAIR: Yes.

25 MS CLEMENT: Just before I sit down, I'm more laying a marker down to say I will  
26 need to address this at some point. The application was made by the applicant to

1 adduce expert evidence; they have resoundingly lost that application. We do seek our  
2 costs of responding to that.

3 THE CHAIR: I was anticipating we might have a discussion about costs at the end,  
4 but I think it's probably more convenient to do that.

5 MS CLEMENT: I just wanted to put the marker down so that I don't forget, if nothing  
6 else.

7 THE CHAIR: Of course. I understand. Thank you.

8 So, Mr Bowsher, I think that's --

9 Reply submissions by MR BOWSHER

10 MR BOWSHER: I don't think that's -- I mean, I'm not sure there's any wild  
11 disagreement here. We've sought to frame what -- there's the narrative in the letter  
12 35 and following. We've sought to frame that in the challenge in 52(a) -- well, it's not  
13 just 52(a) and 52(b), there's other paragraphs, but you know -- and we're focusing it  
14 on the decision-making by GC and Europe Economics.

15 Yes, I'd hoped it was clear that what we were saying was that the Camelot material  
16 was insufficiently robust for the Gambling Commission to rely upon it. So we're  
17 focusing on the reliance by the Gambling Commission, not on -- if Camelot thought  
18 they could have done something different, you know, that's a different topic.

19 THE CHAIR: Well, I think we're back into the same old problem we've been rehearsing  
20 all day, which is that an awful lot of this is material that was not visible to the  
21 Gambling Commission.

22 MR BOWSHER: But 52(a) and 52(b) is very clear what it is focusing on; it's focusing  
23 on the reliance. Now, where it may become -- where there may be some gloss on  
24 that, for example -- can I just give you an example?

25 THE CHAIR: Yes.

26 MR BOWSHER: If you go to the bundle, the main bundle, page 1731.

1 THE CHAIR: Yes, this is -- this is the first of the reports.

2 MR BOWSHER: The first of the reports, the first of the Europe Economics --

3 THE CHAIR: Yes.

4 MR BOWSHER: -- I think it's sometimes referred to as the preliminary assessment.

5 We know that it's looking at a -- I'm not entirely clear which bits, what constitutes the

6 material it's assessing. That doesn't matter for today; we know there's a lot of material

7 just before this in the bundle which it is assessing. And it ends up, if you go to the

8 conclusions, sorry, the top of 1735, asks an important question.

9 THE CHAIR: Yes.

10 MR BOWSHER: In the middle of that answer, there's the sentence:

11 "What confidence [should the modelling] provide the Gambling Commission?"

12 The answer:

13 "More generally, we have not been convinced that the extended models are any closer

14 to estimating the true returns to media spending than the baseline models, but equally

15 the extended models are not conclusively worse."

16 All of that refers back to previous analyses of previous reports. Now, I simply don't

17 know what that -- obviously I know what the words mean, but there's some words

18 doing quite a lot of work there. It's a matter for the Gambling Commission to decide

19 what, if anything, it needs to tell us about what that conclusion really means and what

20 underlies it. And there might be some disclosure that leads to that.

21 THE CHAIR: Well, look, that's all fine and, in a way, I mean, I'm sure that comes as

22 no surprise. I think what causes, to the extent there's any difficulty and I'm not sure if

23 there is, any difficulty is that that's an entirely different thing from what's set out in

24 35(h), isn't it? I mean, 35(h) is about all the things that Mr Williams has identified,

25 some of which are reflected in the Europe Economics point, but to take error 1, that is

26 not reflected, as Mr Johnston says, as I understand it, in the Europe Economics paper.

1 And so actually, in a way, it doesn't really help us with this question to look at what is  
2 in the Europe Economics material, because that's all there. We know that.

3 MR BOWSHER: Our point is we've pleaded the allegation of breach, breach of duty  
4 of 52(a). 35 is a narrative of the facts that we've found.

5 THE CHAIR: Well, 35(h) is a narrative of some facts which, on the face of it, are not  
6 all things that the Gambling Commission knew about, whereas all the things before  
7 that are things the Gambling Commission didn't know about, which is why we're having  
8 this discussion. Obviously the Gambling Commission did know about that paragraph.

9 MR BOWSHER: This is -- all I'm saying is that there clearly is a thought process which  
10 goes directly to 52(a) within the Gambling Commission about, "is this material robust  
11 or not". They're literally looking -- they are at this point that -- 35(h) sets out material  
12 which was all before the Gambling Commission because it's material that is -- it's  
13 a comment on what is in the reports that were provided to Europe --

14 THE CHAIR: That's just simply not right, is it? I mean, for a start --

15 MR JOHNSTON: That can't possibly be right, because this is actually --

16 THE CHAIR: Mr Johnston, I don't think I need you to agree.

17 MR JOHNSTON: Okay.

18 THE CHAIR: That is clearly not right. And the good example of that is error 1, because  
19 error 1, there's nothing in the material, as I understand it, from Europe Economics that  
20 deals with that, so how's the Gambling Commission supposed to know what Camelot  
21 has got by way of strategic plans? I mean, it's just not correct, is it?

22 MR BOWSHER: Sorry, the Gambling Commission has got about ...?

23 THE CHAIR: About strategic plans and best practice in relation to the model design  
24 and so on. How on earth is the Gambling Commission supposed to know about any  
25 of that, just because it's been given the models?

26 MR BOWSHER: Well, it comments on what is in the model.

1 THE CHAIR: Sorry, it being?

2 MR BOWSHER: Sorry, Europe Economics comments on what is in the model.

3 THE CHAIR: Yes, but it doesn't comment on the model design.

4 MR BOWSHER: Well, it makes comments here about the robustness of the model.

5 I mean, that is --

6 THE CHAIR: That's a different thing, isn't it? That's for other reasons. I just don't

7 think -- I just think if you're suggesting that somehow all these things, errors 1 to 6 or

8 whatever they are, the six of them, errors 1 to 3(c), are somehow brought within the

9 material in front of the Gambling Commission, I just don't accept that. I don't think

10 that's a tenable proposition.

11 Of course, you are entitled, as you pleaded, to say that the Gambling Commission

12 might have been on some notice or had a duty to make further inquiry or indeed had

13 material that could piece things together. But it seems to me that that is a long way

14 away from saying the Gambling Commission had in front of it these fundamental

15 problems which Mr Williams has identified because if they weren't in the

16 Europe Economics report, then they didn't, as far as I understand it.

17 MR BOWSHER: But they were before Europe -- well, this is where -- and it may be

18 a question of law for the trial -- we say you can't take Europe Economics out of that

19 decision-making process. The question is, were they in front of Europe Economics

20 who were treated by the Gambling Commission as part of that decision-making

21 process and relied upon by them for the purposes of informing that decision?

22 So if they were material that were before Europe Economics, it must at least be

23 relevant to the decision-making and whether or not the decision could properly be

24 taken.

25 THE CHAIR: Well, I mean, I'm not --

26 MR BOWSHER: That's why we pleaded it that way. We've deliberately pleaded it that

1 way.

2 THE CHAIR: Well, and you're of course, entitled to that argument, and Ms Clement  
3 has, I think, made her position plain on it. So we know there's a difference of opinion  
4 between you on it.

5 But I mean, I'm not sure that that -- well, if Europe Economics hadn't turned its mind  
6 to the issue, then would you accept that it's not within, in any sense, the set of  
7 documents that that (overspeaking) --

8 MR BOWSHER: None of these things have been considered at all by  
9 Europe Economics. It may be that none of this -- that it doesn't -- it can't get into the  
10 decision-making process at all.

11 THE CHAIR: I mean, I think Ms Clement has made it very plain that as far as she's  
12 concerned, she disagrees with your legal proposition, and as a result, you're not going  
13 to be getting anything that doesn't make its way to the Gambling Commission. So, in  
14 other words, I don't think she's contemplating that -- or her client is contemplating -- it  
15 needs to go to Europe Economics and say, "Give us all your material". I think if that's  
16 what your position is, we're going to need to resolve the point of law, if that's what  
17 you're expecting.

18 MR BOWSHER: Well --

19 THE CHAIR: Really, I think this is -- and it's helpful to have this discussion, because  
20 this is precisely the sort of point, I think, that is being flushed out by the nature of this  
21 pleading.

22 MR BOWSHER: But this material -- what I've just taken you to.

23 THE CHAIR: Yes.

24 MR BOWSHER: That is part of consideration which is going to the  
25 Gambling Commission and the Gambling Commission --

26 THE CHAIR: Yes, of course. Yes.

1 MR BOWSHER: That's why I'm not sure we're going -- the Gambling Commission is  
2 being told in what I've just taken you to, "There has been a problem. We're not sure ..."

3 THE CHAIR: That's entirely beside the point, Mr Bowsher, because we're not talking  
4 about the material that the Gambling Commission saw, we're talking about material it  
5 didn't. That's the whole point of the conversation we're having. The question is  
6 whether you're pushing back on what's been said on the other side of the court, which  
7 is you're not getting anything, you don't have any expectation of getting anything  
8 unless it actually made its way to somebody's desk or PC or whatever at the  
9 Gambling Commission and was relied on for the purposes of the decision. And if it  
10 was, then obviously it's the position of the Gambling Commission, the duty of the  
11 Gambling Commission, to consider what it should be putting in front of the court.

12 But I think they're making it very plain that that's all you're getting. You're not getting  
13 what's sitting in Europe Economics' email files if the Gambling Commission never saw  
14 it and relied on it. If that's not your expectation, I think we need to have that out in the  
15 open.

16 MR BOWSHER: Well ...

17 THE CHAIR: I mean, maybe it's something you need to take instructions on  
18 Mr Bowsher. Maybe we can't deal with it today, but I mean, just to be absolutely clear,  
19 I don't want to find that this is something that's unresolved when we get to the hearing,  
20 because, you know, now is your opportunity if you think you're entitled to more than  
21 Ms Clement is indicating she's going to give you. Not necessarily right now, but now  
22 in the sense of, you know, in this period before we start finalising the pleadings is all.

23 MR BOWSHER: Yes, I understand (inaudible).

24 My hesitance is really because when one looks at the Tameside duty, we might end  
25 up having to look beyond -- if what did get to the GC obviously calls for a review of  
26 something else, it might be that one has to go a little bit further. But our starting point

1 is -- I mean, we're on all fours on the starting point.

2 THE CHAIR: Yes, okay. Well, that's helpful.

3 MR BOWSHER: It's what the GC had. There may be questions -- there may be  
4 a space about what the GC ought to have had, if I can put it that way. I'm not sure  
5 that's quite the correct way of putting it.

6 THE CHAIR: Okay. But that's -- all right. Okay. Well, I tell you what, I think we're  
7 going to leave it there, because the only way we can deal with this, I think, is you've  
8 got a clear understanding of how the other side of the court are looking at it. I don't  
9 think you're arguing greatly about it, but you may have some differences of view.  
10 Perhaps you're going to have to wait and see what they produce. But if they do  
11 produce material which you think is deficient, you're really under an obligation to make  
12 it very plain very quickly, and you need to be back here. Obviously, we can deal with  
13 it in a sensible time frame if you do that.

14 But what I don't want to find is that this issue is sitting unresolved, and somehow you're  
15 standing up in the final hearing and saying, "Well, we should be having this material  
16 and it's not there". That would be entirely unsatisfactory.

17 MR BOWSHER: (Several inaudible words). As you say, I'm not sure we're massively  
18 arguing (overspeaking) --

19 THE CHAIR: No, no, I think we're --

20 MR BOWSHER: (Inaudible) mildly (inaudible).

21 THE CHAIR: Yes, it's just the occasional diversion away from agreement and what  
22 appears to be violent disagreement, then we veer back into it. But I think we're fine.  
23 So on that basis, I think I'm understanding there's no opposition to your amendments  
24 in your alternative amended notice of appeal, and therefore -- Mr Johnston?

25 MR JOHNSTON: Maybe one point.

26 THE CHAIR: Yes.

1 MR JOHNSTON: In light of this conversation, maybe Mr Bowsher is content to do this,  
2 given that he's accepting that what's before the Gambling Commission is the starting  
3 point for a rationality challenge, and what's not before the Gambling Commission is  
4 potentially the foundation for a Tameside challenge.

5 Well, let me put it this way, delicately. Errors 1, 2 and 3 do not readily fit or helpfully  
6 fit within that typology. Would it make sense for Mr Bowsher to -- he's pleaded out in  
7 full the Europe Economics report, he's pleaded the contemporaneous documents in  
8 35 up until (g). So he has that, and his argument is, "In light of all of this, it's irrational";  
9 right? If he wishes to say that there was something else that should have been before  
10 the Gambling Commission, it was Tameside irrational that it wasn't there, would it be  
11 sensible for that to become his new 35(h)?

12 I mean, as we narrow down on the way he's putting his case, that seems to be the  
13 point. And that is not errors 1, 2 and 3. Errors 1, 2 and 3 are -- if I can put it this way,  
14 no criticism -- a sort of mishmash of points which involve some things that were in  
15 Europe Economics, some things that weren't considered by Europe Economics at all,  
16 the precise status of them as to whether they're said to be the foundation for  
17 irrationality or a Tameside pleading is not clear, and it's all, in an omnibus basis,  
18 pleaded back to at 52(a) and (b).

19 I don't intend to tell Mr Bowsher how to plead his case, but I'm trying to get a bit of  
20 clarity. Might it be sensible if Mr Bowsher can tell me to, you know, "jog on", frankly.  
21 But might it be sensible for Mr Bowsher to re-plead 35(h) and possibly (i) and (j) and  
22 actually set out, particularise, the matters he says it was Tameside irrational not to  
23 have regard to, and actually move away from the error 1, 2, 3 typology, which really  
24 derives from another world that we're not in anymore.

25 I think that would help both sides of the court and probably the tribunal understand  
26 really what's being said and then help us to know what we're meant to meet by way of

1 | pleading and evidence.

2 | THE CHAIR: Well, that's helpful, thank you.

3 | Mr Bowsher, I'm not going to tell you how to plead your case either. So you've heard

4 | what Mr Johnston said. I have to say, I do think there's some lack of clarity. Or rather,

5 | let me put it a different way. It could be improved, I think, by reference to the points

6 | that Mr Johnston makes. But it's entirely a matter for you, and of course, we are going

7 | to come to timetable in a minute.

8 | MR BOWSHER: That was my point. I'm not anxious to do things which are going to

9 | create difficulties with the timetable at this stage.

10 | THE CHAIR: Well, although there is something to be said for -- getting it right might

11 | save us time later as well and it might make it easier for everybody.

12 | I mean, I don't know whether you -- I mean, you don't want to deal with this, I'm sure,

13 | on your feet, but you might give this some serious consideration as to whether you

14 | can improve the drafting so it is clearer exactly how these errors fit in to the rest --

15 | MR BOWSHER: Which relates --

16 | THE CHAIR: Which relates to which and how.

17 | MR BOWSHER: Yes, noted.

18 | THE CHAIR: Okay. So on that basis, I mean, I think the answer is to give you

19 | permission to amend on that basis. Clearly, if you do anything which departs

20 | significantly -- if you now wish to make some amendments to it and that departs

21 | significantly, then we might have to have another discussion. But I would assume

22 | you're not going to do anything significant.

23 | MR BOWSHER: I mean, our timetable was proposed that we served, I think, on

24 | Friday, and we can probably do it quicker than that, but I -- you know, we left a little bit

25 | of space. But the plan would be to serve that this week. There is --

26 | THE CHAIR: Maybe it's helpful to -- which timetable do you want to look at?

1 MR BOWSHER: There is a -- just before we do that, can I just say, just for  
2 completeness --

3 THE CHAIR: Yes.

4 MR BOWSHER: -- there's some numbering and lettering that has gone wrong in the  
5 alternative draft. So the version that is served will be slightly -- the subparagraphs will  
6 be slightly differently numbered.

7 THE CHAIR: Yes, of course.

8 MR BOWSHER: I don't think I need trouble the tribunal with it.

9 THE CHAIR: I think the permission that you've got is to file this and save it, subject to  
10 any further clarification you want to make along the lines suggested by Mr Johnston  
11 to 35(a) and how it fits in. But any changes that amount to a change in substance,  
12 and in your case, obviously you don't have permission for.

13 MR BOWSHER: Well, indeed. What I was going to propose is that we may need to  
14 take -- we've heard what's been said. We will consider how to take that forward. It  
15 may be that what we end up doing is whether by letter or by something like what would  
16 in the High Court might be further information or whatever. We produce something  
17 which -- and say -- because its intention would be to effectively narrow the case or  
18 focus bits of the case. So it ought not to be problematic, but if it is, we'll have to see  
19 where we go.

20 THE CHAIR: But the only thing I say about that is that there was some real benefit in  
21 you getting it into this document, and if it takes a day or two longer to do that, then that  
22 would be a benefit. Because if you -- I mean, obviously the moment we leave here,  
23 presumably everybody's starting to think about what they're going to put in the  
24 amended defence or in the statement of intervention.

25 So if you produce some document in a week and a half's time which is casting  
26 a different light on this, that's pretty unhelpful, I think, given the timetable. I think we

1 need to know -- if you're going to make any changes, let's do it now. If you need a bit  
2 of extra time and another day or two, then you should say so. It's entirely up to you  
3 what you change and what you don't. I'm not telling you that you have to do anything.  
4 I'll leave it with you. I mean, if you wish to --

5 MR BOWSHER: Can I consider that matter? If the order is that we serve forthwith, it  
6 might be that we end up coming back and saying we needed an extra day or two, but  
7 I --

8 THE CHAIR: Well, I think we need to set a date. I mean, I think you've suggested the  
9 26th and Mr Johnston's timetable suggested the 26th, but if you wanted to make  
10 that -- I hate to suggest that you spend your weekend on it -- the 29th or whatever,  
11 I mean, I don't think there's going to be any objection to that if the result is that  
12 everybody's got more clarity about where they are. I mean, I don't think we've got time  
13 in the timetable for you to have much more than that. But while it's fresh in your mind,  
14 I don't know what else you've got in your diary but hopefully you'd be able to deal with  
15 what's a little bit of a tweak, I think, rather than anything more substantive.

16 MR BOWSHER: Yes.

17 THE CHAIR: Okay. Well, that's the position with the amended pleading. Timetable.  
18 Timetable

19 MR BOWSHER: The timetable, I don't know which one --

20 THE CHAIR: Should we have a look at Mr Johnston's annex 1, probably? Because  
21 I don't think you've produced one -- or have you produced one that assumes --

22 MR BOWSHER: No, we haven't produced one that corresponds to this.

23 THE CHAIR: So the only one we've got, I think, is Mr Johnston's. Do you want to just  
24 tell me where you are on that?

25 MR BOWSHER: I mean, from our perspective, our comments on that were simply that  
26 it, gives Allwyn a lot of time to produce their statement of intervention in factual

1 evidence on material which they have had for a while and leaves us with only a week  
2 after that to produce a reply -- it says "and reply evidence"; leave that to one side -- to  
3 their material as well as the GC material, which we will have had for a couple of weeks  
4 by then.

5 I was simply going to ask to tweak those dates to bring them all, I think, to Fridays, so  
6 that the Allwyn date would be the 24th and our date would be the 7th. Pushing our  
7 date to the 7th doesn't prejudice anyone because we're doing the next step, which is  
8 the 24th.

9 THE CHAIR: Yes. I mean, Mr Johnston, do you have any problem with losing  
10 a couple of days?

11 MR JOHNSTON: It might surprise you, sir, but we do, in part because there has been  
12 something of an internal arm wrestle to get to the date of the 27th, and it was chosen  
13 with some care, in part because the conclusion was -- well, I mean, I can tell you the  
14 earlier versions of the timetable that we had internally went considerably beyond the  
15 27th. We needed that weekend in part because of when the witnesses were going to  
16 be available. So at one point the discussion was, could we possibly do the 24th. Our  
17 view internally was, that just isn't going to work. Witnesses are away. We're going to  
18 need that weekend, which I know doesn't look significant, but was quite important for  
19 our planning purposes.

20 THE CHAIR: Yes. Does it make any difference to you if New Lottery gets a bit more  
21 time? I mean, as Mr Bowsher says, the next job is the skeleton argument; you've got  
22 a bit of extra time. If we gave Mr Bowsher until the 10th instead of the 7th, in other  
23 words, we give him another week, does that make any difference to you or  
24 Ms Clement?

25 MR JOHNSTON: If -- sorry, Ms Clement.

26 MS CLEMENT: That's to change -- I missed the date, sorry.

1 THE CHAIR: Sorry. The item for reply evidence, 3 November 2025, would become  
2 the 10th. So what that would mean was that you have got a week less for your  
3 skeleton due on 1 December.

4 MS CLEMENT: Sir, that does cause problems because I am in the Court of Appeal  
5 twice for big chunks of that period so that extra week was important.

6 THE CHAIR: Well, what if --

7 MS CLEMENT: I thought what we were looking at was Allwyn stays at the 27th  
8 because Mr Johnston says that's important, but Mr Bowsher will have until the 7th to  
9 do his reply evidence, and then that's the period --

10 THE CHAIR: You would be happy with the 7th?

11 MS CLEMENT: 7th as opposed to the 3rd, that still gives three weeks before the  
12 skeleton argument is produced, and then we have the week after that.

13 THE CHAIR: I mean, I just wonder whether it makes any real difference if it's the 10th.  
14 I mean, it's only giving him a couple of extra days; is that really going to affect you?  
15 I'm just concerned that there is some degree of parity in relation to the timings and  
16 I can just --

17 MS CLEMENT: I think the point I'd make about the reply evidence is very much it has  
18 to be reply evidence.

19 THE CHAIR: Well, I don't think there will be any reply evidence as far as I can see.  
20 I mean, I think we are talking about a reply.

21 MS CLEMENT: Oh, I see, yes.

22 THE CHAIR: And as I indicated to Mr Bowsher, I'm not very enthusiastic about any  
23 further evidence. I mean, we've got evidence. Clearly, you need to produce the  
24 evidence that you need to produce and I'm assuming you're going to keep that to what  
25 complies with your duties rather than anything else. I can't at the moment see why  
26 Mr Bowsher would need to put any reply evidence in. So you're going to get a reply,

1 I think, rather than reply evidence.

2 MS CLEMENT: Sir, the reason why I'm hesitating there is you don't usually get a reply  
3 in the Administrative Court, so ...

4 THE CHAIR: No. Well, maybe you don't get one at all, but if he wants to put one in,  
5 then ...

6 MS CLEMENT: It's quite an unusual step, particularly if the skeleton argument is  
7 coming shortly thereafter. What we're hoping is there's no need for, again, extensive  
8 and additional new pleading because the pleading is dealt with.

9 THE CHAIR: Yes. Well, it may well be that's the position. I mean, I'm -- at the  
10 moment, it's, you know, I've been given a timetable, it's got a reply and Mr Bowsher,  
11 I'm sure, would like to preserve the possibility of having one. I entirely agree with you.  
12 If he's giving us a skeleton two weeks later, there's not an awful lot to be gained by  
13 putting one in, but that's where the timetable sits.

14 MS CLEMENT: Can I just check that that date doesn't cause any issues.

15 THE CHAIR: Yes, that would be helpful.

16 MR JOHNSTON: Sir, can I just, whilst Ms Clement's doing that, raise a completely  
17 separate point. But I think it is relevant, which is that rightly, there's a very compressed  
18 window in and around preparation for trial. As I recall, there was an order previously  
19 for a list of agreed facts and various other documents to be produced in and around  
20 here. I do wonder, given we had the luxury of thinking pleadings were done at the  
21 beginning of September, now we're looking at pleadings being done at the beginning  
22 of November. Might it be sensible, tell me if not, to have just a list of issues and  
23 a chronology? I think the list was list of issues, chronology and list of agreed facts.  
24 Just trying to lighten the load, conscious of how much activity was going to be in and  
25 around that time.

26 THE CHAIR: Well, I suppose it's a perfectly sensible suggestion, but I have some

1 reservations about it, given that there does appear to be at least a difference in view  
2 about the way in which the matter is to be approached and quite divergent views about  
3 what the right standard of challenge is, I think, or at least sort of the way in which the  
4 challenges should be looked at. I'm a little bit nervous about not pinning down  
5 everything we can pin down, if I can put it like that. The one thing I can say is that it  
6 seems to me you could actually start doing that after your statement of intervention,  
7 because we're not, I think --

8 MR JOHNSTON: Because the reply's not going to move.

9 THE CHAIR: I don't think --

10 MR JOHNSTON: We can liaise between us about that. I was just looking at the  
11 window thinking, "7 November, it's a month before trial, there's a lot to do. We've got  
12 to do the bundles, et cetera" and I just wondered if we could lighten it. But if you're  
13 keen to have it, sir, then we'll liaise and it may well be you're right that starting work  
14 on those documents before the reply is sensible.

15 THE CHAIR: I think it would be helpful. Can I just check one other point?

16 MS CLEMENT: I'm sorry to raise --

17 THE CHAIR: Sorry, yes, of course.

18 MS CLEMENT: I'm not trying to be awkward; it's just in terms of my experience of  
19 producing those kind of documents in judicial review cases, they're usually produced  
20 seven days before the substantive hearing because by that point, all the parties are  
21 actually very advanced in their thinking and so the right issues have been formulated;  
22 the key facts are set out in the chronology, et cetera. I'm not sure that doing it sort of  
23 four weeks before the hearing is --

24 THE CHAIR: No, fine. At that point, starting it -- well, I suppose I was thinking you  
25 could at least start it, but I can understand that.

26 Well, look ... So, your position would be that you don't think a statement of agreed

1 facts is that helpful, either? I mean, you've done a lot more of this than I have, so  
2 you're --

3 MS CLEMENT: Usually, a statement of agreed facts would be a very helpful  
4 document. I'm anxious that we don't end up diverting a huge amount of time from the  
5 actual hearing prep for a document that just proves to be impossible to agree between  
6 the parties. That's my concern. I wonder whether a chronology is actually of more  
7 assistance to the court, a chronology by reference to hearing bundles, properly page  
8 referenced, et cetera. That will be of more assistance, I would have thought, for the  
9 tribunal than the parties spending weeks arguing about a set of agreed facts.

10 THE CHAIR: Any views on agreed facts?

11 MR BOWSHER: I think they're very helpful. For what it's worth, it was extremely  
12 helpful in the Durham v Durham case, in which I came second, but you know, that's  
13 neither here nor there. But it was actually very helpful in framing that hearing and  
14 shortening the hearing. But I've got no great mission on behalf of lists of statements  
15 of agreed facts.

16 THE CHAIR: Well, I mean, I must confess, I think it would be helpful. I do appreciate  
17 the difficulty with it. If it transpires that it's just -- I mean, I wouldn't have thought that  
18 there should be a lot of contention and I appreciate --

19 MS CLEMENT: One would hope, sir, but --

20 THE CHAIR: Well, and if it turns out that there is, maybe the answer is you should  
21 just let us know and we'll decide whether we --

22 MR BOWSHER: That in particular is why it was useful, because if there are a couple  
23 of bits where there really is a problem, it's worth fleshing out why there is a problem.

24 THE CHAIR: Yes.

25 MS CLEMENT: Yes. Sir, I'm just looking at the timetable about when that would most  
26 usefully be done.

1 THE CHAIR: Well, maybe --

2 MS CLEMENT: I mean, I suppose what I'm looking at is if Mr Bowsher doesn't file his  
3 reply until 10 November, does he need an extra two weeks to produce his skeleton  
4 argument? He should be thinking about all of this when he's doing his reply. Can we  
5 bring that forward a little? It allows time for us to do our skeleton argument and then  
6 we can try and get that agreed facts document done quite close to the hearing.

7 THE CHAIR: I wonder if I might just leave you to work out between you what the best  
8 timing is for those documents. I mean, in a way it doesn't really make a lot of difference  
9 to me, but I am conscious that it would be difficult for you.

10 Can I just chuck one other thing into the timetable discussion. This contemplates the  
11 hearing starting on the 8th. In fact, I think it's going to start on the 10th, to  
12 accommodate the diaries here. I don't know whether that causes any difficulty for  
13 anybody. Ms Clement, I know you were trying to juggle things, so I hope that's not  
14 unwelcome.

15 MS CLEMENT: I did manage to move my other matter, sir. My, slightly different issue  
16 now is that my son has his Christmas performance on 12 December, which I'd be very  
17 keen to get to if I can.

18 THE CHAIR: What time would that be?

19 MS CLEMENT: Well, if it's a two-day listing, sir, which it should be, then the 10th and  
20 the 11th. If it's listed for those days, that leaves me free on the 12th.

21 THE CHAIR: Yes.

22 MS CLEMENT: I don't think anything has changed in the duration of the listing. So if  
23 we can, if it could be fixed for the 10th, we would be very happy with that.

24 THE CHAIR: Is your commitment in the morning or the afternoon? Do you know?

25 MS CLEMENT: That's a very good question. It's usually at 9.00, but I'd have to check.

26 THE CHAIR: Well, what I suggest is, I think we do need to keep three days for it,

1 because I have a nasty feeling it may not just be two days. I think we can be entirely  
2 flexible with about -- I suspect it's not a full three days. It might be two-and-a-half, and  
3 we can certainly be flexible about sitting hours, if that helps you accommodate.

4 MS CLEMENT: I'd be very grateful if we could perhaps sit an hour later or something  
5 on Friday.

6 THE CHAIR: That would be, I'm sure, something we could accommodate.

7 MS CLEMENT: I'm grateful for that, sir.

8 THE CHAIR: That's a very important event.

9 So if you could make sure those are in your diaries, then the 10th, 11th and the 12th,  
10 with the expectation that we'll only sit on the 12th to the extent needed.

11 Anything else on timetable?

12 MR JOHNSTON: No, sir. Just to clarify, what date did we land on for the reply, or  
13 was that something for us to discuss?

14 THE CHAIR: 10th.

15 MR JOHNSTON: 10th. Thank you. I'm grateful. Nothing further.

16 THE CHAIR: Thank you.

17 Costs

18 THE CHAIR: Ms Clement, costs.

19 MS CLEMENT: Yes. Sir, as I outlined earlier, this was an application that the  
20 applicants brought. They've lost. It follows that we should get our costs of resisting  
21 the application.

22 We don't have a cost schedule today, but what I'd suggest is either that it's assessed  
23 by way of, submissions to you in writing, or that it can be dealt with and assessed at  
24 the end of the case. But an in principle order that we do get our reasonable costs of  
25 resisting the application today.

26 MR JOHNSTON: Sir, I've not brought with me Bolton and all the other authorities on

1 second costs and judicial review. My submission is that at the relevant time we will be  
2 seeking potentially, at least, as we put down a marker at the first CMC, a portion of  
3 our costs. We'll address the tribunal in relation to this hearing at that point.

4 THE CHAIR: I think the general rule is that interveners neither generally receive or  
5 pay.

6 MR JOHNSTON: No, indeed. So the starting point is that they don't, and that's the  
7 Bolton case. We'll address you on it. I'm not making an application for them today,  
8 but I'm putting down a marker that at a later point in these proceedings, we have put  
9 down a marker at the first CMC and at a subsequent point we do reserve our right to  
10 seek our costs.

11 THE CHAIR: But if I deal with costs today in relation to the application, that's then  
12 done, isn't it.

13 MR JOHNSTON: Indeed, sir. So if you're making an order as to costs --

14 THE CHAIR: So you're not saying you want to preserve your position in relation to  
15 that. You're just re-making your marker.

16 MR JOHNSTON: Precisely.

17 THE CHAIR: I understand. Thank you.

18 Mr Bowsher.

19 MR BOWSHER: We said this is in the nature of managing cases of this type, where  
20 evidence is being produced and the proper order would be costs in the case for it to  
21 be dealt with, to follow the outcome in the usual way.

22 MS CLEMENT: We made it clear at the last hearing that this should not be pursued,  
23 it was still pursued. We should get our costs.

24 THE CHAIR: Yes. Ms Clement, some of the things we've discussed, albeit for  
25 a relatively short time, have been more case management items, the amendment  
26 point, and obviously the amendment will carry its own costs consequences, and of

1 course the timetabling. So if you were to get your costs, then it might be that it wasn't  
2 for all of -- I mean, I suppose there's the preparation for the hearing, including  
3 Dr Spicer's report and so on, responding to the application. But then in terms of the  
4 hearing itself, it might be said that you were not entitled to all of the costs of the hearing.

5 MS CLEMENT: Sir, I think it's fair to say that the vast majority of the hearing today  
6 has been taken up dealing with the expert evidence application. The vast majority of  
7 the preparation for today has been spent dealing with the expert evidence application.  
8 As I said, we can put in the cost schedule that we'll break that down, but it's certainly  
9 possible to divvy up, shall we say, the costs that have been spent on the respective  
10 matters.

11 MR BOWSHER: Can I just interject? I have been reminded that separately -- in  
12 particular, the costs of making the amendment for and applying for the amendment to  
13 deal with what I loosely call the NLDF point, the point about the structure of the  
14 payment, we say those are costs which we should have in any event. They may not  
15 be a great part of today's hearing, but they have been part of the preparation for today.  
16 That amendment, as you'll recall, only became necessary because we pleaded the  
17 case on the basis of the decision notice that we had. You know how that arose. We  
18 pleaded the cases on the basis of the published decision notice. The point was never  
19 raised in pre-action correspondence and only arose in the defence.

20 THE CHAIR: You're seeking all the costs in relation --

21 MR BOWSHER: The costs of that specific amendment.

22 THE CHAIR: Yes. Ms Clement, I'm not sure you need to say very much about it.  
23 I mean, I've seen what you say in your skeleton about the provisions. That's  
24 section 79, isn't it?

25 MS CLEMENT: Section 76.

26 THE CHAIR: 76, yes.

1 MS CLEMENT: We dealt with it on the last occasion. Basically, sir, what we say on  
2 it is Mr Bowsher's wrong in terms of the interpretation of section 76: the NLDF point  
3 should have been obvious to him, it was a mistake made by the applicants, they bear  
4 the cost of that.

5 THE CHAIR: I've got all of that. Thank you.

6 MS CLEMENT: I'm grateful for that.

7 (4.39 pm)

8 Costs judgment (submitted to the Chair for approval)

9 (4.42 pm)

10 THE CHAIR: I think that's all. Unless there's anything else. Mr Bowsher, anything  
11 further? Ms Clement?

12 MS CLEMENT: So just in terms of the directions that we are to agree, where would  
13 you like us to send a draft of that?

14 THE CHAIR: I think if you just send it into the registry. Well, do we need an order for  
15 this? I don't think we need an order for the timetabling provisions. But unless  
16 you -- well, I mean, it might be helpful, perhaps to have an order for the timetabling  
17 provisions.

18 MS CLEMENT: I think it would be helpful just to have it recorded. It tends to force  
19 agreement, if nothing else.

20 THE CHAIR: Yes. Well, perhaps then in that case, someone might circulate an order  
21 and send their draft into the registry.

22 MS CLEMENT: All right. So one of us will send that to the registrar. Thank you.

23 THE CHAIR: Thank you.

24 Mr Johnston, anything else? No. Good. Okay, thank you.

25 So thank you everybody for your assistance with all of that. I know the timetable is  
26 tight, but it is helpful, I think, that we can fit it into that window in December. Of course,

1 | given the tight timetable, if you anticipate any difficulties, you should let the tribunal  
2 | know, let the registry know, and I will be available or the president will be available to  
3 | deal with those. So please don't let it go, of course, without warning.

4 | Thank you very much.

5 | (4.44 pm)

6 | (The court adjourned)

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