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IN THE COMPETITION
APPEAL TRIBUNAL

Case No. 1326/4/12/19

Victoria House,
Bloomsbury Place,
London WC1A 2EB

23 May 2019

Before:

HODGE MALEK QC
(Chairman)
PROFESSOR ANTHONY NEUBERGER
MICHAEL CUTTING
(Sitting as a Tribunal in England and Wales)

BETWEEN:

PERSONNEL HYGIENE SERVICES

Applicant

- v -

COMPETITION AND MARKETS AUTHORITY

Respondent

- and -

RENTOKIL INITIAL PLC

Proposed Intervener

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CASE MANAGEMENT CONFERENCE

APPEARANCES

Mr Brian Kennelly QC and Mr Nikolaus Grubeck (instructed by Gibson, Dunn & Crutcher UK LLP) appeared on behalf of the Applicant.

Ms Marie Demetriou QC and Mr Tom Pascoe (instructed by CMA Legal Service) appeared on behalf of the Respondent.

Mr Michael Fordham QC (instructed by Freshfields Bruckhaus Deringer LLP) appeared on behalf of the Proposed Intervener.

1 THE CHAIRMAN: I am sitting today with Professor Anthony Neuberger on my left, and
2 Michael Cutting. This is a CMC on the application by PHS. I remind everyone that there is
3 confidential material in the bundles, so do not refer to any of that. If there is a passage you
4 want us to look at, just tell us what the passage is.

5 Yes, Mr Kennelly?

6 MR KENNELLY: May it please the Tribunal, I appear with Mr Grubeck for the applicant,
7 Personnel Hygiene Services Limited. My learned friend, Ms Demetriou QC appears with
8 Mr Pascoe for the CMA. Mr Fordham QC appears for the intervener, Rentokil Initial Plc.
9 I had a brief word with Ms Demetriou before we came in about whether the hearing should
10 be in private, because a part of my submissions today will be a debate about the divestiture
11 period and how that influences the timetable to the main hearing.

12 THE CHAIRMAN: I think we will come to it, because as regards the timetable, it is really a
13 question of when us three are available, and the only slot we can offer is 1 and 2 July. I am
14 sure you are fully aware of our guidance, which is that we fix it to when we are available,
15 and this is an urgent hearing. It has got to be dealt with quickly. Does anyone argue against
16 that?

17 MR KENNELLY: Against the principle?

18 THE CHAIRMAN: Against the date of 1 and 2 July?

19 MR KENNELLY: I will quickly take instructions.

20 THE CHAIRMAN: Ms Demetriou?

21 MS DEMETRIOU: No, we are content.

22 THE CHAIRMAN: Mr Fordham?

23 MR FORDHAM: I will not be able to do it, but we do not object, and of course the approach has
24 to be the one that you have identified, somebody else will----

25 THE CHAIRMAN: We have got no other dates available.

26 MR FORDHAM: I understand.

27 THE CHAIRMAN: Thank you very much. It is just about finding a date when we are all free,
28 and that is all we can really offer.

29 MR KENNELLY: Sir, just so I understand precisely the parameters, the Tribunal is not available
30 at any other date in this composition in July, because in my submission----

31 THE CHAIRMAN: Any other date would be really difficult. We have all looked at our diaries
32 and seen which dates we can actually make, and that slot is 1 and 2 July.

33 MR KENNELLY: I entirely understand the Tribunal's situation, and I understand also the
34 principle that it is your availability, not ours. It also puts my client in difficulty because of

1 the time needed. The basic point is that we are expecting evidence from the intervener on
2 the substance which will need to be responded to. We will come to the timetable in a
3 moment, but the concern is that we will be under real pressure if we get their material with
4 too little time to respond.

5 THE CHAIRMAN: We will try and make sure that everyone has got a reasonable time to
6 respond. The CMA have put forward a timetable, which is probably a bit too tight, but
7 I think if we are going to have the substantive hearing on the 1st and 2nd, then it should give
8 everyone enough time to respond.

9 I am going to make it clear to the intervener that we really do not want duplicative material
10 and that they should be confined to anything over and above what the CMA are saying. For
11 example, if the CMA are going to file their defence on 7 June, I would expect the statement
12 of intervention to be three days later, but to confine itself to points over and above the
13 CMA, and the evidence that it files should be strictly in accordance with the fact that this is
14 a judicial review, and it is not an opportunity to come up with new reasons.

15 MR KENNELLY: I am obviously very grateful for that indication. On that basis I do not think
16 we can press beyond 1 and 2 July, we have to accept that and work back from it.

17 THE CHAIRMAN: The first thing, I presume everyone is agreed that we can treat this as
18 proceedings in England and Wales?

19 MR KENNELLY: Yes.

20 THE CHAIRMAN: As regards your notice of application, since you have filed it, we have had
21 the letter from the CMA of, I think, 17 May, saying that the footnotes were left off the
22 online version. I think that probably means you should amend your notice of application
23 because it does touch upon a number of paragraphs, I think 62 to 65, and possibly 68, 69, 71
24 and 77.2. How long would you need to do that? It may not just be a simple case of deleting
25 things, you may need to rethink slightly.

26 MR KENNELLY: Indeed, sir. That is obviously unfortunate, because we will be put to the cost
27 and expense of doing it, and it is not simply a question of red-lining.

28 THE CHAIRMAN: I know, I have looked at it. I think some of it, red-lining is easy, but some of
29 the other paragraphs, it is not so straightforward.

30 MR KENNELLY: No, so it is going to take us more than a couple of days.

31 THE CHAIRMAN: I would be inclined to give you until 4 pm on Tuesday.

32 MR KENNELLY: If I can take instructions quickly. (After a pause) Very well, sir.

33 THE CHAIRMAN: That is good. If you can serve a red-line version by 4 pm, and you do not
34 need to re-serve all the appendices or anything like that.

1 MR KENNELLY: That does make a difference in terms of costs.

2 THE CHAIRMAN: Can we just deal with the intervention next?

3 MR KENNELLY: Yes. May I say very briefly though, it is not opposed from our perspective.

4 THE CHAIRMAN: Mr Fordham, it is not opposed, so I grant you permission to intervene on the
5 usual terms, which is that you do not duplicate anything that the CMA have done, and you
6 strictly confine any evidence to admissible evidence.
7 What evidence do you intend to file at this stage? Have you given any consideration to
8 that?

9 MR FORDHAM: No, I am not able to indicate that, but if you want an indication, we would be
10 able to give one subsequently. It might just be better though to get on with it.

11 THE CHAIRMAN: Just get on with it, that is fine.

12 MR FORDHAM: We do understand the point that you have just reiterated to me, and I want to
13 reiterate the fact that we understand it.

14 THE CHAIRMAN: Yes. Sometimes, when you have these merger cases, the intervener puts in a
15 number of witness statements and it does not really take it any further. I am doing it in a
16 way that you look and see what the CMA have done, and then on 10 June at 4 pm you serve
17 your statement of intervention with any evidence that you wish to rely upon.

18 MR FORDHAM: Yes, and as you have seen from our application, we envisage that in any event
19 we would liaise with the CMA to ensure an absence of duplication.

20 THE CHAIRMAN: Of course.

21 MR FORDHAM: So we understand both the supervisory jurisdiction that the Tribunal has, and
22 also the supplementary role that we have.

23 THE CHAIRMAN: Yes. So statement of intervention with evidence on 10 June at 4 pm.

24 MR FORDHAM: Thank you.

25 THE CHAIRMAN: Defence: Ms Demetriou, you can supply that by then. Can you just---

26 MS DEMETRIOU: 7 June, I think.

27 THE CHAIRMAN: Is it 7 June?

28 MS DEMETRIOU: Yes, and then that gives the intervener three further days.

29 THE CHAIRMAN: Yes, the intervener does 10 June, and you 7 June.

30 MS DEMETRIOU: Yes.

31 THE CHAIRMAN: Do you intend to file witness statements? In which case, can you give us an
32 idea as to your current thinking? I am not going to commit you to anything?

33 MS DEMETRIOU: I think the current thinking is that we will file one witness statement.

1 THE CHAIRMAN: That is sensible, yes. Do you have any objection to the witness statement
2 filed with the notice of application by PHS. I looked at it, and it seemed fairly anodyne to
3 me?

4 MS DEMETRIOU: No, we do not have any objection to that.

5 THE CHAIRMAN: Good, thank you very much.

6 The question is your reply evidence and skeleton argument - as I understand it, you have
7 agreed that you do not need to serve a formal reply?

8 MR KENNELLY: That is correct, yes.

9 THE CHAIRMAN: Your skeleton argument and evidence will stand as reply evidence. Working
10 back from the timetable, I would have thought that 20 June is a realistic date, but you tell
11 me?

12 MR KENNELLY: The difficulty there is that I think - and you will correct me if I am wrong - the
13 date for the intervener's evidence will be 10 June.

14 THE CHAIRMAN: You will get Ms Demetriou's evidence on 7 June. On 10 June you will get
15 the evidence of the intervener, which I do not expect to be extensive, and hopefully I am not
16 proved wrong on that.

17 MR FORDHAM: In case it helps, the time between those two dates is a weekend, so it will be the
18 Friday and the Monday.

19 THE CHAIRMAN: Yes.

20 MR KENNELLY: The difficulty is, sir, and this is where I do ask for more time for our
21 responsive evidence, that despite Mr Fordham's assurances, as he, himself, admitted, he
22 does not know yet what evidence they will actually be serving and both the intervener and
23 the CMA have said that they expect to serve evidence on questions of fact which do go to
24 the rationality issue. Although it is a JR----

25 THE CHAIRMAN: It is a JR.

26 MR KENNELLY: -- they are still entitled to lodge evidence, particularly the evidence that they
27 put before the CMA that we did not see necessarily, and that will go to the quite complex
28 questions potentially in relation to the different contracts they have, how they have novated
29 the employee situation, questions of TUPE, and more broadly whether a purchaser exists
30 that can offer effective competition in these markets with these particular SLC customer
31 contracts.

32 THE CHAIRMAN: Your case is that they should have gone for option one, and that option two
33 is just not viable at all, they are not going to find someone who is going to be an effective
34 competitor, and that the result will be that instead of having three major players in the

1 market, there are going to be two in the long run because whoever steps in on option two is
2 not going to be an effective competitor. That is one of your points.

3 MR KENNELLY: That is the main point on the rationality ground and that is where the CMA
4 and the intervener expect to put in potentially significant evidence showing that, on the
5 contrary, in the market it does not work like that, there is sufficient infrastructure available
6 to a purchaser, contract novation, and so forth. We will need to analyse that and get factual
7 evidence in response. Bearing in mind this is confidential material also, we may need to go
8 back and revisit the confidentiality ring in order to take instructions from our own clients----

9 THE CHAIRMAN: The CMA have a fairly open mind, because when you read the CMA report
10 when they went for option two, they are saying that option two is equally effective to deal
11 with the SLC as long as a suitable party comes in to be an effective competitor. You say
12 they are never going to get there because there is not someone there.
13 The other issue is the 'becoming' point. No doubt we will be helped further down the line
14 when we have Ms Demetriou's submissions, but it can mean all sorts of things. It can mean
15 that once you take over the contracts you become an effective competitor, or it can mean the
16 opposite side of the spectrum which is, "We envisage you will be an effective competitor
17 some time in the future, maybe three years down the line." The longer that 'becoming' is
18 stretched out, the greater risk of not remedying the SLC.

19 MR KENNELLY: Indeed.

20 THE CHAIRMAN: But I do not think they have got any illusions about that. I think it is fairly
21 clear when you read their report they are saying, "We think this will be effective, if
22 someone can be found and they satisfy all our conditions."

23 MR KENNELLY: The difficulty we face is a more narrow one. That is a point of law on the first
24 ground. I do not say that we need lots of time to deal with that. My focus is very much on
25 the evidence we expect to get from the intervener on the nitty-gritty of how the remedies
26 work in practice.

27 THE CHAIRMAN: Yes.

28 MR KENNELLY: Material we have not seen before, and that will go to questions of fact for
29 which we will need instructions. Eight working days, sir, is not going to be enough.

30 THE CHAIRMAN: Let us work back then. If you are going to have the hearing on 1 July, which
31 is a Monday, I would want the bundle of authorities, the trial bundle, the skeleton arguments
32 by everyone by, let us say, lunch time on the Thursday, and that is 27 June. I do not know
33 how much time Ms Demetriou and Mr Fordham are saying that they will need after your

1 skeleton to respond. We have all got to be flexible here, and I fully understand that you will
2 need time to respond.

3 Ms Demetriou, what do you say about timing, the gap between filing his skeleton argument
4 and you having to do yours?

5 MS DEMETRIOU: May I just take instructions on that point?

6 THE CHAIRMAN: Yes. I am trying to help you. I fully understand what you are saying. Can
7 we just see how much flexibility we have got?

8 MR KENNELLY: Indeed, and really, just to be clear, we are not asking for - working backwards
9 from 1 and 2 July, it is a matter of an extra three or four days, including weekends.

10 Mr Fordham is right, we have the weekend, but of course that is fine for those of us - but
11 I cannot speak for my clients, but we have to bear in mind that working days are the
12 appropriate metric.

13 THE CHAIRMAN: What we have got to try and find out is how much time do the intervener and
14 the CMA need to file a skeleton argument after you have filed your skeleton and the reply
15 evidence. Let us just what they say and we will work back from that.

16 MR KENNELLY: Before Ms Demetriou finishes, so I can use the time available to us usefully,
17 in that respect I would submit they do not need a lot of time because the answers and
18 evidence we are putting forward should not come as a surprise to the CMA.

19 THE CHAIRMAN: One would hope not.

20 MR KENNELLY: Yes, and so they should not need a huge amount of time to deal with our
21 answers. It is the Rentokil stuff that we have not seen before.

22 THE CHAIRMAN: Yes. We are trying to get two dates, are we not? We are trying to get the
23 date for when you file your skeleton and reply, and when Mr Fordham and Ms Demetriou
24 file their skeleton argument. I am saying that I do want your skeleton by lunchtime on the
25 27th, because that would give the Tribunal the time to get ready for the Monday.

26 MS DEMETRIOU: Yes. I am told that we really need five working days to produce the skeleton.
27 You will appreciate it is not just---

28 THE CHAIRMAN: Let us just have a look and see what the diary looks like.

29 (The Tribunal conferred)

30 THE CHAIRMAN: Mr Fordham, have you managed to give any thought to this as well?

31 MR FORDHAM: Yes. Can I tell you what I invite you to do?

32 THE CHAIRMAN: Yes.

33 MR FORDHAM: Sir, you should hold to the 27th at 2 pm.

34 THE CHAIRMAN: Yes, we physically need it by then.

1 MR FORDHAM: At 2 pm. If you say it has to be 12, it has to be 12. That actually means we are
2 already losing half a day.

3 THE CHAIRMAN: We will say 2 pm on the Thursday.

4 MR FORDHAM: I invite you to say 2 pm.

5 THE CHAIRMAN: So the skeleton arguments from the intervener and the CMA at 2 pm on
6 Thursday, 27 June.

7 MR FORDHAM: Exactly, and we will liaise and we will not repeat what the CMA say, because
8 we can do that.

9 THE CHAIRMAN: Of course you will.

10 MR FORDHAM: I invite you to hold to the 20th for the skeleton argument and reply evidence of
11 the applicant. It cuts all ways round, and I would like to offer this solution: if you are
12 persuaded by the plea from Mr Kennelly that he really needs more time than ten days in
13 what is necessarily a very truncated timetable, to which we all have to work----

14 THE CHAIRMAN: I know.

15 MR FORDHAM: The solution I offer is this: we will revert to what was originally said to you,
16 that is just as with our skeletons, same day, we will go for 7 June for our intervention
17 document and evidence. So we will do it on the Friday, rather than the Monday. The
18 reason why we can do that consistently with our duties is the same reason we can do the
19 skeleton consistently with our duties. If we do that, he can have the weekend that I was
20 going to have, or whoever is doing it was going to have. Sir, we will say 7 June, he gets to
21 20 June, and we get to 27 June.

22 THE CHAIRMAN: That is a very decent offer. Let us see what Mr Kennelly says?

23 MR KENNELLY: Well, I am very grateful for that, and that is very helpful. That only leaves
24 one problem, which is, as I understand it----

25 THE CHAIRMAN: It gives you an extra three days.

26 MR KENNELLY: And that is why I am grateful. That still means his documents coming in at
27 the same time as the CMA defence and evidence, as I understand it.

28 THE CHAIRMAN: Yes. That will be a Friday.

29 MR KENNELLY: I understand that. Ideally, as I said, there would be a gap between the CMA
30 defence and the intervener, but in the time available I can see - and I will take instructions
31 on this - the difficulty in doing that, because that would force the CMA to put their defence
32 in extremely early. So I will just quickly confer on the timetable outlined.

33 THE CHAIRMAN: Yes. Mr Fordham, you will liaise and then you----

1 MR FORDHAM: He cannot be right about that, because otherwise we could not have the
2 skeletons on the same day either for the same reason.

3 THE CHAIRMAN: Now we have got six days for intervention and the CMA defence, 7 June, we
4 have got 2 pm on 27 June for their skeleton arguments, and we now need to figure out when
5 you are going to supply your reply and skeleton argument. I suggested 20 June.

6 MR KENNELLY: Yes. On the basis of what Mr Fordham has said, the 20th gives us the extra
7 time.

8 THE CHAIRMAN: It does.

9 MR KENNELLY: So we are content with that and with the timetable outlined by him.

10 THE CHAIRMAN: That is very practical, thank you very much.

11 MR FORDHAM: Can we say noon on that date, because it just means we do get the seven days?

12 THE CHAIRMAN: So you are saying what, noon on the----

13 MR FORDHAM: Noon on the 20th. You have got the extra weekend?

14 MR KENNELLY: We are the applicant, sir, at the end of the day, and we are also being flexible.
15 My junior, for example, will not be available during the whole period----

16 THE CHAIRMAN: I will fix it for 2 pm, because that will give us the afternoon to digest it.

17 MR FORDHAM: Thank you very much.

18 THE CHAIRMAN: So 2 pm on the 20th for your reply skeleton argument.

19 MR FORDHAM: You are absolutely right, you did say 2 pm, it was my mistake, on 27 June.

20 THE CHAIRMAN: It is 2 pm. Yes, it is 2 pm for both of you.
21 The next thing is when do we get the bundle, the agreed bundle. Presumably, Mr Kennelly,
22 your clients will have carriage of that and you will liaise with the other parties?

23 MR KENNELLY: Yes.

24 THE CHAIRMAN: When can you get that agreed bundle by?

25 MR KENNELLY: Friday, 28 June is the day after we finally have all the documents lodged.

26 THE CHAIRMAN: Friday, 28 June is the day after we get the skeletons, so there is going to be
27 no further evidence. I will tell you how I like it. I envisage having a bundle, which is just
28 the skeleton arguments plus an agreed chronology.

29 MR KENNELLY: Yes.

30 THE CHAIRMAN: So that can be my starter pack for preparing the hearing. Ideally I would
31 want that for two o'clock on the Thursday. So you need to have the bundle done before
32 that, the evidence bundle before that, so everyone can put in the page references.

33 MR KENNELLY: I will check, sir. I appreciate that----

34 THE CHAIRMAN: I know it is down to----

1 MR KENNELLY: That is why I am checking, but I entirely understand, and of course we can
2 provide that bundle to you, the skeletons and the core documents, and we can liaise between
3 us to have an agreed core, and that should not be difficult. (After a pause) 14 June is the
4 answer.

5 THE CHAIRMAN: That is fine. Mr Fordham, is that all right with you?

6 MR FORDHAM: Yes, thank you.

7 THE CHAIRMAN: On 27 June we will have the skeleton arguments from the CMA and the
8 intervener. Can you on the same day serve a revised skeleton argument by you with the
9 page references in?

10 MR KENNELLY: Yes.

11 THE CHAIRMAN: That makes it much easier for us.

12 MR KENNELLY: Yes, of course. We can do that.

13 THE CHAIRMAN: The bundle of authorities: I want a composite bundle of authorities, and
14 ideally I would want that also at two o'clock on 27 June. You will have to liaise with each
15 other as to what the authorities are going to be.

16 MR KENNELLY: Yes, of course, and we have done that before, that is not a problem.

17 THE CHAIRMAN: You have done it many times. You will have carriage of the agreed
18 chronology, which you can let us have on the 27th with your updated skeleton argument.

19 MR KENNELLY: Yes.

20 THE CHAIRMAN: Mr Fordham, just a couple of points on your position. If you are not
21 available for the hearing, and we hope somehow you are available, but on the 27th when you
22 serve your skeleton argument can you indicate or just confirm whether or not you intend to
23 take up the opportunity to give oral submissions?

24 MR FORDHAM: Certainly, sir.

25 THE CHAIRMAN: So if you decide it is not necessary, then at least we will know on the 27th.

26 MR FORDHAM: Yes.

27 THE CHAIRMAN: I will limit your oral presentation to 45 minutes, at least for now, or liberty to
28 apply.

29 MR FORDHAM: Are you fixing for two days?

30 THE CHAIRMAN: Yes, we are fixing it for two days. I think it is one and a half days, but we
31 will fix it for the Monday and Tuesday. Hopefully, we will finish by lunchtime on the
32 Tuesday, but if we do not we can ride on.

33 MR FORDHAM: Can I invite you to say an hour?

34 THE CHAIRMAN: Yes, that is fine, that is okay.

1 MR FORDHAM: Would you welcome that the parties liaise to see if we can actually come up
2 with a timetable?

3 THE CHAIRMAN: Oh, that is perfect. I think that it would be for the applicant to, by 2 pm on
4 27 June, provide us with a proposed timetable. Obviously, you will liaise with them, but at
5 the end of the day we will tell you on Monday whether it fits with us as well.

6 MR FORDHAM: And by then we will know if we are saying, well, actually, we do not need that
7 time, or we need less time.

8 THE CHAIRMAN: Yes, of course, you can tell us. That is fine. I expect that Mr Kennelly will
9 have more time than everyone else, because he has got the burden of opening.

10 MR FORDHAM: He is going to need it!

11 THE CHAIRMAN: Yes. I hope that is not an uncharitable comment.

12 MR KENNELLY: It was.

13 THE CHAIRMAN: You were doing so well until then!

14 MR KENNELLY: I know, what a shame. Sir, to take the tone back to something more pleasant,
15 I am very grateful for Mr Fordham's suggestion of a timetable.

16 THE CHAIRMAN: No, it will be very helpful.

17 MR KENNELLY: And we will take the carriage of that also.

18 THE CHAIRMAN: Okay. Confidentiality club, have you considered that?

19 MR FORDHAM: Yes, we do not have a difficulty with the order that the CMA puts forward.

20 THE CHAIRMAN: The parties can lodge that in the next couple of days or whatever. I will not
21 impose a timetable. Clearly, I will want it by next Wednesday. Shall we say it should be
22 lodged by 2 pm on 29 May?

23 MR KENNELLY: Sir, on that point, we have no objection to the order and we have no objection
24 to the date. As I said earlier, we may need to revisit - we will do this with the CMA - the
25 extent to which we need to take instructions on questions of fact from our clients in relation
26 to the material which is produced, but that is something we can do with the CMA, and
27 hopefully we will not need to trouble you with that.

28 THE CHAIRMAN: We can deal with this on paper, and I can deal with it on my own. If there
29 are any practical issues then come back to me. I do appreciate that some of the material that
30 I have got in the bundle is particularly sensitive, and it would not be right for people on the
31 operational side of your clients to see some of this material that is in relation to your
32 competitor. I hope that may help you in formulating your discussions with the CMA.

33 MR KENNELLY: We all understand the parameters, and we will deal with the CMA first before
34 troubling you.

1 THE CHAIRMAN: Is there anything else that I have forgotten?
2 MR FORDHAM: Can I just double-check, we have got the various dates. What I have written
3 down so far as the times are concerned, they are all four o'clock, apart from three of them
4 are two o'clock.
5 THE CHAIRMAN: I want 27 June, two o'clock, because I do need the material that afternoon.
6 MR FORDHAM: Then the 20th, the week before, is also two o'clock. The other one where you
7 said two o'clock was for the one that we have had just now, which is 29 May for the filing
8 with you of the confidentiality order.
9 THE CHAIRMAN: Yes.
10 MR FORDHAM: All the rest I have understood to be 4 pm.
11 THE CHAIRMAN: Correct, that is right.
12 MR KENNELLY: That was my understanding.
13 THE CHAIRMAN: Ms Demetriou, is there anything else that I need to deal with?
14 MS DEMETRIOU: Not from us, thank you very much.
15 THE CHAIRMAN: Thank you. Mr Fordham?
16 MR FORDHAM: No, thank you.
17 THE CHAIRMAN: Mr Kennelly?
18 MR KENNELLY: No, sir, thank you very much.
19 THE CHAIRMAN: Thank you very much everyone. We will rise.
20 _____