IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1766/4/12/26

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Thursday 19th February 2026

Before:

James Wolffe KC

(Sitting as a Tribunal in England and Wales)

BETWEEN:

ARAMARK LIMITED

Applicant

v

COMPETITION AND MARKETS AUTHORITY

Respondent

A P P E A R AN C E S

Ronit Kreisberger KC and Charlie Coverman (Instructed by Simpson Thacher & Bartlett, and Latham & Watkins) on behalf of Aramark Limited

Rob Williams KC and James Bourke on behalf of Competition and Markets Authority

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Thursday, 19 February 2026

(10.30 am)

Housekeeping

THE CHAIR: I think before we start I should give the customary warning to those who are joining by live stream on the website. An official recording is being made and an authorised transcript will be produced, but it is strictly prohibited for anyone else to make an unauthorised recording, whether audio or visual, of the proceedings. Breach of that provision is punishable as a contempt of court.

Now, Ms Kreisberger.

MS KREISBERGER: Good morning, sir.

THE CHAIR: If you just give me a moment to find my bundles.

MS KREISBERGER: Good morning, sir. I appear for the applicant, Aramark, with Mr Coverman and Mr Williams KC and Mr Bourke appear for the CMA.

If I may just begin by expressing our gratitude -- Aramark's gratitude -- to the Tribunal for accommodating a hearing at such short notice. We are very grateful.

Sir, may I ask if you have had an opportunity to read the papers?

THE CHAIR: I have and I am grateful for all the work the parties have done in the last few days to, among other things, narrow the issues.

MS KREISBERGER: I am grateful for that. Thank you, sir.

THE CHAIR: There are just two documents that I asked the registrar to hand out this morning. One is the case of Carter. The reason for that is -- I think your position, Ms Kreisberger, will be all cases turn on their facts, but it just caught my eye in terms of the various authorities on the question that this was a case, looking at paragraph 14, where there was an argument about acting on legal advice that was based on a view of the legal position that subsequently turned out to be wrong. Therefore it seemed to me that I should at least draw it to the parties' attention so that they can make any

submissions they wish.

MS KREISBERGER: Thank you, sir, for that. May I suggest I come back to that in reply.

THE CHAIR: Indeed. I am not looking for any immediate response, it is just to draw the parties' attention to that.

The other document I think was handed out was an email that those instructing you sent to the registry, I think last Monday. Giving advance notice that they intended to submit an appeal to the CAT on Thursday of last week. Then with some other comment about the documents required to be filed and so on. Again, I thought parties should be aware of that and it may be that we will come back to that in due course.

Submissions by MS KREISBERGER

MS KREISBERGER: Of course. That is helpful. I will come back to that. Thank you, sir.

So in that case, if I can be brief in opening. As you know, this hearing is to determine the application by Aramark for an extension of time. That's an extension in relation to its notice of application seeking review of the CMA's decision. Just by way of context that decision finds an SLC, substantial lessening of competition, in a relevant market for offshore catering services. By that decision, Aramark is ordered, as you know, sir -- Aramark, that's a company based in the USA -- to effect the complete divestment of a UK company which it had acquired and controlled.

THE CHAIR: Before you go on, Ms Kreisberger, you have reminded me that I need to make a determination of forum. I wonder if we should just address that first. I don't want to take you out of your stride, but I think it would be as well just to get that out of the way, if you don't mind.

My understanding is that in the notice of application Aramark's submission is these

should be proceedings in England and Wales.

For my own part, I note that Aramark, its principal base if not its only base in the UK is in Aberdeen. You can no doubt confirm that.

MS KREISBERGER: They do have a base in London, sir. That is simply Aberdeen in relation to the offshore services.

THE CHAIR: So the services in question are delivered from Aberdeen, but they do have a base in London.

MS KREISBERGER: Yes.

THE CHAIR: My understanding is that Entier are a Scottish registered company based in Aberdeen.

MS KREISBERGER: Yes.

THE CHAIR: So on the face of it there is a prima facie basis for thinking that this is a Scottish case rather than an England and Wales case. It does strike me I should make a determination of forum for the purposes of this application, you know, lest there need to be any further procedure in due course.

MS KREISBERGER: Yes. I think that would address it and we certainly wouldn't want to push back on that.

THE CHAIR: Yes. Do you have a submission as to forum?

MS KREISBERGER: Not that I am in a position to make right now. Would it assist if I come back?

THE CHAIR: Again, yes. It just seems to me that it is important, just to get that out of the way. If you would rather take instructions and come back to it and then I will ask Mr Williams.

MR WILLIAMS: I don't mind, sir, making our submissions if that would help Ms Kreisberger.

THE CHAIR: It may help. It may help, yes. Thank you.

MR WILLIAMS: Sir, the forum stuff is in Rule 18, sir. And if one considers the (inaudible) Rule then two factors are really relevant. One is the residence of the parties --

THE CHAIR: Yes.

MR WILLIAMS: -- and the other is what would be the place where the merger will be. The applicant is an English company. There is no other party other than the CMA and the CMA is a nationwide organisation. Strictly if one applies Rule 18.3(b), the CMA's head office is in London, so that would strictly be a factor pointing to London. But as I say the CMA is a nationwide organisation so that is perhaps not a powerful factor and as you have said, sir, the acquisition is of a company in Scotland and Scottish operations.

So there are factors which could support an English or a Scottish forum. We don't take a strong position either way. We don't object to it being an English forum as the applicants proposed but if you took a different view on balance we wouldn't seek to persuade you one way or another. For today's purposes the issue only really matters to the extent that the Tribunal is being asked to look at English appellate authorities --

THE CHAIR: I don't think --

MR WILLIAMS: -- which are only of persuasive value in any event and they would be of persuasive value potentially if this were a case with a Scottish forum. So we say it doesn't make -- it won't make a huge difference today. The main impact is as you say if the matter goes further. That would be the principle --

THE CHAIR: That is -- whichever way it goes, obviously there is the prospect of an appeal and the forum of appeal would be determined by a ruling on the forum.

MR WILLIAMS: Very probably, sir, yes. So in terms of the appellate authorities, we would rely on some of your case in the court of appeal.

THE CHAIR: Yes.

MR WILLIAMS: But I don't think -- I will show you what we say about that case in due course. I don't think what we say, what we claim in that case will be very sensitive to the question of forum because they are very general propositions.

THE CHAIR: I don't think forum affects at all the range of authorities that would be relevant to the consideration of the Tribunal. I don't think -- the preliminary view, I don't think that would affect it. It is more for good order to make the determination lest there be any issues subsequently that need to be addressed. I have your position.

Ms Kreisberger, if you could come back to it in due course and remind me if I don't remind you.

MS KREISBERGER: I will. Thank you, sir.

Turning then to the substance, with your permission I propose to structure my submissions in three parts.

The first is just a sort of prefatory remark by way of overview.

The second part of my submissions will be on the legal principles and then the third part of my submissions on why the legal test applying those principles in relation to the exceptional circumstances is met.

So if I may, then, beginning with an introductory couple of remarks. Sir, you will have seen in the papers that this application arises out of an unfortunate error, for which I can say there is profound regret on the part of those sitting behind me.

If I may, I would like to highlight that while there are a number of authorities on the applicable test of exceptional circumstances, and they certainly shed light on the correct approach, it is just worth bearing in mind that none of them is a direct precedent for the particular set of facts that you have before you today.

Again, just by way of overview, there are three principal elements to those facts, in my submission. The first is that it was a genuine mistake made by Aramark's representatives about counting rules.

The second is that that mistake resulted, as you know, in a very short period of time elapsing after the deadline, and that delay, if time is extended, causes no prejudice to any party.

The third element is that the consequences for Aramark are severe, because if the application is not granted, Aramark will be shut out from challenging the CMA's order which mandates full divestment by it of a UK entity.

Because that's a structural remedy, the ramifications extend well beyond Aramark. They affect the operation of the relevant market for offshore catering services. It's a matter which affects the Scottish economy, as you point out, sir. So it in turn affects all those third parties who operate in it. The other suppliers, the buyers of the service, ultimately the consumers of offshore catering services and therefore it engages the public interest.

So we say that particular combination of factors hasn't arisen before in the Tribunal and I will develop in the third part of my submissions why this particular combination should be characterised as exceptional circumstances.

So that's by way of overview. So, sir, if I may move on then to the applicable legal principles. You will have seen from our reply, at paragraphs 5 to 8, the exceptional circumstances test has now been considered in quite a number of cases in the Tribunal. The Tribunal has found that exceptional circumstances have existed in quite a number of those cases and extensions have been accordingly granted in what we see as a variety of factual scenarios, as one would expect, and the cases involve different periods of delay.

THE CHAIR: Would it be fair to say that there are very few retrospective cases?

MS KREISBERGER: There are some --

THE CHAIR: I found three in the bundle and Carter, I suppose, is another one.

MS KREISBERGER: Yes, I think that's exactly right, sir.

I will come back to the point on retrospective, but obviously the nature of the error here means that it could only ever be a retrospective application because there was no awareness of it in advance. So it is really intrinsic in the reason for the application. This fact pattern could only ever come up retrospectively.

THE CHAIR: I suppose what I would be interested in is whether you have any submission on whether the approach or factors are looked at differently when one is looking retrospectively as opposed to prospectively.

MS KREISBERGER: Yes, sir. I think you raised an authority that deals with that, Peter Lyons. I will come back to that if I may in a moment. But, yes, certainly. And that's very helpful.

Now, if I can begin on legal principles by highlighting what in my submission are the three main -- three key -- principles. I can take them most conveniently from the BSkyB case -- that was Sky against the Competition Commission.

Sir, could I just ask, are you working electronically or from hard copies?

THE CHAIR: Hard copy sitting here today.

MS KREISBERGER: I am grateful. I hope these are the right references. The bundles came quite late, necessarily. So the reference I have is the Authorities Bundle, hard copy bundle 6. This case is at tab Q. It begins at page 186. You may not have 186, that may be just for the electronic --

THE CHAIR: I do.

MS KREISBERGER: Yes. It is page 186 Mr Coverman reminds me.

For those working on the electronic bundle, if it is helpful, there seems to be a quirk that when you put the page number in it goes to the previous page, so there is some scrolling down which I will try to seamlessly manage as I address you, sir.

THE CHAIR: I think it is an electronic version of Sedley's Laws of Documents, the electronic reference is always one page out.

MS KREISBERGER: One page out, exactly. I will try to remember that.

Now, sir, you may have already seen this authority. It is a reasoned order from a former president of the Tribunal, Mr Justice Barling as he then was. The facts were that this was a prospective application to extend time for a Section 120 review as here. It wasn't a full divestment order in that case. The reason was -- the reason the extension was sought -- was to align time periods in respect of two distinct but related decisions. You will see it was essentially granted for reasons of administrative convenience. It is useful because Mr Justice Barling articulated three applicable principles that in my submission are instructive for your review here.

The first I take from paragraph 25 on page 191. That is the unsurprising proposition that each case must turn on its own facts. There is no comprehensive definition of "exceptional circumstances." These are of course highly fact-sensitive enquiries, and that is made citing Hasbro, that proposition.

So fact-sensitive enquiry.

The second applicable principle is that it is a high bar. We certainly don't shy away from that. That's at paragraph 27. The Tribunal said:

"I agree that it is a question of fact, although such circumstances should not be restricted to cases of force majeure. The cases where exceptional circumstances are found to exist are likely by their very nature to be rare."

We have obviously had quite a few cases since this authority. But of course, as I say, the bar is high. The judge said:

"As the Tribunal has emphasised on more than one occasion, respect for the deadline for commencing an appeal under the Competition Act and under Section 120 is crucial. Given the importance and urgency of the matters in issue, such deadlines must be strictly adhered to."

So it is certainly not restricted to cases of force majeure. Also, we entirely accept that

respect for deadlines is crucial. That is a theme I will return to, sir, when I come to the facts, because this is certainly not a case of carelessness.

THE CHAIR: Just what I am thinking about, the adjective "exceptional", what that in ordinary language suggests is something out of the ordinary and unusual.

MS KREISBERGER: Yes.

THE CHAIR: But in the context of an exception to a time limit, which you accept is a time limit that prima facie has to be strictly adhered to, is there also carried within the adjective "exceptional" some evaluation of whether the circumstances are such as to justify overriding that general public interest in adherence to the time limit?

MS KREISBERGER: Yes, I think that is very well put. It really takes me seamlessly on to my third --

THE CHAIR: Okay.

MS KREISBERGER: -- principle, as to how should you, sir, approach the assessment of the circumstances.

What I will be saying is that you have a broad scope of enquiry and it is a wide-ranging enquiry, and it is a multifactorial assessment, taking account of all these points in your assessment of whether the deadline should be set aside based on the particular facts. That's really going to be the focus of my submission today. So as I say, the third principle is breadth. I talked about where the bar sits but the third is breadth of the assessment.

If we look at paragraphs 32 to 33, staying in the Sky authority, these are critical paragraphs both as to breadth and the height of the bar. Mr Justice Barling said:

"Given the structural interlinking of the two stages in the present reference, I also agree that, as summarised above there would be considerable case management and other benefits, including savings of time and expense, for the potential parties, interveners and the Tribunal, if the period for challenging the report were to be

extended to the extent proposed. There would be corresponding additional expense, inconvenience and quite possibly delays if there were to be no extension. There is another factor ..."

He goes on to say that the respondents' consent -- one of them actively supports the application, pointing to the same case management benefits. That is obviously not the position we have here. I will come back to that:

"It is difficult to identify any likely adverse consequences to those potential parties or to any third parties and the wider public interest ..."

And he goes on:

"... given the procedure. It is highly unlikely that the proposed extension would in this case cause any material delay at all in the resolution of any challenge to the report. On the contrary, the procedural inconveniences and additional work likely to occur if separate and sequential challenges are made, might well cause delay in ultimate resolution."

So just pausing there for a moment. The Tribunal there considers case management benefits for the parties and the Tribunal. There are four points, I should say. Expense and inconvenience of delays, if granted. That there would be no adverse consequence, not only for the potential parties but he considered the third parties and specifically and importantly in my submission, the wider public interest. That's at paragraph 33.

He also places weight on there being no material delay to the resolution of the merger challenge, in other words to the proceedings themselves.

So it is instructive, because although Mr Justice Barling confirms that it is a high bar and it is not to be treated -- you know, it is to be treated with seriousness, and he emphasises the importance of respect for deadlines, actually what one sees here is the benefits are merely case management benefits. The benefit of saving time and

money.

Now, in the scheme of things, and certainly relative to this application brought by Aramark, those are fairly modest benefits, compared with our set of facts. Equally, the downside highlighted by the judge of not granting the extension is what he calls "additional expense, inconvenience and delays." So it is not momentous consequences.

THE CHAIR: But it might be said, am I right, that this is a case where both decisions would be appealed.

MS KREISBERGER: Yes.

THE CHAIR: And so it becomes a case management question.

MS KREISBERGER: It does.

THE CHAIR: It's not a case where the consequence of refusing an extension of time is that there would be no proceedings.

MS KREISBERGER: Exactly. Certainly not an existential scenario in that case.

THE CHAIR: I suppose what the CMA might say is that the benefit of insisting on the deadline is that there is finality in decision and there will be no costs, delay and so on in dealing with an application for review.

MS KREISBERGER: I think they do say that and I will address you on that, and particularly the finality point that doesn't arise here on these facts.

Just before I leave this authority, if I could just show you paragraph 28 on page 192. I have taken it out of order just to show you those principles. I have shown you paragraph 27. 28 is the conclusory paragraph based on the reasons I showed you below. He says:

"In the present case I am of the view that there exists certain circumstances which combined render them exceptional so as to be capable of justifying the extension sought. I emphasise that it is the combination of circumstances in this case which had

led me to the conclusion that it's appropriate to extend time to make an application for review, rather than any one particular factor."

So you see there, having taken account of all those different affected interests of parties, third parties, the Tribunal and the wider public interest, he then emphasises that there is no single factor. It is a combination of factors together which add up to exceptional circumstances. That's what meets the bar.

So cases turn on their facts. It is a high threshold. The scope of the assessment is wide-ranging and it is multi-factorial and it is a matter, sir, for your assessment and your discretion in weighing the factors.

THE CHAIR: It is an evaluative question of weighing the factors but unless I am satisfied the circumstances are to be characterised as exceptional, I have no discretion. In the true sense. In the sense that it is -- you know, I may only extend time if satisfied that the circumstances are exceptional. But your point is that in deciding whether the circumstances are exceptional that's an exercise of evaluating the whole circumstances as they arise in this case and applying that test, and approaching it with, I suppose the right lens or spectacles.

MS KREISBERGER: Precisely. That's my submission. Of course I have to satisfy you that the weighing up of factors leads to the conclusion that there are exceptional circumstances. That's the threshold I have to cross. But that determination is a matter for your evaluative judgment exactly as you say.

Then before I leave the cases, I have five very brief observations on other points arising out of the case law. I hope as part of that I will address your questions, sir, with my first observation of the five.

That relates to the Peter Lyons case which is in the authorities -- sorry, the supplementary authorities bundle. I have it at page 28. Page 28, paragraph 20. It is tab B. That's where Mr Justice Roth said:

"I am not sure that the requirement to apply for an extension of time before the time has expired can be a mandatory requirement. It is not in the Rules and the Guide cannot override the Rules. But it is certainly a very relevant factor."

And he goes on to say exceptional circumstances have to apply for the entire period of the delay.

You have my submission that it's intrinsic to the application that it was late because the mistake was uncovered after the deadline had passed.

So in terms of coming back to the question of how the Tribunal should approach the assessment, there is no difference in threshold for a retrospective application. One might put it this way: had the mistake been uncovered at 4.50 on the Thursday, I would not be suggesting that that's a material difference for the assessment that you must conduct. Rather you are looking at all the circumstances in the round. Here it is a fact that it came to light the next morning with the CMA's email. It's just a function of how the facts unfolded here.

My second observation on the cases is that the extensions granted both prospectively and retrospectively differ widely. One sees delays of 39 minutes because of traffic, to 28 days. Just purely by way of example, in the case of Advanz, we needn't turn it up, but for your note it is tab K of the Authorities Bundle, page 169. That concerned a 15-day extension and at paragraph 3 it was said that the extension is for a modest period. So it is just a helpful anchor to see we are dealing with hours. That was over a fortnight.

Finally, I am really -- sorry, not finally, point 3 of five, sorry. More for completeness than anything else.

Whether or not the CMA consents -- and as you know they don't here -- is not a determinative consideration. The assessment is a matter for the Tribunal alone to determine. That is set out in terms in the case of Allergan. It is in the Supplementary

Bundle at tab C. Tab C -- I think it is the actually in the regular Authorities Bundle, page 164 -- sorry, I have been given a bad reference.

THE CHAIR: There is certainly at least one of the authorities where the CMA did not oppose and made very clear that it is a matter for the Tribunal. It may be the Prater --

MS KREISBERGER: I am sorry, sir, I didn't catch that.

THE CHAIR: I can't remember whether that was a point made in the Prater case or not.

MS KREISBERGER: It may have been. But the authority I had in mind is Allergan, paragraph 12. Page 39 of the Supplementary Bundle. Mr Justice Roth said:

"I should add that although the CMA has consented to the application, the question of an extension under Rule 9(2) [which is also the same test] is for the Tribunal to determine and cannot be achieved by agreement."

That's as one would expect.

Moving on then to my fourth point --

THE CHAIR: Before we do, you just made the point it is the same case in 9(2) and 25(3).

MS KREISBERGER: Yes.

THE CHAIR: It is the same form of words but is there any difference of approach in your submission, bearing in mind that 25(3) is specifically directed at merger decisions?

MS KREISBERGER: Not as a sort of bright line. But it all goes into the mix and of course it is right that merger issues need to be dealt with quickly. On these facts, given that we are dealing with an extension which is less than a day, a matter of hours, it's not a material factor. I will come on to the fact that we have all been working towards a June hearing, so actually in this case it's not a factor that weighs against the extension.

I wanted to draw out for you, sir, that a number of the cases placed reliance on the absence of prejudice to the respondent. We can take that one from Flynn Pharma. That's tab 5 of the Authorities Bundle. Paragraph 7B. It refers back to the authorities I just cited, Allergan. But the Tribunal said "I do not see any material prejudice to the Respondent in allowing the extension."

There, they didn't object. But it goes into the mix.

THE CHAIR: You are not suggesting that the absence of prejudice on its own is an exceptional circumstance but it is one of the range of factors that together I have to look at.

MS KREISBERGER: Yes. And my overriding submission, which underlines all these points, is the contrary submission that it is no single factor that gets me there but it is the combination of factors. There are factors that I will say weigh more heavily and that is the consequence of Aramark and for the market. So there is certainly weighting but I do emphasise it is the holistic assessment taken in the round which make up the exceptional circumstances.

Then my fifth observation comes back to a point you made, sir, which is the particular form of prejudice which can arise to the CMA under the rubric of legal certainty. That's in Fish. It is cited in my reply. So I don't think we need to turn it up. But the wording is that the CMA, the prejudice arises where the CMA is entitled to assume that the decision is definitive. Entitled to assume the decision is definitive and we quoted the paragraph in the reply.

My submission to you on these facts will be the CMA is not entitled, was not at any material stage pre-action, entitled to assume that the decision was definitive because they were being told that it was coming. On multiple occasions.

Again, just finally for completeness, sir. You will have seen the letter from Latham & Watkins referring to the cases on the Denton framework. That letter draws an analogy

with those cases. But for the purposes of today's application we agree with the CMA that there is no need to go outside the applicable principles in the Tribunal authorities which directly address the test of exceptional circumstances. We have the advantage of that body of case law, I have taken you through some of it, as to how the assessment should be approached.

THE CHAIR: The Denton line is concerned with, as I read it, a rule which doesn't have exceptional circumstances attached to it. And indeed, I have asked to be put in the bundle the Good Law Project case which says, as I understand it -- you will correct me if I am wrong -- that the Denton line in the case of an initiating, a writ that is initiating a process, in that case a judicial review claim form, that you in effect apply the -- even though you are applying the Denton approach, you would read into it the approach indicated in CPR7.6, which does draw quite a very sharp distinction between prospective and retrospective applications.

MS KREISBERGER: Yes, which doesn't carry across to this and I will go into the reasons I have explained. It is simply a distinct line of cases that apply in the High Court. We don't have an absence of a test here nor do we suffer from a lack of applicable principles as articulated by the Tribunal. So we say there is no read across there.

THE CHAIR: You are inviting me to put to one side that --

MS KREISBERGER: Yes. I certainly place no reliance today on that. I think we are ad idem on that point.

THE CHAIR: Sorry?

MS KREISBERGER: I think we are in agreement on that point, based on the submissions.

THE CHAIR: Thank you.

MS KREISBERGER: Turning then -- sir, unless you have any other questions on the

legal approach?

THE CHAIR: I have a couple of questions. The first is whether, just to come back to the difference between prospective and retrospective, and thinking about by analogy but appreciating that here we have a single test, the very different approach taken in the CPR to prospective and retrospective applications, I would be interested in any submission you have as to whether in applying the single question of exceptional circumstances, the fact that we are dealing with a retrospective application has any bearing on the approach or the way that I should be thinking about it.

MS KREISBERGER: Sir, if I could just say a word about that now and then come back to it if I may.

I think there are two levels one can engage on that with, the generality and the specific. The generality is really a question of legal principle. As a matter of legal principle, there is no predetermined weighting of retrospective versus prospective. So you are not bound to say "I find in my assessment in the round -- that the fact that this was retrospective counts against the applicant". There is nothing in the cases that suggests that so your discretion is not bound. Equally there is nothing to suggest that you can't take account of it. Clearly the Tribunal has the discretion to weigh up any factor that it considers relevant.

THE CHAIR: I suppose it's the nature of a retrospective application that the factors that come into play may be different --

MS KREISBERGER: Yes, yes.

THE CHAIR: -- from a prospective application.

MS KREISBERGER: Yes. But I would then invite you, sir, to place emphasis on the very first legal principle, which is that it is a highly fact-sensitive enquiry. Here we say it is in the nature of the error that it came to light after the expiry of the deadline.

THE CHAIR: Yes.

MS KREISBERGER: And we don't say that is a factor which should weigh heavily or at all against the application. And in substance as I said had it come to light earlier, you know, we would not be here but it is not a material distinction. It is simply a function of how matters unfolded. What is, we say, highly relevant in relation to that, is that action was taken swiftly and effectively as soon as that came to light. You can imagine there was, shall I say with understatement, some considerable concern when this emerged. It was a shock, and swift action was taken.

THE CHAIR: My other question -- is that what you wanted to say on prospective/retrospective?

MS KREISBERGER: Yes.

THE CHAIR: That's very helpful. My other question relates to the Court of Appeal case of Somerfield, which I think we have at tab H at page 124. I would like to ask you about something that Lord Justice Vos says at paragraph 26, and then at 43, 44 and 46.

So if I start with 26. He is addressing here an argument that one should draw on the differently framed provision of the statute of the Court of Justice and towards the end of 26 -- I suppose about eight lines from the end of the paragraph, he observes that:

"Rule 8(2) of the Rules is framed more generally in terms of 'exceptional circumstances'. Those words do not inevitably have any temporal consequence, but the first question that must be answered in seeking to establish exceptional circumstances will, as it seems to me, always be 'why did the appellant not lodge an appeal in time?'"

And of course this was a retrospective case, Somerfield. Then he says:

"Whilst the court should certainly have regard to CJEU jurisprudence, and whilst it is clear that the words 'exceptional circumstances' should be strictly construed, they are apt to apply to any circumstances that are shown to be truly exceptional."

That in a sense, that last sentence I think is consistent with your submission but it's the observation that the first question will always be why did the appellant not lodge an appeal in time.

Then if one goes forward in the judgment to 43, where he is looking at what the Tribunal did. In the second sentence he says:

"But it seems to me that it fell into error for the reasons ..."

MS KREISBERGER: I am sorry, sir, which paragraph?

THE CHAIR: Sorry, paragraph 43. Page 156.

MS KREISBERGER: Yes.

THE CHAIR: Then over the page to 157. There is a sentence that starts:

"It started by employing [various points]."

And then:

"Rather than concentrating on whether there was any justification, bearing in mind the need for legal certainty, for the Respondents having failed to appeal in time, knowing what they knew at the time."

Then paragraph 44, the second sentence:

"I am far from sure that the Ruling can properly be described as irrational, but I do think, as I have said, that the CAT failed adequately to focus on the reasons why an appeal was not brought within time."

And then finally, at 46:

"[Whilst I do not] As I say, think the CAT's decision was irrational, in my judgment neither the ERAs nor the subsequent events undermined the Respondents' ability to bring a timely appeal. This ought, I think, to have been a central feature of the CAT's decision as to exceptional circumstances."

I am interested in your submission on those observations, which is at least at first blush directing me that the first question I should ask -- and I think it is put as it should be

a central feature of my consideration -- will be the reasons why the appeal was not brought in time and the question of whether there was anything that undermined the respondents' ability to bring a timely appeal.

MS KREISBERGER: Yes. I think what I would say is I don't understand the judgment to be suggesting that there is somehow a two-stage test, that you need to pass through the first to get to the other factors. And that is defined in the authorities, that it is an assessment -- an holistic assessment.

In terms of the emphasis on why did this happen, I think we accept that the enquiry must start with looking at the reasons why this is made and why it is brought out of time.

I am not sure it takes matter much further because Lord Justice Vos is not laying down principles as to how you then go on to weigh those considerations. Of course he was looking at a very different scenario. Yes, in that case Somerfield applied for the extension which the CAT granted, 28 days. It applied two years after the two-month deadline. So it begs the question, well, why so late?

THE CHAIR: So your submission would be that those observations, I don't think you resist the proposition that the enquiry is to start by looking at the reasons, but you say I should read all this in the context of the particular case that were before the Court of Appeal.

MS KREISBERGER: It is quite striking to grant a 28-day extension in circumstances where it was two years out of time. I mean, it couldn't really be any further removed from the facts here, where there was a panic a few hours after it transpired that the deadline had passed.

THE CHAIR: Yes. Just in terms of the focus on reasons first and then that last paragraph, the observation there was nothing to undermine the respondent's ability to bring a timely appeal, is also a central feature of the CAT's decision. I don't want to

anticipate what you are going to say on the facts, but in this case there were no factors -- or were there any factors in your submission that undermined the applicant's ability to bring a timely appeal?

MS KREISBERGER: Yes.

THE CHAIR: If there were, what were they? I would be interested to hear what they were.

MS KREISBERGER: If I may deal with that as I go along?

THE CHAIR: Yes, of course.

MS KREISBERGER: The short point is as soon as they became aware they sprang into action to deal with the problem. Not within the space of two years, within the space of an hour. There was utter consternation and shock, as I say. And we are talking about 5.00 pm on a Thursday to midday on the Friday.

THE CHAIR: I don't think you need to labour that point.

MS KREISBERGER: But I certainly don't shy away from the correct position being that your enquiry must take account of these particular facts. As I said it's the combination of the genuine mistake, the way it came to light, the action immediately taken and the extremely severe consequences if this is not granted, which together make out the exceptional circumstances.

As I say I don't think it is a two-stage test. It all goes into the assessment. But I am certainly not asking you, sir, to turn a blind eye to any feature of this. On the contrary, I place heavy reliance on the actual facts as to how this unfortunate event transpired and you see all of these cases are highly fact specific.

There is another authority from Mr Justice Roth as he then was, where there was an application which was -- it was heard in 2025 and the deadlines had expired in I think 1998, 1999 -- sorry, it was sort of five, six and seven years earlier. I think my submission is one needs to tread carefully in drawing a line from those kinds of cases,

dealing with delays in the magnitude of multiple years to the case here where prompt action was taken as soon as it came to light.

THE CHAIR: If I am to focus on reasons for the deadline being missed along with all the other factors, one I would welcome your assistance on is Mr Bavasso's statement, which doesn't, as I read it, give me an explanation of how the issue, how the deadline came to be missed. It sets out exchanges with the CMA. But it struck me it is very different from what one sees in the Fish Holdings case where the Tribunal had chapter and verse from the solicitor involved as to precisely what had happened when --

MS KREISBERGER: Yes.

THE CHAIR: -- and how it came to be that the deadline was missed.

MS KREISBERGER: Yes.

THE CHAIR: When I look at Mr Bavasso's statement, he gives me the to and fro with the CMA, but what is notably absent are the kind of explanation that the Tribunal had in Fish Holdings.

MS KREISBERGER: This was obviously prepared at great haste. I don't push that too far, but you can imagine, sir, there was a flurry of activity on the Friday. But the reason for that is really that the reason was given in the application itself that went in on the Friday. The lawyers, the Simpson Thacher & Bartlett team, are very clear that that was their construction.

So there is no -- in a sense, a witness statement from Mr Bavasso confirming the position set out in the notice, which is signed by the firm, would not take matters further. There is nothing more to be said. They misconstrued the statutory language and there is no shying away from that. That is accepted, that it is a misconstruction.

THE CHAIR: Yes, take me to the application by all means but my reading of the application is it advances the argument that on a proper construction the application -- the notice was timeous and it then goes on to advance the argument that

that was a reasonable interpretation. On the hypothesis it was wrong. I find that at page 2. But I did not myself find in the application an explanation of the reasons -- the reason or reasons why the deadline was missed.

MS KREISBERGER: So they come to the same thing. I think that's why the view was taken that it didn't need further explication. In other words, the solicitors set out in the application on page 3 of the application their understanding of how this all works and they say it is reasonable, because that's what they believed.

So I don't think you need a further item of factual evidence.

The construction advocated in the application is the construction that was for the team accepted wisdom. They believed that to be the right construction. There was a genuine mistake. They set it out in the application notice. It is obvious, as it were, implicit in that, that that was the construction.

When the CMA informed them that it had a different reading, that came as a shock.

So the purpose of Mr Bavasso's statement was simply to put the material in front of the Tribunal as to the communications. That is the function it was serving. I don't think it needed to be said that this was Mr Bavasso's interpretation because he set it out in the application note. But it was.

THE CHAIR: I suppose the sharp question is -- because on the face of Mr Bavasso's statement, he narrates an articulation of that position to the CMA after the error has been identified, and the sharp question, and I think you are telling me as senior counsel that the position is this was the considered or the interpretation upon which the team was proceeding before the error came to light and wasn't an approach which was taken in order to justify a problem which had emerged for other reasons.

MS KREISBERGER: Oh no. That was the team's reading of Rule 112.

THE CHAIR: Okay.

MS KREISBERGER: So in a sense, that's accepted, against themselves that that's

how they understood it and I am not sure that the Tribunal requires evidence from someone within the firm to confirm that, because no one is denying it. That was the basis upon which they were proceeding and, as I say, that's why it came as a shock when the CMA said that that's not the right day.

There was no sense, as I understand it, of ambiguity. That's the nature of mistakes. One doesn't become aware of them until they are uncovered. They simply took that position. That's what they believed was the right -- they certainly wouldn't have done so if they had known there was a risk or some problem. I will take you through the communications.

You will see that this is a team that was engaging proactively, constructively and early with the CMA about setting the hearing date, about putting the CMA on notice. Actually far more than one normally sees. In that sense it was a model of pre-action engagement.

THE CHAIR: But of course none of that goes to an explanation of the reason why it was late.

MS KREISBERGER: Yes.

THE CHAIR: I suppose the reason I am pressing you on this, is having read Lord Justice Vos's injunction to regard the reason or to treat the reason for the failure to meet the deadline as the first question, and the central issue, I then go to Mr Bavasso's statement and I don't find that articulated --

MS KREISBERGER: Yes.

THE CHAIR: -- there in the statement.

MS KREISBERGER: I will come back to the communications I think, rather than doing it in the abstract. As I say, I think the application, the error was uncovered in the course of the morning on the Friday. The application went in that day. The purpose of the application was to say this was what we thought -- this is how we thought the Rule

should be construed.

THE CHAIR: Now, I passed out to the parties this morning a message to the registry of the Tribunal --

MS KREISBERGER: I will come back to that.

THE CHAIR: -- on the Monday, indicating that the intention was to file on the Thursday.

MS KREISBERGER: Yes, well, I --

THE CHAIR: Is there a reason that you are able to give me as to why --

MS KREISBERGER: I can tell you the reason that has been told to me and we are obviously dealing with this so perhaps there is a little latitude there, given this has all been dealt with over the last couple of days.

But it is the case that the team thought they would be ahead of the game by filing a day early. It didn't happen.

THE CHAIR: Why did they not do that?

MS KREISBERGER: Because inevitably when there is a deadline and documents are being worked on, you know you need to hit the deadline, an internal deadline can slip. So Thursday was an internal deadline to beat the deadline by a day.

THE CHAIR: Is there a reason, you say it is inevitable, and I think we all have experience of working to deadlines, but the Tribunal's Guide does warn parties not to leave things to the last day or so because of the risk that something will go wrong.

MS KREISBERGER: Yes.

THE CHAIR: Is there anything you are able to say to me as to why this was being left to the day before the deadline or the day which was thought to be the deadline?

MS KREISBERGER: Yes, so the deadline was understood to be 5.00 pm on the Friday. So they still were aiming to file hours ahead of the deadline. It was all pretty usual for parties to file on the day of the deadline, it is certainly my experience.

Obviously this is a very tight deadline. Sir, as you observed it is a merger case and it is pretty tough, pretty punishing for the parties, and they thought they were filing ahead of the deadline. They were going to file on the day before. Internally people are looking at the document. You know, there is a need to get instructions and sign offs and things, and no one -- no one -- at the law firm thought that there was a 5.00 pm deadline on the Thursday.

Obviously, this is a matter of huge regret but what I do want to emphasise to you, sir, is this is not a case of carelessness or failure to treat a deadline with the utmost importance. You see that from the communications to the CMA. It is a case of a most unfortunate mistake.

THE CHAIR: Yes.

MS KREISBERGER: Would that be a convenient moment to turn to the facts? Unless you wanted to break earlier?

THE CHAIR: Perhaps we could have just a short break, maybe 15 minutes or so.

MS KREISBERGER: Yes. I am grateful.

THE CHAIR: Thank you.

(11.40 am)

(A short break)

(12.07 pm)

THE CHAIR: Yes, Ms Kreisberger.

MS KREISBERGER: Thank you, sir.

I was turning to the facts, and if I may I will take it in the order that I was proposing to, but could I just highlight something of importance to the client, which is we had seen the email to the Registry. If there is any suggestion of bad faith, that is in the strongest terms rejected by Aramark. The position was unambiguously that the deadline was treated by all of the team as being the Friday, and the email, that I can turn back to, is

simply referring to the hope, simply acting responsibly, that they would file a day ahead of the deadline. But it is absolutely the position that the deadline was understood to be on the Friday. The position was as set out in the notice of application; in other words, that's the legal team saying, "This is our reading of the Rules, we've always understood it to be a Friday deadline."

I can come back to it, but the reason why they didn't meet their own internal deadline was simply because people were commenting, their client's in the States, there's a time difference, and different people were commenting on the document, and it was believed, well that's okay, because the deadline is 5 pm on the Friday, and then the hope was always to submit several hours ahead of the deadline.

But I do want that to be absolutely clear and unambiguous, and any suggestion to the contrary is really an allegation of bad faith against those sitting behind me, which is a very serious matter and is rejected in the clearest of terms. The understanding was the Friday deadline. They now know that to be wrong.

THE CHAIR: That's very helpful, Ms Kreisberger, I'm grateful to you for putting it that way.

Just picking that up in terms of the exchange we had before the break, had it been appreciated it was the Thursday, I take it from the way you have been putting it that it would have been filed on the Thursday?

MS KREISBERGER: Yes. I think had they appreciated that the deadline was 5 pm Thursday, they would have aimed for Wednesday, and then perhaps it might have slipped to Thursday morning, as it did.

THE CHAIR: Yes. So you are not suggesting there is any other factor, the reason why it wasn't filed on the Thursday but was filed on the Friday was because the Aramark team was working on the basis of an understanding that that was the correct deadline?

MS KREISBERGER: Yes. The Aramark team understood the deadline to be 5 pm Friday.

THE CHAIR: Yes.

MS KREISBERGER: So the fact that there was slippage on the Thursday, because people were commenting on the document, was acceptable, and they thought they were still well ahead of the deadline.

Sorry, I was just going to add, sir, whilst I am on it, the purpose of the Bavasso statement was simply to set out that the CMA was on notice, having kept closely informed of Aramark's intention to bring the review, to bring these proceedings. So that's why it's narrowly put, it's simply, "Here are the communications." It wasn't in anyone's mind, frankly, that anything else needed to be said, because the client was being absolutely upfront in the extension of time application, saying, "Look, this is how we think the Rules work."

THE CHAIR: Yes.

MS KREISBERGER: They still thought that on the Friday. They thought they were right, essentially.

THE CHAIR: Yes. And is the position, as you understand it, that it was a considered view of the Rules?

MS KREISBERGER: [TEXT MISSING?]

THE CHAIR: Someone having gone and looked at the Rules and applied their mind to the question?

MS KREISBERGER: Yes.

THE CHAIR: Because one can see two types of errors here -- at least, there may be others -- but one can imagine a situation where someone applies their mind to a legal test and gets it wrong, or one could see a situation where someone doesn't go and look at the Rules but has in their mind in a sort of general way that this is the approach

and doesn't check it. Do you have any submission on which of those we are in?

MS KREISBERGER: I do, and that's helpful. That really was my first point on the facts.

THE CHAIR: Yes.

MS KREISBERGER: Just so you have it, sir, for signposting purely, I have five main reasons on the facts, and that point is my first one.

THE CHAIR: Okay.

MS KREISBERGER: So the first point is this was a mistake made in good faith. That's very important.

To use your language, sir, yes, minds were applied. This is certainly not an example of carelessness. Mistakes happen. This was a mistake. I don't want to dwell on the point, because no one is now saying this was the correct interpretation, I am certainly not arguing for an alternative interpretation, but purely to address your question and by way of explaining how we got to where we got to, Simpson Thacher & Bartlett proceeded on the basis that under Rule 112, time begins to run on the day after notification.

As you said, minds were applied to that question. It's covered at paragraph 15 of the reply, but if we just turn up the Rule itself -- again, as I say, this is purely to explain how we got there.

THE CHAIR: Yes.

MS KREISBERGER: If one turns up Rule 112(2) -- do you have that, sir, or do you need a reference?

THE CHAIR: I do.

MS KREISBERGER: I am grateful. If we start with Rule 112(3), it provides that, relevantly for these purposes:

"A period expressed in weeks falls on the same day of the week during which the event

from which the period is calculated occurred."

Now I am emphasising those words, "the event from which the period is calculated." This is where we get the mistake. The way they understood that was that it needs to be construed in the light of the previous subparagraph, 112(2). What that subparagraph says is that:

"Where a period expressed in weeks [which is our situation] is to be calculated from the moment at which an event occurs or an action takes place [so that's the same formula as you see in 112(3)], the day during which that event occurs or that action takes place is not to be counted as falling within the period in question."

Now the way they understood that was 112(2) means that you don't count the day of the event at all. So they look at 112(2) and see, well, the day of the event doesn't count, and then they see the reference in 112(3) saying you use the same day as the day on which the event or action occurred. So what they did was, well, you don't count that day, so it must be referring to the day after the event or action occurred. That was how they reconciled those two subparagraphs.

Now I am not arguing that that's correct, I am simply explaining why the mistake was made.

What I would say about that is the mistake has some basis in the language, it was an honest mistake and you can see why. You can see why it was made. Whether one agrees with it or not is irrelevant for these purposes, because I am not applying to you to make a finding that the period was a day later. That's not my submission. I am simply explaining how they got there.

As I said, because minds were applied, and that was the honest understanding, the genuine understanding of the statutory language, there was no sense that this was in some way ambiguous or there was uncertainty or there was risk attached. It was simply read in that way and that was the deadline, and Aramark proceeded on that

basis, that that was the deadline.

So to crystallise the point, having taken you through the language, they understood the reference to the event which triggers the running of time in Rule 112(3) as referring back to Rule 112(2), which says you don't count the day of the event itself. That's how they construed the relevant triggering date.

THE CHAIR: Do you say it was reasonable to take the view that there was no ambiguity, uncertainty or risk attached to that interpretation?

MS KREISBERGER: I would say it wasn't an unreasonable interpretation, in conjunction with the point that it was an honest mistake. One is not saying it's a better view, but it was an unfortunate linguistic confusion which has its basis in the language of the Rule.

If I could crystallise how the problem comes about. You have a subparagraph that says, if we simply deal with our facts, you don't count the day that the decision was published on, the day of publication.

THE CHAIR: Well, is that right? Because 112(2) only applies where the time is to be calculated from the moment at which the event occurs, and that's not the way 25(1) is framed.

MS KREISBERGER: Well, 25(1), if we turn that up, makes clear that it's -- and I don't think there's any doubt that 112(2) applies to 25(1). So if we turn up Rule 25, Rule 25 gives us a timing. Rule 25 means that the review has to go in four weeks after publication or notification, whichever is earlier.

THE CHAIR: Yes. So it's within four weeks.

MS KREISBERGER: Four weeks, yes.

THE CHAIR: So it's not calculating a period from the moment at which the event occurs. You see, when I looked at 112(2) it struck me that the purpose of it is to exclude any argument that where, for example, I don't know whether this is a real

example, you have a rule that says time is to run from the lodging of a -- let's say the rule had said not from the date of publication, but from the publication of, it's to exclude any argument that you basically calculate time from moment to moment. From the moment of publication, that's the purpose of 112(2).

MS KREISBERGER: I think 112(2) is generally accepted, and on this we accept the CMA's interpretation, we're on the same page.

So what one is saying, in substance, is if the decision is published at 4.30 on a Wednesday --

THE CHAIR: Yes.

MS KREISBERGER: -- you are not prejudiced by not having the full day on the Wednesday, so we just don't count that day. And that is implemented then by 112(3).

THE CHAIR: Yes.

MS KREISBERGER: Which says you get your full seven days from the following day. We agree, that is the correct interpretation. That's what they mean, and I am not suggesting otherwise.

THE CHAIR: Yes. I am conscious it is not a matter of dispute, but I suppose that if insofar as the -- well, I don't know, I will hear from Mr Williams -- if I have to make some sort of assessment of whether this was a reasonable judgment to make, I probably have to understand the argument.

MS KREISBERGER: Yes. I don't think that -- let me put it this way, in my submission, this is relevant. This is material to your assessment. I can't say that it's not. At the same time, it's my submission that you don't need to assess the reasonableness of the interpretation that was adopted, because we are not arguing over that interpretation.

What is relevant, in my submission, to your assessment, sir, is that it had some basis, it wasn't a wholly irrational assessment. And most importantly, that it was made in

good faith. It was an honest mistake. I am reminded of the expression, "To err is to be human." It was looked at, it was understood in that way. There would be no advantage -- I mean, Aramark certainly doesn't want to be here today.

THE CHAIR: Yes, understood.

MS KREISBERGER: So that is what happened, and that is made clear by the application notice itself. Because that was the view taken by Simpson Thacher & Bartlett, that that was the appropriate interpretation, and that's what is set out in the application notice. At that point they still thought that was the right interpretation.

So it was a linguistic confusion, one can see how those two subparagraphs might be read in that way, but there is now profound regret about that.

That's why, before I leave this point, I wanted to come back to Mr Justice Barling's observations on the importance of deadlines. The deadline, once calculated -- unfortunately miscalculated -- was treated with the utmost respect. It was not treated as unimportant; it was simply miscalculated. It is important, sir, that I come on to show you the timing of events, and that's borne out by that.

Just before I turn to those events -- and I think it is useful for me to take you through -- you saw in the Sky case that the Tribunal considered whether the extension could cause delay to the resolution of the proceedings.

So you have my first point on the reason -- and just like Lord Justice Vos, that was my first point for you, sir.

THE CHAIR: Yes. Before you go on to your second, then, can I ask you a question that has been occurring to me, which is this: do you accept, for the purposes of this Rule, that in effect the client is fixed with the solicitor's mistake? In other words, that I approach this on the basis of I think what the authorities sometimes call the surrogacy principle, that in effect the act of the solicitor is the act of the client?

MS KREISBERGER: I think it needs to be weighed in the balance. I think, sir, you

have discretion to see that this was a case of an honest mistake on the part of the solicitor. We obviously can't get into legal advice, but as you imagine, the client was advised accordingly.

THE CHAIR: Yes, I don't want to get into legal advice. It's more whether, in assessing the circumstances in the round, as you encourage me to do, but with my first question: what was the reason? The reason: an honest mistake. Do I approach this on the basis that the mistake made by the solicitor is the client's mistake for the purposes of approaching this Rule?

MS KREISBERGER: Yes.

THE CHAIR: Because I can see there might be arguments in different contexts --

MS KREISBERGER: Yes.

THE CHAIR: -- about whether in all circumstances one fixes the client with the error, or whether one treats the error of the solicitor as in some sense at a remove from the client.

MS KREISBERGER: Yes. I would invite you, sir, to adopt, as you're required to by the cases, a fact-sensitive approach to the issue. It would be contrived to conflate the two.

To crystallise the point, the error was on the part of the solicitors. The impact of not granting the extension was on Aramark. It is such a very (Inaudible) thing to do to require a company, here a foreign company investing in the UK, to require full divestment.

So I am not sure that rule has a place in your inquiry, or put another way: I am not sure it's right to say that rule fetters your discretion, sir, to conduct a genuinely fact-sensitive inquiry. That inquiry is capable of distinguishing a solicitor error as to a counting rule from the consequences -- the grave consequences -- for the company itself.

So I would have invite the Tribunal not to feel bound by a rule that conflates the maker

of the error with the party suffering the consequences. Any other approach would be highly artificial, given the facts here.

THE CHAIR: I suppose my question is how does that stack up with the approach taken in Fish Holdings? That was a case where there was a financial penalty that one may take was significant to the applicant, and there was an error essentially made by the solicitor, and then some consequential factors.

There was no suggestion that as I read that judgment, that the client doesn't have to take the consequence of the solicitor's mistake.

MS KREISBERGER: Yes. Yes, I mean, that again, I think, all that can be said is these are fact-sensitive inquiries. So in that case, the lawyers failed to check the correct address which, so it is a case of carelessness. And I have been careful, sir, to distinguish carelessness from mistakes in interpretation of the counting rules.

Fish, of course, does not bind you in any way. It doesn't bind you. And in these circumstances, where failure to draw the fact-sensitive distinction between adviser and client results in divestment of the company, it would be contrived not to have a true fact-sensitive inquiry rather than an artificial conflation of the two. It is simply the fact here that the error was on the part of the legal adviser and the consequences are so severe to the party being ordered to divest that it is appropriate to look at the true facts rather than apply a rule that obscures the true factual basis.

THE CHAIR: That is helpful.

Just on your point about the seriousness. On that point, the significance of the order is self-evident. But just to test that, the point you are making, the Tribunal also has to deal with penalties under the Competition Act. Sums may be very large. They are characterised in some of the cases as quasi criminal. Fish Holdings may be an example, and we see others in the bundle.

I suppose what I am asking is how far does your point about the seriousness of what's

at stake go when one looks at other types of orders that the Tribunal may have to deal with? Accepting absolutely the significance of an order for divestment.

MS KREISBERGER: What we would say that there is a need to tread carefully in drawing comparables between these widely differing cases. There is in fact nothing which confines your discretion in assessing whether this is a case of exceptional circumstances. Of course, there are legal principles and I have set them out. But ultimately, sir, your determination of course needs to be constrained by the governing principles, much like CPR overriding principles.

So the assessment of whether exceptional circumstances exist needs to be conducted in a manner which is proportionate and just in all the circumstances.

So what I would invite the Tribunal to do is take a clear-eyed look at what is really happening here, which again, stepping back, is someone made a mistake. The mistake was really of no odds. It was of no odds to the procedure, it was of no odds to the CMA who were kept informed. There was no prejudice.

It is not even the case that there is a -- there is not an iota of evidence to suggest that the party didn't treat the deadline seriously. On the contrary. They just got it wrong. They just miscalculated. There is no detriment.

But then one looks at the detriment to the other side if the order is not granted, and it is as severe as it could be. Just by way of context, most merger reviews brought in this Tribunal don't concern the divestment remedy. Something like a third of cases are full divestment because it is such a strong thing to do.

So all of that should weigh in the balance of your determination of whether there are exceptional circumstances.

Of course, sir, the point you make is right. There are other cases where there is seriousness. But this is one end of the spectrum, in my submission, because it is dealing with divestment and because the upshot is no review of the CMA order to

divest really for the sake of a few hours based on a good faith mistake. That's the nub here.

That would be an extreme scenario for Aramark, which is why I am grateful to you for the question about distinguishing between representative and client and company here, which I think is appropriate in these circumstances.

THE CHAIR: You shouldn't read anything into the question. I am just interested in your submission on the point. That's helpful.

Just going back to the question that I raised earlier about leaving things to the last day, given the seriousness of what is at stake --

MS KREISBERGER: Yes.

THE CHAIR: -- can I press you again on whether there is anything else you want to say about leaving matters to the last day?

MS KREISBERGER: Simply as a practitioner one might observe that's certainly not unusual. There is not normally a penalty for filing five hours ahead of a deadline, for instance.

As I said, in terms of the specific circumstances here, the intention was to file on the Thursday purely to file a day ahead, responsibly. But there is always that additional delay when one is dealing with a client that's based outside of the jurisdiction, particularly where there is a time delay. Sir, you are inviting me to explain why and I can tell you, sir, that it's because there were client comments coming from the States. And the view was taken, well, this was a soft deadline so it could wait until midday.

There was certainly no intention to file at 4.59 on the Friday. There was going to be a comfortable buffer. You saw it was filed -- if the deadline had been correctly calculated, they were comfortable.

So again, not carelessness. I will show you that when we go through the communications.

If I could just make my second point briefly, and then I will turn to the correspondence with the CMA. I have already flagged this so I think I can deal with it briskly.

This procedural misstep -- what was a misstep -- led to a minimal delay, less than a day. But as I said, the parties were liaising about a June hearing. In fact -- and I can take you to it in a moment -- Mr Bavasso asked the CMA to ask counsels' clerks to liaise with Aramark's counsel's clerks to fix up the hearing date because the Tribunal had indicated that it would be advantageous to get the hearing date in sooner rather than later, was the words used.

THE CHAIR: Yes. I wondered why it was as late as June, frankly.

MS KREISBERGER: Yes. I understand that May is quite a busy time for the Tribunal, so there is a courtroom issue.

THE CHAIR: Right.

MS KREISBERGER: So --

THE CHAIR: I suppose that does prompt another question about the speed, which plays into the issue of finality.

Is it of any bearing one way or another that we are dealing here with a transaction that has already happened and an order to divest, as opposed to prospective analysis of a merger? Does that come into play at all?

MS KREISBERGER: In terms of the assessment, that's of critical importance because, sir, if you don't grant the extension, Aramark will have to divest itself of an entity that it controls.

THE CHAIR: No, I understand that. But the question is does it affect at all, one way or the other -- and maybe it doesn't -- the public interest in speedy determination of merger cases?

Maybe the answer is it doesn't.

MS KREISBERGER: When you are talking about a matter of hours.

Just so I have understood your point, sir: the fact that this was a completed merger, does that in itself suggest that an extension of a few hours is inapposite? To which I would unsurprisingly say no. The more important point is that this is a completed merger. It's quite a thing to unwind an acquisition. To say to Aramark -- again I come back to the earlier point -- through this procedural misstep there is now no review of this order, that, we say, is a very weighty factor in the assessment.

But on any view, even if it were a main hearing, sir, there was then time. The CMA -- this all operates at great pace. Four weeks is very tight for the parties.

THE CHAIR: Yes.

MS KREISBERGER: The CMA has four weeks for their defence. So as of today, that takes us to mid to late March. One could be in a hearing by May, quite comfortably. That would be standard.

THE CHAIR: Yes, or even April. It is a judicial review, after all. It ought to be relatively focussed.

MS KREISBERGER: Yes --

THE CHAIR: But the basic point is that the delay of less than a day and the few days we have spent considering this issue won't have any impact on the progress of the case.

MS KREISBERGER: No. And that is a factor which was weighed in the balance in the Sky case. The future progress of the proceedings remains intact.

Sir, my third point then is that there is no conceivable prejudice to the CMA here. As I say, that's become somewhat allied with the good faith point, which as I said is extremely important. It is set out, just for your note, at paragraphs 13 and 14 of the reply. As I already said, sir, it is quite striking when you look at these communications, the prompt, transparent and constructive pre-action dialogue between Aramark's advisers, Mr Bavasso in particular, with the CMA about the proceedings. The Simpson

Thatcher Bartlett team took very early steps and adopted a cooperative manner throughout.

The first contact that I wanted to show you was on 20 January. It is ordered in a slightly odd way in the bundle, but there is an email. So Shoosmiths, sir, are also instructed by Aramark, although not active at least in this room today. But Mr Barnes of Shoosmiths sent an email. Now this is tab C, page 7 of the Hearing Bundle.

It is tab 4, C, page 7. You see there:

"As CMA is aware, Aramark is considering appealing the CMA's decision in the final report."

So the CMA was already aware only a matter of days after the decision that an appeal was under consideration. He informed the CMA that counsel were instructed to advise on the appeal and asking for an introductory call on 26 January, or the 23rd. So early engagement.

Then you see, on the same page -- but if you go back a page, page 6 -- Mr Bavasso's email of 27 January, thanking the CMA for the call yesterday. So that was on the 26th. There is engagement about undertakings and still considering the CAT appeal.

Sir, I can tell you that there were further communications about the intention to bring proceedings. You can see in the next tab, tab D, page 10, going over the page. Actually if we start at 11, Mr Bavasso's email of 4 February mentions my name: counsel have been instructed. That's where you see a listing in June is possible. That's on 4 February. That's an email to Mr Barnett at the CMA, who is the senior litigation director, and Ms Batchelor, litigation director.

The CMA reply thanking Mr Bavasso for the email:

"Should your client proceed to lodge an application for review we look forward to corresponding promptly and constructively with you."

Then you have this email:

"Daniel, I wanted to inform you that we will proceed to lodge the notice of application by the end of the week."

Then again, another reference to the enthusiasm of the Tribunal to talk about hearing days, which I think was very welcome to everyone, sooner rather than later, "so please let us know when our clerks can liaise." So that was on 10 February.

So you see a series of communications from Aramark, very keen to keep the CMA up to date and there is constructive engagement.

What you then notice is that there is no response to that email that refers to the end of the week. So I make two points. First, Mr Bavasso was operating on the basis that the deadline was the end of the week. He says it there on 10 February. It is very clear.

The second point is that in contrast to the emails we see previously, there is silence. So there wasn't ever a reply to this email. No reply forthcoming, from either Mr Barnett or Ms Batchelor. Instead what you see is three days later on 13 February -- it is page 14 of this bundle, 44 of the electronic -- this is where you see the email from Mr Weighill, who is the assistant director of mergers at the CMA, responding to an email of the day before from Shoosmiths referring to the draft final undertakings being negotiated. So this is Friday morning:

"As regards the potential appeal, having had regard to Rule 25(1) and the Guide, we consider that the deadline for filing an application for review was 5 pm yesterday evening and that deadline has now passed."

That was the first time that the lawyers were on notice of a possible issue about the deadline.

Now just to bring the threads of that together, and then I will come back to the email to the CAT Registry. I showed you in the authorities that prejudice -- and this is the Fish case -- to the CMA is a consideration where the CMA is entitled to assume

a decision to be definitive. That's the language from the authority. Just so you have it, sir, for your note, it is paragraph 21 of the Fish case.

The CMA in this case were not, on any conceivable view, entitled to assume that this decision would not be challenged when it was being asked to liaise via counsels' clerks on hearing dates. Mr Bavasso could not have been clearer on that point. Nor could he have been any more cooperative on timetable.

Now for whatever reason, the CMA remained silent. They chose not to respond about the mistake about the deadline until the deadline had passed. Mr Barnett's witness statement doesn't cast any light on why it was that the CMA did not respond to Mr Bavasso's email which mentions the end of week deadline.

In making that point I would like, if I may, to pre-empt what might be a rebuttal point from the CMA. One is of course not making any general point that the CMA bears some responsibility for when parties file. That's not what's being said. I am addressing the point that the CMA prays in aid of their opposition, which is that there is prejudice to them. I have shown you how legal certainty operates here.

The point I am making is a much narrower one and it is a fact-specific one. In the context of these frequent and open communications from Aramark's team, the chronology of the CMA's responses is striking.

Sir, that is a material point in my submission for your assessment. Whether you are with me or not on the CMA's conduct, granting an extension of a matter of hours certainly, in my respectful submission, causes no prejudice to the CMA in circumstances where they knew Aramark was appealing, they knew Aramark understood the deadline to be the end of the week, and they knew that the hearing is likely to be in June, or at least was being contemplated then as being in June.

So when we come to your assessment, my submission is there is no prejudice to the CMA in these circumstances, nor to legal certainty more generally.

Sir, just on the email of 9 February -- and that's from Sandeep Mahandru at Simpson Thacher & Bartlett -- sorry, I think I was getting the names the wrong way round, I apologise for that -- that sets out exactly what was the position at that time which was they were seeking -- if you look at the wording:

"Dear Registry, this is to provide advance notice that we, on behalf of Aramark, are seeking to submit a notice of appeal on Thursday 12 February."

That's right, that's what they were seeking to do. They didn't think that was the deadline, but they were seeking. The internal plan was 12 February. So that's consistent.

Sir, I was going to move on to a different point, so I wonder if that is a convenient moment to break.

THE CHAIR: Yes. If that is convenient to you, Ms Kreisberger.

MR WILLIAMS: Does Ms Kreisberger have any idea how long she might be?

THE CHAIR: Yes, perhaps we could consider progress.

MS KREISBERGER: I am on my point four of five and it will not take me very long at all. Unless, sir, you wanted to press on, I assume you would rather take the break now.

THE CHAIR: I think if we take the break and we come back at the quarter to 2. Would that be convenient to parties?

Mr Williams, I am assuming that on that footing we will finish submissions today?

MR WILLIAMS: Yes, I hope so. And obviously my learned friend will reply --

THE CHAIR: Indeed. And I am conscious that I have been engaging with Ms Kreisberger and that has necessarily elongated matters.

MS KREISBERGER: I should say I will be in difficulty tomorrow, so I would be very grateful, having taken up all this time, if --

THE CHAIR: We will finish the submissions today. It may be, anticipating that we are

going to take up quite a chunk of the afternoon, that I will reserve my decision overnight. But I will consider that when we get to the end of day and decide where we are.

Presumably if I were to be handing down tomorrow, arrangements can be made for the case to be covered if necessary.

MS KREISBERGER: Indeed. If that is convenient to the Tribunal, we would be grateful.

MR WILLIAMS: When you say hand down, sir, do you mean hand down in writing or do you mean come back to the Tribunal?

THE CHAIR: Let's see where we are at the end of the day. Thank you very much.

(12.58 pm)

(The luncheon adjournment)

(1.47 pm)

MS KREISBERGER: So I was on my fourth point of five. These are points I foreshadowed and so I can deal with them crisply, I hope.

So the fourth point is the extent and the seriousness of the consequences for Aramark. They are extreme. They are not only extreme, they are irreversible. That's addressed at paragraph 16 of our reply submissions.

I have already addressed you, sir, on the severity of an order requiring divestment, of unwinding the transaction. But the point I would like to bring out for you is that if the notice of application were deemed out of time, Aramark would have no possibility of redress in relation to that forced unwinding of its transaction in the UK, and none of the authorities on exceptional circumstances engage this circumstance where a deadline has been narrowly missed through a mistake and the effect, the consequence, is no redress.

Sir, you very fairly asked me about, well, what about other cases that involve serious

issues. Just to make one analogy in the abstract, this is not like, say, a fine of £100,000 for a cartel infringement, where it is possible to seek monetary compensation were a mistake made where that's out of time.

This is not that case. Without the Section 120 review that's the end of the line and the structural remedy goes ahead, and that's compulsory sale of a target business which is already controlled by Aramark.

So there cannot be any doubt that it is the most onerous type of remedy that the CMA can impose. We say it would be a serious interference with Aramark's freedom if it were denied the opportunity to challenge the imposition of that remedy in circumstances where Aramark says, and has filed a case alleging, that the CMA's decision mandating divestment is irrational.

THE CHAIR: I suppose it might be said they had an opportunity. They had four weeks within which to file their notice.

MS KREISBERGER: They did. But they were working to a deadline and, as I said, as far as Aramark, the company, understood, the deadline was Friday. That's where it is, in my submission, appropriate to look the facts here in the face, which is that there was an error on the part of a legal representative but the consequences -- the consequences -- are felt by Aramark.

Now, as I say, if Aramark were forced to sell because the extension isn't granted, those are significant and irreversible commercial consequences. I come back to this being the nub of the case. We have on one hand a modest extension of a few hours, if the application were granted, which causes no material prejudice to the CMA, to the Tribunal or to the progress of the litigation and which would avoid the consequences for Aramark which are far-reaching and are permanent. So that, we say, should weigh heavily in your assessment, sir, in your determination of whether this scenario, this set of facts, are exceptional.

As I say, there is no analogy for them in the cases and there is no prejudice to any party pointing in the other direction. All relevant factors point to the same conclusion. To borrow Mr Justice Barling's formulation again, here it is their combination that establishes exceptional circumstances.

Sir, that brings me to my final submission on the assessment which the Tribunal must conduct. The final relevant circumstance. That is that the structural nature of the divestment remedy means that there are multiple affected interests beyond Aramark. Divestment affects competition in the relevant market for the supply of offshore catering services in the UK continental shelf.

So if the decision is, as Aramark says, irrational, that means that adverse effects will be enshrined in that market.

What does that mean in practice? The forced sale of Entier -- I think I am pronouncing it right -- will affect other off-shore catering operators on that relevant market. It will affect businesses who buy those offshore services and ultimately, the consumers of those services, such as offshore oil rigs.

As Aramark has stated publicly, acquiring Entier was an investment in the Scottish economy. An investment. So this application engages the public interest, which, as you saw, was a factor in the BSkyB assessment of exceptional circumstances.

My final submission, therefore, is that for these impacts to be caused and to be enshrined in the market, affecting third parties for the sake of a short extension, would infringe the governing principles which require that cases are dealt with justly and proportionately.

So, sir, for all those reasons my submission is that the threshold test of exceptional circumstances is met.

Sir, unless you have any other questions for me, that completes my submissions.

THE CHAIR: I should just check. That's very helpful. Thank you.

Is it a consequence of that last submission that in a divestment case -- well, what's the consequence for the time limit in a divestment case if I accept that final submission?

MS KREISBERGER: I am going to refer to my refrain, but it is an important one, it's a refrain but it is also a proposition in the authorities, which is that it all comes down to the facts. As I said it is an important part of Aramark's application that it is the combination of factors, as Mr Justice Barling said, it is the combination of factors that leads to the finding of exceptional circumstances.

My submission is, one needs to tread carefully, as I said earlier, in drawing any precedent value between cases because the facts differ so widely. So I certainly don't set up a submission that this has ramifications for other cases. It doesn't. This is an egregious set of facts for Aramark, because it was an honest mistake by its representatives, which critically requires a very modest extension. If 15 days is modest, this could be said to be trivial. A very short extension of less than a day to avoid the really deleterious impacts.

Now, sir, your judgment will set out the position. Were another representative to make the same mistake you might take a different view, but this is an honest mistake and you have seen the chain of communications and the chronology is very important here. And, as I say, very swift action was taken to remedy it.

THE CHAIR: Thank you very much, Ms Kreisberger.

Before I let you sit down, I should just check whether there is anything you want to say on the question of forum?

MS KREISBERGER: We didn't have anything to add.

THE CHAIR: Thank you.

Mr Williams.

Submissions by MR WILLIAMS

MR WILLIAMS: Sir, the CMA's position is that the circumstances relied on by Aramark

don't meet the threshold for exceptional circumstances individually or in aggregate. In fact we say they fall far short of what is required to justify an exception of the time limits of a merger case.

The starting point -- I can take some of this reasonably quickly because you have seen it, Ms Kreisberger has shown you some of it -- is that the Tribunal applies its time limits strictly. In Prater at paragraph 30, the Tribunal said it is imperative that the present Rules be strictly observed. That was in the context of a competition case.

In BSkyB, which was a merger case, paragraph 27, Ms Kreisberger showed you that where it said respect for the deadline is crucial, the deadlines must be strictly adhered to, and I paraphrase.

The reason for the strict time limits as we have seen is the need for certainty and finality. One gets that, for example, from paragraphs 32 and 41 in the Somerfield decision.

THE CHAIR: What paragraphs did you say?

MR WILLIAMS: 32 and 41.

THE CHAIR: Thank you.

MR WILLIAMS: In our submission, the need for certainty, finality, is particularly stark in merger cases where the regime operates to interfere with the progress of ongoing transactions. As Ms Kreisberger has been at pains to identify, they don't just affect the parties but competitors, customers, and other potential stakeholders.

So in our submission, there is a particular need for clarity and for strict time limits in the context of the merger regime and for those time limits to be robustly maintained.

You have explored with Ms Kreisberger the question of whether one ought to treat a completed merger in a particular way, as distinct from an anticipated merger. I have two points to make about that. The first is that Aramark cannot be in a better position in making this application because it chose to complete this transaction and to take

the risk of intervention by the competition authorities after the event. It can't be in a better position to make this application.

The second point is that if anything, in our submission, the need for matters to be resolved quickly and definitively is more critical in a completed transaction where the transaction has already taken place and if the CMA decision is to be upheld, matters need to be unwound to prevent harm to competition.

That is as distinct from the position where the parties have not merged yet and they still operate separately and there is no risk to competition. So that's my submission on that point.

So exceptional circumstances are, by definition, exceptional. The authorities make clear they are rare. Ms Kreisberger took you to British Sky Broadcasting paragraphs 25 to 27. You actually picked up really my first main submission to Ms Kreisberger, which is the approach of the Court of Appeal in the Somerfield case, and the question raised by Lord Justice Vos as he then was in paragraph 26, the first question being: why is an extension needed?

There is one other paragraph in that judgment that I want to take you to, because it answers one of the questions you put to Ms Kreisberger. You asked Ms Kreisberger, you said the test is exceptional circumstances but is there an evaluative element?

Can I take you to paragraph 41, please. It is tab H in the authorities. There is here discussion of events in that case. I won't go into the events on the facts, but whether they could be distinguished from the Carter case, which you put to the parties, if you read through Lord Justice Vos says:

"I can see why that situation was different from RG Carter, and I understand how, standing back with the benefit of hindsight, one might think such an overall outcome to be unsatisfactory. But, for my part, I do not think that the later events can properly be said to create exceptional circumstances justifying an appeal out of time."

So that is the event, that's the evaluative element you raised with Ms Kreisberger. She agreed to it, but it is clear in the authorities. In fact it is that formulation that is then carried through in the additional paragraphs that you referred to in your exchange with Ms Kreisberger, paragraphs 43 and 46, possibly there were others. But it is that principle that is carried through.

THE CHAIR: It might be said, if one were looking purely at whether this is a highly unusual situation --

MR WILLIAMS: Exactly.

THE CHAIR: -- but it is exceptionally unusual for solicitors to miss a deadline.

MR WILLIAMS: Things can be exceptional in the wrong way.

THE CHAIR: Yes. So the real question is: is it an exception justifying an appeal out of time?

MR WILLIAMS: We say that's the question. When you put this to Ms Kreisberger, she said this isn't a gateway. She said you don't have to show a good reason before you get into the test. We would accept it's not a gateway in the sense that there is a two-stage test but we do say it is a fundamental part of the enquiry and the fundamental question for the Tribunal is, is there an exceptional reason why the time limit wasn't complied with and why additional time should be granted? All bearing in mind the strictness of the time limits in the context of this regime.

In this case, the answer to the why question is simply that Aramark, through its advisers -- I will come back to that point -- has misread the Rules. Aramark says it made the error in good faith and it was an honest mistake and so on. In my submission nothing is added by calling it a good faith error. No one is suggesting that Aramark didn't misread the clause or that they have tried to engineer additional time. Good faith or bad faith doesn't change the complexion of the issue. It still comes back to a simple misreading of the Rules.

Although Aramark does rely very heavily -- as heavily as it possibly can -- on other factors as part of its argument, the operative reason for this application is a misreading of the Rules. There isn't another cause. Your questions to Ms Kreisberger drew that out. That's the reason.

Now Ms Kreisberger made submissions to the effect that the interpretation initially adopted by Aramark's advisers was wrong but reasonable. In my submission, it is important to see it how Aramark's position in relation to this has developed over the last few days. The application for an extension of time that was made at the weekend contended that Aramark was in time on two alternative bases. I am not going to go through the arguments, but we addressed both of those in our submission which we filed on Tuesday and both arguments have been dropped.

Now, there is an awful lot at stake for Aramark here today and if they are not pursuing either of those arguments, it is difficult not to infer that they have concluded that the points are not just wrong, they are not properly arguable, they are not seriously arguable. Or to put it another way, Aramark has concluded on reflection that there isn't any real ambiguity in the Rules and they have simply made a clear error.

We say that is the position. We say the Rules are clear. But not only that: potential applicants have the advantage of being able to consult the Tribunal's Guide, which I was not going to go to, I am sure the Tribunal is familiar with what it says --

THE CHAIR: 4.17.

MR WILLIAMS: That's right. That sets out the proper reading of the Rules. So if Aramark was in any doubt at all, they could simply have followed the Guide on which basis they would have been in time. So we do say this is an obvious error --

THE CHAIR: The word "normally" where it appears in that paragraph, is then explained by the Rules about bank holidays and the like.

MR WILLIAMS: Exactly. That's right.

So Ms Kreisberger said on a number of occasions this wasn't careless. Now, I think what she means by that is that this is not a situation where Aramark didn't care about compliance with the Rules. They have considered the Rules and taken a view. But if, as I submit, they have made in the end an obvious error, then in one sense there is carelessness and we say that that is obviously relevant to the Tribunal's evaluation.

What we come to really is an important question of principle, which is whether the exceptional circumstances doctrine can operate to excuse parties from a misreading of the Rules most likely by their advisers. We say the answer to that is no.

We put our response in two ways. The first is this: the Rules apply to everyone without exception; all potential applicants to the Tribunal have to comply with the same rules. No party is entitled to say the time limits don't apply to them or shouldn't be applied to them. And Aramark has not given any reason why it shouldn't be required to comply with the same time limit as anyone else.

This is a request for exceptional treatment but there are not any exceptional circumstances.

THE CHAIR: Does that not really beg the question that of course the Rules contain the qualification for exceptional circumstances. I don't think it is being said by Aramark that the Rules don't apply to them. They say they made a mistake and they are asking me to apply the qualification to the Rules, which they are entitled to invite me to do if they can make out a case of exceptional circumstances.

MR WILLIAMS: That's right, sir, but ultimately they haven't given any good reason why the same rules shouldn't be applied to them as would be applied to anyone else. They are just asking the Tribunal not to apply the Rules to them. That's what it comes down to.

I am going to develop the point because if one looks at the sort of circumstances that tend to exculpate parties from compliance with the Rules, they tend to be different

sorts of factors and that's the point I am now going to come on and develop.

The second aspect of the submission is that at least as a general proposition the exceptional circumstances doctrine doesn't operate to excuse parties from their own mistakes or mistakes of their advisers which result in the failure to comply with the Rules.

I do need to be clear how I put this. If we could just open up the Sky case, which is authorities tab Q, pages 191 and 192. At paragraph 25 the then president picks up the discussion in the Hasbro case of the former president. At paragraph 26 he quotes a passage where he says:

"'Cases that do not involve force majeure in the strict sense will, in my judgment only rarely give rise to 'exceptional circumstances'."

Mr Justice Barling is then clear to go on and say the circumstances are not restricted to force majeure and that the cases where the circumstances are valid are likely by their nature to be less. So I am not making the submission that the test is force majeure because that point has been dealt with, but we do say that the question of responsibility for the delay is a highly material factor and we say delays that it was within the control of the party to prevent will at least in general not satisfy the test for the grant of an extension of time. I am not saying this is a definitive principle but I say it is a very strong steer and it is a principle the Tribunal ought to have in mind.

One sees this in two of the deciding cases: Fish and Prater, in different ways.

THE CHAIR: What do I make of the statement that cases outside force majeure are likely by their nature to be rare, if anything?

MR WILLIAMS: Do you mean in --

THE CHAIR: In BSkyB -- well, it is either the quote from Hasbro or from paragraph 27. The then President also makes the point about cases other than force majeure by their nature being rare. It is not really a very helpful test.

MR WILLIAMS: Can I just be clear what I am saying about it? First of all I am saying that in Hasbro the then President is putting it a bit higher because he said cases that do not involve (inaudible).

[Counsel away from mic]

So he is saying generally it is force majeure, and if it is not force majeure good luck to you, is sort of what he is saying.

Mr Justice Barling dials it back from that and he says:

"Although such circumstances are not restricted to force majeure."

So he's de-emphasising force majeure as a test. And he says the cases are -- he said I would not put it as high as Sir Christopher did but I still think it is going to be rare.

The submission I am making to you is I am not saying the test is force majeure in the sense there has to be some supervening event outside of their control, but this is an important ingredient of the assessment. One has to look at the extent to which events were within the party's control or not, and that is the relevant factor. When we look at a couple of the decided cases you can see a distinction being drawn in practice between events which were within the party's control and events which weren't.

So I am not introducing it as a hard edged test but I am introducing it as a weighty factor which in my submission is consistent with both of those dicta.

The first case was Fish. I think you are very well read in, sir, so I will show you a couple of passages for your notes. This was a Competition Act case in which the applicant suffered from a double difficulty, you may have seen. It had sent its notice of application to the Tribunal guaranteed delivery through Royal Mail, but it sent it to the Tribunal's old address, when the Tribunal moved from Carey Street to Victoria House. So it arrived at the wrong address and it didn't arrive by the guaranteed date either. So it never rains but it pours for Fish.

In fact, the context was that the Tribunal's address was stated in the old rules

incorrectly. The old address was stated, but the rules also directed the reader of the rules elsewhere. If we could just look at Fish, authorities tab P, page 183. I was going to pick it up, paragraph 17.

If you want to read that to yourself, sir.

So one can understand the applicant's confusion in that situation, because the rules themselves actually stated the wrong address, but the Tribunal had no sympathy with what was a simple error made by the party's representatives. If one reads on to paragraph 18, that deals with the late arrival of the guaranteed delivery. You can see in the first half of that paragraph --

THE CHAIR: In fact the Tribunal had considerable sympathy, as they say at paragraph 22, but didn't feel it could --

MR WILLIAMS: They have sympathy but it's not an exceptional circumstance.

THE CHAIR: No.

MR WILLIAMS: So one sees there two dimensions of late service, both being errors made by the applicant or its representatives in the reading of the rules and identification of the address and in the reliance on the postal service. But both of those matters came back on the party through its representatives. So those sorts of errors didn't assist.

The other case I wanted to look at is Prater, which is a case in which an extension was granted retrospectively, as you picked up, sir.

I don't know if you picked the facts of this up or whether it would be helpful just to go back through them a bit.

THE CHAIR: I have them broadly in my mind. This was the one where essentially the taxi was late, the representative spoke to the registry, the registry said send it in by email. Had they not said that it is at least conceivable that the hard copy would have arrived timeously.

MR WILLIAMS: Exactly, this was 40 minutes late. If we just break those two points down. Picking it up at 32:

"The Tribunal would not regard the fact that the person conveying the notice of appeal became stuck in traffic ..."

I should say the context for this was the service by email was not treated as effective service so they needed an extension of time.

THE CHAIR: It is the old days:

MR WILLIAMS: "... would not regard the fact that the person conveying the notice of appeal became stuck in traffic as 'exceptional circumstances'."

And goes on to pick up the fact that they should have been further ahead of the game than they were, rather than rushing to the Tribunal in a taxi on the last afternoon.

That is to be contrasted with the factor which did justify an extension of time, paragraph 33, which you picked up sir, which is the influence of the communications of the Tribunal. If one looks at the last sentence in particular:

"The Tribunal is unable to rule out the possibility that Prater could have effected personal service of the notice of appeal on the Tribunal before 5.00 pm if the conversation with Registry had not taken place."

And then there is the intervention of an external factor which was the Tribunal trying to be helpful but it had unintended consequences.

So what we see from these cases is relying on an indication from the Tribunal that the document could be sent by email did create exceptional circumstances. Admittedly the Tribunal then goes on to say this is a unique situation, we hope it will never happen again, in a way because this episode has clarified the practice.

But in contrast, missing the deadline because broadly speaking things have gone wrong -- traffic, sending it to the wrong address, mistakenly relying on the post and that sort of thing -- they do not give rise to exceptional circumstances. So one can see

a pattern in these decisions which accords with this idea that responsibility for the error is an important factor.

In my submission, there is no reason why a party that misreads a rule through its advisers should be in a better position than a party whose lawyers get the address wrong, in part because of what the rules say, or a party whose lawyers get stuck in traffic.

Now I think you mentioned earlier on that cases like Carter and also Somerfield are cases of errors of a different sort. Those were cases where the parties didn't bring their challenge in time and then there was subsequent litigation. When they saw the outcome of that litigation they realised that they could have had a successful challenge.

I am not saying this is on all fours. It is a different sort of point. But again one sees that the Tribunal is unsympathetic to parties who in those cases have simply made what was with hindsight an erroneous assessment of the benefits of litigation, or an erroneous assessment as to whether there were grounds to bring litigation, because the parties are then effectively fixed with the consequences of their own actions. I am not stretching the analogy too far but I am saying that that is consistent with the pattern of the authorities I have identified.

Another factor which supports this argument is the distinction that you picked up in discussion with Ms Kreisberger, between applications made before time has expired and applications made afterwards.

Paragraph 420 of the Guide says that generally applications should be made in advance. The importance of that factor is picked up in a couple of the cited cases. Ms Kreisberger noted that it came up in Lyons, where the Tribunal said that it was a very relevant factor. I just wanted to go to Somerfield, which is in the final section of the supplementary authorities bundle on page 62.

There is a paragraph 53, which is an analysis of the Tribunal Rules (away from mic) the following points can be made. Then if you would read paragraph 53(4) please.

Again this is emphasising the distinction between circumstances which arise in advance and which give rise to difficulty complying with the deadline and circumstances which arise afterwards. The point is made you could have filed in time. These circumstances can't have affected you if you had filed in time. You could have done it. It comes back to the good reason question.

THE CHAIR: Do you take issue with Ms Kreisberger's point that albeit that Lord Justice Vos directs that the reason and the ability to file are -- the first question or the central question, depending which paragraph one reads, that at the end of the day one has to look at all the factors in the round and whether that is the determinative factor in principle will have to be considered in light of the whole circumstances.

MR WILLIAMS: If it is a central question, sir, which we say it is a central question, it is very difficult to see an applicant that doesn't have a satisfactory answer to that question -- I will come back to that in a minute -- is going to ever meet the test.

The way I put it earlier on is to say that the fundamental question -- if you treat Lord Justice Vos's enquiry as the essential enquiry, the fundamental question -- it's not the only question -- is is there an exceptional reason why the Rules weren't complied with and why additional time should be granted?

THE CHAIR: That's not the test, is it? The test is exceptional circumstances at large --

MR WILLIAMS: I accept that, but one reads this now through the lens of the appellate authority. That's the effect, in my submission, of what Lord Justice Vos is saying. If you then look through all of the subsequent reasoning in paragraphs 43 and 46, the paragraphs you have identified, he keeps coming back to the question and saying, in my submission this isn't a circumstance which justifies granting more time to bring the application. They could have brought it. They don't have a good reason for having

not brought their application in time.

I don't put my submission in terms as some precise adumbration of the test. That's the enquiry. That's the fundamental enquiry. In my submission that's what Somerfield says. In my submission one can understand why that's why. Paragraph 41 of Somerfield, are the circumstances sufficient to justify an extension of time? One has to ask why is it that the applicant should be granted more time, and it is fundamental to that enquiry why didn't they comply with the time limit in the first place.

So the point I was making in Somerfield and generally is that the focus in the case law on the difference between applications made in advance of the deadline and applications made afterwards, it is in my submission a strong indication that in general a failure to comply with the Rules because of an error or disorganisation or whatever it is, will fail where it leads to the application being made after the event, because the applicant is unable to identify a reason why they couldn't issue in time. That's the weight of the debate, sir.

Now, I just want to pick up a point which is a bit of a digression but I think it is important to deal with it, which is the fact that there has been, I think, in one of the paragraphs that you picked up, sir, discussion in the case law of a test based around errors. That was also in the Somerfield case which we have open, which then went to the Court of Appeal. But this discussion is in the first instance decision at paragraphs 50 to 51. I don't know if you have had a chance --

THE CHAIR: Which?

MR WILLIAMS: I don't know if you still have Somerfield open.

THE CHAIR: It is the Tribunal's decision in Somerfield, yes. What paragraph?

MR WILLIAMS: 50 and 51. I just want to make this point in passing -- it is not a major part of my submission -- in that case Gallagher advanced an argument the Tribunal ought to have regard to the test of excusable error, which is a concept that is in some

ways derived from the European authorities.

It is just important to be clear that the notion of an excusable error was an error for which the Authority was in part responsible. That's what one gets from those paragraphs.

So to the extent that errors have been brought into the debate as part of what the test ought to be, how it ought to be expressed, it's not errors per se, it's errors for which the Authority is responsible. I don't think it can seriously be suggested -- I think Ms Kreisberger accepted this -- that the CMA is responsible in any way for the error that occurred here.

I will come back to what is said about the interactions between Aramark and the CMA, but what we can say is that broadly speaking errors don't cut it, because the Tribunal is not even willing to adopt a test of excusable error in this sense.

I do just want now in that context to deal with your question to Ms Kreisberger about whether one fixes Aramark with the actions of its lawyers. I have really three responses to that.

The first is one can see from Fish and Prater that no distinction is drawn. Those are cases where the circumstances which were held not to justify an extension of time were circumstances for which the lawyers were responsible.

The second point is simply that of course that's true in a legal sense because they act as agents for their client in those senses. But that's not my main point. My main point is the third one, that the Rules have to work in that way or the time limits would break down. Obviously it is the lawyers that are responsible for ensuring that the time limits are observed, both in terms of co-ordinating the process of getting the document done and then taking the necessary steps to effect service.

If one were to start to draw a distinction between the client and the lawyer in this context, it would lead to the collapse of the time limits because in every case it would

be open to a party to say "well, the reason we missed the deadline is because the lawyers got it wrong."

Conversely, the submission that Ms Kreisberger makes here, which is to say, well, look at the consequences for my client, that would be open to any party in any case. So for all those reasons in my submission, the Tribunal can't start to split matters up in that way. One has to look at it on the basis that it is the lawyers that are responsible for complying with the Rules.

So that's really my main submission, sir. It's the submission from which all else follows, which is that if Aramark can't persuade the Tribunal that it has a good answer to the why question, or a satisfactory/sufficient answer to the why question so as to justify an extension of time, then the application will fail.

In my submission, a mistake in reading the Rules is not a satisfactory or sufficient answer to the why the question. And you have my submission that that is central to the enquiry.

Having made that submission, I am now going to briefly divert from my argument into the precedents in which an extension of time has been granted, because it is part of Ms Kreisberger's submission that extensions of time have been granted in a range of circumstances.

I have to some extent already dealt with this in drawing my distinction between errors for which the party is responsible and errors for which they aren't responsible. The other examples in which extensions have been granted are remote from the present facts.

The BSkyB case concerns a highly unusual situation under the public interests merger regime, where the function of deciding on the merger was split between the CMA and the Secretary of State. That's a particular feature of the public interest merger regime, which doesn't apply to classic competition mergers considered by the CMA. In that

case the CMA published a report which dealt with both public interest issues about plurality in the media and with more straightforward competition issues.

The way the system worked was that the CMA published that report but the decision was ultimately made by the Secretary of State taking into account the CMA's findings. Some of the CMA's findings were binding and some of them weren't, but the ultimate decision was for the Secretary of State.

As the Tribunal put it in that case, at paragraph 31, that meant that any decision as to the fate of the merger was inchoate until the Secretary of State had made his decision. Mr Justice Barling also accepted Sky's submission that if it was going to make a challenge it was inevitably going to have to challenge the second decision as well as the first decision, and they were a package. It was in that context that all of the parties -- there was no issue about it and one of the parties positively agreed about it, because there was an obvious benefit to everyone that was involved in dealing with the issue.

So that was genuinely an exception to the usual situation because it involved a different merger regime and a different structure of decision making. A party doesn't normally need two sequential reports or decisions to know where they stand and whether they want to pursue a challenge. It was genuinely an exceptional case. It was certainly a rare case, and the application was made in advance of the expiry of the deadline anticipating all of that.

Although it is true to say that the Tribunal went on to attach weight to the case management benefits, those case management benefits all flowed from this exceptional situation where there was an unusual structure to the decisions.

Perhaps we won't go to it, but at paragraph 32 it says:

"Given the structural interlinking of the two stages I also agree there would be considerable case management benefits."

So the benefits all flow from that starting point.

There are also various cases from the time of the Covid pandemic when, perhaps not surprisingly, exceptional circumstances became a bit less exceptional. That's because the impact of the pandemic on all aspects of life was exceptional. Practice before the Tribunal was one aspect of that. The existence of exceptional circumstances justifying an additional period to prepare appeals in those circumstances, it really says nothing at all about the present fact pattern.

The other case that Ms Kreisberger mentioned was Flynn. That was a case where a party faced particularly acute resourcing issues because of the scale of the case relative to their size and their resources and the availability of one central individual during the relevant period. So again it has nothing in common with this case.

So to the extent that the authorities provide guidance for the Tribunal, in my submission it is the authorities I referred to earlier on in my submissions.

So I will move on to the duration of the delay. The basic argument that is made is that the extension is short, it is a day and it doesn't have any impact on the conduct of the case. My submission is that that factor cannot be a material factor in itself. Obviously the delay was a day because the Rules were misread to the tune of a day. So it follows from that. But if the length of the delay were a factor in itself, it would lead to the collapse of the time limits. It would be open to any party to say "I was only a day late, I was only an hour late, so there's no prejudice, the case will carry on as it did", and so on.

So in my submission this really comes back to the point I have already been emphasising, the importance of there being a sufficient reason for the extension to start with. This point, the duration of the delay, can only come into play if there is a sufficient reason for an extension to start with. It's a relevant factor in the round but it can't be sufficient on its own. We say that the case doesn't reach that point because

the applicant doesn't get through effectively the first part of the enquiry.

Now the second aspect of prejudice that's relied on is it is said, well, there is no prejudice to the CMA in this case because the CMA knew an application was coming so it didn't think the matter had been definitively resolved. The CMA, you know, wasn't uncertain about the direction in which things were going.

There are two answers to that point. The first, and the main answer, is that there is always prejudice in undermining the time limits, whether or not the CMA was expecting an application. The time limits don't only operate for the benefit of the CMA. They operate in the public interest to create certainty for everyone that is interested in or affected by a merger, including all of the various stakeholders that Ms Kreisberger referred to.

That point is picked up in Fish in paragraph 21. Perhaps we don't need to go to it, but it is tab P. Mr Justice Barling said in paragraph 21:

"Where no challenge to a decision is lodged with the Tribunal within the time allowed for doing so, the OFT and everyone else is entitled to assume that the decision in question is definitive."

So the question as to whether there is prejudice or uncertainty can't simply be looked at through the lens of the CMA. So Ms Kreisberger relies on the interests of everyone else but in my submission that point very much cuts both ways and cuts against her in this respect.

These two paragraphs in Fish very, very clearly make the point that undermining the time limits and compliance with the time limits creates prejudice to the regime as a whole. We have set this out in our written submissions but if one looks at paragraph 21, it talks about inevitable prejudice to legal certainty as well as the effort and expense in defending the decision.

If one reads on to paragraph 22, the second sentence:

"I am unable to see how that description of the circumstances here could be justified without seriously compromising future compliance with the time limit."

That's the point. There is prejudice in undermining the time limits which serve such an important function in this regime.

So we do say erosion of the time limits is in itself prejudice and one can't simply start to make exceptions where one party makes a cri de coeur such as Ms Kreisberger has made on behalf of her clients. So we simply don't accept the submission that was made. This is not a case in which certainty or finality -- these are not issues because of the passage of emails between the CMA and Aramark, we just don't accept that submission at all.

THE CHAIR: I understand the public interest point about compromise and compliance with the time limits. But the time limits do have a qualification for exceptional circumstances. Does it not, therefore, always come back to whether or not in the particular fact situation, there are exceptional circumstances? And if there are, and the Tribunal is persuaded that it should grant an extension of time, that doesn't erode the time limits, does it?

MR WILLIAMS: That's right. I am not saying any exception -- any exception -- to the time limits erodes the regime. But Ms Kreisberger's submission was there is no concern about certainty and there is no concern about finality here because of emails. That's really what she says. In my submission that is missing the point. The time limits create certainty and finality, not just for the CMA but for everyone. That's the way the regime works. To say because of emails there is no concern about it I think is missing this much more important point, which is that you can't chisel open the time limits where there aren't really circumstances to justify it and say "it is just a day", because you are then starting to undermine the very constitution of the Rules.

THE CHAIR: When thinking about whether the combination of circumstances is

exceptional, justifying an extension, to use that formulation, the Tribunal is to keep in mind the overall disciplining effect of having a system of time limits as part of the context for deciding whether or not what has been given is sufficient to justify an extension.

MR WILLIAMS: Yes, yes. Secondly, obviously, in the context of the particular regime. I have made my submission about mergers and so on.

THE CHAIR: Yes.

MR WILLIAMS: Thirdly, I mean, we have a test of exceptional circumstances. It is the narrowest test one could have, really.

THE CHAIR: It is broader than the CPR 7.6.

MR WILLIAMS: That is true. That's true. But certainly the point I wanted to make was in the submission from Latham & Watkins we got reference to the Denton principles and the much more open textured evaluation that one carries out in the case of relief from sanctions under the CPR.

But here the drafter of the Rules has chosen to introduce a narrow gateway and in my submission that narrow gateway has been properly construed by the Court of Appeal in the Somerfield case. I say it is not exceptional circumstances per se but it is exceptional circumstances to justify the extension of timing. You have my submissions about that.

So, yes, the importance of the time limit for disciplining but secondly one takes account of the regime and the fact that the test is a narrow one.

THE CHAIR: And when one sees language in the authorities to the effect that it is a strict test or a high hurdle, again, in a way that language is not very helpful to someone trying to decide whether or not a particular set of circumstances is exceptional or not. But should I be reading that sort of language as again reminding the reader that there is a background public interest in maintaining the system of time

limits and that that then bleeds through to one's consideration of whether or not the particular set of circumstances is exceptional justifying an extension.

MR WILLIAMS: Yes. Yes, I agree with that, sir. But I think, that's why it makes perfect sense in my submission that Lord Justice Vos says the central question is: why didn't you comply with the Rules? Because the Rules are there. They are intended to be strict. They are intended to make sure that these cases move through the system quickly and efficiently. So one comes back to the question: why didn't you comply with the Rules?

And if -- following the thrust of the reasoning in that case -- if you had every opportunity to comply with the Rules and there was nothing to stop you doing it and you simply failed to manage it, that doesn't put you in the right place in my submission.

So that's an attempt to join up your question to me of what do I make of it being rare. It is rare because you need to give a good reason for exceptional treatment, given all the factors that you have identified to me, sir.

So that's the most important point, I think, on finality and uncertainty. But there is a sort of second order point, which is that the need for finality and certainty doesn't fall away because a party has said they will appeal. My instructions are -- and I can say this is consistent with my own experience -- it is not uncommon for parties to say they are going to appeal, or to apply to the Tribunal and take it to the wire and then for no appeal or application to materialise. It's not uncommon for the CMA to send me an email the day after a deadline and say "that case never came through after all."

So it is true to say that in this case Aramark made some fairly concrete observations about listing a hearing and so on, but it is not right to say that the CMA was completely certain that there was going to be a challenge because there had been these emails. Experience suggests that parties often take it to the wire and don't follow through.

So Aramark has two more arguments. The first is that the impact of the decision is

severe because the CMA has ordered divestment. The CMA has, in effect, said that the merger can't happen. It should be reversed.

It is said that this factor should weigh in the balance. In my submission the weight that's attached to this factor just doesn't reflect the legal tests, which is not one of the balance of justice overall but whether there are exceptional circumstances which justify an extension of time.

Because the application of a divestment remedy or a prohibition remedy -- which is effectively the parallel remedy in the case of an anticipated merger -- is not exceptional. In fact, in cases that come to the Tribunal I would say it's the opposite of exceptional. I was going to say it is par for the course. I will certainly say it's extremely common for the factor of a divestment or a prohibition remedy to be present in a case where a party has been motivated to challenge the decision under Section 120. It's the fact that there is an onerous remedy that is very often the driver for the challenge. So the stringency of the remedy is not an exceptional circumstance. It is a systemic feature of these cases.

So I don't say that it's not a factor which you can't weigh in the round alongside everything else because of course it is a factor and it is an important feature of the case, but this factor simply can't bear the weight that Aramark puts on it in terms of trying to get up an argument that there should be an extension of time to allow them to bring a challenge. They had an opportunity to challenge the remedy. They had the same length of time as everyone else and they didn't bring the application in time. I am afraid that time limits are sometimes hard on parties that don't comply with them.

THE CHAIR: I mean the central point comes down to, does it not come down to extreme disproportion? I mean of course you are right that the remedy itself -- sorry, the order itself is not exceptional. It is part of the regime in which divestment and prohibition orders are made. Of course in most cases that doesn't come along with

a mistake which results in the time limit being missed by a day.

So the question simply doesn't arise. I think the essential point that is being made is that it is the extreme disproportion between the consequences and the nature and effect of the particular mistake in this case, given how short a time elapsed before it was identified and steps taken to correct it.

Do you have a submission on how I should view or approach that part of Ms Kreisberger's argument?

MR WILLIAMS: Yes, yes. Well, the submission is I think it is a version of the submission I have already made, but I will make it in a way that responds directly to your question, which is the test is not one of proportionality. That is a submission which could be made, and indeed effectively was made in the Latham & Watkins' submission under the broad sort of Denton type framework, which is where one carries out a balancing act having regard to all the circumstances of the case. But that's not the test we are dealing with. We are dealing with a test of exceptional circumstances. Exceptional circumstances that justify an extension of time. And the inability -- the consequences that flow from not opening -- being able to challenge a decision are -- I mean they are intrinsic to not being able to bring the appeal out of time. Any party that misses a deadline and isn't given an extension of time isn't able to obtain the relief that they would obtain if they had brought the challenge, potentially if they had brought the challenge in time and the challenge had succeeded. So the submission is not really grappling with the framework.

If the applicant, if Aramark had made progress on the earlier part of the enquiry and identified circumstances which justified an extension of time, applying the principles which I have been relying on in my submissions, then this would be that factor which would come into the Tribunal's overall exercise of discretion. But the very serious consequences for Aramark of not being able to challenge a decision which imposes

a divestment remedy, they can't be exceptional circumstances so as to justify -- or they can't carry the weight of an application for an extension of time, because again they will be factors which will be present in any case and from the time limits in any case where this type of sanction is imposed. It is another point which, as I said, involves systemic features of the regime.

One has to go back to the fact that this is a time limit for this regime. This is a regime which operates to control transactions which have been identified by the Competition and Markets Authority as creating competition problems, leading to the imposition of remedies and divestment or prohibition is the most absolute form of remedy but a very, very conventional form of remedy in these sorts of cases.

It simply cannot be said to say it is exceptional because a party has missed a deadline they are able seek relief against that kind of measure. As I said it is intrinsic to the regime. They had a four week period in which to prepare the challenge, I am not going back over all that again, but in a regime which applies specifically to these sorts of transactions and which is specifically used to challenge these sorts of decisions, the applicant can't get any mileage out of the fact that they want to challenge the very sort of measure which is the sort of measure one sees in these sorts of cases. The argument is basically circular.

So it is not a proportionality test and these are not exceptional circumstances. This is really an argument which is parasitic on other parts of the argument and in my submission they just don't get to a point where they can get any mileage out of this.

THE CHAIR: Do you go so far as to say that if I were to take the view that there wasn't a good reason or -- that there wasn't a good reason for the missing of the deadline or a reason justifying an extension, that I put out of my mind the points made by Ms Kreisberger about disproportionality regardless of how extreme that disproportionality might appear to be.

I think the point that's been made -- as you understand -- isn't that it is a simple proportionality test; it's that the contrast between the consequences and, you know, the error and its nature, is such in this case as to be -- I think Ms Kreisberger says -- to meet the test.

I think in Ms Kreisberger's submission, that disproportionality was so extreme that in effect that's what brings this into the frame of exceptional circumstances.

Is your submission that I don't even look at that, unless I am satisfied that the central question, as Lord Justice Vos puts it, is answered in the affirmative?

MR WILLIAMS: I don't need to invite you to compartmentalise your remarks, sir. I don't need to do that. Because obviously you have heard the argument and I don't need to tell you that you can't consider factors upon which counsel has placed weight, of course you will consider everything. But I do say that simple disproportionality in terms of the length of the delay versus the seriousness of the consequences is not capable of supporting an application for an extension of time. Because neither of those are -- neither of those are exceptional circumstances to justify an extension of time. I do submit that unless Ms Kreisberger has made progress and persuaded you that there is a good reason to justify an extension of time you are not going to attach weight to these factors in the balance. They are not going to be factors capable of moving the dial in favour of an extension of time.

Shall I move on to the last topic, sir, which is the communications between Aramark and the CMA?

Now, obviously the point has been made that Aramark told the CMA with varying levels of confidence that they were considering and ultimately were planning to file a notice of application. Now the submission has gone a bit further than that. The way it was put in the written submissions was to say that the CMA did not express concern about the proposed filing date. That's the way it was put.

So it seemed to be an attempt to sort of bend responsibility for the outcome to some degree back towards the CMA. It is a very carefully worded submission. If the subtext is that in some way the CMA has contributed to Aramark's error or to a situation where the Rules weren't complied with, it is wrong. And the way that the point has been presented is, in my submission, unfair.

I think we need to go back to the emails.

There were two points I have to deal with. The first point is the communication on 10 February. The second point is the communications later in the week in which the CMA said you are out of time. There are different considerations in relation to both of them.

So I am in Bundle 4, tab 4, page 10.

Now, just to put this into context, if you go back over to page 11, Ms Kreisberger showed you the email of 4 February. I am not going to go through every line the first line says:

"I gather from Raph that you will handle the litigation aspects of the possible CAT Proceedings."

So I just don't think Ms Kreisberger showed you the possible and I pick that up at that point.

Then over the page on page 10:

"Thank you very much for your email. In addition to Amy, I have copied my colleagues in the CMA's litigation unit, Bryony and Lily, who also will be handling the litigation (if it proceeds)."

Then at the top of page. This is 10 February, 18.55, which is Tuesday last week:

"I wanted to inform you that we will proceed to lodge the notice of application by the end of the week."

So it is vague language. It doesn't say Friday. "By the end of the week" could easily mean late on Thursday. But more than that, we have found out for the first time today

that one day before this email was sent, Aramark wrote to the Tribunal and said that their plan was they were seeking to lodge the notice of application on the Thursday. We didn't know about that email. I am here responding to a submission that the CMA has reached a conclusion based on this information that Aramark was working off a Friday deadline and it turns out that at least one day before, by the end of the week meant in Aramark's mind Thursday.

So I can't put this submission any higher than that. We have no evidence from Mr Bavasso about what he thought when. We didn't know that he specifically -- what we didn't know until this morning was that he specifically meant Thursday. Obviously that puts a completely different complexion on the submission that the CMA could see that Aramark was working on the basis of a misinterpretation of the Rules and did nothing about it. Which is essentially the way it's been put.

So it's really not -- on the state of the documents the Tribunal has now, it's perfectly sensible to read this correspondence as revealing no misunderstanding of the Rules at all. Aramark thought or was planning to lodge by Thursday. It told the CMA it was going to lodge by the end of the week, which meant Thursday, from which the CMA could not draw any inference about anything.

I do say it is extremely unsatisfactory to insinuate that the CMA is in some way responsible for this when the Tribunal has not been presented with a complete version of events. It just so happens that the Tribunal pulled this email out. If it hadn't done then we would not know about this and I would not be able to make these submissions to you. So I do say it is extremely unsatisfactory sir.

Even if one takes the email at its absolute highest, this is not a case where the party has indicated they are proceeding on an interpretation of the Rules and the CMA has gratefully waited for them to miss the deadline. The email is vague. It is consistent with the correct reading of the Rules or at best the position is unclear and the

discussion went no further.

So when Ms Kreisberger refers loosely to the CMA's conduct, then in my submission this really does put quite a different complexion on the whole issue.

The second aspect of this concerns further communications between Aramark and the CMA later in the week after Aramark had missed the deadline. I do just want to show you the way that this is put in the reply. It is Bundle 1, tab 1, paragraph 14. This says: "The CMA was not merely on notice; it was actively corresponding about listing dates for the substantive hearing. At no point could it reasonably assume that the decision was definitive and unchallenged. Nor did the CMA raise any objection when Mr Bavasso candidly informed it of his 'end of the week deadline', but waited until the deadline had passed before doing so."

So the flavour of the submission is that the CMA has sat on some information and then sprung it on Aramark after the deadline and said ‘oh, in fact, sorry, too late.’ I have dealt with the first part of that, about the end of the week deadline. But in fact the way that this characterises what happened in the rest of the week isn't accurate either.

We endeavoured to correct the position in Mr Barnett's witness statement. It is, in my submission, unfortunate that the point has been made again and again orally today.

So if we could look at the emails again, Bundle 4, tab 4. So what happened was after the exchange we have just seen, if we pick it up on the bottom of page 14, there is an email from Manu Mohan at Shoosmiths, who are dealing with the continuing administrative aspects of the investigation, including the issue of the final undertakings.

We have seen that extension. So this engages in parallel with work on the application. It is an email to Raphael Cannell of the CMA who has been dealing with the application:

"We should be grateful if you would agree a short extension to the deadline for us to

provide comments on the revised draft final undertakings."

And they explain the reasons for that. The last sentence:

"Aramark is also heavily engaged in finalising the appeal submission, which is due imminently."

Now, this email was sent on the Thursday evening, 6.03 pm on 12 February, so the application is out of time. So it is now accepted it was out of time. When he replied the following morning, Mr Weighhill of the CMA says so.

So the position until then was that there was nothing to suggest that Aramark was compliant. All we had was "by the end of the week." The CMA doesn't reply to that, quite reasonably. There is then a further separate exchange in relation to the undertakings in which reference is made.

By this stage it is clear that Aramark is out of time. So when they say they are still planning to lodge a notice, it is obviously perfectly reasonable for the CMA at that point to say ‘well, okay, you are out of time now.

But again the insinuation in paragraph 14, that the CMA has sort of sat on this until Aramark is out of time, the CMA didn't just email them and say ‘sorry, I refer to your email of 10 February, you are now of out of time.’ They are responding directly to this email which was received at 6 o'clock the following evening.

So in my respectful submission this hasn't really been presented in a balanced way. I hope that fills in the picture for the Tribunal. This sort of half attempt to implicate the CMA in what has happened, it really doesn't have any basis.

But even if one took the submission at its highest, it doesn't go far enough to assist Aramark because it is obviously not for the CMA to start to advise or steer counterparties as to how to bring proceedings against them in accordance with the Rules. I don't think Ms Kreisberger says that it is. But that point is even more obviously true where the parties are as sophisticated and well resourced and well

represented as Aramark is.

It can't be the position that when a party like Aramark writes to the CMA and says what its plans are, the CMA has to provide them with guidance about how to bring a case against the CMA, failing which the CMA runs the risk of criticism and ultimately an extension of time. It is obviously up to parties to run their own cases with the advice of their legal representatives. We say that is simple litigation common sense.

THE CHAIR: So you would say that if I had a witness statement from Mr Barnett where he said 'I read that letter, I realised that they had made a mistake, I took the view it wasn't for me to correct that error, and I was entitled to sit and wait and see what happened', if that was the position you would say it would make no difference?

MR WILLIAMS: I do say it would make no difference. Can I just take you to a bit of the Good Law Project case, which I think -- it's not on point but I think it is informative. This is a case that you raised, I think, in the context of the Denton issue. But it is useful on other points, albeit by way of broad analogy, sir.

It is a judicial review of a procurement decision around the time of the pandemic. The position was that an unsealed claim form had been served on the Secretary of State at the right email address, but – the unsealed claim form was sent to the right email address, and the sealed claim form had been sent to the wrong email address for service. The Good Law Project came to court and sought an order that this should be -- that the court should make an order for alternative service, treating the service as though it had been effective service.

I am just going to show you a few paragraphs. There is one particular paragraph that goes to the point I would like you to read.

I just want to -- I am not putting huge weight on this, I just think it is useful context given that the Tribunal wanted to hear submissions about the case and it has something to say about this. If one picks it up at paragraph 38, Bundle 7, page 11.

You might just want to cast your eye over those paragraphs, because it shows that there are parallels between the context in that case and the present case.

THE CHAIR: You are looking particularly at paragraph 41.

MR WILLIAMS: paragraph 41, sir. So echoes of the present case. Importance of service to initiate the process and in that context justification for a strict approach to an issue is addressed.

If one moves on to the next page, you can see the application under CPR 6.15, which is the provision which applies for alternative service. Paragraph 55 sets out a summary of the applicable principles. You can see the test is whether there has been good reason to treat the form of service as good service.

Service has a number of purposes. The most important is to make sure the contents of the document -- the content of the document I should say, that is the content of the claim not just the facts of the claim -- are brought to the attention of the person to be served, and this is a critical factor. The mere fact that the defendant knew of the existence and content of the claim form is not without more a good reason.

So even if you know what's in the document the fact that it has not been served on you is not disregarded.

Then paragraph 57 I wanted to pick up:

"Provided that the defendant had done nothing ...(Reading to the words)... has not been effected."

It is just giving credence to the submission I made that this is just not our responsibility. It's not a relevant -- whatever the CMA did, if it didn't do anything to obstruct service, it's just not relevant what happened in these communications.

THE CHAIR: I don't have a statement of the sort that I postulated. But can it be right that if I did, that that wouldn't be one of the range of considerations and factors that one should put into the mix?

MR WILLIAMS: I am not going to attempt to consider all of the circumstances because clearly you will look at all the circumstances. Just to be clear it's not a circumstance here, for all the reasons I have developed. There was nothing to put the CMA on notice that Aramark was proceeding on the basis of a misinterpretation of the Rules. And in fact upon joinder of those two emails there is everything to suggest that they would (inaudible), at least in terms of what the CMA was told. So that is the first point. But if it were the case that the CMA had been put on notice and had sat on that information, you would consider it but in my submission it would simply not be a weighty factor because it was not the CMA's responsibility. One comes back to the point that it was Aramark's responsibility to comply with the Rules. They have to demonstrate a good reason why they didn't comply with the Rules, and the fact that the CMA, in your example I should say, not in the real world, the fact that the CMA in that example has sat on the knowledge is not a factor that has in any way prevented the applicant from bringing their application to the Tribunal. So you can consider it, but it won't be a weighty -- it wouldn't be a significant factor.

Paragraph 58 goes on to say the consequences of this are going to be harsh. Obviously there are parallels with this situation as well.

When I made my submission at the outset that I was going to be referring to appellate cases dealing with English procedure, that's what I was referring to. But in my submission this isn't -- I don't make this as a matter of technically English law or Scottish law, I simply say these are the rules of engagement in serious litigation. It is the party's own responsibility to make sure they comply with the Rules.

So, sir, subject to one thing I want to say, those are my submissions on the application, subject to anything else from behind me.

For now, the only other point I wanted to make locks into points Ms Kreisberger made about the interpretation of the Rules, and the interpretation that Aramark adopted at

the time. This did begin as a case about the correct interpretation of the Rules and has ended up being a case that is solely about an application for extension of time under Rule 25(3), but it has been fully presented to the Tribunal in the written submissions, subject to one point I just want to come back to.

But Aramark has conceded the point. What the CMA absolutely doesn't want is ever to end up back here again. So if the Tribunal were able to bear that in mind in preparing its judgment, and to record the way the argument has developed and the position that was reached, which as I say was consistent with the Guide in any event, that may be of assistance going forward.

You raised the question whether Rule 112 --

THE CHAIR: Rule 112.

MR WILLIAMS: -- is engaged because of the word "moment." We have considered that argument. If I can tell you what we made of it, if it helps you --

THE CHAIR: It would be helpful, because what struck me -- and this may be betraying my primary home jurisdiction -- where the law draws a distinction between what's called naturalis computatio, where -- I am afraid in Scotland we occasionally still use Latin terms. Where a time is computed from moment to moment, so that if, say, a rule said four days from the publication --

MR WILLIAMS: Or service.

THE CHAIR: -- or service, there might be an argument that you run it from moment to moment, or what's called in the books civilis computatio, where you ignore the first day. You ignore where something happens in the course of the day. It is basically the equivalent of rRle 112(2).

So I then, wearing those spectacles came to 112(2) and thought, well, what that's trying to make clear is that even if you have a time period that bears to start at a particular moment, you are calculating in the second way that I have mentioned

rather than the first way.

MR WILLIAMS: Yes. What we would say of the argument is this, sir. The question, I think, is whether the language of moment precludes it being a date. If a date -- if one looks at Rule 25(1), there is a period which is expressed as "within four weeks of", of a date. If that date is capable of being a moment, then the two provisions would lock together. It seems to me that the phrase "moment" was a broader word and that it was capable of embracing a date. But where that one takes you is that if and to the extent that Rule 112 is engaged, because a date is capable of being a moment, then one follows the analysis through in our submission.

So the point doesn't create additional time and if it did create additional time, it would be at odds with 112(3), which says the period runs -- it is clearly intended to say that the period runs to same day weeks later.

THE CHAIR: I suppose what is curious about your analysis is that Rules 112(2) and 112(3) essentially duplicate each other.

MR WILLIAMS: To some degree. They are dealing with different parts of the enquiry. The fact they reach a consistent outcome isn't a point --

THE CHAIR: Okay.

MR WILLIAMS: One is dealing with when time starts and the other is dealing with when it ends. They come to a consistent outcome, but they are not duplicate.

Of course, Rule 112(3) is not just dealing with this point because it is dealing with days of the month as well, so the submission does go a bit further.

The only other strand I just mention is that there is law -- and I was not intending to get into it -- about whether parts of days count as days when one is counting in English law. Obviously to the extent that one was contemplating that a moment -- time might run from the moment, the question will be in fact, is that already catered for by the general approach to parts of days where there are legal presumptions. If one does

read that into the scheme, then it would not be necessary to approach the matter in the way you have suggested, sir, because that would already be catered for.

I think the bottom line is that even if -- we proceeded on the basis that Rule 112, its language is capable of applying to the situation naturally, but even if it does apply, it doesn't buy the applicant an extra day.

Unless I can assist the Tribunal further that's my response to the application.

THE CHAIR: That's very helpful. Thank you. Mr Williams.

Ms Kreisberger, is there anything you would like to come back on.

Reply submissions by MS KREISBERGER

MS KREISBERGER: Thank you, sir.

My first point is that Mr Williams submitted to you that proportionality is not a factor when it comes to exceptional circumstances. With respect, sir, that point is wrong as a matter of law. If I could just show you Rule 2.2 of the CAT Rules, we cite it in the reply -- do you have the bundle reference? I am using that version. It is tab A in Bundle 6, page 3. That provides that these Rules are to be applied by the Tribunal and interpreted in accordance with the governing principles set out in Rule 4. The governing principles are obviously just and proportionate hearing of cases. So that does include exceptional circumstances within the Rules.

THE CHAIR: Yes. I mean, the leading principle is Tribunals should seek to ensure each case is dealt with justly and at proportionate cost. Which is, I think, a slightly different point to the point you are making on proportionality.

MS KREISBERGER: If one looks at the subparagraphs, it is justly and apt proportion of costs which includes ensuring equal footing, saving expense, dealing with the case in ways which are proportionate. Amount of money involved is one but there is also importance, complexity, expeditiously and fairly and so on.

THE CHAIR: Yes.

MS KREISBERGER: That's generally understood to be a general principle of proportionality.

THE CHAIR: And enforcing compliance with these Rules. So do we really not come back to --

MS KREISBERGER: Exceptional --

THE CHAIR: -- whether circumstances are exceptional within the Rules.

MS KREISBERGER: Yes, of course. But it would be surprising to suggest the converse, which is that the Tribunal should approach the exceptional circumstances test in a manner which is disproportionate.

MR WILLIAMS: With respect, I didn't intend to say that there is no proportionality aspect. I meant to submit, and I think I did submit, it is not a proportionality test. I don't want there to be any confusion about what our position is but clearly this is the overriding objective. I don't want to interrupt, but I also don't want to send us sort of into diversions if I misspoke in my submissions.

THE CHAIR: Thank you.

MS KREISBERGER: And of course that then is consistent with the combinatorial approach in play, looking at all the factors in the round.

The second point I would like to make, if I may, is picking up on your question about completed mergers, which Mr Williams addressed you on as well. You put to me -- and I am very fortunate to have some merger specialists behind me -- in terms of whether it should affect the timing, Shein v The UK enshrines the legal right to complete a merger and that is fundamental to the Enterprise Act. So it doesn't suggest any harsher treatment if a party completes a merger which is then subsequently picked up.

It follows that a completed merger shouldn't be treated differently from a timing

standpoint. There are various structures in place -- hold separate orders and so on -- which means that there is no prejudice relative to an anticipated merger.

It is also right that the system doesn't expedite completed mergers compared to anticipated ones. So there is no difference in treatment. The relevant distinction, which formed part of my submissions to you, sir, is that of course a completed merger does engage the rights of Aramark in a different way, because it is interference with the freedom of property. One might say that's distinct from what one might term the denial of expectation in relation to an anticipated merger and also the realities on which I have already addressed you, which are jobs, customers and so on.

I think I am right in saying that Mr Williams also said this is an entirely conventional remedy. One is not suggesting in any way the CMA isn't entitled, it's not within its powers -- of course it is within its powers -- but it is a very strong thing to do, and it is relevant to your assessment, sir, because the consequence of not granting the extension is plainly a matter within your assessment of whether there are exceptional circumstances which warrant an extension.

That really addresses Mr Williams' point that Aramark can't be in a better position because it chose to complete this transaction. That is not at all my submission.

Sir, then, if I may, move on briskly to address you briefly -- this is the only authority I will come back to, if that is at all reassuring at this time in the afternoon -- it is the case of Somerfield and it is obviously of some importance. It is a Court of Appeal authority.

Mr Williams took to you paragraph 41 of that authority. It would be useful to just turn that up. Before I turn to the actual wording at 41, I just wanted to step back and remind you, sir, of the facts there. The facts there were that Somerfield, another of the applicants, had taken the decision to enter into early resolution agreements. As part of that, they conceded the infringements, and in return for entering into the agreement

they got a significant discount from the penalty. They subsequently regretted it when later events proved that the CMA's theory of harm didn't stand up. So that's when they asked for more time to appeal, because they regretted paying a smaller penalty when later events showed that they could have paid no penalty. So that's why they wanted more time.

It is very clear that that's what Lord Justice Vos is referring to at paragraph 42. He refers to "later events" -- if one looks at paragraph 40, he refers to the need not to repeat, to recite the history, but it arose out of the vicissitudes of litigation. That's because a third party did successfully challenge the CMA's theory of harm, and the OFT had to concede it couldn't make that theory good.

That's the later event that Lord Justice Vos said cannot possibly be said to create exceptional circumstances justifying an appeal out of time. Then he gives the example of criminal pleas.

THE CHAIR: That's also the context for the particular reference to the principle of finality and legal certainty in that paragraph.

MS KREISBERGER: Exactly.

THE CHAIR: It appears in other cases we have looked at. But in that particular paragraph that's the context in which he's talking about it.

MS KREISBERGER: Exactly.

THE CHAIR: In effect, it is, you know, a final decision, yes. A lot of water had flowed under the bridge, including decisions by the applicants not to appeal.

MS KREISBERGER: That's right.

THE CHAIR: The mere fact that other parties had chosen to appeal successfully doesn't undermine their decision. So that's the context in which that passage is --

MS KREISBERGER: Exactly. It's not a phrase that Lord Justice Vos uses, but one might say they were "gaming the system"; because they admitted liability, they got

their discount, someone else then did the work, and they regretted what was a commercial decision to take the lower penalty. Lord Justice Vos was unimpressed and said that's not an example of a good reason.

THE CHAIR: Do you accept Mr Williams' point, which I thought was rather helpful, pointing me to the phrase "exceptional circumstances justifying an appeal out of time", that that phraseology is quite a helpful way of encapsulating the question I have to address?

MS KREISBERGER: It is. It is. The point I am about to make is allied with that, which is that Mr Williams urged on you a somewhat different test, which is one of an exceptional reason. That, of course, doesn't appear anywhere in the authorities. There is not an exceptional reason. The test is "exceptional circumstances such as to warrant an extension", which formula I gratefully adopt.

You see there that the problem for Somerfields was that it wasn't a very good reason. And it couldn't be further removed: a commercial decision to settle, understanding the risks involved, versus a mistake quickly remedied.

THE CHAIR: I suppose would it be your submission that paragraphs 43 and 44 and 46, which tell us what the CAT had failed to do --

MS KREISBERGER: That's right.

THE CHAIR: -- shouldn't be read, you would say, as articulating a sort of particular primary test that has to be applied in every case?

MS KREISBERGER: No, it should be seen to be --

THE CHAIR: You would say this is the Court of Appeal looking at the decision of the CAT and identifying an error in that case.

MS KREISBERGER: Yes. And I think key to Lord Justice Vos' lack of enthusiasm, should we say, for the reason is that it was knowing. It is the antithesis. The entering into the ERAs, these agreements, was a decision made knowingly. A calculated risk

was taken by Somerfield, "We will take the discount rather than fight the case now." They made that commercial calculation. When subsequent events showed that that was a bad calculation, they wanted to reverse it. It was all incredibly calculated and knowing and so couldn't be further from the facts at issue here.

Mr Williams took you to the Sky case. I am not going to turn it up again. I think Mr Williams referred to "obvious benefit to everybody involved". I would just reiterate my submission, which is that it is quite striking that the obvious benefits were really about costs and administrative convenience.

As you say, sir, the Rules provide for this exception, for exceptional circumstances. Sky is a case which shows that that is a test which can be met through what might be regarded as fairly modest benefits: benefits of cost, a more efficient conduct of the litigation, and no countervailing prejudice. So in that case the exception applies, not the generality of the rule.

Just a few very short points on Mr Williams' submissions in relation to the communication. One brief point, Mr Williams said maybe the appeal wouldn't have transpired in any event. It is noteworthy that the CMA were instructing counsel for the appeal and so did anticipate it.

Mr Williams made the submission that "end of the week" meant Thursday. You have my submission that any suggestion that there is bad faith involved would be a matter of serious concern. The position is -- and Aramark's submission -- is that this was always on the basis of a Friday deadline. That was the advice.

The one email that it is worth coming back to which really makes that abundantly clear is one Mr Williams took you to in the hearing Bundle, tab 4, E, page 14. That's the email from Mr Mohan at Shoosmiths. Mr Williams showed this to you, but perhaps not in relation to this point. It is the end of the second paragraph, last sentence:

"Aramark is also heavily engaged in finalising the appeal submission which is due

imminently."

That was on the Thursday evening, 12 February, at 18.03. So that was an hour after we now know the deadline had in fact passed. So "imminently" clearly meant after 5 pm on Thursday; in other words, in terms of working days, the Friday. That was the basis on which everyone was operating.

THE CHAIR: I think Mr Williams' point was perhaps a slightly different one, that the phrase "end of the week" is a pretty broad phrase which doesn't exactly set up a red flag.

MS KREISBERGER: I think all I would say to that, sir -- apart from the natural meaning of the words "end of the week" is Friday -- and that's, I would say, Thursday is not a natural meaning to "end of the week", although I sometimes wish my week ended on a Thursday.

But what he did say in that 10 February email that may just be worth noting is a quite emphatic "we will lodge by the end of the week." I will just turn it up. It is D, page 10: "Daniel, I wanted to inform you that we will proceed to lodge by the end of the week." It's an emphatic statement. I can't take the meaning of "end of the week" much further than the usual meaning of the words, but it was certainly an emphatic statement about lodging and it wasn't suggesting any earlier deadline than the end of the week.

Then I just wanted to mention -- and I do so in a light touch manner because it is not an authority in the bundle, it's not a huge point -- but paragraph 417 of the Guide --

THE CHAIR: Just before you do, Mr Williams is pointing me to your written submission where you say "nor did the CMA raise any objection when Mr Bavasso candidly informed them of the end of the week deadline, but waited until the deadline had passed before doing so."

It might be said that you are insinuating some form of impropriety or bad faith on the part of the CMA. I would like to understand just what it is you are saying about this.

MS KREISBERGER: No, I certainly couldn't possibly. We cannot know why that was. We make the submission in relation to the prejudice to the CMA point. So Mr Williams relies on prejudice to the CMA, because he says the CMA was entitled to assume, after 5 pm on Thursday, that the position was final.

We say actually it doesn't arise in the circumstances that they were told we are going to file by the end of the week and they remained silent. For whatever reason, there was no response to that email. I certainly wouldn't press the point any further than that. But in that connection, I would just note that Federation of Wholesale Distributors, which is the case cited in the Guide at paragraph 417 on the timing point, which I don't know if you have seen, sir. We don't have that case in the bundle. It is cited in the Guide to distinguish between press announcements and the handing down of a decision. But perhaps for your note, paragraph 6 of the judgment in that case, Federation of Wholesale Distributors, records a letter where FWD, the applicant, said it was going to be filing its application on a precautionary basis because there was some uncertainty as to the deadline for filing its notice of application, and the OFT, as it then was, expressed the view:

"If your appeal is made later than this Friday, it is possible that we will seek to have it rejected as out of time."

Simply to note that in some situations the CMA will flag its view that an application will be out of time.

My final point is really to say I have nothing to add to the debate about the construction of Rule 112, but it does illustrate that reasonable minds can differ on the wording of this Rule. But I leave the point there.

Unless I can be of any further assistance, those are my reply submissions.

THE CHAIR: Thank you very much.

Mr Williams?

Reply submissions by MR WILLIAMS

MR WILLIAMS: Given the emphasis which has been put on bad faith, I do just want to clear that up. I don't think my position is vague, but it is probably best if I am very clear about it.

THE CHAIR: It would be helpful if you were very clear about it in the way that Ms Kreisberger was about the position of her client.

MR WILLIAMS: We are not saying that Aramark didn't proceed on the basis of a misunderstanding of the rules. But they are what they are, what they rely on. We have no basis on which to do that. We are not doing that. In some ways the proof is in the pudding. I am sure they don't want to be here any more than we do.

What I did submit, I hope clearly, is it is not satisfactory for Mr Bavasso to prepare a witness statement in Aramark's submissions that we should have understood "by the end of the week" to mean Friday, when we found out this morning that they had emailed the Tribunal the day before and said, at least the day before, that they meant Thursday.

We didn't know about that communication. I came to the Tribunal to say, well, the words are vague. But now the submission goes further than "the words are vague", on the basis of the documents we have now seen, it looks as though they meant Thursday, or at least they may well have meant Thursday. We have no evidence from Mr Bavasso or anyone else to take it any further.

So I do say it is unsatisfactory and unfair for them to suggest that we should have drawn inferences when there is material we haven't seen that suggests that they may well have not meant what they say we should have understood.

I don't put it higher than that. But I want to be clear about that, because we were very surprised, given the case we have come to meet about what the email means and

what it appears to mean, we were very surprised to see that email for the first time this morning.

I hope that is clear, sir.

THE CHAIR: Thank you.

I am very grateful to both counsel for what I think has been perhaps a slightly heavier and longer day than we all anticipated. I am going to reflect on the submissions overnight. You have given me plenty to think about.

My intention would be, if I am able to, to issue a decision tomorrow morning and to do so in writing. But what I am minded to do, subject to any submissions about availability, is to make the written decision available first thing, assuming I have been able to get to that point, and have a hearing later in the morning so that parties can raise any consequential issues that may arise.

Ms Kreisberger, I know that you indicated earlier that that would put you in some difficulty.

MS KREISBERGER: I am in difficulty tomorrow. I wonder whether that might be done next week so we would have Friday to consider.

THE CHAIR: Yes. I suppose my concern, obviously, is the passage of time here. We have discussed a number of times the importance of bringing things to a swift conclusion.

MS KREISBERGER: Yes.

THE CHAIR: You would not be content for Mr Coverman to cover the matter for you?

MS KREISBERGER: I think it should be me.

THE CHAIR: Yes.

I am quite happy if ultimately it needs to be a day next week. It is fair to say I was not planning to be in London until later next week but, you know, I can to some extent adjust my plans if that is where we are.

MS KREISBERGER: A remote hearing on the Monday would that --

THE CHAIR: That's perfectly --

MR WILLIAMS: Sir, it is also a question of wait and see.

THE CHAIR: Indeed.

MR WILLIAMS: Because we can try and legislate for this. I would hope that if a short notice hearing is needed, the parties could deal with it remotely, including you, sir, if it is necessary. That would be a workable approach.

But at the moment we don't know what the decision is; we don't know what arises. It could be something, it could be nothing. In cases where there are no urgent consequentials costs and so on are often dealt with on paper anyway and so on. So it really will depend on what position the parties take in response to your judgment.

I am not trying to deter you from preplanning, but it might be appropriate to be flexible anyway, because what is needed might depend --

THE CHAIR: I can see that. And parties are quite happy that I have a written judgment issued without any hand-down hearing?

MS KREISBERGER: Yes.

THE CHAIR: I am looking at the Registrar just to make sure that doesn't cause any difficulty from the Registry point of view.

MR WILLIAMS: If there are corrections, we can (inaudible).

THE CHAIR: I could hand it down under embargo. That would give parties a chance -- if I have, you know, made an error of some sort -- that it is appropriately raised.

MS KREISBERGER: And we are very grateful in advance for the opportunity to have a short consequential hearing next week should that prove necessary.

THE CHAIR: I am perfectly happy to do that. We can either do it remotely in the early part of the week or, as I say, I will be back in London towards the end of the week.

Good, thank you very much indeed.

(3.46 pm)

(The hearing concluded. Judgment reserved.)

Key to punctuation used in transcript

--	Double dashes are used at the end of a line to indicate that the person's speech was cut off by someone else speaking
…	Ellipsis is used at the end of a line to indicate that the person tailed off their speech and did not finish the sentence.
- xx xx xx -	A pair of single dashes is used to separate strong interruptions from the rest of the sentence e.g. An honest politician - if such a creature exists - would never agree to such a plan. These are unlike commas, which only separate off a weak interruption.
-	Single dashes are used when the strong interruption comes at the end of the sentence, e.g. There was no other way - or was there?