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

Case No. 1277/1/12/17

Victoria House,  
Bloomsbury Place,  
London WC1A 2EB

14 June 2017

Before:

**THE HON. MRS. JUSTICE ROSE**

(Sitting as a Tribunal in England and Wales)

**BETWEEN:**

**(1) BALMORAL TANKS LIMITED**  
**(2) BALMORAL GROUP HOLDINGS LIMITED**

Appellants

- and -

**COMPETITION AND MARKETS AUTHORITY**

Respondent

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Mr. Robert O'Donoghue QC (instructed by K&L Gates LLP) appeared on behalf of the Appellants.

Mr. Rob Williams and Mr. James Bourke (instructed by CMA Legal) appeared on behalf of the Respondent.

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**PRE-TRIAL REVIEW**

1 THE CHAIRMAN: Good morning, ladies and gentlemen. Mr. O'Donoghue?

2 MR. O'DONOGHUE: Madam Chairman, good morning. Very quickly, the line up:

3 Mr. Williams for the CMA with Mr. Bourke. I am here on my own. My solicitor is behind  
4 me, and CMA Legal Service and other personnel are behind Mr. Williams and Mr. Bourke.  
5 Madam Chairman, this litigation so far has been a model of efficiency and proportionality,  
6 because of course this is the first time we have had the pleasure of seeing you in this case. I  
7 am glad to report that today there is not much of substance between us. There are  
8 essentially a couple of points, and we hope they can be dealt with very quickly.

9 The two points, subject of course to anything the Tribunal wishes to add - they are separate,  
10 but, of course, in a sense they are related, so there is a question of overall trial timetable,  
11 and then there is a particular question about the viewing of the DVD, which of course bears  
12 on, to some extent, the trial timetable.

13 If I could take them in that sequence, my overall submission is that, as a matter of  
14 impression and common sense and proportionality, bearing in mind their case is about part  
15 of one meeting, the idea that, as a general matter, we would have a four, possibly five day  
16 hearing to deal with this, in my submission, is lacking in common sense and proportionality.  
17 In particular, on the cross-examination of Mr. Joyce for one day - just to put that in  
18 perspective - that would involve double the period for cross-examination of what they say is  
19 the relevant duration of the meeting. That seems to me extraordinary, again as a matter of  
20 impression and common sense and proportionality.

21 THE CHAIRMAN: Is it just Mr. Joyce giving oral evidence?

22 MR. O'DONOGHUE: It is also Mr. Snee, who is giving evidence for the CMA, who was one of  
23 the other attendees at the meeting. I think that can be done within half a day, and by parity  
24 of reasoning and common sense, there is no reason why they cannot be done with Mr. Joyce  
25 in a similar time.

26 For what it is worth, Madam Chairman, and you may have picked this up, Mr. Joyce was  
27 cross-examined in the criminal trial, and it was for half a day or less. So we simply do not  
28 understand the basis on which they would need a day for him. We do not understand, more  
29 generally, why they need four, potentially five days for this hearing. It is the kind of  
30 approach, frankly, that gives litigation a bad name. On their case it is about one meeting.

31 THE CHAIRMAN: Are there rival timetables that I can look at, that have allocated the different  
32 parts of the day to different---

1 MR. O'DONOGHUE: Madam, yes. Our proposal is set out at para.15 of our skeleton, and the  
2 CMA's proposal is on p.2 of their letter of 12<sup>th</sup> June. Would you like me to hand up a spare  
3 copy, you seem not to have some of the documents? Starting with my skeleton----

4 THE CHAIRMAN: That is the Balmoral skeleton, where is the CMA skeleton?

5 MR. O'DONOGHUE: The CMA does not have a skeleton, it was simply correspondence. Do  
6 you have that?

7 THE CHAIRMAN: Yes. The CMA suggests four days, including half a day for preparing  
8 closings.

9 MR. O'DONOGHUE: Well, potentially five, because they say, "We think it would be prudent to  
10 hold Friday in reserve", so potentially five days.

11 THE CHAIRMAN: Where is the Balmoral suggestion?

12 MR. O'DONOGHUE: It is para.15 of our skeleton. Ours is very straightforward. One day in  
13 terms of openings, half a day for the DVD, one day in total for cross-examination, and one  
14 day for oral closings, nothing in writing - so three and a half days, not more.

15 Madam Chairman, you will obviously have apprehended that the difference boils down to  
16 two points. It is driven in large part by the suggestion there would be a full day for  
17 Mr. Joyce, which we say is inappropriate and would be unfair to him.

18 THE CHAIRMAN: So you are both agreed that one day will be for opening submissions?

19 MR. O'DONOGHUE: Madam Chairman, yes. Frankly, again, given that we have the transcript  
20 and we have the DVD, this is about a meeting and we may not need a day. Only so much  
21 can be said, frankly.

22 THE CHAIRMAN: Then you want to spend half a day reviewing the DVD?

23 MR. O'DONOGHUE: Yes, that will take a morning.

24 THE CHAIRMAN: I thought the DVD was four hours long.

25 MR. O'DONOGHUE: It is about three hours 35 minutes. There is about 35 minutes at the start  
26 when Mr. Joyce is not in the room, which we could skip. There is also a substantial period  
27 at the end after he has left the room, which I am certainly content just to cross-examine on.  
28 It is obviously a part of Mr. Williams' case, and he may wish that to be reviewed  
29 specifically.

30 To answer your question, Madam Chairman, we can certainly fit this in, with a bit of co-  
31 operation, into a morning. That should not be problematic.

32 THE CHAIRMAN: Right, so you just want half a day for cross-examining the two witnesses?

33 MR. O'DONOGHUE: Yes, our witness and their witness.

34 THE CHAIRMAN: Then you want a day for closings?

1 MR. O'DONOGHUE: Yes, and we would go straight into it. This is not a case where, in my  
2 submission, written closings are necessary or proportionate, we can simply get on with it.

3 THE CHAIRMAN: Right.

4 MR. O'DONOGHUE: The one point I do want to emphasise, and we have obviously taken on  
5 board the Tribunal's suggestion that it may wish to look at the DVD in advance, and one  
6 can perfectly see the good sense in that. If I can just develop very briefly why we have  
7 suggested that the DVD should, at the very least, be viewed in a single sitting in court.

8 THE CHAIRMAN: So you do not mind us seeing it in advance?

9 MR. O'DONOGHUE: Obviously not. Of course, Madam Chairman, there has been a lot of talk  
10 about this DVD, and I am afraid to report that it is not exactly *Citizen Kane*. It is bound to  
11 be a different---

12 THE CHAIRMAN: Very few things are, Mr. O'Donoghue!

13 MR. O'DONOGHUE: -- once we have seen it. We make two points in terms of this being  
14 viewed in open court before the evidence. One is a point of proximity, which is that if it  
15 comes immediately before the evidence, that is as proximate as it can get. That seems to me  
16 to have benefits for all concerned.

17 We do make a second point, which is more important and substantive. I do not know if you  
18 have----

19 THE CHAIRMAN: I do not know how this happened in the criminal trial, but do you envisage  
20 that during the course either of your cross-examination of Mr. Snee or Mr. Williams' cross-  
21 examination of Mr. Joyce you will be using the DVD as part of your questioning?

22 MR. O'DONOGHUE: Madam Chairman, I would very much hope not for two reasons: first of  
23 all, the transcript is there and will be time stamped. It seems to me that it is far more  
24 efficient to do that quickly, rather than to have pause, re-wind and fast forward. It is bound  
25 to slow things down.

26 THE CHAIRMAN: I see, so you can use the transcript if you want.

27 MR. O'DONOGHUE: It would be time stamped, so there would be no ambiguity whatsoever.  
28 The transcript is agreed and the time stamp will be agreed. That seems to me much more  
29 efficient.

30 The CMA have slightly pivoted on this point. It did say initially in correspondence that it  
31 absolutely wanted to put this DVD during cross-examination. In the letter of 12<sup>th</sup> June there  
32 has been a slight softening of that position. I do not want to shut Mr. Williams out if he  
33 wants to do that. He is obviously sensible. There is obviously a question of efficiency in  
34 the conduct of the proceedings if we start pausing, re-winding and getting it wrong. In my

1 submission, that helps no one. From my perspective, that might happen exceptionally. I do  
2 not envisage doing it, but I do not want to shut him out entirely, but it will obviously cause  
3 delay.

4 THE CHAIRMAN: Would it be possible - if somebody wants to show an extract from the DVD  
5 to a witness, if they know that in advance it must be possible to get a little clip of it  
6 produced so that we do not have to be winding it backwards and forwards.  
7 Technologically, I would guess that is a feasible thing to do.

8 MR. WILLIAMS: If it helps, we wrote on 6<sup>th</sup> June and raised for discussion the question as to  
9 whether the DVD needed to be available for the purposes of submissions and cross-  
10 examination. We said we can see some advantage, but we have not reached a concluded  
11 view about whether it is necessary but we would be grateful for their views.

12 Mr. O'Donoghue's clients have indicated that they do not think it is necessary. In the letter  
13 we wrote on Monday we said that, on balance, it is probably disproportionate in terms of the  
14 advantage it would provide, as against the complexity and the possible delay to the trial. I  
15 think we are *ad idem* on this. I do not think either of us are proposing it is necessary.

16 THE CHAIRMAN: Right.

17 MR. O'DONOGHUE: That is extremely useful. One final point, if I may, just to develop the  
18 reasons why we say the DVD should be viewed in court in a single sitting - I have made the  
19 point of proximity which is a practical point - the substantive is a more important one. I do  
20 not know if you have the evidence in this case before you, Madam. We can pick this up in  
21 one or two statements, but I am looking in particular at Mr. Joyce's second statement dated  
22 25<sup>th</sup> April, just to telegraph the point that I wish to make. One of the central issues of  
23 dispute in this case is whether one can disaggregate or itemise the meeting into a series of  
24 different purposes or distinct events or infringements. The CMA's case, which is clearly  
25 based on these two decisions, a cartel decision and information sharing, is that one can do  
26 that, that there is more than one purpose, and they say at least two.

27 At the core of our case is the point that that is wrong, that that is artificial and unreal.

28 Balmoral's purpose in attending this meeting was singular, to reject all overtures of anti-  
29 competitive activity. I will take you through the passage very, very quickly, it is a very  
30 simple point, but the reason we raise this now is that, in our submission, there is a risk of  
31 prejudice from the very outset to the way in which Balmoral has put its case if the DVD is  
32 disaggregated in terms of viewing in open court. On one version of the CMA's case, they  
33 would say, "Ignore everything before we say the information sharing infringement started,  
34 that is the bit you need to focus on". We say that is wrong. It does not matter today who is

1 right or wrong on that point, that is for the trial. Our approach to this being viewed in one  
2 go in a single morning avoids that risk of prejudice, whereas the disaggregation that they  
3 have proposed risks causing such prejudice. So it is simply to preserve the integrity of that  
4 point for trial that we submit there should be a single viewing.

5 THE CHAIRMAN: That is to a certain extent a legal point, is it not? There is a legal point about  
6 whether something can both be one element of a single continuous infringement, and also a  
7 separate infringement; and a legal point about whether there can be more than one purpose-  
8 ---

9 MR. O'DONOGHUE: More than one purpose, yes.

10 THE CHAIRMAN: -- or a primary purpose and a secondary purpose.

11 MR. O'DONOGHUE: Indeed. Those points are certainly in issue. The primary issues are  
12 matters of fact and evidence and, frankly, impression. If I can quickly show you the  
13 evidence, just to show you where we are coming from on this point, and we can pick this up  
14 at para.4 of Mr. Joyce's second statement. I am going to take this very quickly because of  
15 course this is for the trial. It starts at para.4 on p.2, where he makes the point that Balmoral  
16 was a new entrant in the galvanised steel tanks market. Then at para.5, "We had immediate  
17 success with the galvanised steel tank products, customers were clearly happy to have a new  
18 competitive alternative, competitors were very unhappy". At the end, "Balmoral was of  
19 course delighted to be getting traction with its new product, and so were customers".  
20 Then at para.6, "I had some general suspicions about the level of cosiness between the  
21 competitors"; and then, "I decided to be extremely careful and document conversations  
22 with them going forward".

23 Then he accepts that he attended some meetings because he had to co-operate with one of  
24 the competitors, Vulcan, to get this vortex inhibitor.

25 Then at para.8, "I made no secret of these meetings within Balmoral, including right up to  
26 the highest levels of our chairman, Jim Milne". You will see at the bottom of the page a  
27 draft email of 11<sup>th</sup> February 2012, with Mr. Joyce expressing himself being very uneasy  
28 about the cosy way in which this market appears to be working, and again, "I decided to  
29 document my discussions".

30 Then, over the page at the bottom of p.2, "Before the meeting of 11<sup>th</sup> July 2012, I went to  
31 the highest levels within Balmoral, to Jim Milne, our chairman, Bill Main, finance director,  
32 to kill the scope for an illegitimate cartel with the competitors".

33 Then at para.13, and this is the critical point:

1 “The key overall point is the suggestion that, given the background outlined above,  
2 Balmoral’s purpose in attending the meeting or during the meeting was to restrict  
3 its ability to compete with competitors makes absolutely no sense. We were a new  
4 entrant who had captured shares through aggressive competition, that was pleasing  
5 customers and upsetting the competitors which of course made me and Balmoral  
6 happy. It makes no sense to say that during the meeting I would have disclosed  
7 Balmoral information that was commercially sensitive and useful to competitors.  
8 To do so would shoot us in the foot, since we would giving away a competitor  
9 advantage on which we had built our early success in galvanised steel tanks. Why  
10 would I have done that? Revealing commercially useful information against this  
11 background would have meant that I wanted to undermine Balmoral’s prospects of  
12 getting more work. The CMA does not explain what possible reasons I could have  
13 had to provide commercially valuable information that could have helped  
14 competitors to undercut us as a new entrant.”

15 And he goes on.

16 At para.16 he says:

17 “The reason why the above factual context and Balmoral’s purpose in my  
18 attending the meeting is important, because it provides crucial background to  
19 understanding comments made by me at the meeting which the CMA relies on ...”

20 And so on.

21 The point we make, and again this is a matter for trial not for today, is that he and Balmoral  
22 went into the meeting with a singular purpose and therefore the meeting needs to be viewed  
23 as a whole. His behaviour, his words, his demeanour----

24 THE CHAIRMAN: So what you want is an assurance that the Tribunal Members are, first of all,  
25 going to watch the whole of the DVD, and I think, despite what you said at the beginning, it  
26 is useful to see the bits before and after Mr. Joyce attends, and you want to be sure that we  
27 have that fresh in our minds at the point when Mr. Joyce and Mr. Snee are being cross-  
28 examined about it?

29 MR. O'DONOGHUE: Madam Chairman, yes.

30 THE CHAIRMAN: Is there any particular reason why you want it to be in open court with  
31 everybody here? Are you going to be giving us a commentary on it or not?

32 MR. O'DONOGHUE: No.

33 THE CHAIRMAN: No. I am just reluctant to have us all sitting here watching a DVD for four  
34 hours or whatever, but I am thinking that if there was a way that we could accommodate

1 your concerns that did not take up the trial timetable in that way, whether that would be  
2 satisfactory?

3 MR. O'DONOGHUE: Yes. Madam Chairman, the point that the CMA fairly makes is that we  
4 are the ones looking for a short trial, and we have overlaid this DVD within it. Certainly,  
5 on the understanding that this would be in a proximate way and in a relatively complete  
6 way, I think we would be very content.

7 THE CHAIRMAN: Right. I am wondering, therefore, whether one way to deal with this would  
8 be for the Tribunal to meet on the Monday morning itself, and we can meet early in the  
9 morning and watch the DVD through, and then start the hearing in the afternoon of the  
10 Monday. Would that be - you are tut-tutting, Mr. Williams.

11 MR. WILLIAMS: I was just wondering whether that is going to put a bit of time pressure on you,  
12 Madam, because, as Mr. O'Donoghue said, the DVD is approaching four hours.

13 THE CHAIRMAN: What I suspect is that the Panel Members will watch it themselves  
14 individually in the comfort of their own home, but then we could certainly watch the main  
15 part of it----

16 MR. O'DONOGHUE: I am certainly happy to undertake, with Mr. Williams' help, that we will  
17 get a segmentation that is three hours or less for that viewing. We can certainly do that.

18 MR. WILLIAMS: When we got the Tribunal's letter of 2<sup>nd</sup> June, asking us to identify passages  
19 that we thought were of particular relevance, we did that exercise. We did not identify  
20 passages that were supportive of our case or our defence or the decision, we identified the  
21 passages that we thought were relevant to the appeal. Those passages added up to two and a  
22 half hours.

23 THE CHAIRMAN: Right. I think, even if we are watching the whole thing through - maybe on  
24 the Monday morning we will watch just the bit where Mr. Joyce is there, because we will  
25 have seen the other bits and those are not so key. We will have then your list of the bits that  
26 we should be particularly awake for.

27 MR. WILLIAMS: We are very happy to liaise further with Balmoral about that.

28 THE CHAIRMAN: All right. Mr. Dhanowa, do you think that makes sense, to have a Panel  
29 meeting here on the Monday morning, us being able to watch it? I think that would be  
30 better, and we have the hearing starting in the afternoon. That way we do not have the  
31 expense of everybody sitting here whilst we watch that.

32 MR. O'DONOGHUE: Madam Chairman, I am extremely grateful for that. You will have picked  
33 up from more than one of our letters that we are already at a point where the costs of these

1 proceedings materially exceeds the penalty. If we can shave half a day off court time, those  
2 behind me and my client would be extremely grateful.

3 MR. WILLIAMS: Madam, just to round that discussion off, the reason I think there has been a  
4 difference between us coming into the hearing is that the Tribunal asked in its letter whether  
5 there were objections to the Tribunal watching the DVD in advance, and Balmoral  
6 confirmed that it did object to that. In terms of how we got to where we got to, if the  
7 suggestion is that the Tribunal watches it in advance of the Monday, but certainly on the  
8 Monday, then I think that that----

9 THE CHAIRMAN: I would like to see it in advance of the Monday. I would like to have a copy  
10 of the whole of the recording, and I will watch it, and I will ensure that the other Panel  
11 Members also are able to watch it. Presumably there can be three copies of this?

12 MR. O'DONOGHUE: Of course.

13 THE CHAIRMAN: Then on Monday morning the Panel will be together and we will watch  
14 either in here together or somewhere else on the Tribunal premises. If you can let us know  
15 where we should start and where we should stop, and also within that time what bit we  
16 should pay particular attention to that would be helpful.

17 MR. O'DONOGHUE: We will do that in co-operation.

18 MR. WILLIAMS: And just to make another practical point in connection with those  
19 arrangements, Madam Chairman, you may have seen from the correspondence that the  
20 CMA has prepared a time stamped version of the transcript, so that as one moves through  
21 the transcript one can see what time on the DVD that page of the transcript relates to.

22 THE CHAIRMAN: All right, but is that marked up with the areas where there is some debate  
23 about what is actually said?

24 MR. O'DONOGHUE: Not yet, as I understand it.

25 THE CHAIRMAN: I think that would be useful, to have an indication on the transcript.

26 MR. O'DONOGHUE: The wording of the transcript is obviously agreed in so far as it is audible.  
27 The point is, what are issues in dispute? That would require a further marker, as I  
28 understand it.

29 THE CHAIRMAN: I thought there was some dispute about whether you thought there were  
30 some bits that were inaudible, and the CMA had purported to find the words?

31 MR. O'DONOGHUE: No, I do not think so. Mr. Williams may tell us otherwise.

32 THE CHAIRMAN: I had misunderstood. That is not a problem.

33 MR. WILLIAMS: That will be in the bundle. It occurred to us that it might be useful for us to  
34 make that available to the Tribunal outside the bundle, so that whenever you start watching

1 the DVD you have that. We did not want to just send that in, but we thought that if we  
2 mentioned it today you might know what it related to, Madam.

3 MR. O'DONOGHUE: Madam Chairman, given that we are agreed that no more than half a day  
4 should be spent during the trial with the DVD, you have my submissions as to why this  
5 trial, as a whole, should not, therefore, last more than three and a half days. I do not think I  
6 can usefully add to that.

7 I have made the point about cross-examination. There is one final point, which you may  
8 have picked up from para.19 of our skeleton, and this is also relevant to the cross-  
9 examination of Mr. Joyce. Our submission is that Mr. Joyce has been, frankly, 'mucked  
10 around' by the CMA. You see the point at 19(i) about him being arrested and cut loose a  
11 day later to make his own way home; then (ii), which, frankly, is disgraceful, at the time he  
12 was arrested the record of the meeting was in the CMA's possession. Given that it is now  
13 unequivocally accepted that he had not been part of a cartel, why he was arrested and  
14 detained overnight in those circumstances is a mystery to us. Of course, he was a CMA  
15 prosecution witness. He has been interviewed high up and low down, and these  
16 proceedings are stressful for him. This is a company that has been in existence for many  
17 decades, has never been accused of any wrongdoing. There is a question of decent and  
18 proportionate treatment of him in these proceedings, including now by the CMA, and we  
19 would ask you to bear that in mind in the context of cross-examination.

20 Madam Chairman, those are my submissions, unless I can assist further.

21 THE CHAIRMAN: The cross-examination and, more generally, the evidence in the criminal  
22 trial, is that going to play any role in these proceedings?

23 MR. O'DONOGHUE: It may do in the sense that obviously there are witness statements in the  
24 criminal proceedings. There is a transcript of cross-examination and re-examination and the  
25 judge's summing up. There may be points that both sides wish to make on the back of that  
26 which may be put to witnesses. That is possible. I suspect it will be very much a minor  
27 feature of any cross-examination.

28 THE CHAIRMAN: Right, but is the Panel expected to have read all that material, or only in so  
29 far as it is relied on?

30 MR. O'DONOGHUE: In my submission, no. Obviously the skeletons will give a road map to  
31 what is the critical reading list, but, in my submission, almost certainly not.

32 THE CHAIRMAN: Thank you. Yes, Mr. Williams?

33 MR. WILLIAMS: Madam, as Mr. O'Donoghue indicated at the outset, the two issues that were  
34 on today's agenda were related, which is the arrangements in relation to the viewing of the

1 DVD and the timetable for the hearing. We have now got to a position where, if the DVD  
2 is going to be viewed during the first half day of day one, the difference between us is a  
3 difference between three and a half days finishing on the Thursday at lunchtime or possibly  
4 running into the Thursday afternoon. So the difference is really very narrow. The question  
5 is whether it is necessary at this stage to say that the hearing will finish on Thursday at  
6 lunchtime, or whether the Tribunal ought to hold open the Thursday afternoon so that the  
7 cross-examination of Mr. Joyce can take as long as it takes.

8 When I say 'take as long as it takes', I think we have made clear in correspondence that we  
9 are not saying that we want a full day to cross-examine Mr. Joyce. What we have said is  
10 that at this stage we do not feel able to say it will definitely take half a day or less. If you  
11 want my best estimate, it will not take a full day but it may well take more than half a day.  
12 If, when the preparation of cross-examination is taken further, it looks to us as though it is  
13 going to take half a day or less, then of course we can tell Mr. O'Donoghue's clients and tell  
14 the Tribunal. At the moment we are concerned that to put the case to Mr. Joyce might take  
15 more than half a day, and we do not want the timetable for the hearing to be fixed in a way  
16 which would shut us out from putting our case.

17 The timetable as it now appears, I think looks like this: there is non-sitting but watching the  
18 DVD on the Monday morning. Presumably Balmoral will open its appeal on the afternoon  
19 of day one. We will open our defence on the morning of day two, and Mr. Joyce will start  
20 to give his evidence on the afternoon of day two. So really the only difference between us  
21 is whether there is an order now that we have to finish cross-examining Mr. Joyce by the  
22 end of day two, or whether the Tribunal can leave things open and a bit flexible.

23 THE CHAIRMAN: There is quite a lot of law in this case.

24 MR. WILLIAMS: That is right.

25 THE CHAIRMAN: When is that going to be dealt with? Are you going to deal with that in  
26 opening or are you going to deal with that only in closing submissions?

27 MR. WILLIAMS: I would anticipate dealing with the law to a significant degree in opening. I  
28 cannot speak for Mr. O'Donoghue.

29 MR. O'DONOGHUE: There will obviously be skeletons, and the law on object does not need to  
30 be said three times.

31 MR. WILLIAMS: Certainly we anticipate setting out the framework for the evidence which the  
32 Tribunal will hear to some degree.

33 MR. O'DONOGHUE: Madam Chairman, if it helps, I am not going to die in the ditch over  
34 whether we finish at 1 pm on Thursday or 2.30 pm. Our concern is this suggestion that the

1 fifth day, Friday, 21<sup>st</sup> July, would be dialled in now. We would strongly oppose that. If we  
2 can limit ourselves to four days then so be it.

3 MR. WILLIAMS: The suggestion of a fifth day was linked to the suggestion that the Tribunal  
4 watched the whole DVD in open court. As we have already discussed this morning,  
5 Madam, watching the whole of the DVD would probably take more than a half sitting day,  
6 and we were concerned that it would take up a reasonable chunk of the afternoon, if not the  
7 whole of the afternoon. I do not think we are in that territory now, and if we reach a point  
8 where----

9 THE CHAIRMAN: You are both agreed that you will be to do all your closings and replies in  
10 one day?

11 MR. O'DONOGHUE: Yes.

12 MR. WILLIAMS: That is the current proposal, yes, Madam.

13 THE CHAIRMAN: Right. I think where we are is here: Monday morning, the Panel watches the  
14 DVD; Monday afternoon, Balmoral opening. Then Tuesday morning, CMA opening;  
15 Tuesday afternoon, Mr. Joyce gives his evidence. I would expect you to be able to finish  
16 with Mr. Joyce in half a day, but Mr. Joyce and Mr. Snee should be ready to give their  
17 evidence on Wednesday. We will complete all the evidence by Wednesday afternoon. If  
18 we are terribly quick and finish Mr. Joyce on the Tuesday afternoon and have Mr. Snee on  
19 the Wednesday morning, then you can have the Wednesday afternoon off to prepare, and  
20 then Thursday will be closings.

21 MR. WILLIAMS: I am grateful, Madam. I think, if where we end up is that Mr. Joyce spills over  
22 from day two into day three, and Mr. Snee is finished earlier than the end of day three, then  
23 it would be to the advantage of both parties to have some time to take stock. That always  
24 seemed to us to be an advantage of this sort of timetable.

25 THE CHAIRMAN: So what we need to do is tell Mr. Joyce that he may well be finished by  
26 Tuesday afternoon, but he should make arrangements to be here on Wednesday morning, if  
27 necessary, but Mr. Snee should also be available to start on Wednesday morning if we have  
28 finished Mr. Joyce.

29 All right, that is then four days.

30 MR. WILLIAMS: I think that deals with the matters that needed to be resolved by the Tribunal.

31 THE CHAIRMAN: All right. Where are you on how much of the criminal trial are we likely to  
32 have to dip into for the purposes of this case?

33 MR. WILLIAMS: The way in which that issue arises primarily is that Balmoral refers to various  
34 features of the criminal proceedings in its notice of appeal and relies on what was said by

1 the judge and what was said by Mr. Joyce. We responded to those submissions in our  
2 defence, and we have set out what we say are the relevant points in connection with that and  
3 given references to other relevant passages of the criminal proceedings. That is all there in  
4 writing. It is not part of our positive case that that material bears on the interpretation of  
5 what happened at the meeting. That is more Mr. O'Donoghue's case than it is our case.

6 THE CHAIRMAN: There is no point about whether the outcome of the criminal proceedings  
7 affects or creates some kind of factual----

8 MR. WILLIAMS: Estoppel.

9 THE CHAIRMAN: Estoppel, or something like that.

10 MR. WILLIAMS: I think I am right in saying there is no point about that.

11 MR. O'DONOGHUE: We are not running an abuse of process point.

12 MR. WILLIAMS: The points are really, in our submission, contextual points made by Balmoral,  
13 and the Tribunal will make up its mind in due course about whether those points are  
14 significant or relevant or not.

15 THE CHAIRMAN: Good. If that is going to be the timetable, is there anything else we need to  
16 deal with?

17 MR. WILLIAMS: There are just some bits of housekeeping essentially that we just wanted to tell  
18 you about, Madam. In relation to confidentiality, the position is reasonably straightforward  
19 actually. There are marked up versions of both the CMA decisions, and they are marked up  
20 in two colours. Blue is third party confidential information, and red is material which was  
21 redacted from the published version of the decision, not for reasons relating to third party  
22 confidentiality, but for other reasons like data protection, so that is things like individual  
23 names, and so on.

24 THE CHAIRMAN: It is going to be very difficult to conduct this trial without mentioning the  
25 individual names.

26 MR. WILLIAMS: Of course, and we fully agree, but we thought it was right to identify what is  
27 in the public domain and what is not in the public domain. In terms of what is treated as  
28 confidential for the purposes of these proceedings, our proposal is that it is really the third  
29 party confidential information which is marked in blue which needs to be treated as  
30 confidential. The red markings are really just there to alert everybody to the fact that that  
31 material is not in the public domain. I think everyone is happy with that. The position is  
32 also simpler, because nothing in the pleadings and the witness statements is confidential, or  
33 at least it is not going to be treated as confidential for the purposes of these proceedings.  
34 So, to that extent, the picture is reasonably simple.

1 The only point I have been asked to raise relates to a small amount of leniency related  
2 material. That will be treated as confidential under the arrangements I have just been  
3 describing, but the CMA does ask me to make the point that obviously that material is of  
4 particular sensitivity for reasons which the Tribunal will fully understand, and so particular  
5 care needs to be taken in dealing with that material at the hearing, and I think that is----

6 THE CHAIRMAN: There is nothing of that presumably in the decisions?

7 MR. WILLIAMS: No, but it may be that it is sensible - I am thinking on my feet - for that  
8 material to be marked in some way or possibly printed on different colour paper in the  
9 bundles so that nobody could be under any illusion that it needs to be treated with particular  
10 sensitivity.

11 That is broadly the position in relation to confidentiality. I would hope, as things stand, that  
12 it will not be necessary for the Tribunal to sit outside open court - to go into camera at any  
13 point.

14 In relation to bundles, there is essentially agreement on the content of the bundles. The  
15 arrangement that we are adopting is, I think, that envisaged by the Tribunal's guide. We are  
16 going to use all of the bundles that have been created so far so that we do not need to fell  
17 lots more trees, but those bundles are going to be supplemented with two bundles. One is  
18 some additional material that Balmoral wants to put forward now that was not in any of the  
19 earlier bundles, and I do not think there is any issue about the content of that, but that will  
20 be in the new bundle.

21 In addition to that, we thought we would create a core bundle so that the Tribunal has all the  
22 most important documents in one file.

23 THE CHAIRMAN: We have our own sort of core bundle, which is the TP papers which the  
24 Tribunal always produces. We may use that as a core bundle, because Panel Members may  
25 have marked up their copies. I think, as far as we are concerned, we may not need  
26 additional core bundles.

27 MR. WILLIAMS: Can I suggest that the CMA writes to the Tribunal soon after this hearing  
28 setting out what is going to be in the core bundle and you can tell us whether it is going to  
29 be useful to you or not?

30 THE CHAIRMAN: Yes, all right.

31 MR. WILLIAMS: I think that covers everything.

32 THE CHAIRMAN: When are we going to receive the DVDs and the transcripts, or have we got  
33 them already?

1 MR. WILLIAMS: I am sure you have a copy of the DVD. I know that there are some  
2 complications in relation to encryption, and so on. I will talk to those behind me, and we  
3 will let you know, but I am sure it can be made available very quickly for you. I think at the  
4 moment you may only have one copy.

5 THE CHAIRMAN: I think it would help us if we had three copies of the DVD. You will provide  
6 an authorities bundle?

7 MR. WILLIAMS: Yes, we will do that.

8 THE CHAIRMAN: I think that will be fine.

9 MR. WILLIAMS: Can I just mention one other thing in relation to the DVD, Madam: we have  
10 obviously watched it and, in our experience, in order to watch it, it is sometimes helpful to  
11 have a particular piece of viewing software available, and so we have had to install that in  
12 Chambers. We cannot just stick it into our computers and watch it. So to the extent that  
13 issues of that sort arise then I will make sure that the CMA liaises with the Tribunal.

14 THE CHAIRMAN: I thought I was just going to put it in my DVD player at home and watch it  
15 on the television.

16 MR. WILLIAMS: So far it has been encrypted. I will take instructions on how far it is necessary  
17 to maintain that encryption, also taking account of---

18 MR. O'DONOGHUE: It is rather awkward. The transcript is not encrypted.

19 THE CHAIRMAN: I do not think it needs to be encrypted. I would like three unencrypted  
20 versions of it that one can put in any DVD player and watch on the television or in a DVD  
21 drive on a computer.

22 MR. O'DONOGHUE: Could we also have copies that are unencrypted, please?

23 MR. WILLIAMS: If we are generating them for Tribunal, yes.

24 THE CHAIRMAN: The bids are rising. Can we have four copies of the unencrypted DVD, the  
25 whole nine yards, or whatever the metric equivalent is, so that we can all watch it in our  
26 own time?

27 MR. WILLIAMS: Yes, that is understood.

28 THE CHAIRMAN: Very well. I will see you again, all being well, on the afternoon of Monday,  
29 17<sup>th</sup> July. Thank you very much.

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