IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1766/4/12/26

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Friday 17th April

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, Ciar McAndrew and Charlie Coverman (Instructed by Simpson Thacher & Bartlett, and Latham & Watkins (London) LLP) on behalf of Aramark Limited

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

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Friday, 17 April 2026

(10.29 am)

THE CHAIR: Good morning.

Before we start, I'd better read the usual notice. Some of you are joining us by live stream on our website, so I must start with the customary warning. 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 and breach of that provision is punishable as contempt of court.

Ms Kreisberger.

MS KREISBERGER: Good morning, sir.

THE CHAIR: Good morning. I should say I'm very grateful to both parties for the respective written submissions and it may be that we can take matters relatively quickly this morning, but I'm very much in your hands. The principal purpose of fixing a consequentials hearing was because I rather anticipated that there might be issues, in particular, arising from anything that Mr Williams said that you might wish to comment on.

MS KREISBERGER: That's understood and I'm very grateful. Can I just check -- yes, my microphone is now on. Thank you, sir. Well, we're very grateful for the opportunity to address you in person, sir.

Housekeeping

Just very briefly on housekeeping, there are four bundles, but I won't be going to them in any great depth at all. I think, sir, to the extent that I do, you were working from the hard copy bundle last time.

THE CHAIR: Yes. I've got with me the hard copy supplementary hearing bundle and supplementary authorities bundle, but I also have material on the screen if we need it.

MS KREISBERGER: In terms of the scope of argument today, costs are agreed

between the parties. You may have seen the --

THE CHAIR: I saw that. I'm very grateful to the parties for that. The one thing that didn't seem to be agreed would be what should happen if I was with you and your application for permission to appeal.

MS KREISBERGER: I think that has been agreed --

THE CHAIR: I don't think I'd seen that.

MS KREISBERGER: -- and the costs of today will only be payable by Aramark if we were to lose today, so the costs of today will follow the event.

THE CHAIR: And if you're successful, costs lie where they fall. Is that the ...?

MS KREISBERGER: I'm not sure.

THE CHAIR: Is that where we are?

MS KREISBERGER: I should check whether that's been addressed. We will come back to you on that, sir.

THE CHAIR: I don't want you to read anything one way or the other into the question, I'm waiting to hear what parties have to say, but it's clearly one of the potential outcomes.

MS KREISBERGER: Yes, perhaps when we cross that bridge, that may be most sensible.

So on that basis, the only matter arising is our application for permission. And as you suggest, sir, I don't propose to reiterate all the points. You have our written submissions; we maintain those submissions. If I don't address them --

THE CHAIR: Indeed.

MS KREISBERGER: -- there's no suggestion they fall away.

THE CHAIR: Indeed.

MS KREISBERGER: I thought it might be helpful to address you, sir, first before I come to the grounds on the statutory appeal route --

THE CHAIR: The jurisdiction question.

MS KREISBERGER: The jurisdiction question.

THE CHAIR: Yes, I'd be very interested to hear what you have to say in particular on the alternative interpretation that Mr Williams has put forward.

MS KREISBERGER: It's really in order to get matters right, as there really isn't anything between us except the route to the appeal and the correct wording.

THE CHAIR: Indeed, if I understood -- it may be better just to make sure I am clear on this -- Mr Williams, as I understand in your written submission, you're formally adopting a neutral position but you're offering, as it were, a possible alternative interpretation to that offered by Ms Kreisberger if I were to take the view that there is a statutory appeal here.

MR WILLIAMS: Neutral as to the outcome in the sense that we don't try to persuade you that there is or isn't a right of appeal, but not neutral as to the questions which arise on the way, as you've seen, because we do positively disagree with aspects of their interpretation for reasons that we've explained.

THE CHAIR: Yes, I understand that.

MR WILLIAMS: But exactly as you've said, sir, having disagreed with them about the route that they proposed, we say, "Well, there is another route". So our disagreement about the route is not decisive, but we are not neutral on the questions of interpretation that arise along the way, because they have implications for other cases.

THE CHAIR: Indeed. No, I understand that, but you're not urging me one way or the other to find that there is an appeal or isn't an appeal, as I understand it.

MR WILLIAMS: That's right.

THE CHAIR: Yes, thank you.

Sorry, Ms Kreisberger.

MS KREISBERGER: Thank you, sir.

Submissions by MS KREISBERGER

MS KREISBERGER: So turning then to the provision that you're construing, sir, section 120, subparagraph 6 of the Enterprise Act. That should be at Tab 30 of your supplementary authorities bundle, page 657.

THE CHAIR: Thank you.

MS KREISBERGER: Can I just check, sir, that you have that insert; I think that was added subsequently.

Sir, as you will have seen, the wording of the provision is that:

"An appeal lies on any point of law arising from a decision of [the tribunal] under this section to the appropriate court."

So the words that we're construing are, "a decision ... under this section". And that's the question: is your judgment, sir, such a decision?

THE CHAIR: There's a narrow view, which is that it's only referring to section 120, subsection 5, and there's the broader view which Mr Williams advances that it's any decision taken in proceedings brought under section 120.

MS KREISBERGER: That's correct.

THE CHAIR: I think that --

MS KREISBERGER: Although I would actually frame it somewhat differently, which is that we adopt a broad construction of section 120(6).

THE CHAIR: Okay.

MS KREISBERGER: I will show you why I say that; it really arises from the Evans judgment, which you'll have seen the CMA reject. They say, "It says nothing about matters here", and we say that's the wrong approach, actually. That crystallises the substance of my submission here.

My submission, sir, is that the judgment refusing to extend time is a decision under this section on two bases. The first is just as a matter of ordinary English and statutory

construction of section 120. The second is applying the legal principles that are specifically articulated by the Court of Appeal in Evans on the precise question of whether an appeal from a decision of this Tribunal is available, and what Evans says is: that calls for a broad construction. And I'll show you that Evans addresses a different statutory provision, but the reasons given by Lord Justice Green in Evans apply equally, possibly with even greater force here.

THE CHAIR: Yes. Sorry, I don't want to take you off the line, but we want to test it this way: if section 120, subsection 6 is to be interpreted in a way which doesn't include, let's say, procedural decisions that the Tribunal may make en route to a final determination, any such appeal being available but only with permission, and therefore being subject to control so one isn't at risk of interlocutory appeals sort of disturbing the Tribunal's process; the risk would be that any interlocutory decision would be subject to a judicial review application.

MS KREISBERGER: That's right, and that's what the Court of Appeal cautions against. Whether you're looking at section 49 of the Competition Act or section 120 of the Enterprise Act, the same concern arises.

THE CHAIR: Yes, yes.

MS KREISBERGER: So just dealing briefly with -- because I do think that Evans is the more important point -- section 120(5), sir, as you said, provides that this Tribunal can dismiss the application -- that's the section 120 application -- or quash in whole or part the CMA's decision. We say: just using ordinary English, the Tribunal has certainly disposed of Aramark's application under section 120 by refusing to extend time under rule 25(3). Therefore, as a matter of ordinary English, that judgment is in substance a decision to dismiss Aramark's section 120 application within the meaning of subparagraph 5. On that basis, it is therefore also a decision under section 120 for the purposes of subparagraph 6. Now, as I say, my submission is that that's the

correct construction, but you don't need to rely only on my submission to get there, because we've got such clear guidance now from the Court of Appeal. So that's my second point.

The Court of Appeal in *Evans* requires that the statutory right of appeal against decisions of this Tribunal be construed broadly. That's the nub of it. In the context of Aramark's application, that requires the phrase, "a decision under ... this section", in subparagraph 6 to be broadly construed. That means it should be interpreted to include a Tribunal decision which finally disposes of a section 120 application by dint of refusing to retrospectively extend time.

Now, I said that my submission is more appropriately framed as the broad construction. You will see in a moment, and when I show you the passages in Evans, sir, that even decisions which do not terminate a section 120 application -- as you said, sir, interlocutory matters that arise -- are also likely to be in the scope of section 120, subparagraph 6. It's just that those decisions don't concern us today, so I don't need to address you on those. But, to the extent, sir, that you'd find it helpful, we would say they are within the scope as well. You don't need to have a termination of the application, but I'm only addressing you on the facts that arise today.

THE CHAIR: Yes. So the primary position is, as set out in your note of argument, that in a practical sense the decision I made has dismissed the application, even if in a technical sense it was doing something different. If one's looking narrowly at the, sort of, technical form of the order, I simply refuse an application to extend time.

MS KREISBERGER: Yes.

THE CHAIR: But your fallback position would be -- if I understand it correctly -- effectively to adopt Mr Williams approach that section 120, subsection 6 ought to be capable of applying to any decision the Tribunal makes in dealing with an application.

MS KREISBERGER: That's right. I probably wouldn't use the phrase, "fallback", because I adopt all of it as correct; it's just that I'm always cautious about arguing points that don't arise, essentially. Perhaps if I could put it this way, which is really just tweaking your formulation, sir: there isn't any doubt in this case that's before you, given there's a termination of the application, but that's not to say that the broad construction that I'm submitting wouldn't cover other types of decision which don't terminate, and I'll show you that in Evans. It's very clear actually.

So if I could ask you, sir, to turn up the supplementary authorities bundle and Evans is at tab 9, page 226. That's the headnote. Now Evans concerned section 49(1A) of the Competition Act. You can see that on page 248, paragraph 43; that's the jurisdictional clause. An appeal is available from a decision of the tribunal:

"(a) as to the award of damages or other sum" with the carve out on costs].

So that's the provision which the Court of Appeal was concerned with. We don't need to turn up the paragraphs, but so you have it, sir, the Tribunal decisions which were being appealed there included three types of decisions: the Tribunal's power to strike out claims of its own motion -- so obviously bringing the claim to an end -- the Tribunal's powers to regulate how damages claims should be pleaded -- so simply a pleading point, which is at paragraph 64 of the judgment on page 254. Thirdly, the Tribunal's decision to certify the collective proceedings on an opt-in basis only -- it rejected the opt-out basis -- which it was agreed would in substance bring the claims to an end. Just for your note, you can see that at paragraph 82 on page 262. So you can immediately see these were not decisions as to damages in the narrow sense, and they concerned prior matters arising at a much earlier stage of the proceedings. It's pre-certification.

If we go down to page 249, paragraph 48, you see there the Court of Appeal observed that the wording "as to" -- if you remember in section 49, a decision "as to

damages" -- the Court of Appeal observes there that that presupposes some connection between the point of law and the damages, but not how close that connection must be. The Court of Appeal then goes on to answer that question in the paragraphs that follow. So that's what the judgment is directed to answering.

In the interests of time, I wasn't proposing to take you through all the passages. Perhaps for your notes, sir, the relevant paragraphs: paragraph 48 to 54, where Lord Justice Green cites a number of Supreme Court and Court of Appeal authorities on jurisdiction, including Merricks, which was a landmark judgment.

What I suggest we do is go down to paragraph 55. His Lordship said there:

"The test [which was suggested by the Tribunal]: 'whether the decision affects the amount of damages to be awarded in some causal way' highlights the need for there to be 'some' (sufficient) causal link between the decision and damages. The guidance from 'Merricks', [from the Supreme Court] is that the link or effect does not have to be very direct or close. The test is not one capable of being applied with mathematical exactitude. However case law indicates for example: that a decision which brings the possibility of a claim for damages to an end (such as a strike out), is 'as to' damages" -- that's obviously the closest example to our case -- "that a decision going to the amount of a possible claim (for instance [...] that part of a claim is unsustainable) is 'as to' damages; that a decision that a claim should not be struck out is 'as to' damages, not least because if the appeal prevails the effect is as if the CAT should have struck out the claim; and that decisions as to the procedure to be applied to determine damages claims are also 'as to' damages because the procedure adopted could affect the ultimate quantum".

He then goes on, relevantly for our purposes, at paragraph 56, to reject as too narrow a test of whether the decision brought a claim or part of a claim to an end. So that's really the question you put to me, sir, and that's why I say it's not a fallback. It's all

part of the approach. He says, "No, that that's too narrow".

Now, paragraphs 57 to 60 are very important. Lord Justice Green says at paragraph 57 that he was clear that the statutory right of appeal should be construed broadly in order to minimise the scope of judicial review. Sir, can I suggest that I give you a moment just to cast your eye over those passages rather than reading them out.

THE CHAIR: Yes, I have read them, but I will look at them again. I agree, those struck me as providing quite an important policy context, which one might think would be equally germane in the present case.

MS KREISBERGER: (Inaudible) Perhaps even with greater force given this is a specialist merger context.

I'm grateful, sir. Then I'll give you a moment. (Pause)

THE CHAIR: Yes. Thank you.

MS KREISBERGER: Thank you, sir.

You see, he focuses on legal policy, as you say, sir, and judicial efficiency. My fundamental submission is that the same approach must apply a fortiori to your construction of the statutory right of appeal, sir, under subparagraph 6 of section 120; as I said, particularly in this specialist context of merger analysis.

Accordingly, a Tribunal decision refusing to extend time, which brings Aramark's application to an end for the purposes of determining the appeal jurisdiction, should be characterised as a decision under section 120, and any narrower approach violates the principles set out in this judgment.

Lastly, then, turning briefly to the CMA's response. As I understand it, the CMA has three main points. Their primary position appears to be that the Tribunal's decision does not dismiss Aramark's section 120 application, because the Tribunal hasn't addressed the merits, and they point to subparagraph 5. But there is no statutory basis for reading in the words "as to the merits", when construing the reference to

decisions under subparagraph 6, nor is subparagraph 5 so confined. But in any event, in the light of Evans, that narrow construction of decisions under this section is unsustainable.

Slightly curiously, the CMA argues at paragraph 11 of the response that Evans says nothing about jurisdiction under section 120(6), because it addresses different wording in section 49(1A), but I've shown you the reasons apply equally to our basis, as they do to section 49, because these are matters of judicial efficiency, legal policy, and so on.

THE CHAIR: You would say that even if the parts of Evans which are focused on the particular connection between the order in question and damages aren't really germane, insofar as they're concerned with a very differently framed provision, the policy considerations set out in 57 onwards are equally applicable.

MS KREISBERGER: Equally applicable. There's a direct read-across. There's no reason why, and -- yes, sir, that's the point. I think the CMA sort of somewhat diffidently suggests at paragraph 8 that there is doubt about subparagraph 6, where the application wasn't served in time. But if you look at the types of decisions at issue in Evans, we say again, that's just not sustainable. Really, Evans eradicates any doubt.

The last point here is that the CMA relies on Somerfield. That's their alternative approach. We agree that Somerfield is helpful, but there are just a couple of points I should make, really in the interest of clarity and precision, on that judgment. That's in the authorities bundle, the original authorities bundle, at tab H, page 144, but I don't think we need turn it up, unless you'd find it helpful, sir, to sort of have it to hand. I think I can just make the points, though. They shouldn't be controversial.

The appeal route there was another statutory basis, this time section 49(1), not section 49(1Aa), as in Evans. If you were able to have section 49 in front of you, sir,

and I don't have a reference for that. It should be in the supplementary authorities bundle at page 655. Section 49(1) provides for an appeal from a decision as to the amount of penalty -- that is subparagraph (a) -- and on a point of law arising from any other decision of the Tribunal. That's a wider provision.

I just mention that it's slightly curious that the CMA rejects Evans because it's on a different statutory basis, but relies on Somerfield, although I can see why they do it -- and we'll come to that, why they do rely on Somerfield -- but the logic doesn't follow through to rejecting Evans. My submission is: both are relevant, but it's actually Evans that elucidates the correct approach, in quite some detail, as you saw.

As the CMA observes, in Somerfield, it was the CMA's predecessor, the OFT, that was applying for permission in that case. The appeal jurisdiction wasn't opposed, and that's why there's no discussion of it.

THE CHAIR: I think they also make the point that that was an appeal against grant of an extension.

MS KREISBERGER: Yes.

THE CHAIR: I understand the point that was originally raised in the CMA's letter last month and the way it relates to Somerfield; it's that in Somerfield, there was a decision on an application and there were live proceedings which could be appealed under section 120, subsection 6.

MS KREISBERGER: If it were in that context, yes.

THE CHAIR: Yes, indeed. Mr Williams will no doubt tell me if I've understood this correctly. I think the point that is being made is that I think on the CMA's interpretation of section 120 subsection 6, if I understand it correctly, they would say if that interpretation is right, the grant of an extension of time would be within the scope of the appeal. They, I think, accept that it would be anomalous and unfortunate perhaps if the approach to the interpretation resulted in a non-reciprocal position.

MS KREISBERGER: Yes.

THE CHAIR: He's nodding, so I'm taking it that I picked that up correctly.

MS KREISBERGER: Yes, and I was going to go on to endorse precisely that point. Stepping back, it wouldn't be satisfactory to have a statutory right of appeal in respect of retrospective extensions of time under section 49(1), but no such right under section 120(6). That sort of uneven approach can't have been Parliament's intention.

THE CHAIR: Yes.

MS KREISBERGER: So we endorse the CMA's position, and the way I would put it is that Somerfield provides a further reason in support of the broad construction that's laid down in Evans, as applicable here. To the extent that the CMA points to section 120(1) as an aid to construction, we agree that's also helpful. That's simply the reference to -- that's the provision on the basis of which the applicant applies for the section 120.

THE CHAIR: Yes.

I appreciate that we're not concerned with other types of procedural decisions, but do you say that one would require to treat any procedural decision as somehow implicitly encompassed within 120, subsection 5, in order to open up an appeal under subsection 6?

MS KREISBERGER: No.

THE CHAIR: No.

MS KREISBERGER: I would adopt the language used by Lord Justice Green, which is -- one is construing the statutory wording in subparagraph 6. A decision under this section is akin to a decision as to damages. I suppose the direct read-across is "as to" to "under this section". He says there must be a limit, so I wouldn't attempt to foreshadow every type of decision that might arise. There must be a connection, but a matter as to pleading is a sufficient connection. Lord Justice Green tells us that. It's

a pretty broad, pretty wide net that one casts when asking, "Is it a decision under this section?"

THE CHAIR: Yes. It doesn't say, "Under section 120, subsection 5". It says "under the section".

MS KREISBERGER: No, it doesn't. We're not suggesting -- all we're saying there is this decision is within subsection 5. So it assists in the statutory construction, sir, that you have to conduct here. But I'm not limiting the interpretation of subparagraph 6 as only those decisions within subparagraph 5.

THE CHAIR: Yes.

MS KREISBERGER: It's just, we are.

THE CHAIR: Indeed. And Parliament, when it enacted that provision, clearly understood that there would be all sorts of decisions that would be taken in the course of the proceedings.

MS KREISBERGER: There's no statutory limit, whereas you saw the carve-out in section 49 for decisions on costs, which are excluded from scope.

Sir, unless you had any other questions on that, I was proposing to move on to the grounds.

THE CHAIR: That's very, very helpful, Ms Kreisberger. Thank you very much.

MR WILLIAMS: Do you want to hear Ms Kreisberger's submissions rather than hear me on that point while it's fresh? Whatever's helpful to you, sir.

THE CHAIR: It might be helpful just to deal with this and then -- yes.

Thank you, Mr Williams.

Submissions by MR WILLIAMS

MR WILLIAMS: I think (inaudible) it might be helpful if I stand up now.

So, I have two preliminary points, but your question to me at the outset was my first

preliminary point about our neutrality. And I explained our neutrality as to the outcome, but not on some of the arguments that we understood had been advanced.

The other preliminary point I was going to raise, but I'll take it quickly, is the question of sequencing, and what point do you need to decide today, and what are the possible routes through the issues? Because it did occur to us that it might be said that, if you were against Ms Kreisberger on her grounds, you might think it's not necessary to take a view on the jurisdictional question, and that question might be left over for another day in a case where it was decisive.

But, having reflected on the matter, it did occur to us that this matter may well go further. And if it were to go further, it would probably be of assistance to the Court of Session to see what the Tribunal made of the point. So, on reflection, it seemed to us that you were probably likely to want to set out your views about the point, regardless of what comes afterwards.

THE CHAIR: I'm going to have to reach a view on it in order to decide whether or not I can turn to the grounds, if I put it that way.

MR WILLIAMS: I won't say any more about that, really. We just thought through the ways that the Tribunal might find its way through it.

So, on the substance of the point, I think, part of the reason for the disagreement on the papers I think has fallen away.

If you could take out Ms Kreisberger's written case, paragraph 5(a). This is really what we reacted to quite strongly, where it says, in the second sentence:

"The only condition for a right of appeal to arise is that the Tribunal has taken a decision of the kind specified in section 120(5)." [as read]

So, it says that's a condition.

And the point we made in our written case is that if that really were a condition, then it would ostensibly preclude appeals in relation to decisions on other sorts of matters,

interlocutory matters. We gave the example of a point of law on disclosure. Another example might be interim relief, for example. So that's what we reacted adversely to. Now, I don't think Ms Kreisberger clearly maintains that submission. But her way through that is, I think, to rely on Evans. Now, there were a couple of things going on in Evans, if I can explain what our position is.

One is the construction of the statutory language at issue in that case, which is "decision as to an award of damages". And as Ms Kreisberger fairly points out, the Court of Appeal, in that case, has one eye on the policy outcome, which is the undesirability of a fragmentation of routes of challenge, and hence they adopt a broad construction of the phrase "decision as to an award of damages" and says, "Well, that could extend to anything that could ultimately affect the decision as to the award of damages".

And I think what Ms Kreisberger says is, "Well, by parity of reasoning, when the court construes section 120, it should take a very broad view, with a view to avoiding a fragmentation of routes of challenge". And, really, we make two points about that.

The first is we accept and recognise that the policy issue in Evans, which is the undesirability of a fragmentation of routes of challenge, we acknowledge that in paragraph 10 of our written case, but, of course, the whole point of our alternative construction of section 120 is that it avoids fragmentation of routes of challenge as between interlocutory decisions and final decisions. So, we don't at all take issue with that. In fact, we positively adopt it.

But, in my submission, the argument Ms Kreisberger makes that the court ought to adopt the same sort of interpretive approach as Evans in construing section 120. That doesn't necessarily take her as far as she wants to, because then one would be construing section 120(5). And, in my submission, it's very difficult to see how a decision, for example, on a disclosure application or on an interim relief application

would be a decision dismissing an application or quashing the decision or any of the things there.

So, if one's going to try and arrive at an outcome which avoids a fragmentation of routes of appeal, in my submission, it's very difficult to see how you can adopt it by adopting an Evans-like construction of section 120(5).

THE CHAIR: And I think that was the point that I clarified with Ms Kreisberger at the end of her submission that she, in effect, I think, is adopting your broader submission insofar as it might be necessary or insofar as one might want to consider how the interpretation applies to other types of decisions. Her short point is that, be that as it may, she's also within five.

MR WILLIAMS: Yes, that's right.

So, I'm not going to take up time on all the arguments. We stand by what we said in our written case about whether this is a decision under section 120(5) in a case where the Tribunal doesn't even register -- the case was never activated, and no extension of time was granted, and therefore it was a non-case. Now, it's true that that results in the application failing, but the Tribunal, in my submission, doesn't, on any natural construction of section 120(5), make any of the orders in that section. If the Tribunal were to prefer our wider construction of the section and to take the view that the Evans policy considerations support that construction, then the point about whether this is a decision under section 120(5) doesn't matter. And, as I've said, there's another way through.

So, that's just my response to Ms Kreisberger's submission, and where we are overall. The question that our written case raised and I won't take up time on it, is a different question, which is whether actually section 120 is engaged at all in a case where there is no effective application for review because the case doesn't satisfy the statutory time limits. It isn't an application which satisfies the rule within 25(1), and is therefore

never registered and, effectively, it never comes to life.

And the potential interpretation that we put before the Tribunal so that it could consider it is whether actually section 120 is engaged at all. And if I could just summarise that submission, I mean, really, what we say is that, on one view, in this case, there was an attempt to bring an application for review under section 120, but because it was filed out of time and because an extension of time was refused, the application never existed in a legal sense, in a formal sense.

So, that would be the argument. And as I said at the outset, we're not pressing that argument. And indeed, we thought it was important to put forward the alternative interpretation under section 120(1) so that the Tribunal has the full range of interpretations to consider.

THE CHAIR: You say, on one view, there was an attempt to bring an application, but the application never existed in a formal sense, with the consequence that section 120 -- the question you raised is whether the section is engaged. How do you deal with the Somerfield conundrum?

MR WILLIAMS: Well --

THE CHAIR: I mean, on this hypothesis, I appreciate you're, as it were, acting as a contradictor, so that I've got the range of --

MR WILLIAMS: Well, I think all one can say is actually that this point wasn't really tested in Somerfield. Everyone received it on the basis that there was a right of appeal. It wasn't argued that there wasn't a right of appeal for this reason.

THE CHAIR: But if that were the correct construction -- I think it's the point you make in your written submission, once the extension has been granted, there are live proceedings, even if the Court of Appeal subsequently holds that the extension shouldn't have been granted, and that's within the right of appeal on this alternative construction.

MR WILLIAMS: I think at that point, then, one would run into almost a pure question of legal policy, which is that if one arrives at a conclusion where there is a right of appeal in respect of a decision to grant an extension of time, because at that point, the legal inability point falls away, would Parliament have intended the statute to have worked in a way where there were asymmetric rights of challenge? And we've said in our written case it probably wouldn't.

THE CHAIR: Yes.

MR WILLIAMS: So, I can see that if you follow the logic in that way, sir, it does lead you back to a construction of the Act in which the right of appeal lies.

THE CHAIR: Yes. And you would get there by saying that, in this case, Aramark applied to the Tribunal for a review. The Tribunal declined to register the application because it was out of time, and took a decision that it wouldn't grant an extension and one would, reading subsection 6 broadly, say that that's a decision --

MR WILLIAMS: Under this section.

THE CHAIR: -- under this section, that's helpful.

MR WILLIAMS: So, those are the points on jurisdiction. There was only one other practical point to make, which I'm not going to take up time on, but we've made the point in our written case that this is an application for an extension. It is a curious form of application in the sense that the applying party comes to court. It's not strictly an inter partes application. And one gets that, I think, quite clearly from the decision on the costs issue in Somerfield.

THE CHAIR: Yes.

MR WILLIAMS: And, so one can characterise the application as an application where one party comes to the Tribunal and tries to satisfy the Tribunal that the test is met. And there are other applications of that nature that come to the Tribunal, for example, applications for warrants, for example. And in that situation, if the Tribunal refuses

a warrant, the route of challenge is judicial review, in which the defendant is the Tribunal, because what's happened in that case is that a single party has come to the Tribunal in non-inter-partes proceedings and asked for a ruling. So the route of a judicial review in the context of that kind of application, it would be consistent with what one sees in other parallel sorts of cases.

Now that's a different point from the point about the construction of the Act, but we simply make it as a point about how the nature of the application, how this all fits together.

THE CHAIR: Yes. No, that's helpful.

MR WILLIAMS: So, unless there's anything else, sir, I just thought it was helpful to wrap those points up.

THE CHAIR: It's helpful, Mr Williams.

Ms Kreisberger, is there anything you wish to pick up on this issue before you move on to the grounds?

MS KREISBERGER: I think I've largely addressed these points.

I think I just made two brief observations on the approach that I'm submitting. It just cuts through all of this. It is a very straightforward application of direct guidance given by the Court of Appeal. It's not only guidance, they are applicable legal principles as to the approach. Lord Justice Green says, in terms, the language "as to" presupposes some connection between the point of law and damages, but that connection doesn't need to be close. We say precisely the same approach should apply here when you're construing, sir, the phrase "a decision under this section". And I think it's pretty clear from everything Lord Justice Green says, the fact that the application has not been formally served is no bar to there being a route to appeal. And, as far as the facts of this case are concerned, he makes also very clear that a decision which brings a claim to an end is within the jurisdiction of appeal and that is the position which you have to

determine, sir.

So, you summarise perfectly my submissions on subparagraph 5. It is an aid to construction here, because the refusal to extend time does dispose of the application. So, section 120(5) is an aid to construction here, because it's very clear, then, that it's the type of decision that's within the scope of subparagraph 6, but it's not a necessary condition. And I do want to make clear, that's my submission, that 120(5) doesn't impose a limit on the scope of subparagraph 6.

That's all I was proposing to say.

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

Submissions by MS KREISBERGER

MS KREISBERGER: Thank you, sir.

With that, I will move on to the grounds of appeal. Just in terms of timing, I will take the two grounds of appeal in turn. I may spend a little longer on the first sub-ground, so that shouldn't be taken as the approach I'll take to the remaining ones. I'm going to focus a little bit on the first. I'm taking them out of order.

I should say there's nothing between us on the test. We agree with the response from the CMA on that, and I need to show you, sir, that our grounds are arguable and have a realistic prospect of success.

Beginning with ground 1, but sub-ground (b), that is set out at paragraphs 13 to 19 of the written permission application. I should say, just in case it's of assistance, we have prepared a version of the written permission application which includes references to the supplementary bundles. The CMA have this. I'm not going to refer to that, but it may be helpful after the hearing, sir. It just has all the references to these four bundles.

THE CHAIR: Thank you.

MS KREISBERGER: Sub-ground 2, at paragraph 13, is the Tribunal's finding that

Aramark, the client, bore responsibility for the missed deadline. Aramark's submission, with respect, sir, is that the Tribunal made errors of law, both where it determined that Aramark, the client, was culpable and where it went on to rely on that determination to find that there were no exceptional circumstances.

The relevant passages of the judgment are paragraphs 91 to 93, and they're at the supplementary hearing bundle at tab 25, page 237. It's internal page numbering 41. Also paragraph 97 on the next page.

There are three relevant findings contained in those passages. The first is that the solicitor error was compounded by Aramark's provision of comments on Thursday afternoon. One finds that at paragraphs 91 and 97. One could describe that as a factual finding - compounded.

The second finding, at paragraph 92, was that Aramark was therefore also responsible for the late filing, along with its solicitors. The language in the judgment, sir, is that the Tribunal cannot hold that Aramark had no responsibility. It's a double negative. That could be the legal characterisation, as it were.

THE CHAIR: Yes.

MS KREISBERGER: I'm sorry, sir. That's at paragraph 92.

THE CHAIR: Yes.

MS KREISBERGER: "It's in these circumstances I cannot hold".

Then --

THE CHAIR: I would have said that's a negative rather than a positive finding.

MS KREISBERGER: Yes. It's a double negative. "I cannot hold that Aramark had no responsibility", I think, is equivalent to saying Aramark had responsibility; and there are other references in the judgment which underline the attribution of blame, as it were, to Aramark, particularly in the surrogacy section. I can show you those if it would be helpful.

THE CHAIR: Yes. It would be helpful if you could show me what I said, because - I'm very conscious the reasons will stand as they are, but I think CMA's response makes the point -- or their reading of it was that in the context of a submission that, I think, Ms Kreisberger, you made about the question of whether someone was or wasn't blameless being an aspect of justice. I think the CMA have read these remarks as a, as it were, a non-finding: an inability to find that Aramark was blameless.

MS KREISBERGER: Yes. That is the language in paragraph 115.

THE CHAIR: Yes. Yes, but I would welcome it if you could draw my attention to any of the passages that you wish me to look at.

MS KREISBERGER: The language at 115, which is at page 49:

"As I have explained in paragraphs 91 to 94 above, I cannot hold that Aramark itself had no responsibility for the fact that the Notice was filed on [the] 13th ..."

My submission is that is equivalent to saying that Aramark did have responsibility.

"I cannot accordingly hold positively on the evidence before me that Aramark was entirely 'blameless' ..."

I'll come back to the evidential point, but that is equivalent to saying, "On the evidence before me, Aramark was not blameless". In other words, it bore blame.

Then going back up to paragraph 97, sir -- so that's the third finding -- the judgment goes on to conclude that there are two reasons. The reasons why Aramark failed to meet the deadline were the solicitors' mistake as to the counting rule, and the departure from the internal plan to file on the Thursday, which arose because of the client's comments. You went on to find that together those reasons are not exceptional circumstances such as to justify an extension of time.

We see there the conclusion that the facts don't satisfy the exceptional circumstances test depends on the finding that Aramark caused the delay. So if it was wrong to attribute blame to Aramark, to refuse to hold it blameless, then the conclusion that

there were no exceptional circumstances can't stand, because it depends, it hangs on that finding.

My overriding submission, and it's set out in the written permission application, is that holding Aramark responsible for the delay because it gave comments on a call on the Thursday is to mistake causation for culpability. If I could, sir, with your permission, develop that submission, by focusing on three reasons why we say that's the error.

The first reason is that Aramark conducted itself appropriately and reasonably, given that it provided comments well in advance of what it had been advised was the deadline. This was a day and a half before the deadline, bearing in mind that it's normal practice to file on the day of the deadline.

Sir, you will have seen we provided some analysis on filing practice. That's in Aramark's reply submissions on the surrogacy principle. That's in the supplementary hearing bundle at tab 7, page 56, paragraph 21(b). That analysis shows that of the 13 section 120 applications which were made in the last ten years, seven of them were filed on the day of the deadline. Curiously, an eighth application brought by a party called Tobii was filed one day after the deadline, we see. The Tribunal registry did not in that case reject the filing, and the CMA didn't challenge it. We've looked at the timing. We've double and triple checked it. It's curious.

THE CHAIR: And there's no --

MS KREISBERGER: No mention.

THE CHAIR: So it was simply registered, and the point wasn't taken by (inaudible).

MS KREISBERGER: Wasn't taken.

THE CHAIR: Okay. Thank you.

MS KREISBERGER: Whereas here, Aramark's application was filed five hours ahead of the deadline as understood by all involved.

My submission, sir, is simply that this wasn't filing at the 11th hour. In fact, a five-hour

margin, in the context of a short four-week period -- it's a pretty punishing period to prepare the application -- is a comfortable buffer. In that sense, based on the knowledge at the time, filing was timeous, and it reflected a diligent approach. That in itself shows that in providing comments on a call on Thursday, Aramark wasn't in fact courting risk based on its contemporaneous understanding of the deadline.

Aramark, of course, had no idea at all that its solicitors had made this fatal counting error. I mean, how could it, given that the solicitors themselves were unaware? Let's just say, if Aramark had said at 4.00 pm on the day of filing, as it understood it, "We've got comments", then one can see that might be a different matter, and that might attract criticism. But really, there is nothing risky or unusual about providing comments on a call which took place a day and a half before the deadline. For your note, sir, that's recorded in Mr Miah's witness statement. The reference to that call is paragraph 3(e), and that's tab 23, page 100 of the supplementary hearing bundle.

Actual events show that Aramark's conduct didn't jeopardise what it understood to be the deadline. That's my submission.

My second point is that -- and this is set out in the permission application at paragraph 17 and 18 -- it's for the solicitor team to advise the client on what should be done and when it should be done to achieve timeous filing. Aramark was not responsible for deciding how far in advance of the deadline the filing should be made, when comments should be brought to a close, or to have a working knowledge of what the Tribunal's guidance says about when it's advisable to file. These are all matters for the legal team to manage. So Aramark's provision of comments on a call the day before filing is something which Aramark can't be criticised for. Responsibility for identifying and communicating the point at which delay became impermissible lay with the legal representatives alone.

The CMA's response to this is at paragraph 24. They say, "Well, no one is suggesting

otherwise", and this is, I quote, "a straightforward application of the surrogacy principle". But, sir, with respect to Mr Williams, that misses the point entirely, because this sub-ground addresses the Tribunal's determination that not only was Simpson Thacher to blame for the missed deadline, but Aramark was responsible as well. That obviously has nothing to do with surrogacy, because it's not an example of the Tribunal fixing Aramark with its solicitors' mistake. It's a finding, a distinct finding, of an error by the client itself, which we say is wrong in law.

That brings me to my third and last point on this sub-ground. The judgment comments at paragraph 92 -- this is the evidential point, sir -- that Aramark did not adduce factual evidence to explain why it had provided comments on Thursday, or on whether the risks of doing so were considered. The CMA hone in on this point as an insuperable obstacle to any appeal.

The short answer, in my submission, is that the reasons why Aramark provided comments on a call on Thursday are simply not material to the analysis. The Tribunal makes the positive factual finding at paragraph 97 of the judgment, based on the evidence before it, that Aramark and its solicitors were earnestly working to comply with the deadline as they understood it. Having a call at 2.00 pm on Thursday, we say, was consistent with earnestly working to that deadline, as demonstrated by the early filing on the next day. For the same reason, there was no need to consider the risks of having a call at 2.00 pm on Thursday. With respect, the suggestion does have an air of unreality, because given that the solicitor team were thoroughly unaware of their mistake, as necessarily were their client, there was simply no reason for that call to ring alarm bells. It's ordinary practice.

For those reasons, we say it is at the very least arguable that the Tribunal's finding on the culpability of Aramark, the refusal to hold Aramark blameless, was wrong in law and has a real prospect of success.

Sir, if I could move on, unless you have any questions on that, to the first sub-ground under ground 1. I was going to deal with this very shortly indeed. This is the Tribunal's -- I'm so sorry. Yes.

THE CHAIR: Yes. Sorry. If I could just make sure I've got clearly in my mind: what is the error of law that you say I made, or the Tribunal made, in -- obviously for it to be an error of law, there are certain ways in which one can go wrong in law.

MS KREISBERGER: Yes.

THE CHAIR: I would be interested if you could just help me with specifically how you say that finding was an error of law.

MS KREISBERGER: Yes. I'm grateful for that.

I come back to the three findings I began with.

THE CHAIR: Yes.

MS KREISBERGER: We do not attack as an error of law the finding that the solicitor error was as a matter of fact compounded by the provision of comments on Thursday afternoon. We understand that as a factual finding. But we then say it's given legal characterisation at paragraph 92 of the judgment, which I will just pull up, where, sir, you held, "I cannot hold that Aramark itself […]" that is equivalent; the wording is equivalent to a finding of responsibility of attaching blame to Aramark's provision of comments, and paragraph 93 goes on to rely on the Tribunal guide in that respect as against Aramark. And we say that that is a legal characterisation of Aramark's conduct -- so we don't attack the factual finding -- we do say there's an error of law in holding Aramark responsible or refusing to find the Aramark was not responsible; we say they come to the same thing, but it's a finding which attaches blame or refuses to find Aramark blameless. That's an error of law, which then is material because, sir, you say, "Well, these are not exceptional reasons". That's in paragraph 97 and that's a subsequent legal finding which hangs on the prior legal characterisation. So those

are the two errors of law. Sir, does that answer the question? I showed you paragraph 115 as well, which refers back to those passages, but I'm very grateful for that because I think that that is important.

Moving on then, I was going to say very little on subground 1(a) on the Tribunal's treatment of the mistake. That's addressed in writing at paragraph 10 to 12. I don't press the point, but I would just mention again here that we have this case of Tobii, one of the 13. We obviously cannot know whether the late filing was based on the same construction of the counting rule. It is striking though that this case is not the first instance of a filing a day late, although in that instance, it was consequence free. I would suggest that in the light of your judgment, sir, we can be fairly sure that this one will be the last.

But when the CMA submitted that the rules haven't caused any practical difficulty at paragraph 49, second bullet, that may not be entirely accurate. And I just note that Mr Williams very fairly invited you, sir, to write on the issue of the interpretation of rule 112 on the basis that it may be of assistance in the future, which suggests the need for guidance -- I don't press the point too hard, but I do raise it, sir -- and in any event, you accepted that it was an honest mistake. In my submission, that sets it apart from Fish and Prater, where there was carelessness or the deliberate reversal in Somerfield.

THE CHAIR: Yes. In fact, I think during the last hearing you made a point that the very fact that I disagree with both parties, or at least have a reservation with part of the submission -- not that it's an aspect that affects this case -- suggests that the rule may be slightly more complex.

Just on the point you have just made, though, the CMA make a point about your characterisation of "absence of carelessness", and I would be interested to have your response on that point. I think they take issue in their written submission with your

submission that what happened here didn't involve carelessness.

MS KREISBERGER: Yes. Sir, my response to that is: it's set out in your judgment. I may just need to find the paragraph, but sir, I think you accepted that minds were applied. To illustrate it by way of example, if there was any suggestion that someone didn't bother to read the rule properly, then that would be equivalent to the carelessness involved in setting (inaudible) off far too late. Here, minds were applied, and the piece of evidence that I would remind you of, sir, is that, as you note in your judgment, it continued to be the approach of the solicitor team that their construction was right in the immediate aftermath of the rejection of the application, because, as I say -- and we went through this at the hearing -- there was some basis for this in the language that the rule was considered. It was misconstrued. It's very unfortunate, but it was a genuine misconstruction, not a careless construction.

THE CHAIR: Correct me if I'm wrong, but my memory is that that was also the nature of the error in one or both of the Good Law Project and the Ideal Shopping case.

MS KREISBERGER: Well, factually, they are very different cases and I think we've addressed you on that, sir.

THE CHAIR: Well, I appreciate each case is very much on its own facts and also, you might say it has a different legal regime, but certainly my recollection was that at least one of those cases was, in effect, a misunderstanding by the solicitor of the rules. As I say, I'm afraid I don't have it right in front of me.

MS KREISBERGER: I think it was the Scott & Scott case, where it concerned the difficulties affecting formal service. This is a very different context to simply misreading the effect of a rule. And again, the confusion here arose out of the two subparagraphs and how they interrelated in 112. It's a very different fact pattern from affecting formal service and, of course, a much longer period in which to achieve that as well. So I would invite you, sir, not to read across from those cases to the situation

here.

With that, I was going to move on to sub-grounds 1(c) and (d) and take those two together in the interests of time. Those are the sub-grounds which focus on the consequences for Aramark and for third parties. The relevant paragraphs of the judgment are 106 to 110, which start on internal, page 45, bundle page 241. If I could ask you, sir, to go down to paragraph 107, I'm going to particularly focus on your determination that begins:

"I am not convinced, though, that a damages action against Aramark's solicitors is an inadequate remedy for the loss of the opportunity to challenge the Decision. Aramark's interest is essentially commercial or economic. The assessment of Aramark's loss, by reason of the loss of that opportunity, may raise complex questions, but Courts routinely assess damages in situations of complexity and uncertainty, including, where appropriate, by reference to the loss of a chance".

And my submission there is, sir, that there are three errors here. The first, with respect, is that this finding sidesteps the question of adequacy. So it is of course right, sir, as you observe there, that a court presented with a negligence claim will do its best to quantify the party's loss. But the fact that the court will attempt to do so is not the same as saying that any compensation would be adequate. My submission there is that it's an analytical error to treat the former, the possibility of quantification, as equivalent to the latter, adequacy. You will have seen that we set out the various types of losses which were sustained by Aramark at paragraph 25 of the application and, we say, for many of those that the damages award would be a poor recompense.

Now, sir, the courts routinely recognise precisely that difficulty of quantifying damages when they grant an interim injunction on the basis that it would be unjust to leave a party to a claim to damages. Now, if I may show you a single paragraph in a Court of Appeal authority on the point, it's in the supplementary authorities bundle,

tab 31 and the case is Bath and North East Somerset District Council. This is, of course, English law, but the proposition I'm going to show you, sir, is not controversial. The facts needn't detain us. It concerned an injunction requiring an incumbent contractor to allow a second contractor onto the construction site to carry out some remedial works.

THE CHAIR: Before you go on, Ms Kreisberger. I don't have it in the bundle that I have in front of me here.

MS KREISBERGER: We have copies if --

THE CHAIR: If you've got one handy, that would be helpful.

MS KREISBERGER: I'm grateful. It should have been added as tab 31, I think.

THE CHAIR: Okay. That's absolutely fine.

Mr WILLIAMS: (inaudible)MS KREISBERGER: It was too late for me as well. I'm grateful for that.

That's the case. So, as I say, it was an injunction application to require a contractor to let another contractor onto the construction site to carry out remedial works to the work that the first contractor had done. The incumbent contractor opposed the injunction and argued that damages would be an adequate remedy, and in that case, there was a liquidated damages clause in the agreement, and they said that that would be sufficient.

Could I just show you paragraph 16 of the judgment. That should be on page 667 if it has been paginated. This is the judgment of Lord Justice Mance, as he then was, and he says this:

"I would only add that the fact that difficulty of quantification is an acknowledged basis for treating damages as an inadequate remedy means that the court recognises, when deciding whether to grant an interlocutory injunction, that it can be unjust to leave a party to a claim to damages which the court would if necessary have to quantify.

The court may in other words be sufficiently lacking in confidence about its own ability fairly and adequately to quantify damages after the event to prefer to grant an injunction." [as read]

It then goes on to talk about the liquidated damages clause as also being "rough and ready".

So, sir, coming back to the judgment, Aramark's submission is that in deciding whether there were exceptional circumstances, the Tribunal's assessment should have taken into account that it would be unjust to leave Aramark to fall back on a negligence claim, given the likely inadequacy of any damages award. But, sir, the judgment does the opposite thing; rather than treating inadequacy of damages as a matter in favour of finding exceptional circumstances which justify an extension, the Tribunal, we say, erroneously treated it as a matter pointing in the other direction, a matter against granting the extension.

So that was the first of the three errors and the second, we say, is that it was an -- I'm sorry, yes --

THE CHAIR: No, not at all. I'm just thinking about the point. (Pause)

In your submission, would this point be inapplicable, or equally applicable or -- you might say, perhaps I shouldn't even consider it - to other types of orders that the CMA might make? I mean, here we're very focused on our divestment decisions. And you understand the different categories of loss, or the list of categories of loss that you set out in your written submission. Would you say that this point about difficulty of quantification is unique to divestment decisions, or would you not advance the submission to that effect on the basis that we're not really concerned with any other types of decisions in this case? Or would you want to make a different submission?

MS KREISBERGER: I would make that latter point, sir, that I really do only have to address the facts before you. I wouldn't put the submission on a generalised footing.

I'm certainly not making a submission about every divestment case either.

But on the facts here, and it might just be -- we'll come to third party in a moment. If we turn up paragraph 22 of the written submission application that is on page 10 of the supplementary. We set out there the types of losses that Aramark will face as a result of this divestment remedy. For instance: the loss of an established UK business and workforce, loss of synergies and economies of scale, losses associated with a fire sale, disruption to the existing business, damage to customer relationships and, really, reputational harm; all of which arise out of the fact that this is a divestment remedy.

So we say, "Yes, it should". My submission is: it should have been weighed in the assessment as a factor which militates in favour of the extension. Rather, it was discounted on the basis that damages weren't accepted as inadequate so it went into the wrong side of the scales, as it were, which we say is an error of law, an error of approach and it does arise out of the nature -- it's worth saying that divestment remedies are still pretty rare and I'll remind you, sir, of the numbers in a moment, but it's not a floodgates point, given that assessment remedies are the most intrusive and are still quite rare. So these points are limited to this type of intrusive remedy.

THE CHAIR: Yes.

You made a point a moment ago about this particular case -- my recollection of the hearing, but you will correct me -- is that this point was approached very much on, as it were, simply on the basis this is a divestment remedy, and that's the most intrusive type of remedy. I don't recall being given, as it were, factual material specific to this case.

MS KREISBERGER: No, no. It flows from the fact of the nature of the business, of divestment in the offshore catering context.

THE CHAIR: Yes.

MS KREISBERGER: Sir, we say that the second error was to minimise or, perhaps dismiss, the impact on Aramark as essentially commercial. And what we say here is that it overlooks the fact that if the divestment is unlawful, it violates Aramark's rights under article 1 of the first protocol, which is of course a fundamental right. Now, it is, of course, right that the judgment does make reference to what I, if I may, refer to as A1P1, at paragraph 107 of the judgment.

But where we say the error arises is that this factor isn't given any weight in the assessment of exceptional circumstances. Rather, it's rejected at paragraph 107.

Now, while the Tribunal's observation in that part of the judgment that Aramark's rights are only infringed if the CMA's decision, if the remedy is unlawful, the Tribunal's observation there is, of course, right. But my submission is that's not a reason to refuse the extension. Rather, it's a reason which goes the other way, it's a reason to grant it, because it's only by permitting Aramark's challenge that the answer can be known, and a potential violation of its rights avoided. So that's what we say is the second error.

The third error is that a negligence claim cannot restore the position of third parties.

THE CHAIR: Just before you move on to that one, and again, because I'm concerned here with a statutory test of exceptional circumstances, do you say that the engagement of A1P1, that that distinguishes this case from other cases? And which types of case does it --

MS KREISBERGER: Yes. So, clearly it, again, is inherent in the nature of the --

THE CHAIR: Yes.

MS KREISBERGER: But this is full unwinding. There are, of course, weaker versions of this that arise. This is full unwinding. But could I make this submission, sir. The test of exceptional circumstances does not depend on uniqueness. So, I can't say to you, sir, this is a unique set of circumstances that will never arise in any other

divestment case, but that is not a bar to a finding of exceptional circumstances. And that would be the wrong approach, so we say these are all matters which arise here.

THE CHAIR: And you would say that if they arise in other cases, then those cases equally are exceptional.

MS KREISBERGER: So be it. Although, as I mentioned, you may take a different approach to the mistake in a future case, matters move on.

But in this case, coming back to what will be my last point on this ground, it's the combination that matters. Here, the far reaching effects for the sake of a few hours, we say is exceptional. Never been considered before. And I'm reminded that, in terms of remedies, there's a sliding scale. And this is, as I said, full unwinding. It's right at one end of the scale.

THE CHAIR: Yes.

MS KREISBERGER: And, sir, I think you have that point. We've made that point.

THE CHAIR: Yes. Thank you.

MS KREISBERGER: So, thirdly, the position of third parties. We've summarised the effects in the market at paragraph 25 of the written application. Now, the judgment rejects the point. And I think, sir, it's fair to say, this is a point very much in your mind, at paragraph 107, on the basis that similar points could be made in any divestment case. And so my response to that is the same, which is that's not a reason in itself to exclude third-party effects from the assessment of exceptional circumstances.

So, as I said, these remedies right at the far end of the spectrum are still rare. In fact, this is only the 14th case in the whole period of the CMA's operation, not its predecessor. It's the 14th order for full unwinding. So, still rare, but in any event, my submission is the fact that consequences for third parties cannot be unwound is material because it shows that damages won't restore the position, and the effects on third parties will become irreversible. Again, the submission is that should have

weighed in the balance in finding whether there are exceptional circumstances to justify the extension.

Sir, just aware of the time. Would you like a transcriber break?

THE CHAIR: Yes. I'm very sorry. Thank you for reminding me. We'd maybe better take a short break. How long do you think you're going to be?

MS KREISBERGER: It will be about 10, 15 minutes, I would hope.

THE CHAIR: Great. That's fine.

MS KREISBERGER: I've got the last subground which I can deal with on ground 1. And then surrogacy, which I won't address you on at length.

THE CHAIR: Yes. And if Ms Kreisberger takes 10 or 15 minutes.

Mr Williams, we could take quarter of an hour now and --

MR WILLIAMS: There won't be a problem.

THE CHAIR: And finished by lunchtime. Yes, yes. Thank you. Okay. Well, let's take quarter of an hour. Thanks very much.

(12.02 pm)

(A short break)

(12.15 pm)

THE CHAIR: Yes. Thank you.

MS KREISBERGER: Thank you, sir.

I was on the last subground of ground 1 on the holistic nature of the assessment under rule 25(3). It's addressed at paragraphs 26 to 27 of the application.

The objection is not that the various circumstances relied on by Aramark don't feature in the judgment; they do, and that seems to be the CMA's point. Aramark's objection is that they're each addressed separately, with the reasons for missing the deadline being treated as largely determinative. So, Aramark submits, respectfully, that what's missing is a truly cumulative approach that weighs the unfortunate, honest mistake

made by the solicitors against the short extension required, the irreversible harms to Aramark and the market, and the absence of any practicable effect on the litigation timeline.

So, the submission is that's an error of approach, and it has a realistic prospect of success. That's all I was proposing to say on that, sir.

So, then, moving on to surrogacy. Sir, you'll be relieved to hear I'm not proposing to take you to any of the authorities, and I know you're well familiar with them by now, as we all are. But I would just draw out three principal reasons why we say the Tribunal should permit an appeal on the surrogacy principle.

The first is this is the first time that the Tribunal has considered and applied the surrogacy principle, either under rule 25(3) or at all or otherwise. Now, in doing so, the judgment makes a determination at paragraph 114, as follows:

"In proceedings to which rule 25 applies there are compelling considerations of legal policy for proceeding, as a general rule, on the footing that errors made by a solicitor will be imputed to the client."

Now that's a generalised finding, and we submit it inevitably has implications for future cases. And it may have the practical effect that cases involving solicitor error will generally be found incapable of meeting the exceptional circumstances standard.

So, given the absence of authority on the point, my submission is that's a good reason, it's a compelling reason in itself for an appeal court to consider the Tribunal's finding on legal policy, on the correct approach, and on the scope of the principle in this context.

THE CHAIR: Is it implicit in that submission that you contend that it is not the case that there are compelling considerations of legal policy for proceeding generally on the basis that surrogacy principle applies when we're dealing with rule 25 cases?

MS KREISBERGER: My submission is the narrower one that it was unjust to apply

the surrogacy principle here. But given that this is a generalised finding, it's appropriate, we say, for the appeal courts, the Court of Session, to look at that, because it will inevitably have implications beyond this case. And it will no doubt be a matter for argument.

THE CHAIR: Yes. Thank you.

MS KREISBERGER: Thank you, sir.

The second point I can deal with very briefly. It's based on paragraph 115 of the judgment, which I showed you earlier. It applies the surrogacy principle on the basis of the prior finding that Aramark could not be held blameless. And the CMA points this out in its response. Sir, so, simply that means that if you are with me, that Aramark's prior ground of appeal on the point is arguable, then so must this ground be, since it rests on the same determination. And the same point goes for adequacy of damages, which is also relied on in this paragraph.

Thirdly, and this is my last point today, Aramark submits that it's at least arguable that the Tribunal misconstrued the scope of the surrogacy principle as it applies in this context. Now, the judgment interprets the proposition drawn from the authorities that the client will not be fixed with the solicitors' error where to do so would be unjust. The judgment interprets that as being confined to cases involving Article 6 of the ECHR, and therefore inapplicable here.

Now, Aramark's submission is to the contrary: that the Tribunal should have considered whether applying the surrogacy principle to refuse to extend time would produce injustice on the facts of this case, and the basis for that submission, that it should have considered injustice, is twofold.

The first reason is, as I've already addressed you, sir, fundamental rights are at stake here. And given that if unlawful divestment infringes Aramark's right to peaceful enjoyment of property in the most far-reaching way, compared to any other remedy

which could have been imposed, and the distinction which the Tribunal draws in this regard between natural and corporate persons, the judgment uses that distinction to distinguish those authorities where clients weren't fixed with solicitor error, we say that distinction overlooks the fact that fundamental rights -- different fundamental rights, but fundamental rights -- are an issue in each type of case. So, that's the first basis for saying here the question of injustice arises.

The second basis is that what the authorities do focus on is the severity of the consequences for the client. So, Aramark's submission is that the tribunal fell into error at paragraph 115, where it dismisses the impact on Aramark as essentially economic and commercial. Sir, we say that's an error because the consequences for Aramark are severe; they are irreversible; and if the remedy is unlawful, it does violate its rights. And on that basis, this case is factually far closer to the line of cases involving professionals, like the teacher in MacCallum who lost the right to practice their profession. It's closer to that than, say, a party claiming damages, which can be made whole, or challenging a penalty before the Tribunal. So, in each case, the consequences for the party militate against fixing them with the error of their legal representative.

The particular question that arises here is whether or how to approach surrogacy in the context of a divestment order, where property rights are at issue and damages can't restore the position. Now, that question hasn't been considered before by the Tribunal or the courts.

So, we say the issue for the appellate court, for the Court of Session, is whether the Tribunal should adopt the approach that's laid down in the Supreme Court authority, Court of Appeal authority, in cases such as O'Connor, FP (Iran) and Pomiechowski, where surrogacy gives way if there's injustice. And that must, at the very least, be an open question in the context of divestment, A1P1, and therefore should be considered

by the appeal courts.

So, those are my submissions on surrogacy, unless I can be of further assistance.

THE CHAIR: That's very helpful.

MS KREISBERGER: Thank you, sir.

THE CHAIR: Thank you very much, Ms Kreisberger.

Mr Williams.

Submissions by MR WILLIAMS

MR WILLIAMS: Sir, so we've put in a detailed submission on the proposed grounds of appeal, and I don't want to repeat what we've said about all the grounds, so I'm going to try and summarise our position overall, if I may.

THE CHAIR: Yes.

MR WILLIAMS: And I'm going to start with some more general observations, and then lead into the detail.

The first point to make, really only because it has no prominence in Ms Kreisberger's application at all, is that the Tribunal found, and I don't think it's an issue, that the context for all this is that the Tribunal maintains short time limits in the interests of finality and certainty, and the exceptional circumstances test is applied strictly to maintain those time limits. That's in the judgment, at 70, 73, 75. And, as I say, Aramark hasn't really engaged with that as part of this application, but it is a fundamental feature of the case. In my submission, it covers the issues that arise under both grounds.

Secondly, it is common ground that an appeal lies on a point of law, and although we're now dealing with Scots law, I don't think that the way one analyses the position differs between the two jurisdictions. What that means is that Aramark has to identify an error on a point of law, or that the Tribunal has exceeded its reasonable margin of

appreciation on a matter of evaluation.

I do just want to develop that a little bit, if I may, with reference to the Murray Group case, which we've cited in our submissions, because it is important, I think, to get a handle on what can constitute an error of law, given the wide-ranging and diverse submissions that Ms Kreisberger makes and the criticisms that are made of the Tribunal's judgment. It's in the supplementary authorities bundle at tab 7.

This is a decision on an appeal arising from, I think, the upper Tribunal, and I wanted to look at paragraphs 41 to 46. I don't know if you've looked at this. I thought you might have done, sir, so I'm not going to go through it in detail. There's some long and quite dense paragraphs, but I was going to pick up the key points, and you can tell me if you want to look at things in more detail. But this is unpacking what an error of law might be in the context of an appeal from a statutory tribunal. It runs through from 42 with four categories of error, and then some observations about the analysis of tribunal findings in the different sorts of issues.

If I could pick it up in 42:

"… [a]n appeal on a point of law covers four different categories of case. The first […] is appeals on the general law: the content of the rules. The second […] [is] appeals on the application of the law to the facts as found by the First-tier Tribunal". [as read]

Just on that point, the application of the exceptional circumstances test to the facts is an example of that. I think in Somerfield, the Court of Appeal similarly observed the application of the laws to the facts is a point of law. But there's a bit more to say about that, which I'll come to in just a minute.

Then moving on to 43, the third category of appeal is a point where the tribunal has made a finding for which there's no evidence, or which is inconsistent with the evidence or contradictory of it. This runs into a fourth category, which is cases where the tribunal has made a fundamental error in its approach to the case by asking the

wrong question, taking account of manifestly irrelevant considerations, or arriving at a decision that no reasonable tribunal could properly reach. You can see we start to bleed in something that looks a bit like a public law ground of challenge there.

So we've got pure decisions on law, and in my submission in this case it doesn't involve any pure decision on law. We've got applications of law to the facts, and then we've got what I might refer to as sub-findings, which are findings that are made on issues that then feed into the statutory test. A lot of what Ms Kreisberger wants to challenge, in my submission, are things in the third category; things like the finding that Aramark -- the double negative finding that the Tribunal couldn't find that it bore no responsibility. Really, to make that out, Ms Kreisberger has got to bring herself into these latter grounds, which are essentially irrationality-type findings, no evidence, and so on and so forth.

That's the challenge that Ms Kreisberger has got to meet. What she has done today is to some extent sort of re-argue the case, but that's the target for her, in my respectful submission.

If we can then move on to 45, and I'm not going to read these out, but I'm going to make my submission about what the paragraphs say, because you've read them, sir. It starts off saying, "Decisions of the First-tier Tribunal frequently involve elements of evaluation and judgment", and then it says that the tribunal should be slow to interfere. What it goes on to say on the next page is that there is a spectrum of decisions, some of which are more factual, and some of which are more legal.

That leads into a submission we made in our written case, but I will just repeat, because it's important, which is that whether exceptional circumstances exist is not a hard-edged point of law. It's an evaluative matter concerning the application of a broad test to the facts of the case. In our submission, there's very limited legal content in that. There is some law in relation to the surrogacy principle, but ultimately

the Tribunal's findings turn on factual matters, as I'll come to.

We do say that whether one is focusing on the sub-findings, as I put it a minute ago, or on the overall application of the exceptional circumstances test, it's really got to show that the Tribunal exceeded its reasonable margin of appreciation in making an evaluative judgment. That applies across the piece, in my submission, because that's the nature of the grounds that are being pursued.

I can't remember if I'm on thirdly or fourthly now, but moving to point 3 or 4, my overarching submission is that the evaluative conclusion which the Tribunal reached on this application was obviously open to the Tribunal, and its conclusion was in my submission clearly correct, or at least entirely reasonable, entirely rational.

The Tribunal correctly focused on the "why" question, in line with the leading case of Somerfield. That's paragraph 78 of the judgment. The essential answer to that question, subject to what I'll say in a minute about the position of Aramark itself, is that this was a case of solicitor error. As the Tribunal found at paragraph 97, a solicitor error is not an exceptional circumstance. There's a long line of case law under the CPR and the CAT to support that view, and Aramark hasn't really engaged with that. They have picked up this point about "good faith" and "careless". In my submission, that is not a reasonably arguable point, for the reasons we've given in writing. As the Tribunal found in paragraph 97, it adds nothing to a legal error to call it good faith. Legal errors tend to be in good faith, in the sense that one doesn't make a bad faith legal error.

The question is: is it exceptional? Aramark says it's exceptional because it wasn't careless, but the Tribunal found that there was no reasonable room for doubt about the reading of the rules. There is no reasonable basis for the interpretation, so in my submission, it's clearly careless, to the extent that matters. In my submission, that's not a reasonably arguable submission, given the Tribunal's clear and unchallenged

findings about the extent to which Aramark's interpretation was reasonably defensible. That's the solicitor error, and then beyond that, the Tribunal found that Aramark compounded the position by providing late comments, and that derailed the intended plan to file on the Thursday, which would have resulted in service in time, albeit unwittingly.

My submission about this is that this is really an evidential and factual matter. I won't go over the history; the Tribunal is familiar with it, but when the Tribunal got evidence from Mr Miah eventually, it wasn't what the Tribunal described as a full, specific and acceptable account, using the language of 21 of the judgment. It did show that Aramark had affected the planned time for service by providing late comments. But as the Tribunal found, the evidence didn't address why Aramark had provided comments on the afternoon on which service was intended to be made.

Now, Ms Kreisberger says, "Well, this was all in time, and why shouldn't the solicitors be speaking to Aramark the day before they thought they had to serve?" But that isn't the Tribunal's point. The Tribunal's point is: the plan had been to serve on that afternoon, and yet further comments were being provided, which resulted in a deviation from the plan. We don't know any more about that, because the evidence doesn't cover it.

The Tribunal found, on the facts and on the evidence, that it couldn't find -- it made a double negative finding -- that Aramark didn't bear any responsibility for the position, because the plan had been to file that afternoon, and then suddenly that plan fell by the wayside. In my submission, given the evidence, the Tribunal was clearly entitled to reach that finding, which was in any event a factual and evidential matter. We're back into the third and fourth categories, per Murray Group.

Really, what we see in the written case at least is an attempt to attack a strawman, which is the idea that the Tribunal is saying that Aramark can't rely on its solicitors.

But that's not what the Tribunal is finding at all. The Tribunal is saying, "I cannot make a finding, based on the limited evidence before me, that Aramark didn't bear any responsibility for the document being served late". In my respectful submission, Ms Kreisberger has not made out any reasonably arguable case that that finding wasn't open to the Tribunal applying effectively a standard of rationality, which is what it comes to.

In my submission, there is no plausible argument that the Tribunal erred in making either of those core findings relating to the "why" question, and absent any realistic basis for disturbing them, permission for ground 1 should be refused, because that's the nub of it, the "why" question.

It's true to say that ground 1 includes a number of other arguments which chip away around the edge of those core findings. In my submission, those points fail too; first of all, because they don't attack the core reasoning, but secondly, because they are also in error, or don't properly reflect the Tribunal's reasoning. I'm not going to go through this in detail, but I'm going to give you a flavour of what we say about it, which you've seen from our written case already.

The first point is about adequacy of damages and the Tribunal's view on that, the context for that finding being the Tribunal's finding that this was essentially a commercial case, where Aramark suggested it was commercial and financial. There are a couple of things to say about that. I think that the main submission Ms Kreisberger has made today is about difficulty of assessing damages, and Ms Kreisberger took you to the Bath case. In my submission, all that case does is acknowledge that in any given case, difficulties in assessing damages may mean that damages are an inadequate remedy. That's obviously an issue which arises anytime anyone ever argues an application for an injunction. Of course, there are cases where difficulties in assessing damages mean that damages aren't an adequate remedy, and

that contributes to a decision to grant an injunction; and there are cases where damages can be assessed and therefore they are an adequate remedy, and that contributes to the refusal of injunction. There's no general point of law that difficulty in assessing damages means that damages are an inadequate remedy, otherwise an injunction would never be refused.

So this isn't a point of law, in my submission. The Tribunal reached an evaluative finding that this was a case in which damages could be assessed for the commercial harm to Aramark, and although issues would arise in relation to that, there would be a remedy for the interests for the harm that Aramark suffered. That, in my submission, is not a point of law. It's an evaluative matter on the facts of the case.

Then Aramark points to other features of the case, such as the fact that the sale will be forced, and they say it will be a fire sale and so on. But as the Tribunal found in paragraph 107 of the judgment, to the extent that those points apply, it would be true in any case where a party has filed late, seeks to challenge a remedy, whether it's a divestment order or anything else, and then questions arise as to whether damages can be assessed for the harm that's been suffered.

Really, all this is is the playing out of the situation in which we find ourselves, where a party serves late, and because time can't be extended, it's confined to a remedy in professional negligence claim against its solicitors. We say that it can't be exceptional that you then flow into that channel and the issues that arise in that context would be the client's remedy. It's an inevitable consequence the Tribunal found of the application not being in time and the remedy being for professional negligence instead. It's not an exceptional circumstance; it's intrinsic to the situation. The factors in paragraph 22 of Ms Kreisberger written case are all, effectively, generic factors that would go to that assessment of damages in any case like this. Again, they're not exceptional circumstances, they're just features of the situation that comes before the

Tribunal. So none of this is exceptional, they're just inevitable consequences of Aramark missing the deadline.

Now this leads to the related question of the fact that this is a case involving a divestment order, and my submission about this is the same submission I made before the Tribunal. The Tribunal correctly asked: does the divestment remedy in this case give rise to exceptional circumstances? And the Tribunal correctly found that it didn't. The point made before is that the sorts of arguments that are made here, including the Article 1 Protocol 1 argument, is that they're all just arguments that would arise in any case involving a challenge to a full divestment order, which is the sort of remedy that tends to be challenged in these sorts of cases.

Ms Kreisberger's given some evidence about how many orders of this nature have been made, but even on her own case, there have been a large number of these remedies over in recent years. So I'm not saying that exceptional circumstances means unique circumstances. What I am saying is that the points that are being made are intrinsic to a challenge of this nature. They're not exceptional; they're just points which flow from a party who misses a deadline seeking to impose the very sorts of remedies that get imposed in these sorts of cases. I'm sorry if I'm repeating submissions I made to you in February, sir, but we say you've answered the point. That's the answer to the proposed grounds of appeal. It's not an exceptional circumstance.

The same point applies to third-party impacts. Ms Kreisberger points to fact-specific circumstances, but third-party impacts arise in any case where a party would have sought to challenge a remedy and that remedy can't be challenged. The third-party impact may be favourable; they may be unfavourable. It all depends on what the third-party interest is, but there's nothing exceptional about it. These are just inevitable consequences of the remedy being shut out because the claimants are out of time.

We say that there's nothing, really, in the critique that's made of the Tribunal's findings. The Tribunal correctly applied the statutory tests. None of the features of the case that have been identified are exceptional. The Tribunal's decision was clearly right, but at the very least, the Tribunal was entitled reasonably to reach those evaluative findings in relation to those findings, and it was entitled to reach the conclusion overall that there were no exceptional circumstances.

With respect, we don't understand the submission that the Tribunal didn't consider matters in the round. If you look at the final page of the judgment, sir, it said, "the circumstances considered cumulatively" [as read], and it specifically considers all of the circumstances in the round, and directly addresses our submission that you should consider all of those factors together, not just in silos. The Tribunal did exactly what Aramark invited it to do. Obviously, Aramark disagrees with the Tribunal's conclusion, but to say that the Tribunal has erred in law because it hasn't considered the factors cumulatively is, in my submission, not arguable at all.

THE CHAIR: I think Ms Kreisberger's point was that it is an error of approach to take each factor separately and consider those, before then turning to consider them cumulatively.

MR WILLIAMS: I don't see how it can be an error of law to consider each factor that's been relied on and say, "These factors are not in isolation exceptional, nor is the combination of them exceptional". I just don't see how that could be arguably an error of law. But in any event, where does the criticism take her if that is the criticism, because if the argument is that you should have considered them in the round, then you did consider them in the round. In my submission, if that's the criticism, it doesn't go anywhere. Those are my submissions on ground 1.

Ground 2 concerns the surrogacy principle. And, I mean, there's a short answer to some of this which I'll come to, but I'll try and deal with the submission Ms Kreisberger

made. Overall, the way this unfolded was that prompted by the Tribunal's letter on, I think, the day after the hearing. Aramark put forward an argument that it would be unjust to make Aramark carry the can for its solicitor's error when Aramark was not itself to blame for late service, and therefore, the surrogacy principle ought to be disapplied. Obviously, it was intrinsic to that argument, and it's recorded in paragraph 113 of the judgment, that Aramark was itself blameless. And that's intrinsic to the argument because the whole essence of the argument is, "You shouldn't pin their mistake on us".

Then the argument has broadly two aspects as set out in the written case. The first is that the Tribunal didn't answer the right question and didn't address Aramark's submission that it would be unjust for Aramark to bear the consequences of its solicitor error, and that, in some way, it said that the argument was confined to a situation where the application of the surrogacy principle would violate Article 6 rights.

I have to say, speaking for myself, I'm not sure I fully follow the argument, but my understanding of the position is that the whole thrust of this line of argument was that, in considering whether to fix Aramark with the error of its solicitors, this line of case law said that the Article 6 jurisprudence was a constraint on the ability to fix clients with the errors of their solicitors, and one ought to consider a number of factors before doing that in the context of the (inaudible) scheme and that line of case law.

So the case law flows from Article 6 and then, on that basis, Aramark said that it would be unjust to do so, and the Tribunal directly answered that question in paragraph 115 and it said, "In all the circumstances, I'm not satisfied, I'm not persuaded it would be unjust". So, in my respectful submission, I simply don't see any arguable error of law in that analysis, which specifically applied the framework and the test that Aramark invited the Tribunal to apply.

Now, again, you disagreed with their submission, but to suggest that you didn't apply

the test that they were inviting you to apply is, in my submission, not reasonably arguable. And the idea that in some way your consideration of the issue was constrained by the need to find some violation of Article 6, in my submission, is just not the way that the judgment is actually reasoned. So that's the overall approach.

Now the second strand of this is the argument that the Tribunal erred in failing to disapply the surrogacy principle. In my submission, there are two general points in response to that. The first is a point which did come up in Ms Kreisberger's submission towards the end, which is, as we put in our written submission to the surrogacy principle, there are two competing policy interests at stake here. One is the policy interest in favour of legal certainty and finality, and the importance of holding parties to the rules, and the need to treat solicitors as responsible for compliance with the rules in cases where they're responsible for service. And the Tribunal notes the concern that if one doesn't proceed on that basis, it's going to lead to systematic undermining of the time limits, because solicitors are obviously responsible for compliance with the rules in most cases. And the Tribunal says, as Ms Kreisberger points out, that there's a compelling policy interest in proceeding on that basis.

Now, towards the end of her submissions, Ms Kreisberger drew attention to this and said that this is an important factor which merits consideration on appeal, but when you put it to her and said, "Well, do you say that's wrong?", she didn't submit that it was wrong. She just submitted that it was something that merited consideration on appeal. Now, in my respectful submission, it's plainly not wrong to say that there is a compelling policy interest in proceeding on the basis that solicitors are principally responsible for compliance with the rules.

Now, obviously, the whole of this Article 6 jurisprudence sits against that background, and identifies that there may be cases where it would nevertheless be unjust. There may be cases where it would nevertheless be unjust to fix the client with the error of

the solicitor, but there clearly is a policy interest which Ms Kreisberger doesn't seem to challenge in starting from the position that the rules need to be complied with. And in my respectful submission, Aramark can't really try and overturn the Tribunal's reasoning on this issue without grappling with that side of the scales, if I can put it that way. There clearly is that policy interest and the issues there need to be considered against that background.

THE CHAIR: Yes. As I understood it, Ms Kreisberger was putting that as one of three points and really to, I suppose, perhaps illustrate a broader point that neither the Tribunal or the appellate courts have had to consider this particular principle and its scope in this context. At least that's how I took her submission. I didn't understand it to be, as it were, a sort of freestanding point that the Tribunal had gone wrong in identifying that general policy approach.

MR WILLIAMS: And I think I'm making a point building on that, which is that the point is in my submission, it's unchallengeable, which is why it's not challenged.

And then one has to consider the application of the surrogacy principle in this case, and whether the Tribunal arguably erred on the basis that there is such a policy interest.

That leads me to the second point, which is that it was critical, as I've said already, to Aramark's submission on this ground that it was blameless. That was the submission. But for the reasons I've already given, Aramark failed to make out that submission as a matter of fact, and on the evidence. The Tribunal decided that it couldn't conclude Aramark was blameless, in large part because of the limitations of Aramark's own evidence, paragraph 115 of the judgment. And that isn't a point of law. It's a matter of factual evaluation. I've already made the submission, and in my respectful submission, there's no credible basis for trying to reopen that factual evidential finding in the context of this case. And unless Aramark can reopen that finding, its whole

submission on the surrogacy principle doesn't get off the ground because it was fundamental to the submission that it was blameless, and that the error was entirely that of the solicitor.

There are some other points under this ground. Aramark's replayed some of the other points about adequacy of damages, I've already addressed those. My answer is the same in the context of the surrogacy principle. But just pulling that together, the case ultimately boils down to two things. First of all, this is an orthodox case of solicitor error, which isn't exceptional. And if I add that none of the features of the case which flow from a solicitor error in failing to file merger proceedings were exceptional either. And secondly, it's a product of factual findings which are themselves a reflection of the evidence and the limitations of the evidence that Aramark itself adduced. So, we say that the appeal is not reasonably arguable, and given that that's the bottom line, there's no compelling reason for the Tribunal to grant permission either. And we have made the point in our written case that it is actually highly undesirable that matters are dragged out further if there aren't meritorious grounds of appeal, and the desirability of getting on with the remedies process is itself a compelling reason for permission to be refused. So, we actually say that consideration goes in the opposite direction.

So, there are good reasons why, if the Tribunal doesn't think that the grounds are reasonably arguable, it shouldn't grant permission to appeal because one is then moving to a compelling reasons point. We said there are no compelling reasons if the grounds aren't arguable; there are strong reasons to get on with implementing.

THE CHAIR: Yes. On the second point, you know, in a sense, does it actually have any weight at all? Because if I were to conclude that the grounds were reasonably arguable with real prospects of success --

MR WILLIAMS: it can’t neutralise a reasonably arguable appeal.

THE CHAIR: Yes.

MR WILLIAMS: That's not a balance of convenience test. I'm not saying that. No, I'm just saying if they haven't persuaded you on the merits and you're getting to, "Is there a compelling reason?" I think I'm entitled to make the point at that stage.

THE CHAIR: Yes. You put that in the context of her submission that even if I were to take the view that the grounds were not reasonably arguable, nevertheless, there was some, as it were, broader reason why an appeal court should be allowed to look at this case, it being the first case of this sort that --

MR WILLIAMS: Tribunals and courts sometimes say, "Actually, I'm not persuaded you've got grounds of appeal. This point is of such general importance. It should go up".

THE CHAIR: And you say, in that context, it would be at least legitimate to bear in mind the fact that you've just identified. Okay. Thank you.

MR WILLIAMS: So those are my submissions.

THE CHAIR: Okay. Thank you very much, Mr Williams.

Ms Kreisberger, anything you would like to pick up on?

MS KREISBERGER: Actually, I was just going to respond to your question, sir, which was about Good Law Project and Ideal and the difference -- that was the only point I was going to come back on.

THE CHAIR: Just before you do that, though, do you have any observation on whether the last point that Mr Williams made is something that I should take into account at any stage of this process?

MS KREISBERGER: I struggled a little to follow, if I'm honest, that last piece.

THE CHAIR: I think his point is that, you know, assuming, if I were to take the view there were no reasonably arguable grounds of appeal, I shouldn't be tempted to say, "but this is a kind of case that the court, the Tribunal has never had to deal with before. Therefore, let's allow the appeal court to look at it anyway". And he says that if you

get to that point, then I should bear in mind that there is a public interest in drawing a line and allowing the remedies process to take its course.

MS KREISBERGER: Yes, and that's a point they make in their written response.

THE CHAIR: And I suppose I'd just be interested whether you have any submission as to whether that would be a legitimate consideration or one that I should leave out of account.

MS KREISBERGER: The response I had to that, sir -- and thank you, I'm grateful for that -- is that the CMA submission comes down to saying the appeal would risk delaying the implementation of the merger remedy, but of course it's the CMA's position that it's going to press ahead with the final order on divestment irrespective of the appeal process. Now, Aramark doesn't agree that that's the right approach, particularly given that there's a whole separate undertaking in place, and so on. But, on the CMA's case, they're proposing to press ahead, so there's a tension in the CMA's submission here and their approach actually in the investigation, which is to order divestment.

THE CHAIR: Okay.

MS KREISBERGER: It also bears noting, sir, that we're all grateful to you, sir, for raising the surrogacy principle in the first place, otherwise it would never have been ventilated in fact. So, it is something we say that it's appropriate to go up. It's an important point, of which many were unaware hasn't been raised before in the Tribunal.

Just very briefly, just to give you the references, sir. So, the submission that I make is that Good Law Project and Ideal Shopping are truly cases of carelessness. In Good Law Project, the solicitors were told by the defendants what the correct email address was for service, but failed to send the claim form to that correct email address. And the first instance judge described that as a careless mistake. For your note, that's

the original authorities bundle, it's bundle 7. The bundle at the back of that bundle tab A, page 7, paragraphs 13 and 14. So that's Good Law Project. And Ideal Shopping, the key point there, it's at paragraph 14 of that judgment, was that the requirement for service of the sealed forms "didn't occur to the solicitor", that's a quote, and, it's not clear if she checked was the finding.

Now, the forms of carelessness in those cases, we say, have nothing in common with the mistake here, which, as you know, we say was not carelessness, but was a genuine misconstruction about how to understand the two subparagraphs together. It was a positively made misconstruction of the counting rule.

So, we say that the Tribunal shouldn't hesitate to distinguish Good Law Project and Ideal Shopping.

MR WILLIAMS: So, on that point, I meant to mention Fish, as a case, which was a case about the interpretation of the Tribunal rules. You probably remember that.

THE CHAIR: Yes.

MR WILLIAMS: So, Fish is a case which is probably more like this case in the sense that the rules stated the address for service, but said all such other address as there is, and it appeared that the solicitor had misread the rules and proceeded on that basis. I just meant to mention that as a case a bit closer to home, sir.

THE CHAIR: Yes. Thank you.

MS KREISBERGER: I have nothing further in reply, sir.

THE CHAIR: Thanks, Ms Kreisberger.

Well, I'm very grateful to counsel for the written and oral submissions, and indeed for all the work that's gone on, on the part of others in preparing this application.

I'm going to reserve judgment, but I'm very conscious of the desirability of an answer being with you just as soon as I am able to produce it. So, I hope to be able to deal with that over the next few days.

MS KREISBERGER: I'm very grateful.

THE CHAIR: Thank you very much.

(The hearing adjourned)

(1.02 pm)

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?