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4 record.

5 **IN THE COMPETITION**  
6 **APPEAL TRIBUNAL**

Case No. : 1334/4/12/19

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8  
9 Salisbury Square House  
10 8 Salisbury Square  
11 London EC4Y 8AP

12 18-19 February 2020

13  
14 Before:  
15 The Honourable Mr Justice Roth (President)  
16 Sir Iain McMillan CBE DL  
17 Professor Michael Waterson  
18 (Sitting as a Tribunal in England and Wales)

19  
20  
21 **BETWEEN:**

22  
23 Ecolab Inc.

**Applicant**

24  
25  
26 v

27  
28 Competition and Markets Authority

**Respondent**

29  
30  
31 **A P P E A R A N C E S**

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33  
34 Mr Brian Kennelly QC and Mr Paul Luckhurst (On behalf of Ecolab)  
35 Mr Rob Williams and Mr Ben Lask (On behalf of the CMA)

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1 **Tuesday, 18 February 2020**

2 **(10.30 am)**

3 **(In open session)**

4  
5 **Discussion re confidentiality**

6 **THE PRESIDENT:** Can we please have a word at the outset  
7 regarding confidentiality, which, as you know, has  
8 exercised us a bit in this case.

9 As I understand it, Mr Kennelly, you represent both Ecolab and  
10 Holchem; is that right?

11 **MR KENNELLY:** Yes, that's correct.

12 **THE PRESIDENT:** As far as the confidentiality ring is  
13 concerned, there is just one ring containing the external  
14 advisors of both; is that right? Two lots of solicitors,  
15 I think.

16 **MR KENNELLY:** Yes, that's correct, sir.

17 **THE PRESIDENT:** Yes, so it is not that there are multiple  
18 rings in this case.

19 If we look at the final report, we have got a markup with all  
20 sorts of different colours. As far as we have got blue,  
21 which you said is confidential to Ecolab; green which is  
22 confidential to Holchem. But as far as those in the ring  
23 are concerned, that distinction doesn't matter.

24 **MR KENNELLY:** That's correct.

25 **THE PRESIDENT:** Then there is yellow, which is confidentiality  
26 of third parties, I think, but, again, anyone in the ring

1 can see that.

2 The red is both Ecolab and Holchem together, so that doesn't  
3 take it any further.

4 What is the grey? If you go to 10.73, and there's a whole  
5 section, 10.206 and following. What is that  
6 confidentiality?

7 **MR KENNELLY:** I understand that that is material --

8 Mr Williams can correct me -- that was disclosed into the  
9 confidentiality ring at the time of the defence, and the  
10 colour merely indicates the time.

11 **THE PRESIDENT:** But to whom is it confidential?

12 **MR KENNELLY:** I'm told third parties.

13 **THE PRESIDENT:** But it is not the confidence, is it, of third  
14 parties?

15 **MR KENNELLY:** I understand it is third party confidential  
16 information. The CMA.

17 **THE PRESIDENT:** Mr Williams, is that right?

18 **MR WILLIAMS:** Sorry, sir, I was taking instructions. We think  
19 that that is a particular category of third party  
20 confidential information. You can see in the first line  
21 of 10.73 that two particular parties are referred to.  
22 Those behind me think the reason it is in a different  
23 colour is, as Mr Kennelly says, it was unredacted at that  
24 particular point in the process.

25 **THE PRESIDENT:** It was ...?

26 **MR WILLIAMS:** Unredacted as part of the provision of

1 the defence.

2 **THE PRESIDENT:** Yes, but now, as it stands here, and for the  
3 purposes of this hearing, it's confidential -- it's for  
4 the confidence of third parties, that's all.

5 **MR WILLIAMS:** To the potential purchasers. You can see the  
6 heading, sir. One can see the subject matter.

7 **THE PRESIDENT:** It is their confidence, is it?

8 **MR WILLIAMS:** Yes.

9 **THE PRESIDENT:** It is confidential to them. Okay. Well, you  
10 will inform us if that --

11 **MR WILLIAMS:** Would it help, sir, if we went back and looked  
12 at any other grey redactions?

13 **THE PRESIDENT:** The other grey redactions, I have just given  
14 you. It is 10.206 and following.

15 **MR WILLIAMS:** We will confirm the position.

16 **THE PRESIDENT:** That should have been done before we start,  
17 because we did raise the issue of confidentiality.

18 Now, the title of the tables is a bit puzzling. If you look  
19 at page 39 in this document, figure 2 -- you can barely  
20 read it in our copy -- and figure 3, over the page. The  
21 title of the table is shown as confidential, but I don't  
22 see how it can be. I mean, you can work out what the  
23 title is from the previous paragraph. Isn't it the case  
24 it's the contents of the bar chart that is confidential,  
25 not the title?

26 **MR KENNELLY:** Sir, yes, that's our understanding. My

1 understanding is, that's what the dark blue is intended to  
2 signify, that the contents of the --

3 **THE PRESIDENT:** We can read the title. There is no objection  
4 to my saying the title is "Proportion of revenue from  
5 customers under contract".

6 **MR KENNELLY:** No, there is no objection to that.

7 **THE PRESIDENT:** It is what is below, and ditto over the page,  
8 figure 3 --

9 **MR KENNELLY:** Yes, figure 3.

10 **THE PRESIDENT:** -- and so on. This applies to most of these  
11 tables. Certainly the figure -- the bar charts, page 48,  
12 page 50, and so on. So the titles are never confidential,  
13 are they?

14 **MR KENNELLY:** No.

15 **THE PRESIDENT:** Beyond that, we can quite understand,  
16 obviously, the details of revenue, market share of  
17 individual companies, customer classification, and so on,  
18 is confidential. That's quite normal, and doesn't cause  
19 a problem. Our concern here is obviously in the  
20 alternative divestiture remedy and then the revised  
21 remedy, which are at the heart of your grounds 2 to 4, and  
22 it's the nature and the detail of the remedy which are the  
23 reasons why the CMA rejected it. We want to see, really,  
24 how we can proceed with that.

25 First of all, your ground 4. In the disclosure ruling that  
26 I gave, which, as I understand it from the letter from

1 Cleary Gottlieb, did not cause concern on confidentiality  
2 grounds, I described the further remedy, which is your  
3 ground 4, as Ecolab's fallback alternative divestiture  
4 proposal. That's in the public judgment.

5 **MR KENNELLY:** Yes.

6 **THE PRESIDENT:** Can I take it we can use that term?

7 **MR KENNELLY:** Indeed. In fact, I will address the codewords  
8 for the purpose of maintaining the entire hearing in open  
9 for the purpose of my submissions. I propose to adopt  
10 that phrase as a description for what I would call the  
11 fallback divestiture remedy.

12 **THE PRESIDENT:** The other thing is that I saw that in their  
13 letter, your instructing solicitors -- if we look at that,  
14 which is in the correspondence bundle, tab 10, which is  
15 the letter from Cleary Gottlieb of 4 February, explaining  
16 confidentiality, and then, at the bottom of page 38 -- it  
17 is paginated in our bundle -- the final paragraph:

18 "Third, in Ecolab's respectful submission, disclosing the  
19 identities of potential purchasers is not necessary for  
20 submissions or any subsequent judgment, and, if need be,  
21 they could be referred to as ..."

22 And then something actually said to be confidential. Are  
23 those terms we can now use?

24 **MR KENNELLY:** Yes, and, indeed, that's what I will be doing in  
25 the course of submissions.

26 **THE PRESIDENT:** We can refer to them as purchaser A and

1 purchaser B?

2 **MR KENNELLY:** Purchaser A, and purchaser B, and I will take  
3 you to my skeleton and show you which one is which.

4 **THE PRESIDENT:** We can see how we get on. Our feeling was  
5 that it is likely to be the case that we will have to go  
6 into closed session, because we think that, really, some  
7 of the details of the remedy and some of the fine details,  
8 indeed, of the remedy are quite important in looking at  
9 what was decided in the final report and, indeed, your  
10 complaints about it. So we shall keep that open as  
11 a possibility.

12 But our expectation is that we may need, when we come to  
13 grounds 2 to 4, to go into closed session. We certainly  
14 don't need to do that for ground 1, and we can see how we  
15 get on, but that's our -- we have had a discussion about  
16 that, as you might expect, and that is our present  
17 feeling.

18 Is there anything else by way of preliminary? We have seen  
19 your timetable, which is helpful. Just to mention, we  
20 will, in the usual way in this tribunal, take a short  
21 break for the benefit of the transcribers at some  
22 convenient moment.

23 **MR KENNELLY:** Yes, I'm grateful. Sir, the only thing left  
24 before I open my submissions is housekeeping, but I think  
25 I can actually see the tribunal has the necessary papers.

26 **THE PRESIDENT:** Yes, we have, and we have read your skeletons

1 and so on.

2 **MR KENNELLY:** I'm very grateful. I will come, in the course  
3 of my introduction, to the proposed codewords we can use  
4 in order to progress, but we have actually dealt with them  
5 now in large part.

6 **THE PRESIDENT:** Yes.

7

8 **Opening submissions by MR KENNELLY**

9 **MR KENNELLY:** Stepping back, members of the tribunal, I appear  
10 with Mr Luckhurst, as the tribunal knows, for the  
11 applicant, Ecolab, and my learned friends Mr Williams and  
12 Mr Lask appear for the CMA.

13 As the tribunal knows, Ecolab challenges the CMA's decision to  
14 unwind Ecolab's merger with the Holchem Group Limited by  
15 requiring Ecolab to sell at least 90 per cent of  
16 the Holchem business, that is, Holchem Laboratories, the  
17 primary company within the group. As you know, there are  
18 two pillars to the CMA's decision. The first is the  
19 finding that the merger would lead to a substantial  
20 lessening of competition, or an SLC, in the market for the  
21 supplying of cleaning chemicals and ancillary services to  
22 food and beverage producers in the UK. That is the SLC  
23 decision.

24 Second is a rejection of Ecolab's proposal to remedy any SLC,  
25 namely, the divestiture of one of the merging parties'  
26 existing UK-only business to one of Ecolab's global

1 competitors.

2 Now, the tribunal has seen Ecolab had secured offers from its  
3 global competitors for that divestment business. That is  
4 the remedy decision.

5 I propose now briefly to introduce our challenges to each of  
6 these decisions before developing the submissions in  
7 detail. Beginning with ground 1 and the challenge to the  
8 SLC decision, it is now common ground that the potential  
9 competition concerns do not relate to the whole of  
10 the relevant market as defined by the CMA. The CMA  
11 accepts that the competition concerns relate only to  
12 a subset of customers in that market, namely, UK-only  
13 customers. That is, customers who procure cleaning  
14 chemicals on a national basis.

15 **THE PRESIDENT:** You're not, as I understand it -- there is no  
16 challenge to the market definition?

17 **MR KENNELLY:** No. Just to show you that, if you look at the  
18 defence, it's in the core bundle behind tab 7,  
19 paragraphs 106 to 107. In particular, the middle of 107  
20 and the penultimate line:

21 "The CMA made clear that its SLC finding did not relate to  
22 international customers."

23 On any view, therefore, there is no SLC in respect of  
24 international customers. These include many of  
25 the largest customers in the relevant market and comprise  
26 the majority of Ecolab's business in the relevant market.

1 But there is a further subset of customers in the market  
2 for which there is no evidence of an SLC, and that is  
3 small customers, as defined by the CMA.

4 The evidence demonstrated, as I shall show you, that suppliers  
5 other than the four largest undertakings have  
6 a substantial share of the relevant market, especially  
7 amongst small customers.

8 **THE PRESIDENT:** Is "small customers" an established  
9 definition? It is used for convenience, but that  
10 distinction, small versus big, isn't there a sort of  
11 gradation/spectrum of customers?

12 **MR KENNELLY:** There is. That's the CMA's point.

13 **THE PRESIDENT:** You said "as defined by the CMA". That's why  
14 I'm asking you, "as defined". I thought they said they're  
15 using it for convenience, but they don't actually say that  
16 there's such a clear distinction.

17 **MR KENNELLY:** Certainly, when I use the word "defined",  
18 I don't mean defined in the sense of a market definition.  
19 I could just as easily have said "categorised" or  
20 "described". But it is an important description.  
21 Although they describe a gradation between small and  
22 large, when the tribunal looks at the characteristics of  
23 this group of customers, small customers, you will see, as  
24 the CMA did, that they are very different from large  
25 customers and there are very different competitive  
26 constraints. True it is the line between small customers

1 and large customers is blurred, but that does not mean  
2 there's no distinction between the two groups -- far from  
3 it -- and I shall come to the evidence to make that point  
4 good.

5 Because what the evidence does show is that small suppliers  
6 had a huge share of the small customer business. They  
7 compete vigorously for it and would continue to do so  
8 following the merger. And not just existing small  
9 suppliers. There are two new entrants. Although they are  
10 small in the sense of their current UK market presence,  
11 they are major global companies -- AFCO/Zep and Kersia.

12 **THE PRESIDENT:** Kersia and ...?

13 **MR KENNELLY:** AFCO/Zep, but AFCO for short.

14 **THE PRESIDENT:** AFCO has now got customers in the UK?

15 **MR KENNELLY:** Yes. Although -- my point is, yes, they do, and  
16 although they are small, in the sense that they don't have  
17 anything like the customer volume of the large incumbents,  
18 the evidence shows that they are already positioned to  
19 compete effectively. At the very least, for small  
20 customers, they can do so immediately as part of their  
21 plans for further expansion in the UK. There is no  
22 evidence, we say, of an SLC in respect of small customers.  
23 So, at most, there's an SLC for large customers. That's  
24 the highest the CMA can put their case. We say, is that  
25 sufficient for the CMA's conclusion? The CMA says it is  
26 sufficient to find an SLC in the market, even if not in

1 all of the market.

2 In our respectful submission, that is the wrong approach.

3 They need to establish where the SLC arises, in respect of  
4 which customers.

5 **THE PRESIDENT:** Is that under the statute?

6 **MR KENNELLY:** Yes, for the reason I am about to give. It is  
7 self-evident, sir, because they must identify in respect  
8 of which customers the SLC arises so that a proportionate  
9 and effective remedy can be fashioned.

10 **THE PRESIDENT:** I understand that it is relevant to remedy.

11 I can see that. But I don't, at the moment, understand,  
12 under the statutory test they have to apply, why it's  
13 relevant to actually determining is there or is there not  
14 an SLC, that they have to say there is an SLC more  
15 specifically.

16 **MR KENNELLY:** The statute doesn't say they have to do so more  
17 specifically and neither does the guidance. But it must,  
18 as a matter of, at the very least, good practice on their  
19 part. But because of the necessary link between the  
20 finding of an SLC and the duty to fashion a remedy, they  
21 must be required to identify in respect of which  
22 customers. I don't mean -- of course, when I say "which  
23 customers", it may be necessary to identify them by  
24 category or description. I don't mean necessarily in  
25 every case each individual customer. But what they cannot  
26 do is simply say, "We can say there is an SLC in the

1 market and we don't need to be precise about which  
2 customers -- in respect of which customers competition is  
3 lost".

4 **THE PRESIDENT:** You say that that is legally wrong. That's  
5 what is slightly puzzling me. Because your ground is to  
6 say that the evidence doesn't support an SLC finding or  
7 the SLC finding that was made.

8 **MR KENNELLY:** I'm not putting it as an error of law point. It  
9 is really that, simply, the evidence isn't there to  
10 support an SLC in respect of these customers. The CMA in  
11 response says -- and I'm paraphrasing and Mr Williams will  
12 correct me, of course -- "We don't need to be precise  
13 about which customers suffered a loss of competition", and  
14 I say, well, that can't be right, because you do need to  
15 be precise, not least for the purpose of remedy.

16 **THE PRESIDENT:** But they do explain, which is your point, that  
17 it's the bigger, larger, customers where the loss of  
18 competition is.

19 **MR KENNELLY:** Yes.

20 **THE PRESIDENT:** So the factual findings are there, which is  
21 why you go on to attack the remedy. But why does it in  
22 some way vitiate the conclusion on SLC? That's what I'm  
23 struggling with.

24 **MR KENNELLY:** Absolutely. The point is, if we are forced to  
25 accept that there is this loss of rivalry for large  
26 customers, what does it matter? Is that not enough to

1 establish the SLC that the CMA found? That's their  
2 materiality point. They say: well, even if we mistakenly  
3 included small customers in our SLC finding, it doesn't  
4 make any difference. But we say that materiality point  
5 can't be right because the loss of rivalry doesn't go  
6 directly to an SLC finding. It is necessary to take that  
7 loss of rivalry and weigh it in the balance with the other  
8 factors that the CMA considered, such as countervailing  
9 buyer power and, crucially, they need to be precise about  
10 the scale of the SLC in order to fashion the remedy.

11 I will make this good by reference to -- this is just my  
12 introduction. I will come back to all of this.

13 The point is that it can't be enough to simply say, "Well, it  
14 doesn't matter, we don't need to be precise". We say  
15 that's wrong as an answer to our concern.

16 If the tribunal finds that actually there was no SLC in  
17 respect of small customers and the most they can show is  
18 a potential SLC for large customers, it should be remitted  
19 back to them so they consider that issue on a proper  
20 basis.

21 **THE PRESIDENT:** The finding on SLC is in 9.2 of the report.  
22 That's the finding. It doesn't exclude international  
23 customers. When you read it, you can see, quite clearly,  
24 that they're not concerned about international customers,  
25 but, really, you have got the statutory question they have  
26 got to answer, and they take it in stages -- first, what's

1 the relevant market? Well, that's not being challenged,  
2 so they say the relevant market, and that of course is  
3 section 6.38. That's the market: namely, the supply of  
4 formulated cleaning chemicals and ancillary services to  
5 F&B customers in the UK. You accept that?

6 **MR KENNELLY:** Yes.

7 **THE PRESIDENT:** That includes international customers. Then  
8 they have to ask the question, does this merger give rise  
9 to an SLC in that market? And the answer to that question  
10 is in 9.2. They don't say in relation to supply to  
11 non-international customers, and you're not saying it's  
12 wrong for that reason, as I understand it. They don't say  
13 not international and smaller customers. There is an SLC  
14 in the market.

15 Now, of course, when you go on to remedy, the nature of  
16 the SLC is terribly important, and all your points about,  
17 well, there's not a concern about small customers, that  
18 must feed into what's the appropriate remedy. I see that.  
19 But what I struggle with is, what's wrong about 9.2 or  
20 irrational about it, given the statutory question they  
21 have got to answer?

22 **MR KENNELLY:** 9.2 has to be read, obviously, in relation to  
23 what was set out in part 7 of the report. Obviously it is  
24 a summary. When one reads 9.2 with 7, one sees that the  
25 CMA has expressly excluded international customers from  
26 its SLC finding, because it says there's no -- they

1 haven't needed to consider it because there's no overlap  
2 between Ecolab and Holchem for those customers. But it  
3 does include small customers within its SLC finding. May  
4 I show you 7.203.

5 **THE PRESIDENT:** Yes.

6 **MR KENNELLY:** I will just take this slowly because it needs to  
7 be unpacked. The previous paragraphs refer to some of  
8 the evidence we put forward demonstrating there was no SLC  
9 in respect of small customers. The CMA said what I have  
10 just summarised:

11 "However, we have not segmented the market by customer size  
12 and our assessment seeks to establish whether an SLC is  
13 likely to arise within the market for cleaning chemical  
14 supply to F&B customers as a whole."

15 Pausing there, my point is that the CMA has already found in  
16 the preceding evidence, which I shall take you to,  
17 significant differences between the competitive  
18 constraints for small customers and large customers. So  
19 it's not good enough, we say, to simply say, "We are  
20 looking at whether an SLC is likely to arise within the  
21 market as a whole in light of what they have already  
22 established as the distinction between small and large  
23 customers, not by label or definition, but by reference to  
24 the evidence they had and the competitive constraints  
25 facing those customers. Then:

26 "Within this market, we found that smaller suppliers do not

1 significantly constrain the parties, as they are not  
2 effective competitors for the larger customers who account  
3 for the vast majority of the parties' sales."

4 Okay, that may be true, but that's not an answer to the  
5 question, "What about the small customers?" Then:

6 "Moreover, whilst small customers responding to our  
7 questionnaire did view smaller suppliers as good  
8 alternatives more often than large customers ..."

9 Pausing there, that is a gross oversimplification of  
10 the evidence they did receive and significantly  
11 underestimates the constraint provided by smaller  
12 suppliers:

13 "... the majority nonetheless named the large  
14 suppliers as their best alternatives."

15 That is the CMA's rejection of the parties' submission that  
16 there was no basis for an SLC finding in respect of small  
17 customers.

18 Then they move on to constraints from specialist suppliers,  
19 and so on.

20 So when they go on to describe the SLC at 9.2, that has to be  
21 read with 7.203 where they expressly rejected the  
22 submission that there was no basis for an SLC finding in  
23 respect of small customers, as the CMA had itself  
24 described in this investigation.

25 Now, I can address the tribunal now on why that's a material  
26 error, but I am otherwise happy to pick it up in the

1 substance of my submissions when I get to it. I'm in the  
2 tribunal's hands.

3 **THE PRESIDENT:** If you are dealing with ground 1, I suppose  
4 you want to say it is a material error.

5 **MR KENNELLY:** Yes.

6 **THE PRESIDENT:** Ground 1 is independent of what happens about  
7 remedy.

8 **MR KENNELLY:** Absolutely. Yes. Again, I'm in your hands.  
9 I'm happy to go back to my introduction and stick to my  
10 structure or go straight into --

11 **THE PRESIDENT:** Why don't you finish on ground 1?

12 **MR KENNELLY:** But to do that, sir, I need to go back to the  
13 beginning, I'm sorry to say, because I don't want to go  
14 straight into issues of materials without showing you the  
15 evidence on small customers. I do need to take the  
16 tribunal to that.

17 **THE PRESIDENT:** We have read the report. We see the  
18 differences in many ways with smaller customers.  
19 What I'm not clear on is, are you saying that there was no  
20 anti-competitive effect of significance with regard to  
21 smaller customers and you want to show us the evidence of  
22 that, and that's what you're seeking to do? But if we  
23 take that evidence as read, then you say they should have  
24 restricted their finding in that way.

25 **MR KENNELLY:** Yes. I say restricted their finding; restricted  
26 their finding in relation to where there had been a loss

1 of rivalry, which then feeds into the broader question of,  
2 does that ultimately lead to a substantial lessening of  
3 competition? Yes, that is my submission.

4 **THE PRESIDENT:** Because, as I understood, and Mr Williams may  
5 be able to help on this, and you will correct me if I am  
6 wrong, the CMA's case is not, no, there is a very  
7 significant effect on smaller customers; I thought your  
8 case was, well, there's nothing wrong with the finding you  
9 expressed, even if the effect on smaller customers was not  
10 significant because you're not segmenting the market.

11 **MR WILLIAMS:** That's right, sir. We are not segmenting the  
12 market. We have assessed whether there's an SLC in the  
13 market as we have defined it, having regard to the  
14 evidence as it relates to the different categories of  
15 customers that have been identified. One is international  
16 customers, and Mr Kennelly has already addressed that.  
17 There are then the larger customers, and, sir, you have  
18 seen those customers, there are particular concerns in  
19 relation to their position.

20 **THE PRESIDENT:** Yes, and I think it is accepted there is an  
21 SLC in regard to larger customers.

22 **MR WILLIAMS:** I think what's between us is whether it was open  
23 to the CMA, in making its finding of an SLC in the market,  
24 to have regard to evidence of a loss of competition in  
25 relation to smaller customers without breaking that out as  
26 a discrete issue and a discrete topic in itself. The

1 CMA's position is that it analysed all of the evidence  
2 relating to competition in the market for larger and  
3 smaller UK-only customers. This was one strand of that.  
4 The evidence highlighted by Mr Kennelly in 7.203 is one  
5 strand of that evidence and some of that relates  
6 particularly to smaller customers, and that was taken into  
7 account as part of the finding of an SLC in the market as  
8 defined.

9 As we understand it, what Mr Kennelly says is that we ought to  
10 have given the merger a clean bill of health, effectively,  
11 in respect of smaller customers. Our position is that we  
12 didn't analyse the case in that binary way. We had regard  
13 to the evidence relating to the different categories of  
14 customers and took account of the evidence of a loss of  
15 competition for smaller customers alongside the evidence  
16 of a loss of competition for larger customers.

17 Taking the tribunal's point, we didn't segment the market. We  
18 don't say that we needed to segment our analysis.

19 **THE PRESIDENT:** Yes. I think, if I have understood you  
20 rightly, you are saying there was some -- you did have  
21 regard to some anti-competitive effect on smaller  
22 customers, is that right --

23 **MR WILLIAMS:** Yes.

24 **THE PRESIDENT:** -- in looking at the market as a whole?

25 I don't want you to take me to the evidence --

26 **MR WILLIAMS:** No, but it is right to say the last sentence of

1 7.203 identifies a concern about a loss of competition for  
2 smaller customers and the fact that larger suppliers are  
3 the best alternatives -- are identified by customers as  
4 their best alternatives for smaller customers in  
5 particular and that is one strand of the evidence which  
6 the CMA was entitled to take into account.

7 **THE PRESIDENT:** I see. Thank you very much. That's helpful.  
8 Mr Kennelly, you had probably better take us to the  
9 evidence.

10 **MR KENNELLY:** If I may just say, that brief interchange really  
11 demonstrates the difficulty in which we find ourselves.  
12 The CMA has not said there is no SLC in respect of small  
13 customers. But (inaudible). They still blur the  
14 distinction and include small customers within the SLC.  
15 If we could go first on this question of segmentation to  
16 the final report, paragraph 7.75, on page 47 of the final  
17 report. To begin the story with international customers,  
18 when one asks whether the CMA did segment customers in its  
19 analysis, one has to take these into account.  
20 International customers are described at 7.75 and the CMA  
21 says:

22 "... we refer to customers who contract for supply across  
23 multiple countries ... When an international customer  
24 contracts for supply within the UK, the applicable  
25 framework agreement may have been negotiated and agreed  
26 outside of the UK with little or no UK-specific terms."

1 7.76, the first sentence:

2 "The parties submitted Holchem does not compete with Ecolab  
3 for these. Our investigation confirmed this."

4 Then 7.77:

5 "That is not to say, however, that all multinational customers  
6 have a single contract to cover supply in all the  
7 countries they serve -- some will have a UK-only contract  
8 for their UK operations. The parties' customer lists show  
9 that both Ecolab and Holchem supply some multinational  
10 customers on a UK-only basis. Indeed, in terms of  
11 customer numbers, over [you can see] ... of both parties'  
12 customers are for supply only in the UK. However, larger  
13 customers are more likely to be multinational customers.  
14 Ecolab receives [that percentage] of its UK F&B revenue  
15 from multinational customers, and Holchem earns slightly  
16 more than [that much] of its revenue from multinational  
17 customers. This demonstrates that Holchem [despite being  
18 UK only] can attract some of these customers and contract  
19 on a UK-only basis."

20 In fact, what the tribunal sees there in that last sentence is  
21 that the distinction between international customers and  
22 large customers is also not very sharp, because an  
23 international customer that is sourcing supply for several  
24 countries under one contract could be persuaded to source  
25 separately for the UK and become a large customer on the  
26 CMA's description if, for example, the terms were

1 attractive. The description obviously is distinct, but  
2 one can see how a customer could move from the category of  
3 international to large multinational fairly easily.

4 **THE PRESIDENT:** Or vice versa.

5 **MR KENNELLY:** Or vice versa. Then 7.82, the conclusion:  
6 "In contrast, the evidence available to us indicates that  
7 while some suppliers to international customers also  
8 supply UK-only customers ... suppliers who only supply on  
9 a UK-only basis are not viable for international  
10 customers."

11 There they say Holchem isn't a strong constraint:

12 "The remaining of our findings therefore focuses on UK-only  
13 supply."

14 What that demonstrates is, despite the fact that the line  
15 between large and international is blurry, the CMA is  
16 still capable of excluding that group within the defined  
17 market from its SLC finding. It should also, we say, have  
18 concluded --

19 **THE PRESIDENT:** They haven't excluded them from the finding.  
20 They have explained there is no concern. But the actual  
21 finding, as I referred you to, does not specify any  
22 category of customers.

23 **MR KENNELLY:** Sir, may I show you the defence --

24 **THE PRESIDENT:** I know in the defence they say they're not  
25 concerned, but the finding in the report is at 9.2, it's  
26 the statutory question.

1 **MR KENNELLY:** But that's the very point. As I said at the  
2 beginning, sir, 9.2 is obviously a single sentence. The  
3 substantive part of the sentence. One has to ask, when  
4 one reads 9.2, in respect of which customers does the SLC  
5 arise? That's what the CMA does in section 7. It  
6 reflects its defence:

7 "The CMA made clear its SLC finding did not relate to  
8 international customers."

9 That's appropriate because, when they said it didn't relate to  
10 international customers, they were being precise, as we  
11 said they should be, as to which group of customers would  
12 suffer the loss of competition arising from the merger.

13 **THE PRESIDENT:** They have to do it because they have to find  
14 that it is significant and, if it was only two customers,  
15 then you could say it's not significant so there's no SLC  
16 in the market.

17 **MR KENNELLY:** That's part of the reason, yes.

18 **THE PRESIDENT:** You're imposing on them an obligation to  
19 answer a question that is not the section 35 question.

20 **MR KENNELLY:** I don't need to go that far because it goes to  
21 the materiality issue. I will come to materiality after  
22 I show you the evidence. Because it really does -- we are  
23 not imposing a straitjacket on the CMA. This is  
24 a fact-specific issue. In some contexts, the CMA can say  
25 legitimately that the groups of customers are so  
26 interchangeable that, although there are characteristics

1       which distinguish them, it is impossible to distinguish  
2       between them for the purpose of our analysis and,  
3       therefore, we will do the best we can with what we have  
4       and find an SLC. But here, all they can show is that the  
5       dividing line between small and large customers is blurry,  
6       but the characteristics and competitive constraints within  
7       them are very different. That's on their own findings.  
8       Here it really was incumbent on them to identify with more  
9       precision the customers for whom competition would be  
10      lost, which is the essence of the SLC test.

11     As I say, we've left international customers, and you have our  
12      point about small customers.

13     The next part I want to show you is how small customers came  
14      to be described -- 6.26 and 6.27. The tribunal raised  
15      this point earlier this morning, about, well, these aren't  
16      really definitions, it's a tool for analysis. It's  
17      important to see where it came from.

18     At 6.26 and 6.27, you see how the parties applied thresholds.

19      I shan't read those.

20     **THE PRESIDENT:** Yes. We have got 6.31, don't we?

21     **MR KENNELLY:** Before that, 6.30, to the extent that the CMA  
22      seeks to disavow this threshold as a basis of something  
23      which they have adopted simply because it is used by the  
24      parties, and that's not entirely correct. At 6.30, the  
25      CMA says:

26      "We have not defined separate markets for customers of

1 different sizes. In particular, for ease of  
2 evidence-gathering analysis, we have drawn [the CMA has  
3 drawn] distinctions between large customers with over  
4 £50,000 of annual cleaning chemical purchases and small  
5 customers with under £50,000 of purchases."

6 They say the threshold was chosen, and they say why, but it is  
7 one the CMA, itself, has settled on as a basis of its  
8 analysis. Then, at 6.31, of course they say it informs  
9 their analysis. There is not a sharp distinction between  
10 customers spending over and under £50,000. There is  
11 a continuum of customers by size, with larger customers  
12 tending to require greater levels of servicing.

13 You have my submission about this. The fact that there is  
14 a blurry line between the two does not mean that the  
15 distinction between them can be ignored entirely and they  
16 can be lumped together for the purposes of an overall SLC  
17 finding in view of what they did actually find about small  
18 customers.

19 You see that from the evidence. I am now going to take you to  
20 the evidence to demonstrate why the CMA erred in bundling  
21 them together for the purpose of a single SLC finding.

22 The first is to look at 7.19 of the same report. Really only  
23 relying here on the very last sentence because this is  
24 about the parties' share of revenue attributable to large  
25 customers. Remember, we are asking ourselves here in the  
26 merger, what is the SLC arising from the overlap between

1 Ecolab and Holchem? At the very bottom of 7.19 on  
2 page 31:

3 "... we do not consider that this statistic has any material  
4 bearing on the accuracy of the estimated market shares,  
5 given ...."

6 This is the important part:

7 "... that there is significant discrepancy in the size  
8 of customers [and this bit] and that the parties are  
9 focused on larger customers."

10 Right away, the CMA is recognising that the main battleground  
11 between the parties is for larger customers.

12 Then the second reason, and really key for the purpose of my  
13 submission, is that smaller customers are supplied  
14 predominantly by smaller suppliers. That's important  
15 because large suppliers can supply and compete for smaller  
16 customers. Large suppliers can supply smaller customers.  
17 The fact that smaller suppliers win so much of the smaller  
18 customer business and, as I shall show you, get so little  
19 of the large customer business demonstrates that for  
20 smaller customers there is a very different competitive  
21 battle.

22 You see that first at 7.202. So 7.202, all of the evidence  
23 that they have described indicates:

24 "... smaller suppliers compete for smaller customers but  
25 provide only a minimal constraint when competing for  
26 larger customers. Given that larger customers account for

1 the clear majority of both parties' sales ... smaller  
2 suppliers therefore exert a minimal constraint..."

3 I rely on that to make the obvious point that smaller  
4 suppliers get -- do not win, normally, large customers.

5 But then go back to 7.191, because this shows you what the  
6 smaller suppliers' share of the market as a whole is. The  
7 smaller suppliers' share of the large market which  
8 includes large and small customers:

9 "Several small suppliers are also active in the supply of  
10 cleaning chemicals. According to our market estimates,  
11 these suppliers, the small suppliers, collectively account  
12 for ..."

13 And you see that percentage:

14 "... of the market."

15 Since we know the small suppliers are getting very little of  
16 the large customer business, their share of the small  
17 customer business must be huge, if that's their overall  
18 share of the market.

19 We made this point in the reply and our skeleton and the CMA  
20 hasn't disputed it. We don't have the precise market  
21 share of small -- supply of business in the small customer  
22 segment, but if the small suppliers are taking that much  
23 of the whole market and none of the large customer  
24 business, or very little of it, that is a very large  
25 percentage. It must be, we say, of the small customer  
26 business.

1 **THE PRESIDENT:** Do we have figures for the size of the market  
2 split by large and small customers?

3 **MR KENNELLY:** I will ask Mr Luckhurst to do that and we will  
4 get it for you, if it exists, in the course of  
5 the morning.

6 The third reason why I say the CMA erred in finding an SLC in  
7 respect of small customers was how the CMA applied its own  
8 questionnaire data. Here I need the tribunal to hold our  
9 skeleton on one side and the raw material on the other.

10 If you could take our skeleton argument in the core bundle --  
11 it is behind tab 1 -- paragraph 16, and then hold the  
12 final report on the other side, beginning with 7.151,  
13 which is page 70 of the final report.

14 The first point is, as you see in paragraph 16 of our  
15 skeleton, we say:

16 "The CMA did not draw appropriate conclusions from the  
17 questionnaire responses from small UK-only customers."

18 I'm reading my skeleton:

19 "Out of the 57 small, UK-only Holchem customers who responded  
20 to the question 'Who is the best alternative supplier?',  
21 smaller suppliers were rated as the number 1 alternative  
22 18 times, beating Ecolab, Diversey and Christeyns."

23 You see that in figure 17 on page 70. The first -- Ecolab,  
24 Diversey and Christeyns, the first three columns,  
25 "Murphy's", "DBM" and "Other" are small.

26 **THE PRESIDENT:** Nobody seems to have listed AFCO or Kersia,

1           because you said they're supplying small customers.

2   **MR KENNELLY:** Unless they are included in "Other", sir.

3   **THE PRESIDENT:** "Providers listed only once grouped together

4           includes ..."

5   Yes, well, they might be the various, but ...

6   **MR KENNELLY:** I will, at a later stage --

7   **THE PRESIDENT:** Yes, we'll come back to that --

8   **MR KENNELLY:** -- come to the survey data, which --

9   **THE PRESIDENT:** -- but I just noticed that.

10 **MR KENNELLY:** There's no getting away from the fact they are

11       new entrants, and that's reflected. There are specifics

12       of this market that mean customers are not well informed.

13       It is clear from the survey as to who is actually in the

14       market. They tend to stay with suppliers for a long time.

15   The second, paragraph 16, we say:

16   "When asked who their previous supplier was, small UK-only

17       Holchem customers identified smaller suppliers 22 times,

18       beating Diversey, Ecolab and Christeys."

19   We see that 7.156, as amended. For this, we are going to need

20       to go to tab 3 in the final report bundle because the CMA

21       made mistakes in the final report, so there is an annex of

22       corrections. This is a paragraph which they had to

23       correct. So in tab 3 of the final report bundle there is

24       a table of corrections produced by the CMA to the final

25       report. If you skip through it, you get to the paragraph

26       in the left-hand column, 7.156. Do you see what the CMA

1 says: most of Holchem's small customers that responded  
2 didn't name a previous supplier. We're looking here at  
3 previous suppliers. Among the customers that did name  
4 a previous supplier, the most commonly named previous  
5 supplier was: Diversey, 11; Ecolab, 9; and Christeyns, 9.  
6 Murphys and ACS, small, were mentioned -- sorry, some --  
7 well, you see the number. Other providers were also  
8 listed.

9 You can see, if you combine the small customers, how many are  
10 listed. Slightly less, but still close to the number of  
11 times Diversey, Ecolab and Christeyns are listed. But  
12 then the CMA says this:

13 "This indicates smaller customers may have some additional  
14 options outside of the largest four suppliers ..."

15 True it is that the small number of large suppliers get more  
16 mentions, but a very significant number, in the context of  
17 this description, goes to the small customers. Sorry,  
18 goes to the small suppliers.

19 So back to the skeleton, 16(3):

20 "Out of the ..."

21 **THE PRESIDENT:** I'm not sure why the figure in the middle  
22 sentence, "Some [X] other providers were also listed ...",  
23 why that's confidential. Mr Williams can take  
24 instructions on that at some point.

25 **MR KENNELLY:** I had the same query in my head. The point is,  
26 you can see there how many listings -- how many mentions

1 small suppliers got as previous suppliers. Very close to  
2 the large ones. Then at 16(3) in the skeleton:  
3 "Out of the 15 small UK-only Ecolab customers who responded to  
4 the question 'Who is the best alternative supplier?',  
5 smaller suppliers were rated as the number 1 alternative  
6 four times, beating Diversey ... and Christeyns ..."  
7 We see that at page 68 of the final report, going back into  
8 the main final report now, figure 14 at the top of  
9 page 68. So this is asking 15 small Ecolab customers who  
10 is the best alternative supplier. So in that figure 14,  
11 putting Holchem to one side, we see how  
12 Diversey/Christeyns fare as against "Other" in the minds  
13 of small UK-only customers.

14 **THE PRESIDENT:** Why do we put Holchem to one side?

15 **MR KENNELLY:** Because we are asking the extent to which  
16 Diversey -- it is easier if I show you right away what the  
17 CMA took from this. If you go to 7.243 in the same  
18 document. This is the answer to the president's question.  
19 From this data, all of it together, this is what the CMA  
20 say the parties will face, after the merger:

21 "(a) a strong constraint from Diversey.

22 "(b) a slightly weaker constraint from Christeyns.

23 "(c) limited constraints from all other suppliers of  
24 formulated cleaning chemicals."

25 But for small customers, we say that is an irrational  
26 conclusion. You can see from figure 14 what the small

1 customers say about Diversey and Christeyns, when compared  
2 to small suppliers, when asked who is their alternative  
3 supplier, and what's plain from 7.243 is the CMA's only  
4 thinking about large customers.

5 The next reason that we say the CMA erred in relation to  
6 finding an SLC for small customers is their reliance on  
7 tender analysis. The tribunal will have seen it's large  
8 customers who use tenders. Small customers don't. The  
9 extent to which the CMA relies on tender analysis to  
10 demonstrate an SLC cannot apply, we say, in the same way  
11 at all to small customers.

12 If you go to 7.137. I'm focusing really on the bottom half of  
13 that paragraph, beginning:

14 "Moreover, competition for tenders is focused predominantly  
15 amongst the big market players with very few smaller  
16 competitors having the ability to compete successfully.  
17 Thus, all the tender evidence points to the parties being  
18 close competitors within a limited set of large  
19 suppliers."

20 True, I say, but not with small customers. Because, if you go  
21 to 7.47 and 7.48, you see we submitted only a small  
22 proportion of customers use tenders. Larger customers are  
23 much more likely than smaller ones to carry out that  
24 procurement arrangement. Then, at figure 3, 7.48, a large  
25 portion of sales to customers that are over that figure of  
26 purchases are tendered, whereas only a very small portion

1 of tenders are recorded for the smaller customers. Then  
2 please go to 7.119. This is the CMA's conclusion:

3 "... it is true that the majority of the parties'  
4 customers do not use tenders [that's the small ones] those  
5 who do use tenders tend to be larger ..."

6 **THE PRESIDENT:** I think if you are saying the tender analysis  
7 can't support an effect on competition for smaller  
8 customers, that's clear.

9 **MR KENNELLY:** I will move on. The fifth reason, we say, is  
10 the CMA's own evidence from their analysis of accounts  
11 gained and lost by the parties and that's at 7.109 of  
12 the final report. This is a very short point. I'm  
13 relying only on the penultimate sentence of this  
14 paragraph. This, again, is just demonstrating the tension  
15 in the CMA's own reasoning. Because here they say:

16 "... any competitive constraint from other suppliers,  
17 it is likely to be stronger at the lower end of the market  
18 but much weaker for larger customers."

19 We say that's a gross underestimate of what was happening in  
20 the face of the evidence the CMA itself had. But even  
21 they are forced to acknowledge that in 7.109. We then  
22 look at the evidence from Christeyns, again, major market  
23 player, well placed to give evidence on this issue. You  
24 see that at 7.201 on page 85 at (c):

25 "Conversely, smaller suppliers are better able to compete for  
26 smaller customers than large suppliers like Christeyns

1 because they have a leaner overhead structure and can  
2 therefore offer better prices, as well as being able to  
3 offer more frequent deliveries if they are focused on  
4 serving local customers."

5 The seventh reason is that many of these smaller customers, as  
6 I said earlier, have been acquired by large global players  
7 in a series of acquisitions and we can see in respect of  
8 two they're well placed to compete for smaller customers  
9 immediately. You can see that in our skeleton argument in  
10 the core bundle at paragraph 20. Could the tribunal  
11 please read paragraph 20. I appreciate the tribunal has  
12 read that already, but --

13 **THE PRESIDENT:** Can you just help me, it is something I wanted  
14 to ask you at some point and I might as well ask you now.  
15 Is AFCO a UK company?

16 **MR KENNELLY:** There is a UK company in it. I will check  
17 precisely where it is established.

18 **THE PRESIDENT:** And where it operates.

19 **MR KENNELLY:** AFCO is a United States-based company. It is  
20 a global business, but it has a UK subsidiary in Bury.

21 **THE PRESIDENT:** Thank you.

22 **MR KENNELLY:** As you have seen in the papers, these large  
23 global companies are often a product of several  
24 acquisitions of smaller --

25 **THE PRESIDENT:** So AFCO is US based and Zep is also US based,  
26 is it?

1 **MR KENNELLY:** Zep is the mother company, the parent company,  
2 of AFCO.

3 **THE PRESIDENT:** Only since 2017, as you say.

4 **MR KENNELLY:** Yes.

5 **THE PRESIDENT:** When you say Zep purchased AFCO, that's one US  
6 company bought another US company, but AFCO has a UK  
7 subsidiary. Is that the point?

8 **MR KENNELLY:** Yes.

9 **THE PRESIDENT:** Thank you.

10 **MR KENNELLY:** So what does the CMA say about all of this?

11 That's the end of my survey of the evidence on this issue.  
12 The CMA says that we are cherry picking, that it is  
13 inappropriate in any judicial review for us to pick bits  
14 of evidence here and there. But this is not cherry  
15 picking. This is all the evidence. It is all going one  
16 way. In spite of this, the CMA decided to extend the SLC  
17 finding to small customers. That is the finding which we  
18 already read at 7.203.

19 If we could just go back to that, since it's the culmination  
20 of all of this, at page 85, we looked at it previously to  
21 establish whether they made a finding in relation to small  
22 customers at all. But this is also where they conclude in  
23 the face of the evidence that you have seen. 7.203, in  
24 the face of all that evidence, we submitted,  
25 unsurprisingly, there was no SLC for small customers, but  
26 they say:

1 "... we have not segmented by customer size and our assessment  
2 seeks to establish whether an SLC is likely to arise  
3 within the market ... as a whole."

4 But that's not good enough, in view of what they have already  
5 established are the clear distinctions between the  
6 competitive constraints for small customers and large  
7 customers. They need to identify where the SLC arises.

8 Then they say:

9 "Within this market, we have found that smaller suppliers do  
10 not significantly constrain the parties, as they are not  
11 effective competitors for the larger customers who account  
12 for the vast majority ..."

13 As I said earlier, fine, but then limit your finding to large  
14 customers. Then they say:

15 "Moreover, while small customers responding to our  
16 questionnaire did view smaller suppliers as a good  
17 alternative more often than large customers, the majority  
18 nonetheless named the large suppliers as their best  
19 alternatives."

20 That's what they derive from all the evidence you have seen,  
21 that's what they derive from it. Bearing in mind the  
22 broad discretion they have in assessing the evidence, that  
23 is still an irrational finding, to include small customers  
24 within the SLC in the face of the evidence you have seen,  
25 on the basis of what they describe there.

26 Now, the CMA's response to this really boils down to, what

1 difference does it make? But the scale of SLC, as I said  
2 earlier, is important. You get that, if it is necessary,  
3 from paragraph 8.43 of the final report. This is quite an  
4 important part of my conclusion on this ground. I'm  
5 conscious of the time and the need for a shorthand  
6 writers' break.

7 **THE PRESIDENT:** How long will you be on this point?

8 **MR KENNELLY:** 8.43 will take me about 30 seconds, but after  
9 that ...

10 **THE PRESIDENT:** Well, deal with that.

11 **MR KENNELLY:** 8.43. This is where we submit they haven't  
12 defined sufficiency in how they have considered expansion.  
13 They say:  
14 "In our view, whether or not entry and expansion is sufficient  
15 as a competitive constraint, such that it is likely to  
16 mitigate the effect of the merger on competition and  
17 prevent an SLC is a matter of judgment based on an  
18 assessment of all of the relevant evidence in the round.  
19 We therefore do not consider that there is a particular  
20 threshold for sufficiency that can be set out in the  
21 abstract, and the extent to which entry and expansion is  
22 a sufficient competitive constraint in any given merger is  
23 a question to be weighed on a case-by-case basis against  
24 the scale of any finding of an SLC arising from the  
25 reduction in rivalry between the parties involved."

26 That is self-evidently correct. You have to weigh these

1 issues against the scale of the finding of an SLC. In  
2 order to establish what is the scale of the SLC in this  
3 case, they have to make a decision in relation to small  
4 customers, and they got that wrong, and so, if you take  
5 small customers out, that affects the scale of the finding  
6 of the SLC.

7 If I may, I will pause there for the shorthand writers' break.

8 **THE PRESIDENT:** We will take five minutes. Come back just  
9 after 11.45 am.

10 **(11.41 am)**

11 **(A short break)**

12 **(11.53 am)**

13 **MR KENNELLY:** Members of the tribunal, I was dealing with the  
14 materiality of what we say is the CMA's error in relation  
15 to small customers. I have taken you to the importance of  
16 the scale of the SLC in the CMA's own words. The next  
17 point I wanted to make was that, although small customers  
18 amount to a small proportion of the revenues in the  
19 merging business, they're a large proportion of the number  
20 of customers of both parties. You see that on page 50 of  
21 the final report in figure 6. I must apologise on behalf  
22 of all the lawyers here for the illegible black text under  
23 the blue highlighting "Proportion of customers" --

24 **THE PRESIDENT:** "... by customer spend".

25 **MR KENNELLY:** "... by customer spend", yes. You see in the  
26 four columns on the left the proportion from 0 to £50,000

1 and the significance of that number.

2 So the point made against me, well, they don't really count  
3 because their revenues are smaller, but there's a large  
4 number of them, and small -- it is perhaps trite to say,  
5 but small customers can become large customers, and it is  
6 telling, when we come to look at remedy -- and you have  
7 seen it already in the papers -- how the new market  
8 entrants, global businesses, are anxious to win the small  
9 customer business. It is plainly a profitable line of  
10 work and you see the large number of them in that figure.

11 The next point you have already. It is the fact that it is  
12 highly relevant to remedy. Identifying precisely the  
13 customers in respect of whom competition is lost when  
14 there's an SLC is necessary, plainly necessary, when  
15 fashioning an effective and proportionate remedy to cure  
16 the SLC and its adverse effects.

17 In relation to the materiality of this customer group, if  
18 I could show you then paragraph 10.158 of the final  
19 report. This came up in the remedy issues. It is  
20 relevant, we say, for the purpose of just understanding  
21 the significance of the group. There was an issue, as the  
22 tribunal knows, in relation to remedies and divestment,  
23 about potential transfer of small customer contracts and,  
24 at 10.158, we see what the CMA says about this:

25 "However, not transferring [that number of those things] would  
26 further reduce the scope of the divestiture package and

1       thus the size and scale of any purchaser, further  
2       exacerbating our concerns that the purchaser in  
3       combination would not comprehensively address the SLC we  
4       have identified."

5       **THE PRESIDENT:** That's the number of [the transferring  
6       party's] small customers that we have there in 10.158?

7       **MR KENNELLY:** That's confidential.

8       **THE PRESIDENT:** The number is confidential, I see that, but  
9       that's what it is, [the transferring party's] customers?

10      **MR KENNELLY:** Yes. Later, sir -- well, I will move on. The  
11      point I'm making here is the relevance of small customers  
12      as a business proposition and their significance, even in  
13      the analysis of the CMA.

14      **THE PRESIDENT:** Yes.

15      **MR KENNELLY:** The final point I wanted to make was that, of  
16      course, even if, as the tribunal said, we're forced to  
17      accept that for large customers there is a significant  
18      loss of rivalry, it doesn't follow automatically that  
19      there's an SLC for large customers. On remittal, the CMA  
20      would have to redo its analysis, including its  
21      countervailing buyer power analysis, to see -- because  
22      that would be particularly important if they were confined  
23      to large customers in respect of whom more countervailing  
24      buyer power would exist. So there's real merit and  
25      importance to remittal if the tribunal finds that there is  
26      no SLC in respect of small customers or the CMA has failed

1 to establish it in this decision. Those are my  
2 submissions on SLC. I propose, at this stage, to move on  
3 to remedy.

4 **THE PRESIDENT:** Yes.

5 **MR KENNELLY:** Again, on remedy, I propose to introduce our  
6 case on remedy and then go through the evidence. Just to  
7 reassure the tribunal, this introduction is just an  
8 introduction and, if you would indulge me, I will get  
9 through it as quickly as I can and then get into the meat  
10 of the material.

11 **THE PRESIDENT:** Yes.

12 **MR KENNELLY:** We are doing well on time, so the tribunal  
13 should be reassured that things are moving according to  
14 our plan.

15 The remedy decision is challenged in grounds 2 to 4 and, as  
16 the tribunal knows very well, as a matter of law, the  
17 remedy must be effective in addressing the SLC and the  
18 adverse effects that arise from the SLC. We know the CMA  
19 prefers remedies that have a high degree of certainty,  
20 that they will achieve their intended effect. The CMA  
21 accepts that complete certainty is not required.

22 The test -- we see this from the CMA's skeleton at  
23 paragraph 43, no need to turn it up, and this is taken  
24 from the guidance -- is whether the uncertainty as to  
25 whether the remedies will achieve their effect is such  
26 that customers or suppliers of the merger parties would

1 bear significant risks that remedies will not have the  
2 requisite impact on the SLC or its adverse effects. As  
3 I said, Ecolab propose to divest --

4 **THE PRESIDENT:** Do you accept that principle? You're not  
5 challenging it?

6 **MR KENNELLY:** Not at all. We rely on it.

7 Before I get into the -- even into my introduction, because of  
8 the concerns and confidentiality and the importance of  
9 doing as much as possible in open court, I do wish to take  
10 you to some of the codewords that I mentioned at the very  
11 beginning. If you just give me a moment, I will not take  
12 you to the ones we have already discussed.

13 The first is, the ADP, the alternative divestment proposal,  
14 involved one of the merging companies divesting the part  
15 of the business that overlapped between the two companies.  
16 The identity of the divesting company is confidential, so  
17 I propose to call that simply "the divesting company".

18 Similarly, the identity of the companies which made the  
19 non-binding offers to purchase the divesting business is  
20 confidential, and here, to be clear, if you take our  
21 skeleton behind tab 1 and go to paragraph 2 -- sorry,  
22 tab 1, paragraph 1, just to be clear about who is  
23 purchaser A and who is purchaser B.

24 In paragraph 1(2), so paragraph 1 of the skeleton, and you see  
25 within it about halfway through the paragraph there is  
26 a subparagraph (2).

1 **THE PRESIDENT:** Under "Introduction"?

2 **MR KENNELLY:** I'm sorry, yes. It is the one that begins  
3 "A rejection of Ecolab's proposal". Below that  
4 subparagraph (2) there is an (a) and (b). I am going to  
5 call the company at (a) "Purchaser A" and the company at  
6 (b) "Purchaser B", if the tribunal is content.

7 **THE PRESIDENT:** Yes. That's very helpful.

8 **MR KENNELLY:** Consistently with the tribunal's disclosure  
9 ruling, I propose to call -- what I have already called,  
10 and what the tribunal called, the "fallback proposal", the  
11 parties' fallback proposal in the event that the primary  
12 ADP was rejected, I will simply call that "the fallback  
13 proposal" for the purposes of our ground 4.

14 **THE PRESIDENT:** Thank you.

15 **MR KENNELLY:** We say that the ADP went far beyond what the CMA  
16 has accepted in similar cases. To take the first  
17 question, the first question for the CMA -- again, I'm  
18 paraphrasing in this introduction -- were the purchasers  
19 suitable? The evidence I will show you is they were major  
20 global operators with strong international brands,  
21 experienced in the EU, which is important because the  
22 relevant chemical product standards are all EU standards  
23 and these companies had a small but growing presence in  
24 the United Kingdom.

25 The second question: would the divested customers agree to  
26 switch to the purchaser? Well, under the ADP, the

1       divested customers had to find a new supplier because the  
2       divesting company committed to refuse to supply them.  But  
3       the divested customers --

4   **THE PRESIDENT:**  Sorry, the ADP is your proposal; is that  
5       right?

6   **MR KENNELLY:**  Yes.

7   **THE PRESIDENT:**  You said a moment ago the ADP went far beyond  
8       what was necessary.  That's your proposal.

9   **MR KENNELLY:**  Sorry, I said the ADP went far beyond what the  
10       CMA had accepted in other cases.

11   **THE PRESIDENT:**  Oh, in other cases.

12   **MR KENNELLY:**  Yes, in other cases.  The ADP is our proposal.  
13       Plainly the fallback is our proposal.  I don't rely on any  
14       doctrine precedent for this, but it is important to  
15       understand how the CMA ought to apply its own guidance.  
16       But this ADP we produced was a remarkable remedy for its  
17       degree of certainty, produced in a very short timeframe,  
18       and went beyond what the CMA has accepted in similar  
19       cases.

20   But I was talking about, at this stage, again, by way of  
21       introduction, we have to persuade the CMA that divested  
22       customers would be prepared to move to the purchaser and  
23       not simply disperse.  They'd have to go somewhere because  
24       the divesting company had agreed to refuse to supply them,  
25       but --

26   **THE PRESIDENT:**  What I wasn't quite clear is, under the

1       remedy, the divesting company was merging with the  
2       other -- one of the two parties.

3       **MR KENNELLY:**   Yes.

4       **THE PRESIDENT:**  The divested customers, could they, under the  
5       remedy, still be supplied with the product of  
6       the non-divesting company?

7       **MR KENNELLY:**   No.

8       **THE PRESIDENT:**  That's not very clear from the way it's  
9       expressed.

10      **MR KENNELLY:**   I apologise for that.  I hope it is so  
11      obvious --

12      **THE PRESIDENT:**  Because they would be one company then.

13      **MR KENNELLY:**   The details will be given to me, but under no  
14      circumstances would that be --

15      **THE PRESIDENT:**  That's what I thought.  But it wasn't quite  
16      clear, the way it's expressed.

17      **MR KENNELLY:**   As to whether the customers could be persuaded  
18      to switch, finding themselves homeless, the remedy  
19      involved financial incentives from Ecolab to the customers  
20      to encourage them to move on to, and stay with, the  
21      purchaser.  Sufficient employees from the divesting  
22      company were going to be transferred to the purchaser to  
23      provide continuity of service to the customers, and those  
24      employees which were to be transferred would also receive  
25      financial incentives to encourage them to move.

26      Equipment buying for the divesting company on their customers'

1 premises, what we call onsite equipment, would also be  
2 transferred to the purchaser. The customer's database  
3 records would be transferred to the purchaser and the ADP  
4 included transitional arrangements to allow the purchaser  
5 to immediately take over the relevant services whilst  
6 gradually phasing the customers from the divesting company  
7 manufactured chemicals to chemicals manufactured by the  
8 purchaser.

9 So the transfer would cost the customers nothing. They would  
10 get continuity of service and products while the purchaser  
11 used the transition period to demonstrate how its products  
12 and services were at least as good as those of  
13 the divesting company. The evidence from the purchasers,  
14 the unchallenged evidence from them, was they could do  
15 that. In fact, they declined Ecolab's offer to divest  
16 manufacturing facilities, since they already had their own  
17 UK manufacturing distribution capabilities.

18 The CMA's primary reason for rejecting the ADP had three  
19 parts. First, they say in the final report customers  
20 might refuse to leave the divesting company. That's  
21 a plain mistake because the customers wouldn't have  
22 a choice.

23 Secondly, the customers might not stay with the purchaser, but  
24 transfer away, either back to the divesting company or to  
25 another supplier.

26 Thirdly, the purchasers didn't have the sufficient scale or

1 brand to cure the SLC, in any event.

2 **THE PRESIDENT:** I think your first one, you say "might refuse  
3 to leave", I think what they said, might refuse to leave  
4 or transfer to what you call the purchasing company or the  
5 intended divestee and go somewhere else. The second one  
6 is, they may not stay, but the first one is, they might  
7 not go there in the first place.

8 **MR KENNELLY:** Actually, in the final report, and they said in  
9 several places, the CMA say, well, the customers may  
10 refuse to leave the divesting company at all --

11 **THE PRESIDENT:** Or not go --

12 **MR KENNELLY:** Sure. It is just a basic mistake that they have  
13 made.

14 **THE PRESIDENT:** You say that's wrong because they had to  
15 leave?

16 **MR KENNELLY:** The key issue is, could they be persuaded to go  
17 to the purchaser and not to one of the large incumbents.

18 **THE PRESIDENT:** Yes.

19 **MR KENNELLY:** But this, again, is a question of examining the  
20 evidence, and the CMA's conclusion on this critical issue  
21 was founded on a completely flawed evidence-gathering  
22 exercise. I fully appreciate in this tribunal, with the  
23 legal standard that I have to reach, that is ordinarily  
24 a very difficult task. But the evidence I shall show you  
25 is of the nature of an irrational analysis; in particular,  
26 an irrational failure properly to gather the evidence

1 necessary to answer the statutory question. You have seen  
2 this in the CMA's skeleton: it is all very well dealing in  
3 the abstract with the broad powers that the CMA has and  
4 the margin of discretion it enjoys in assessing evidence,  
5 but even in judicial review, the tribunal is examining the  
6 evidence, and proportionality means that you are entitled  
7 and required to look closely at the evidence. The margin  
8 of discretion which the CMA enjoys comes in its assessment  
9 of the evidence that it has obtained. But that applies  
10 after the proper evidence has actually been produced, and  
11 here there is no real evidence to support the CMA's  
12 finding on remedies. What evidence supports the CMA's  
13 case was provided by customers who were not given crucial  
14 details of the ADP and evidence from buyers, and I say  
15 that without any criticism, competitors of the parties who  
16 had their own agenda, in particular to purchase the  
17 divested Holchem business, which was the CMA's preferred  
18 remedy.

19 The CMA consulted with ten customers but did not ask them the  
20 correct question, namely, what will they do if the  
21 divested company was to cease supplying them and they were  
22 offered a seamless and financially incentivised transition  
23 to the purchaser under all the conditions I have just  
24 described? Instead, the CMA discussed in very general  
25 terms --

26 **THE PRESIDENT:** The question you say they should have been

1       asked, that's the point you're making. I mean, we have,  
2       I think, in your skeleton, is it, the question you say  
3       they should have been asked, don't you?

4       **MR KENNELLY:** Yes. But there's no need to turn to that  
5       particular question. The CMA doesn't like it, and the  
6       formulation of the question is ultimately for them.

7       **THE PRESIDENT:** But you say -- well, it is for them, but you  
8       say they asked the wrong question and you say this is the  
9       question they should have been asked, not as a matter of  
10      grammar, but these are the points in order for it to be  
11      a proper gathering exercise. I think you set it out  
12      somewhere.

13      **MR KENNELLY:** We set out a potential question.

14      **THE PRESIDENT:** Where is that?

15      **MR KENNELLY:** It is page 17, on the left-hand side,  
16      subparagraph (i).

17      Before the tribunal reads this -- I don't shy away from it,  
18      but it is not appropriate for this question to become the  
19      subject of textual analysis because there is no magic in  
20      the words. It doesn't matter in what form the question is  
21      asked. All that matters is that the gist, the key  
22      features, of the ADP were put to the customers.

23      **THE PRESIDENT:** I understand.

24      **MR KENNELLY:** Whether it is put in this way or a different  
25      way, it matters not.

26      **THE PRESIDENT:** What were the key features, is what I was

1       trying to get. That's why it is helpful. Thank you for  
2       reminding me it is on page 17. It sets out numbered 1, 2  
3       and 3. Are those the three key features? I appreciate  
4       you can word it slightly differently, but what are the key  
5       features that you say should have been put?

6       **MR KENNELLY:** The fact that [the transferring party] --  
7       starting again, you see in (1) the fact the divesting  
8       company would cease to supply you and there would be  
9       replacement supply from these global rivals. Pausing  
10      there, I would add that in describing the global rivals to  
11      the customer, it's also important to stress not just the  
12      fact that their global power and size, the significance of  
13      their business, but of their record, experience in EU  
14      member states.

15      **THE PRESIDENT:** So you'd say you would be supplied by global  
16      rivals with experience in EU member states?

17      **MR KENNELLY:** And then (3) --

18      **THE PRESIDENT:** But you couldn't -- I mean, it is put here,  
19      you say they should have been asked, but with the names of  
20      the global rivals, and that that's what they should have  
21      done. When you say "key features", it's global rivals,  
22      being ..., and then who they are; not an A and a B, but  
23      the specifics.

24      **MR KENNELLY:** I see that.

25      **THE PRESIDENT:** Are you saying that that's what they should  
26      have done or are you saying they should have done it

1           anonymously?

2   **MR KENNELLY:** We are not saying they needed to put the names  
3           to them. As I said at the very beginning, this is  
4           a suggestion.

5   **THE PRESIDENT:** I'm sorry, Mr Kennelly, it's not just  
6           a suggestion. You have said there were key features that  
7           they should have put. We are not concerned with the  
8           wording, of course. It doesn't have to say, "What would  
9           you do ...", you could express it differently, but it is  
10          very important to identify what are the key features.  
11          What I'm asking you is, is a key feature, as suggested  
12          here, the identity of the global rival, or do you say, no,  
13          it was simply to say "a global rival".

14   **MR KENNELLY:** It is a question of timing. Before the global  
15          rival had been nailed down and signed the actual agreement  
16          with the divesting company, its identity could not have  
17          been revealed to third parties like the customers. After  
18          the sale and purchase agreement had been signed, yes, the  
19          identity could be revealed to the customer.

20   **PROF WATERSON:** Can I just raise a point here? You say the  
21          CMA appears to have discussed in very general terms.  
22          I think the key question here is whether the way that the  
23          question would have had to have been put would itself be  
24          as general as that.

25   **MR KENNELLY:** Absolutely. I will come to the evidence. As  
26          I have said, we are still -- can you believe it? -- in the

1 introduction. There is a huge difference between the  
2 generality of the question the CMA put and a question  
3 which would have taken the customers to the key points.  
4 Just to be very clear, the key points that ought to have  
5 been included in the question, in addition to (1), in  
6 relation to the rivals -- focusing only now on these  
7 global competitors who would be the purchasers -- their  
8 global scale, their experience of EU standards, their  
9 presence in the UK, so their small but growing presence in  
10 the UK --

11 **THE PRESIDENT:** And that's all things they could have said.

12 **MR KENNELLY:** That's all things they could have said. They  
13 could have said that legitimately without naming them.  
14 That's the purchasers and the suitability of  
15 the purchasers.

16 Then --

17 **THE PRESIDENT:** You're not saying anyone in the business could  
18 work out who they were from that?

19 **MR KENNELLY:** That is a risk which the divesting company and  
20 the parties to the merger would have to take.

21 **THE PRESIDENT:** It's the question of what was permitted under  
22 the terms of the proposals you received because there are  
23 strict non-disclosure requirements.

24 **MR KENNELLY:** What I have just described -- the global  
25 presence, EU experience, a small but growing UK  
26 presence -- describes four or five different

1 possibilities. That does not just describe the purchasers  
2 in the frame for this transaction. So even though it  
3 could have been limited to four or five possibilities, it  
4 would not have definitely identified the purchasers here.  
5 The point I am going to get to is, had they gone when they  
6 knew -- when the CMA knew who the purchasers were, had  
7 they gone to the customers and put that to them without  
8 naming them, just what I have described to the tribunal,  
9 which could have been done in a sentence, a very short  
10 phone call or email, even without precisely identifying  
11 them, it would have produced a very different response,  
12 and to answer the tribunal's question about whether that  
13 question would be as general as the one they asked, it  
14 most certainly would not have been as general. It would  
15 have given a very different context to the question and,  
16 when you see what the customers' concerns were, those  
17 features of the purchaser would have given a great deal of  
18 reassurance to the customers, because what they were  
19 concerned about really, as you can see, is whether they  
20 were about to be handed over to some underfunded,  
21 inexperienced, small supplier.

22 **THE PRESIDENT:** Given the confidentiality concerns that were  
23 stressed at the time, did your client suggest to the CMA  
24 that this is how the purchaser could be described?

25 **MR KENNELLY:** Well, not in the terms that I have put to the  
26 tribunal, but it was plain what could have been done by

1 the CMA because the parties had already commissioned their  
2 own survey which they included in their response to the  
3 provisional findings report, the Survation survey, which  
4 did include a question along those lines.

5 **THE PRESIDENT:** Can we see that question, please?

6 **MR KENNELLY:** That is in the notice of application bundle 2,  
7 the second notice of application bundle, behind tab 20,  
8 and the particular page is page 681 in the bottom  
9 right-hand corner. The question is 25:

10 "If you could consider for a moment that there was a supplier  
11 that was building up presence in your market segments in  
12 the UK that could demonstrate either a convincing track  
13 record in cleaning chemicals for related industrial  
14 sectors ... or a convincing track record in supplying  
15 food, beverage and dairy customers elsewhere in EU. Given  
16 this scenario, which of the following statements is  
17 closest to your view?"

18 **THE PRESIDENT:** Yes.

19 **MR KENNELLY:** You see the question -- "which of these  
20 statements":

21 "I would be prepared to allow such a company to conduct  
22 a survey of my plant and provide an indicative offer."  
23 That gives a flavour of the kind of question that could have  
24 been asked by the CMA in respect of the purchasers. At  
25 this stage, when this was produced, it was 27 August. At  
26 this stage, when the survey was produced, the parties were

1 still not in a position to -- hadn't advanced their  
2 discussions enough to identify the purchasers to the CMA.  
3 So the real meat of the remedy discussion, what the CMA  
4 did and didn't do, came at a later stage. But this  
5 Survation survey gives you a flavour of what could have  
6 been asked and the kind of question that could have been  
7 asked.

8 **THE PRESIDENT:** The question could have been whether, once you  
9 have identified and, indeed, received expressions of  
10 interest from purchaser A and purchaser B, what they  
11 describe as a non-binding indication of interest, whether,  
12 at that stage, you would have been happy, as you say you  
13 would, for the CMA to put a question describing them in  
14 the terms you have.

15 What I was asking is, when you got into the meat of  
16 the remedies discussion, did your client say to the CMA,  
17 "Well, you mustn't reveal the identity, but we have no  
18 problem with you describing them like this"? Was there  
19 any correspondence or something like that, saying --

20 **MR KENNELLY:** Not at that stage, because, true it is that at  
21 the oral hearing between the CMA and my clients, when the  
22 identities of the purchasers were revealed, they said,  
23 "For at least the next few weeks, please don't reveal the  
24 identity of the purchasers or the number of them", but  
25 it's the CMA's job then to put the ADP that had been  
26 described to the customers. What I'm saying to the

1 tribunal is that they could have done that without  
2 identifying the particular identities of the purchasers or  
3 the number of them by referring to the features I have  
4 just described to you.

5 We have no idea, of course, as the parties, what questions the  
6 CMA is putting to customers. We trust the CMA to do their  
7 job.

8 **THE PRESIDENT:** But if you tell them they mustn't reveal the  
9 identity, they have got to be careful not to describe them  
10 in a way, without naming them, that does reveal the  
11 identity. You are the experts in this industry and you  
12 know they have to test a remedy. I'm just surprised, put  
13 it that way, that you didn't say, "Well, don't reveal the  
14 identity, but you can -- this would be all right, or this  
15 would be acceptable", because you can get very close to no  
16 doubt adding some adjective which narrows from the four or  
17 five possibilities to the two possibilities. I wouldn't  
18 know what it is, but your clients do.

19 **MR KENNELLY:** With the benefit of hindsight, one looks. But  
20 the point is, the CMA knew from the survey -- they may  
21 have known anyway, but from the material they had already  
22 obtained, they knew how many companies fell into the  
23 category that I have just described -- the global  
24 business, EU experience, small growing presence in the UK.  
25 They knew that extended beyond the number of purchasers.  
26 All we said is, you mustn't reveal the identity. The CMA

1 is a sophisticated body. They know what they are doing.  
2 We trust them to know what they are doing. We have no  
3 idea what questions they are asking. My clients were,  
4 quite frankly, shocked when we saw, as I'll show you, the  
5 questions they did ask and the extent of the engagement  
6 they did have, which comes nowhere close to touching on  
7 the features of the ADP. That's the failing. It is  
8 a matter for them. They could have easily put the gist of  
9 it without revealing the identity of the purchasers to the  
10 customers.

11 **PROF WATERSON:** Could I just raise the question from this  
12 Survation survey of the actual question that was put,  
13 "I would be prepared to allow such a company to conduct  
14 a survey ..." The question the CMA would have to put  
15 would surely be different from that?

16 **MR KENNELLY:** Of course. I took you to the Survation survey  
17 to simply give you a flavour of the kind of general  
18 question, but it is nothing like -- well, "nothing like"  
19 may be too much, but it is plainly not the question that  
20 we say the CMA should have been asking. The CMA should  
21 have been giving more detail in the question that it put  
22 to the customers. And of course, critically, the detail  
23 that it would be putting to the purchasers -- sorry, the  
24 detail they would have been putting to the customers would  
25 not just be detail about the purchasers, but about the  
26 benefits and enhancements and incentives that they would

1 receive under the ADP, the financial incentives, the high  
2 likelihood of retaining their account manager and the  
3 guaranteed supply of the [transferring party's] products  
4 pending trialling the new -- the products they would have  
5 pending the trialling of the new purchasers' products.

6 **THE PRESIDENT:** You will come on, in due course, to what the  
7 financial incentives were, and so on, when we get into the  
8 detail?

9 **MR KENNELLY:** Yes. The next reason in the final report for  
10 rejecting the ADP was that the divested business might not  
11 have suitable scale or sufficient brand awareness to  
12 compete effectively in the relevant market. We say that  
13 was irrational, given the identity and existing  
14 capabilities of the purchasers and the unchallenged  
15 evidence from them of their confidence in their ability to  
16 compete. The CMA had no evidence, no basis, for doubting  
17 or disbelieving what the purchasers themselves said about  
18 their ability to run the divested business as part of  
19 their own UK business and grow generally.

20 Finally, the final report doesn't even mention one of the most  
21 important aspects of the ADP: the fallback position.

22 **THE PRESIDENT:** It does mention it.

23 **MR KENNELLY:** Sorry, engage --

24 **THE PRESIDENT:** There is a paragraph where it describes it.

25 **MR KENNELLY:** It mentions its existence, sorry, but there's no  
26 engagement with it at all.

1 The CMA's skeleton, though, says you only need to deal with  
2 the fallback proposal if you are against us on the ADP  
3 remedy. That is incorrect. The fallback proposal is  
4 directly connected to the ADP.

5 **THE PRESIDENT:** I think the point that's made against you is,  
6 if the ADP is just unsuitable, in itself -- you say it is,  
7 of course. It is one thing to say, well, it might not  
8 have been achieved because the negotiations with purchaser  
9 A and B might have -- you know, this was the start. They  
10 might not have come to fruition. That's one scenario.  
11 Then the fallback remedy is very important. But if the  
12 ADP itself is just unsuitable and the CMA were within  
13 their margin of appreciation of saying, this wouldn't  
14 remedy the SLC, then the fallback remedy is irrelevant.  
15 I think that's the point. That's how I understood it.

16 **MR KENNELLY:** Absolutely. That is the argument that's made  
17 against us. It begs the question, it depends why, why do  
18 they say the ADP is unsuitable? If they're saying the ADP  
19 is unsuitable because of a lack of certainty, concerns  
20 about whether customers would switch, concerns about the  
21 purchasers' commitment, those things can be addressed if  
22 extra time is available and the right questions are asked  
23 in order to achieve that certainty.

24 Since the tribunal is concerned with testing the remedy for  
25 proportionality, we say that the fallback allowed them to  
26 approve the ADP, achieve the certainty they said was

1        lacking, by asking the right questions of the customers,  
2        once -- and, as I said earlier, once the agreement with  
3        the purchaser is signed, in addition the identity of  
4        the purchaser can be revealed to the customers, and the  
5        purchaser will give further detail to the CMA. At that  
6        stage -- again, we are talking here about a matter of  
7        weeks, a short number of months, and at that stage, if the  
8        CMA is still unhappy, if the certainty isn't there, they  
9        say, "Sorry, we can't approve the purchaser. We are not  
10       content these customers will switch or will stick and we  
11       are reverting to the fallback", that's why the fallback is  
12       connected to the ADP and why it is critical for the  
13       proportionality analysis. Sure, if the CMA could show  
14       there's some fundamental error with the ADP, the purchaser  
15       doesn't exist, there is no hope of finding one, it is  
16       a waste of time --

17    **THE PRESIDENT:** Or just they say, "We couldn't be satisfied  
18       that customers will remain with the purchaser even if they  
19       switched", for example.

20    **MR KENNELLY:** Exactly. If they had the evidence saying, "We  
21       have asked all the customers the right question, we've put  
22       to them the gist of the ADP, we've told them about all the  
23       great things you're going to do and they all say, 'No  
24       interest', we are not going to waste our time taking it  
25       any further". That's not the discussion.

26    **SIR IAIN McMILLAN:** Was it the case that the CMA had concerns

1 about the fallback, that it might not happen?

2 **MR KENNELLY:** No, that's not the concern. The CMA's concern  
3 appears to be, what's the point with bothering with this  
4 since the ADP is never going to work? The fallback  
5 itself -- as you know, sir, the businesses are held  
6 separate, so the CMA's -- so the remedy the CMA wants to  
7 impose is protected and is always there, so that, once, in  
8 the short period, the CMA reviews whether the ADP is  
9 working, if they decide it isn't, they can then switch to  
10 the fallback and there's no prejudice in the meantime. So  
11 the position is protected in that respect.

12 The CMA's position -- you saw it in the skeleton, they dealt  
13 with it in a short number of paragraphs -- is simply, the  
14 ADP is hopeless, why bother with it? Why bother with the  
15 fallback when the primary remedy is doomed?

16 **THE PRESIDENT:** Do you accept -- I wasn't quite clear how you  
17 put it -- that it would be appropriate for the CMA to go  
18 back to customers once an agreement had been signed and  
19 the identity could be disclosed?

20 **MR KENNELLY:** Certainly, yes. This may cut to the chase. In  
21 Mr de Boo's evidence in the core bundle, behind tab 6,  
22 paragraph 63, on page 21, it describes what Ecolab would  
23 have done had it been given time. Could the tribunal  
24 please turn to that?

25 I appreciate this is a witness statement that wasn't before  
26 the CMA before their decision.

1 **THE PRESIDENT:** I think we have a draft here. It's been  
2 signed, has it? Yes, it has been signed. Apparently the  
3 bundle has a draft. Professor Waterson tells me there is  
4 a signed copy.

5 **MR KENNELLY:** You should have a signed copy. We will make  
6 sure a signed copy is supplied to the chairman.

7 **THE PRESIDENT:** Yes, on 1 November.

8 **MR KENNELLY:** If I just cut to subparagraph (3) on page 22,  
9 because, of course, Ecolab is selecting a preferred bidder  
10 between the purchasers it needs to maintain some  
11 competition between them which is why confidentiality is  
12 important, at least in relation to their identities, and  
13 agree to negotiate exclusively with that bidder for  
14 a short period of time:

15 "Once a preferred bidder had been selected and exclusivity  
16 agreed, Ecolab would have negotiated with the preferred  
17 bidder to agree the final terms for the transaction."

18 And then at (5) --

19 **THE PRESIDENT:** As you have said, this wasn't before the CMA,  
20 but the fallback remedy -- the remedy was before the CMA,  
21 of course.

22 **MR KENNELLY:** Yes.

23 **THE PRESIDENT:** Obviously, because you say they should have  
24 accepted it. Was it explained in these terms to the CMA?

25 **MR KENNELLY:** I will be corrected if I am wrong, but not in  
26 these precise terms. But to reassure the tribunal, when

1 I take you through what was discussed with the CMA, it was  
2 clear as day that it could have been done, and what you  
3 will see from the engagement is the CMA's complete lack of  
4 interest.

5 **THE PRESIDENT:** Never mind that. You complain about their  
6 lack of interest. But it's what you told them you wished  
7 to do, which you say they should have agreed to, and tell  
8 the tribunal now this is what you wish to do. It doesn't  
9 help if it wasn't explained at the CMA.

10 **MR KENNELLY:** It was. This is a summary of what you will come  
11 to see. Just to reassure you, this is not trying to sneak  
12 in something through the back door. There is copious  
13 material to come which will show you what we did tell  
14 them.

15 **THE PRESIDENT:** That's fine. You will take us later to what  
16 you told them.

17 **MR KENNELLY:** Yes.

18 **THE PRESIDENT:** So this is a summary of what they were told.

19 **MR KENNELLY:** Coming back, sir, to --

20 **THE PRESIDENT:** Why is (5) confidential?

21 **MR KENNELLY:** The only thing that's confidential there is the  
22 extent to which it identifies the divesting company.

23 **THE PRESIDENT:** The rest of it --

24 **MR KENNELLY:** The rest of it doesn't seem to be confidential  
25 at all.

26 **THE PRESIDENT:** That's right. So we can remove -- thank you.

1 **MR KENNELLY:** Yes. Before getting into the evidence, I wish  
2 to take the tribunal to some case law guidance and  
3 practice. I know these authorities are very familiar to  
4 you, and the tribunal will also have seen that the CMA has  
5 said that there is no dispute between us on the legal test  
6 that's applicable either at SLC level or the remedies  
7 level. So the tribunal can take that from their skeleton.

8 **THE PRESIDENT:** They have set out on that, in their defence,  
9 the CMA, certain legal principles on remedy. So on  
10 pages 48 to 51, legal principles on remedy, some of which  
11 is a sort of quote from the guidelines, and so on, and  
12 some from some of the authorities. Is any of that  
13 disputed or in issue?

14 **MR KENNELLY:** None of it is wrong. I don't want to be taken  
15 as a comprehensive and accurate -- a comprehensive summary  
16 of the law. We would present it differently and emphasise  
17 different passages. My answer to the tribunal is that,  
18 while none of it is wrong, it needs to be read with what  
19 we say in the notice application on remedy, and, read  
20 together, the tribunal then has a comprehensive picture.  
21 Because I think the CMA is in a similar position: they don't  
22 dispute our presentation of the law. They say that we  
23 agree on the law. But they would presumably take issue  
24 with how we have presented it and the bits we have  
25 emphasised. But collectively, what you see here is  
26 a common view of the law. I just don't want to see this

1 turning up in the tribunal's judgment as an agreed summary  
2 of the position.

3 Can I take you then to the Tesco case. I haven't taken you to  
4 the Act at all because I think that is very well trodden  
5 ground for you. Unless the tribunal wants to go to it for  
6 completeness.

7 **THE PRESIDENT:** I think bear in mind that not everyone on the  
8 tribunal has dealt with these matters before. So it may  
9 be worth looking at, what is it, section 35?

10 **MR KENNELLY:** I will go, then, first, to the Act which is in  
11 the authorities bundle 3, at tab 28. As the chairman  
12 said, section 35. Each of section 35(1), (2), (3) and (4)  
13 is relevant:

14 "Questions to be decided in relation to completed  
15 mergers."

16 I direct the tribunal's attention to section 35(1)(b):

17 "Whether the creation of that situation has resulted,  
18 or may be expected to result, in a substantial lessening  
19 of competition within any market or markets in the  
20 United Kingdom for goods or services."

21 Then (2):

22 "For the purposes of this part, there is an anti-competitive  
23 outcome if:

24 "(a) a relevant merger situation has been created and the  
25 creation of that situation has resulted, or may be  
26 expected to result, in a substantial lessening of

1 competition within any market or markets in the  
2 United Kingdom for goods or services."

3 Then (3):

4 "The CMA shall, if it has decided on a reference under  
5 section 22, that there is an anti-competitive outcome  
6 (within the meaning ...) [I have just described], decide  
7 the following additional questions:

8 "(a) whether action should be taken by it under section 41(2)  
9 [which I will come to] for the purpose of remedying,  
10 mitigating or preventing the substantial lessening of  
11 competition concerned or any adverse effect which has  
12 resulted from, or may be expected to result from, the  
13 substantial lessening of competition."

14 (c):

15 "In either case, if action should be taken, what action should  
16 be taken and what is to be remedied, mitigated or  
17 prevented."

18 And then (4):

19 "In deciding the questions mentioned in subsection (3), the  
20 CMA shall, in particular, have regard to the need to  
21 achieve as comprehensive a solution as is reasonable and  
22 practicable to the substantial lessening of competition  
23 and any adverse effects resulting from it."

24 If the tribunal could then turn to section 38, over the page,  
25 at section 38 you see the duty on the CMA to section 38(1)  
26 to "prepare and publish a report on a reference under

1 section 22 [for these purposes] within the period  
2 permitted by section 39."

3 And the report has to answer the questions which it has to ask  
4 under section 35, which we have just seen, and give  
5 reasons.

6 At section 39, time limits --

7 **THE PRESIDENT:** Section 38(3) is important.

8 **MR KENNELLY:** Yes:

9 "The CMA shall carry out such investigations as it considers  
10 appropriate for the purposes of preparing a report under  
11 this section."

12 **THE PRESIDENT:** Yes.

13 **MR KENNELLY:** Section 39 is also important in the particular  
14 circumstances of this case because the time limit -- the  
15 primary time limit is at section 39(1):

16 "The CMA shall prepare and publish its report under section 38  
17 within the period of 24 weeks beginning with the date of  
18 the reference concerned."

19 But this at (3):

20 "The CMA may extend, by no more than 8 weeks, the period  
21 within which a report under section 38 is to be prepared  
22 and published if it considers that there are special  
23 reasons why the report cannot be prepared and published  
24 within that period."

25 You've seen my submission in my skeleton that we say they  
26 ought to have extended time in this case under

1 section 39(3) by eight weeks to have done the proper  
2 evidence gathering they ought to have done earlier, and  
3 properly considered the revised remedy on the basis of  
4 the evidence they would have gathered from customers had  
5 they asked.

6 **THE PRESIDENT:** I think the 24 weeks expired on the date they  
7 published their report. Isn't that right? On 8 October?

8 **MR KENNELLY:** Yes.

9 **PROF WATERSON:** Can I just ask, are special reasons defined  
10 anywhere?

11 **MR KENNELLY:** No. But I will show you an authority, the  
12 recent Tobii judgment of this tribunal, which demonstrates  
13 the circumstances in which the CMA has found special  
14 reasons and extends time.

15 I have been asked by the CMA to show you also section 103 in  
16 relation to the question of time because these are the  
17 countervailing points the CMA makes in its skeleton. We  
18 have a right to extend time if there are special reasons,  
19 but we also have this duty of expedition in relation to  
20 references. Section 103(1):

21 "In making any decision for the purposes of its functions ...  
22 the CMA shall have regard, with a view to the prevent or  
23 removal of uncertainty, to the need for making a decision  
24 as soon as reasonably practicable."

25 "As soon as reasonably practicable". If you could go back,  
26 then, members of the tribunal, to section 41, "Duty to

1 remedy effects of completed or anticipated mergers". We  
2 saw the reference to 41(2) when we looked at section 35.

3 41 deals with the duty to remedy effects. 41(1):

4 "Subsection (2) applies where a report of the CMA has been  
5 prepared and published under section 38 within the period  
6 permitted ... and contains the decision that there is an  
7 anti-competitive outcome.

8 "(2) the CMA shall take such action ... as it considers to be  
9 reasonable and practicable:

10 "(a) to remedy, mitigate or prevent the substantial lessening  
11 of competition concerned; and.

12 "(b) to remedy, mitigate or prevent any adverse effects which  
13 have resulted from, or may be expected to result from, the  
14 substantial lessening of competition."

15 Again, I emphasise the concern is to remedy the SLC and the  
16 effects which arise from the SLC -- not from the merger,  
17 but from the specific substantial lessening of competition  
18 which the CMA has already identified, and the tribunal has  
19 the point I made earlier about the importance of precision  
20 when identifying the SLC. One sees straight away why  
21 that's so important here in fashioning a remedy.

22 Could the tribunal then go to the merger assessment  
23 guidelines, which are in the same bundle of authorities,  
24 but behind tab 31, just on that last point that I made, to  
25 take you to a single paragraph to show what I mean, the  
26 merger assessment guidelines behind tab 31 describe what

1 an SLC is on page 19. Paragraph 4.1.3, about two-thirds  
2 down, you see the sentence:

3 "A merger gives rise to an SLC when it has a significant  
4 effect on rivalry over time ..."

5 And I would add rivalry for customers over time:

6 "... and therefore on the competitive pressure on  
7 firms to improve their offer to customers ..."

8 So you need to know which customers we are talking about:

9 "... or become more efficient or innovative. A merger  
10 that gives rise to an SLC will be expected to lead to an  
11 adverse effect for customers."

12 Again, I stress, which customers? It's built into the  
13 analysis, you have to ask which customers are we talking  
14 about.

15 Then, please, go to tab 34 in the same authorities bundle, and  
16 we are back on remedies, the merger remedies. At  
17 paragraph 3.4 on page 5, this is a reference to  
18 proportionality. Do you see at the top of that section,  
19 "The objective of remedial action"?

20 At 3.4, three lines down:

21 "The CMA will seek remedies that are effective in addressing  
22 the SLC and its resulting effects [again, the effects of  
23 the SLC] and will then select the least costly and  
24 intrusive remedy that it considers to be effective. The  
25 CMA will seek to ensure that no remedy is disproportionate  
26 in relation to the SLC and its adverse effects."

1 So it asks first, is it effective, and, if there is a range of  
2 effective remedies, it has to choose the one that is  
3 proportionate.

4 Over the page, in relation to effectiveness, the tribunal sees  
5 the factors that the CMA applies or relies upon in  
6 assessing effectiveness. If the tribunal could read those  
7 to itself, and then I will take it up again at (d). (d)  
8 is the one on which I place some reliance. At (d):

9 "Acceptable risk profile. The effect of any remedy is always  
10 likely to be uncertain to some degree. In evaluating the  
11 effectiveness of remedies, the CMA will seek remedies that  
12 have a high degree of certainty of achieving their  
13 intended effect. Customers or suppliers of merger parties  
14 should not bear significant risks that remedies will not  
15 have the requisite impact on the SLC or its adverse  
16 effects."

17 Then if the tribunal could go to paragraph 5.20, where the CMA  
18 guidance turns to the question of divestiture and suitable  
19 purchasers. If you look at 5.21:

20 "The CMA will wish to satisfy itself that a prospective  
21 purchaser is independent ... has the necessary capability  
22 to compete; is committed to competing in the relevant  
23 market; and divestiture to the purchaser will not create  
24 further competition concerns. The relative importance  
25 that the CMA attributes to each of these criteria will  
26 depend on the circumstances of the investigation. These

1 criteria are considered in more detail below:

2 "(a) the acquisition by the proposed purchaser must remedy,  
3 mitigate or prevent the SLC concerned or any adverse  
4 effect resulting from it ..."

5 Again, critical to focus on the fact that the acquisition that  
6 the purchaser is going to make has to cure the SLC -- not  
7 fix all the problems in the market or restore everything  
8 to exactly how it was before the merger. The particular  
9 SLC that's been identified should be fixed by the  
10 acquisition by the purchaser. Capability at (c):

11 "The purchaser must have access to appropriate financial  
12 resources, expertise (including managerial, operational  
13 and technical capability) and assets to enable the  
14 divested business to be an effective competitor in the  
15 market. This access should be sufficient to enable the  
16 divestiture package to continue to develop as an effective  
17 competitive."

18 Not necessarily the biggest, or one of the biggest, in the  
19 market: an effective competitor.

20 That guidance, although useful, is relatively abstract. What

21 I propose to do, if I may, after lunch is to take you to  
22 some concrete examples of how the CMA has applied that  
23 guidance in practice, briefly, before I go to the evidence  
24 on remedy to see how the CMA applied it in this case.

25 **THE PRESIDENT:** Would that be a sensible break point?

26 **MR KENNELLY:** Yes.

1 **THE PRESIDENT:** We will come back at 1.55 pm.

2 (12.58 pm)

3 (The short adjournment)

4 (1.55 pm)

5 **MR KENNELLY:** Members of the tribunal, I have taken you  
6 through on remedies the CMA's guidance, and I wanted to  
7 show you some concrete examples of how that guidance was  
8 applied so you see what the CMA means by the words it  
9 uses. Two examples are in the bundle. The first is the  
10 Rentokil/Cannon merger and that's in the notice of  
11 application bundle, volume 2, at the very back at tab 28.  
12 You see in the background, just to give you some background as  
13 to what this was about, it is a completed acquisition in  
14 the hygiene services market, and I refer in particular --  
15 this is the final undertakings given by the parties to the  
16 CMA. Over the page at 927, the bits upon which I rely, D  
17 and E, so we have the principal remedy here:

18 "The CMA, having regard to its findings [it found an SLC],  
19 requires the divestiture of the contracts of Cannon UK's  
20 customers affected by the SLC (the 'SLC contracts') to  
21 a suitable purchaser with any operations and  
22 infrastructure required by a prospective purchaser to  
23 enable it to service and perform the SLC contracts which  
24 could involve a sale of the Cannon legal entity to an  
25 approved purchaser if the framework contracts cannot be  
26 novated ..."

1 That's a question of whether they can legally be novated:

2 "... to an approved purchaser in accordance with the  
3 obligations ... below."

4 So the primary remedy that the CMA has opted for in applying  
5 its guidance is the transfer of contracts of particular  
6 customers to a suitable purchaser. But then, at E, you  
7 see what was the alternative divestiture remedy in that  
8 case which applied if the primary remedy could not be  
9 achieved.

10 **THE PRESIDENT:** It is the same parties' customers.

11 **MR KENNELLY:** That's correct, yes.

12 **THE PRESIDENT:** So if you can't divest the customers, then you  
13 [carry out the alternative].

14 **MR KENNELLY:** Exactly. Some caution needs to be taken as we  
15 go through this that we don't inadvertently reveal any of  
16 the confidential information coloured in yellow, so I will  
17 take it with some care.

18 Just to understand what is meant, again the definitions are  
19 from page 928. The definition, in my submission, of  
20 the fallback in that case is in yellow. If you could turn  
21 then, please, to paragraph 3.1 on page 932, these are  
22 divestiture undertakings. So for the primary remedy, the  
23 parties, Rentokil and Cannon UK, give the undertaking to  
24 their best endeavours to procure the divestiture package,  
25 those contracts, to an approved purchaser. They haven't  
26 actually got an approved purchaser. CMA is approving

1 this, even though there isn't actually an approved  
2 purchaser identified. The purchaser hasn't been  
3 identified within the period. Then, at 3.1.3, to give the  
4 CMA information, within one month, to make sure that the  
5 purchaser will meet the purchaser approval criteria. In  
6 the middle of 3.1.3:

7 "... and will operate the divestiture package as an  
8 effective and financially viable competitor in the supply  
9 of washroom services ..." and so forth.

10 There's less certainty, on one view, in this case than  
11 there is in our own. Then, at 3.2, you see the fallback  
12 in that case, which, in my submission, gave the CMA the  
13 ability to adopt a proportionate remedy to allow the  
14 parties to do the less onerous thing, which was to  
15 identify a purchaser and see if the contracts could be  
16 transferred to it. Failing that, there was a fallback,  
17 3.2, which would secure the CMA's concerns.

18 Then if we go to annex 1, which is on page 951, the matters  
19 which were included in the investor package in that case.

20 1.1.1:

21 "... contracts of the customers in markets in which the SLC  
22 arose, namely, the direct SLC customers and the framework  
23 customers ..."

24 I'm not relying on a strict, factual read-across from this  
25 case to ours. This is an example of how the CMA applies  
26 its guidance in a proportionate way. But you see what's

1 being transferred. Contracts. Then, 1.1.2, there is the  
2 transfer of a brand, the Cannon hygiene brand, the Cannon  
3 brand. CMA say, well, that's a difference, and sure it  
4 is. In that market, that was necessary in that context  
5 for the brand to be transferred also. We say it is not  
6 the same in our case because the products are unbranded.  
7 It is a different competitive dynamic. Intangible assets  
8 are being transferred, and then, 1.1.4, the Cannon  
9 employees and the personnel primarily engaged in providing  
10 and supporting the contracts. Then permits and licences  
11 and other assets, and the facilities engaged in washroom  
12 services to support the SLC contracts.

13 Then over the page at annex 2, transitional arrangements. You  
14 have seen transitional arrangements in our case and they  
15 have been criticised by the CMA because they say, well,  
16 (inaudible) arrangements mean the purchaser can't act  
17 effectively as a competitor because, in the transitional  
18 period, the product is still coming from the divesting  
19 company, so that's too uncertain for our purposes. But  
20 here, at 1.2, transitional arrangements are made available  
21 to a prospective purchaser to the extent required by the  
22 purchaser, support for back office, assistance in the  
23 hygiene and washroom products, customer care. Then this  
24 at 1.2.4:

25 "The right to purchase hygiene and washroom products and  
26 consumables for [that period]."

1 So the CMA approved a transitional arrangement in that case.

2 Then annex 3, the purchaser approval guide. The criteria.

3 Interesting, in the Rentokil case, they didn't have

4 a purchaser. The CMA was still happy to approve this

5 remedy without an actual purchaser in existence. But they

6 set out the criteria for what they wanted.

7 If you go to 2.2.1:

8 "When assessing the capability of a potential purchaser of

9 the SLC contracts, an approved purchaser must:

10 "Be currently active within the supply of washroom services

11 (in the UK or internationally) ..."

12 So no UK presence needed if they have an international

13 practice:

14 "... or be able to demonstrate the ability to provide

15 the necessary capabilities to be active upon acquiring

16 (eg, by access to an experienced management team)."

17 The purchaser doesn't even have to be active in the market at

18 the time of approval if they can show that with the

19 addition of the contracts and the addition of the new

20 people, it will be. One might say a lot more uncertain

21 than what we will come to look at in the remedy offered by

22 the parties.

23 Then at 29 -- I will take this more quickly -- another case,

24 Rentokil merging with MPCL, Mitie Pest Control, in the

25 pest control market. If you could turn, please, to

26 paragraphs 10 and 11, again you see what's being approved

1       here by the undertakings. The second line in 10:  
2 "Rentokil has offered to divest a number of contracts to  
3       provide pest control services to customers of Mitie  
4       located in eight or more regions of the UK ..."  
5 Including divestment contracts:  
6 "Rentokil has offered to divest ... vans, employees,  
7       technicians and provide transitional services."  
8 That's the business.  
9 **THE PRESIDENT:** Sorry, you're in which ...?  
10 **MR KENNELLY:** Page 959.  
11 **THE PRESIDENT:** "The undertakings offered", yes.  
12 **MR KENNELLY:** I have simply read out, two and three lines down  
13       from the top of paragraph 10, the gist of what Rentokil  
14       was offering, to divest contracts and to offer to divest  
15       with them vans, employees, technicians. In 11, they have  
16       offered to enter into an agreement for the sale and  
17       purchase of these contracts, the business, with an upfront  
18       buyer, and the upfront buyer is ServiceMaster.  
19 If you go to paragraph 13, you see the five respondents, one  
20       of whom is a customer of Mitie but not a customer under  
21       the divestment contract. At 14, an echo of what we see  
22       later:  
23 "The customer stated that being serviced by a local Mitie  
24       employee was the main reason for the customer using MPCL  
25       and that, if this situation were to change, the customer  
26       would likely switch to an alternative supplier."

1 One sees in this context also some concern from customers  
2 about switching. Then if you go, just to see, finally, on  
3 this case, a little about the purchaser, ServiceMaster,  
4 that's at paragraph 20:

5 "In relation to the concerns around the viability of  
6 the divestment business ..."

7 Earlier in this document you see some of the consultees  
8 raising concerns as to whether ServiceMaster -- whether  
9 the divestment business is viable in its own right because  
10 of route density:

11 "ServiceMaster has provided the CMA with a business plan for  
12 the divestment business, which takes into account the  
13 current financial performance of the divestment contracts  
14 and sets out its strategy and objectives for the  
15 development and growth of its pest control activities in  
16 the UK."

17 Our understanding is ServiceMaster was a completely new market  
18 entrant in relation to pest control. They had operations  
19 in other businesses in the UK, but they were new to the  
20 pest control market. But they had a business plan and  
21 they pledged significant financial resources for the  
22 business and intended to achieve its growth plans through  
23 securing local and regional contracts and increasing route  
24 density. They do that by using the expertise of the staff  
25 they would be getting as well as other means such as  
26 marketing. They had its business expertise necessarily

1 from other businesses to meet and enhance the service  
2 levels. Again, it could be said a great deal of  
3 uncertainty, but a plan had been produced which satisfied  
4 the CMA.

5 With that examination, or brief examination, of cases in which  
6 the CMA has applied this guidance in other cases, we turn  
7 to our case.

8 **THE PRESIDENT:** Just to be clear, Rentokil/Mitie is  
9 undertakings in lieu of the reference and Rentokil/Cannon  
10 is a remedy following a report finding an SLC?

11 **MR KENNELLY:** That's correct, sir, yes.

12 **THE PRESIDENT:** Do we have the report, the Rentokil report, in  
13 here somewhere?

14 **MR KENNELLY:** No, we do not. Obviously it is a publicly  
15 available document, but it is not in the papers.

16 **MR WILLIAMS:** Sir, in the disclosure bundle you have the  
17 remedies section of that report, I believe. I think the  
18 material must have been before the tribunal in connection  
19 with disclosure issues.

20 **THE PRESIDENT:** Yes, we do, thank you.

21 **MR KENNELLY:** Sorry, my learned friend is quite right. That  
22 part of it is in the bundle.

23 **THE PRESIDENT:** Thank you.

24 **MR KENNELLY:** Turning to our case, the tribunal has seen our  
25 case is the CMA failed to gather the evidence necessary to  
26 evaluate the ADP and they reached unreasonable conclusions

1 in relation to the evidence that they did gather. I shall  
2 take this, if I may, chronologically and go through the  
3 evidence, making my submissions as I go along. When I get  
4 to the end of the material, I will have got to the end of  
5 my submissions, so you can track how we are doing for  
6 time.

7 So we begin, if I may, with notice of application bundle 1,  
8 tab 12, and the appendix to the provisional findings  
9 report, which is behind tab 12. I'm not taking you to the  
10 provisional findings report itself, but to the CMA survey  
11 which was attached to it.

12 We see that from page 474, which describes -- this is behind  
13 tab 12, page 474, in the bottom right-hand corner, the  
14 description of the standard document "Conduct of the  
15 inquiry" is referring to the questionnaire put to  
16 customers. Those questionnaires we see over the page at  
17 page 476 of appendix B to the provisional findings report.  
18 These are questionnaires issued in --

19 **THE PRESIDENT:** This is the same as appended to the report,  
20 its final report, isn't it?

21 **MR KENNELLY:** Yes.

22 **THE PRESIDENT:** We have got it with the final report.

23 **MR KENNELLY:** Yes, you do. I'm just taking it in  
24 chronological order.

25 **THE PRESIDENT:** Yes.

26 **MR KENNELLY:** Page 476. You see in paragraph 2:

1 "We sent questionnaires to all customers of Ecolab and Holchem  
2 for which we held contact details ... customers which were  
3 multinational companies or made purchases of cleaning  
4 chemicals from one of the parties ... greater than £50,000  
5 were sent a more detailed questionnaire, and national  
6 customers with spend of less than £50,000 ... were sent  
7 a streamlined questionnaire."

8 Even the questionnaires are framed differently for small and  
9 large customers. Then we see the large customer  
10 questionnaire and the small customer questionnaire and, at  
11 paragraphs 3 and 4, the first thing you note is the  
12 response rate. This is the core evidence base, members of  
13 the tribunal, that the CMA obtained in this investigation.  
14 They sent the large customer questionnaire to 103 Holchem  
15 customers and 49 Ecolab customers and received completed  
16 questionnaires from 21 customers, after excluding one  
17 where the respondent was not responsible for purchasing.  
18 Seven were from Ecolab customers and 14 from Holchem  
19 customers. So a very limited response rate and,  
20 necessarily, a limited evidence base for large customers.

21 Then small customers -- were sent to 1,010 customers. 843  
22 Holchem customers and 167 Ecolab customers. There was  
23 a 13 per cent bounce-back rate. Completed  
24 questionnaires -- we see this at paragraph 8 -- from 150  
25 customers. So a response rate of only 15 per cent.

26 **THE PRESIDENT:** Yes.

1 **MR KENNELLY:** Turn then, please, to page 480. I'm not taking  
2 you through every piece of this. I'm pulling out the bits  
3 that are relevant for the submissions I shall make when we  
4 come to remedy. I want to take you to this to see what  
5 the CMA found was important to small and large customers.  
6 In table 7 at the bottom of page 480, a small customer  
7 questionnaire, key word matching, "Reasons given for  
8 choosing Holchem and Ecolab". Key word category matches  
9 in "Reason for choosing current suppliers". Then you see  
10 "Service" scores very highly; "Price" less so; "Quality",  
11 you see also where it scores, 33. These aren't  
12 confidential figures. But then "Historic" scores only 19,  
13 in the sense of historic -- you see what historic means  
14 when you look above in table 6. It means: previous, past,  
15 prior, already existing. So an existing relationship. It  
16 only counts for 19. And "Reputation" gets 10,  
17 significantly less than "Service", "Price" and "Quality".  
18 For large customers, at paragraph 17, we see what the CMA did  
19 with them. This is page 482:  
20 "Due to the limited sample of large customer qualitative  
21 responses, we did not carry out a key word mapping. The  
22 main difference between the reasons given was that the  
23 large customers frequently referred to making the decision  
24 via a tender process."  
25 But we know from the survey of the smaller customers, at  
26 least, reputation came well below service, price and

1 quality.

2 Then --

3 **THE PRESIDENT:** Sorry, they say they didn't do a large  
4 customer --

5 **MR KENNELLY:** Unless I'm corrected, the CMA did not do key  
6 word matching for the reasons given for choosing Holchem  
7 and Ecolab for the large customers.

8 **THE PRESIDENT:** But they did something -- I'm looking  
9 at figure 1 in the final report, page 37 on the final  
10 report, which seems to give a ranking by larger customers,  
11 doesn't it?

12 **MR KENNELLY:** It must be an answer to a different question.  
13 You are right, sir, figure 1 on page 37, there is a number  
14 given for brand/reputation. Mr Luckhurst can check --

15 **THE PRESIDENT:** "Responses by larger customers, while smaller  
16 customers gave a similar ranking of factors, see  
17 appendix B, table 40."

18 I'm not quite clear of the difference. Table 40 is in the  
19 same document you have been at on page 491.

20 **PROF WATERSON:** I think one is the free text response when  
21 they are asked and the other is when reasons are  
22 suggested.

23 **THE PRESIDENT:** Ah.

24 **PROF WATERSON:** So table 7 refers to free text response and  
25 table 40 to suggested responses.

26 **MR KENNELLY:** Sir, you're quite right. In the document that

1 I'm looking in, that's at pages 491 and 492. When they  
2 prespecify factors, they're given ranks by the small and  
3 large customers. You see that at page 491. Small  
4 customers' score for brand/reputation is 3.6. Again,  
5 below quality, technical assistance and support, and I say  
6 that is all borne out later when we come to look at what  
7 they say in individual cases. And for large customers,  
8 brand/representation is 3.7. Again, below quality and  
9 range and, even higher, technical assistance and support.  
10 This is relevant because when I come to show you the CMA  
11 place excessive weight on reputation in assessing the  
12 viability of the remedy.

13 **THE PRESIDENT:** Yes. Well, the figure 1 in the report also  
14 shows brand/reputation is below everything else.

15 **MR KENNELLY:** Yes, indeed.

16 **THE PRESIDENT:** So you get the same result, really, wherever  
17 you look.

18 **MR KENNELLY:** Indeed. Staying with the document in the  
19 application bundle volume 1, please move on to page 488,  
20 which deals with new entrants. New entrants, above  
21 paragraph 23. Again, an open question: were the  
22 respondents aware of new entrants in the last two years?  
23 You see here that awareness of new entrants is low. On  
24 the small customers, a very large number say they are not  
25 aware of any new entrant. A small number say they are.  
26 That's in circumstances where we know that there have been

1 new entrants and some new entrants with significant  
2 commercial backing, recently -- very recently -- entering  
3 the market in the UK.

4 Table 28. The large customers are asked the same question,  
5 are they aware of new entrants, and they say yes. But the  
6 ones they mention are not particularly recent, and they  
7 don't mention AFCO or Kersia. Then they are asked  
8 specifically about Kersia. The small customers aren't  
9 aware, in large part; the large customers, table 31, are  
10 aware. Of the small number answering, 4 say yes, 17 say  
11 no.

12 But then the next question over the page, table 32 on  
13 page 490, to large customers, out of those aware of  
14 Kersia, is it a viable alternative? Two say no, one says  
15 yes, one says unclear. That's, I would submit, a neutral  
16 analysis. So even in respect of very recent and largely  
17 unknown new entrants, one is saying yes and two are saying  
18 no and one is saying unclear.

19 My submission would be that, with proper information, this is  
20 a market that would have understood what was being  
21 proposed.

22 **THE PRESIDENT:** We don't know why they're saying no.

23 **MR KENNELLY:** That will become clearer, sir, as we go through  
24 the documents. We see the concerns that customers have  
25 about unknown companies. They say it themselves in  
26 particular cases.

1 **THE PRESIDENT:** But these are the people who are aware of  
2 Kersia.

3 **MR KENNELLY:** Between being aware and having trialled  
4 companies' products and familiarised oneself with them,  
5 and there is a gap, as we will see.

6 **THE PRESIDENT:** They obviously have -- they haven't trialled  
7 them, but --

8 **MR KENNELLY:** Sir, if you forgive me, we will get there. The  
9 answer is --

10 **THE PRESIDENT:** They are not asked why not.

11 **MR KENNELLY:** No.

12 **THE PRESIDENT:** That's all I'm ... because it says, "Please  
13 explain why or why not". That's why I'm wondering. Is  
14 there any mention of what the explanation was?

15 **MR KENNELLY:** I will come back. I will move on, if I may,  
16 sir, because this factual material is not really an area  
17 of dispute for us. This is background to what's coming.

18 **THE PRESIDENT:** Yes, but you're taking us to it for a reason,  
19 I hope.

20 **MR KENNELLY:** Of course.

21 **THE PRESIDENT:** I just noticed that that's the question that  
22 was asked. I was just curious if there was an answer.

23 **MR KENNELLY:** May I come back to it, sir, in the course of the  
24 afternoon? My learned junior is on the case and, if we  
25 can get an answer for you, we will.

26 **THE PRESIDENT:** Yes.

1 **MR KENNELLY:** Then can we go, please, to tab 19 in the next  
2 volume, the application volume 2. This is our response to  
3 the provisional findings report. This response was  
4 largely the CMA on 27 August 2019. To give you an idea of  
5 just how quickly things were happening, 27 August 2019 was  
6 the day that the CMA received the provisional response  
7 which attached the Survation survey that we have already  
8 seen in part and it was the day of the major oral hearing,  
9 the oral discussion, between the CMA and the parties where  
10 the identities of the purchasers were explained to the  
11 CMA. It all happened on the same day.

12 **THE PRESIDENT:** So 27 August?

13 **MR KENNELLY:** Yes.

14 **THE PRESIDENT:** What we are looking at here is -- this  
15 document is dated 27 August, you're saying? The document  
16 at tab 19.

17 **MR KENNELLY:** That is the date that it bears in the index, so  
18 if it contains a different date, I will be corrected, but  
19 that is certainly the date, as I understand it. So you  
20 can proceed on the basis that that's correct, and we will  
21 be corrected if it is wrong.

22 Paragraph 1.3.1, just to explain in more detail where the  
23 Survation questionnaire came from, the parties explain  
24 that a Survation questionnaire of large customers was  
25 undertaken, according to the CMA's own guidance on  
26 surveys, by a reputable external market research company:

1 "The full results of the survey ... are attached ... as set  
2 out in the annex, the survey reflects responses from large  
3 customers ... Importantly, the number of responses [30]  
4 exceeds [by about a third] the number of large customers  
5 who responded to the CMA."

6 So the survey had a better response rate and it tracked CMA  
7 guidance in the construction of such surveys.

8 Could you go, please, to page 603 -- sorry, go to the  
9 Survation survey, which is behind tab 20, and within it to  
10 page 603. This is to deal with Kersia, because there was  
11 a particular point addressed in the Survation survey.

12 This is a summary of the findings. If the tribunal could  
13 read paragraph 6 under the heading "Competitive threat  
14 from Kersia" down to the bottom of that page, please.

15 Then over the page, under figure 9, "Willingness to offer  
16 Kersia the opportunity to survey and quote". Despite  
17 their lack of awareness of it, which we have already seen,  
18 77 per cent say they agreed to offer Kersia the

19 opportunity to survey and quote, having been told  
20 something, some context, regarding its track record,  
21 activities and the accreditations in issue. Then if you

22 turn over the page to 605, there's an interesting  
23 figure 10 at the top of 605 which contrasts the large

24 proportion who hadn't heard of Kersia, with the equal --  
25 well, the also large block of those who would allow Kersia  
26 to survey and quote. As it says in the text below that:

1 "These results imply that, despite the majority of respondents  
2 not being previously aware of Kersia, the company is in  
3 a strong position to engage with, and potentially win,  
4 customers in the future."

5 So a static assessment of whether they'd previously heard of  
6 them or not doesn't catch the competitive constraint it  
7 will place on the merged entity post merger. Obviously,  
8 this is not dealing with remedy, but has resonance for  
9 what I shall come to in relation to remedy.

10 **PROF WATERSON:** Can I check a detail here on this figure? We  
11 have, obviously, 100 per cent in the pie, and then we have  
12 got 67 per cent in the boxes to the side. That is  
13 67 per cent of what?

14 **THE PRESIDENT:** Is that the "no", the 67 per cent broken down?

15 **PROF WATERSON:** Is that correct?

16 **MR KENNELLY:** Yes, exactly.

17 **PROF WATERSON:** Okay. So that's of the "no". Okay.

18 **MR KENNELLY:** Sorry, now I understand the question. Yes,  
19 I was saying "yes", echoing my colleagues, but now I'm  
20 saying yes with my own voice, if that adds anything.

21 Go next, please, to page 681.

22 **THE PRESIDENT:** You may have just not noted. It's sent the  
23 Survation survey, it's sent to large F&B customers, not  
24 specifically customers of Ecolab and Holchem, just  
25 large -- is that right, large F&B customers?

26 **MR KENNELLY:** Yes, exactly. It wasn't sent. It was a phone

1 survey.

2 **THE PRESIDENT:** It was a telephone survey, but it is not  
3 specifically your client's customers?

4 **MR KENNELLY:** That's correct, sir, yes. Still in the  
5 Survation survey, I was going to take you to page 681, but  
6 you have seen that already, the question about, if there  
7 was somebody with a convincing track record, would you  
8 give them a chance, allow them to survey and quote? You  
9 have seen that already. I shan't go back to it. Its  
10 significance here, though, is what it demonstrates is  
11 that, when given a little more information, the customers  
12 demonstrate a willingness to allow alternative suppliers  
13 to come, examine them and quote for business, despite what  
14 we see in the market, a general lack of knowledge of new  
15 market entrants and competitive competitors. But you've  
16 seen that document already at page 681, and I shan't go  
17 back to it.

18 Sorry, I have a correction. My clients have told me that the  
19 interview -- the phone interview for the Survation survey  
20 was in fact directed to the large customers of Ecolab and  
21 Holchem, contrary to what I told you a moment ago, not  
22 others' customers. That's an important correction. So  
23 that's all I want to show you in the Survation survey.

24 On the same day --

25 **THE PRESIDENT:** It is just the large customers?

26 **MR KENNELLY:** Yes, just the large customers only, yes.

1 On the same day, 27 August, if you turn over to tab 21, you  
2 see the notes of a hearing from CMA and the parties at the  
3 CMA's offices in Canary Wharf. As I have said, this was  
4 the day when the parties could reveal to the CMA the names  
5 of the purchasers with whom -- the prospective purchasers  
6 with whom they were talking and a brief description of  
7 them appears at page 809, if you turn to that, please.

8 At line 7, you see Mr de Boo for the parties saying they have  
9 reached out to the purchasers, they have expressed an  
10 interest, they have signed an NDA, they have provided  
11 a request for information and returned that. Then at  
12 lines 12 to 13, "We are talking to [those named  
13 companies]". They are active, as you see there. Their  
14 qualities within the European Union are made plain, in  
15 summary form, very, very clear to the CMA at this meeting.  
16 And the UK presence is also described at line 18 to  
17 line 20.

18 Over the page, line 2 down to line 8, at page 810, all  
19 confidential, but a description is given there of their  
20 commercial power and their willingness to move quickly  
21 with the transaction.

22 Now, true it is that, as I said earlier, because of  
23 the negotiation with the purchasers, it was important for  
24 the parties that the identities, the actual names of  
25 the purchasers, weren't revealed to third parties. It was  
26 never said that the features that made them suitable could

1 not be described to customers.

2 Then we turn to tab 22, to the Remedies Working Paper. This  
3 is produced by the CMA on 10 September 2019. I ask you,  
4 please, to turn to paragraphs 34 to 37 which summarises  
5 the parties' views on the ADP. The tribunal can skim this  
6 because it is a description of what has already been put  
7 to you. This is a summary by the CMA of what the parties  
8 have told them. The important point is how the CMA  
9 addresses its evidence base. We see that under the  
10 heading "Third parties' views" from paragraph 41. I'm  
11 coming now to the real heart of the evidence base that the  
12 CMA used to reject the remedy proposal. This is the key  
13 evidence upon which the CMA relied in rejecting it. At  
14 41:

15 "The CMA carried out these calls with third parties after the  
16 parties had submitted their response to the remedies  
17 notice. Some calls were carried out before the parties  
18 had provided a non-confidential version of their remedy  
19 proposal. On those calls, the CMA did not disclose that  
20 the parties had made a specific proposal involving the  
21 transfer of contracts. Third parties were instead asked  
22 for their views on transferring customer contracts more  
23 broadly."

24 But one could still read that and understand the question to  
25 be described in relation to the qualities, the general  
26 qualities, of the purchasers in issue along the lines that

1 I described to the tribunal today.

2 Then paragraphs 44 to 46. Reliance is placed on what  
3 competitors say. Unsurprisingly, competitors aren't very  
4 happy with this proportionate and less onerous proposal  
5 that would benefit the companies against which they  
6 compete.

7 **THE PRESIDENT:** They don't rely much in the report on the  
8 views of competitors.

9 **MR KENNELLY:** Well, what we don't see in the report is  
10 a proper recognition of the fact and a recognition of  
11 the particular agenda that the competitors would have had,  
12 and reliance -- certainly, unless I have missed something,  
13 and Mr Williams can correct me, they don't place less  
14 weight on the competitors' evidence because it is coming  
15 from the competitors. We see the competitors' evidence is  
16 given prominence and weight within the report itself.

17 **THE PRESIDENT:** That's what I was just looking at in the  
18 remedies section.

19 **MR KENNELLY:** I don't recall, sir, and I will be corrected, if  
20 they have a section saying, "We placed less weight on this  
21 because, plainly, these competitors have an interest in  
22 not giving us -- well, a particular interest in  
23 a particular answer". I don't remember seeing a paragraph  
24 like that, certainly not in the -- not at this stage.  
25 So we see what the competitors say. They say it is highly  
26 unlikely a transfer of customers would be effective.

1 Customers choose large suppliers because of their  
2 resources, expertise, products and services, and so  
3 customers would push back against being transferred to  
4 a smaller supplier. CMA, reading that and knowing what it  
5 knew, would have known that, even though there's  
6 a reference to a smaller supplier, and even though the  
7 purchaser's presence in the UK may have been small,  
8 there's no lack in terms of resources, expertise, products  
9 and services.

10 At 45:

11 "... it was unlikely a purchaser would be able successfully to  
12 acquire a portfolio of customers ..."

13 **THE PRESIDENT:** Can I ask you, in 41, "Some calls were carried  
14 out before the parties had provided a non-confidential  
15 version of their remedy proposal".

16 **MR KENNELLY:** Yes.

17 **THE PRESIDENT:** When was that? When did you provide  
18 a non-confidential version of your remedies proposal?

19 **MR KENNELLY:** That is not in this file. I need to be given  
20 that.

21 **THE PRESIDENT:** A date.

22 **MR KENNELLY:** That is an answer that I will need to be given  
23 from behind me because I don't have that in the papers in  
24 front of me. I don't recall seeing a non-confidential  
25 version.

26 **THE PRESIDENT:** That's presumably something, by its nature,

1       that could be disclosed, in the way it's described.

2   **MR KENNELLY:**  It must have been something which was produced  
3       after the hearing of the 27th when the detail, the  
4       confidential detail, was given to the CMA, but I don't  
5       have a date for when a non-confidential version of that --

6   **THE PRESIDENT:**  Have we got a copy of it?

7   **MR KENNELLY:**  I don't think so.  It will be produced if it  
8       exists.  Somebody will find it.  I'm afraid we will have  
9       to wait.

10  **THE PRESIDENT:**  It may be the CMA can help as well.

11  **MR KENNELLY:**  I don't think it is in the papers that we have  
12       here.

13  Back to the competitors.  Then 46:

14  "Competitor said it did not believe it would be possible to  
15       effectively transfer a portfolio ... it said nobody would  
16       ever buy a portfolio on its own because there is no value  
17       in it and a large amount of risk."

18  That demonstrates that the evidence has no credibility,  
19       because we know, the CMA would have known already, the two  
20       purchasers -- sorry, the purchasers were prepared to do  
21       so.  Again, that would have affected, should have  
22       affected, the weight which the CMA gave to this particular  
23       competitor.

24  **THE PRESIDENT:**  As I say, looking at the way they analysed in  
25       the report, the problems with the remedy, it doesn't  
26       seem -- what they record in the chapter about alternative

1 remedies doesn't seem to get a lot of weight.

2 **MR KENNELLY:** In my respectful submission, that's not good  
3 enough. This tribunal is well familiar with many other  
4 cases where the CMA specifically says, "We have taken  
5 information from competitors, but we give it less weight  
6 because they are partisan", it happens regularly. I look  
7 in vain for it here.

8 **THE PRESIDENT:** I understand we look at the reasons -- what  
9 they have taken into account in reaching their decision.

10 **MR KENNELLY:** You're quite right. In terms of the core  
11 evidence upon which they rely, it is plainly the customer  
12 evidence, and that's why -- we are coming to it now --  
13 when we look at how flawed it is, there is nothing else  
14 for the CMA to fall back on.

15 So customers. Here I want to go to the raw material rather  
16 than look at the CMA's summary in the Remedies Working  
17 Paper. There is not a huge amount of it. We have it in  
18 the defence bundle so I am going to take you to that.  
19 This is the fruits of the CMA consultation with customers.  
20 So the defence bundle and I'll begin at tab 1, if I may.

21 **THE PRESIDENT:** Before we go to that, people are looking to  
22 see where there's the non-confidential version of  
23 the alternative remedy. You have taken us to the  
24 discussion at the oral hearing. Was there a written  
25 submission setting out the remedy before the oral hearing?

26 **MR KENNELLY:** No.

1 **THE PRESIDENT:** I think there was something, was there not, on  
2 the 16th -- I thought there was a submission on 16 August.

3 **MR KENNELLY:** Sorry, you're asking when --

4 **MR WILLIAMS:** Tab 15 in the notice of application.

5 **THE PRESIDENT:** Yes, that is 16 August. That's where you set  
6 out the alternative remedy.

7 **MR WILLIAMS:** I think it is page 525, sir.

8 **THE PRESIDENT:** Yes, that's what I was looking for. That was  
9 the remedy that was then discussed, presumably, at the  
10 oral hearing.

11 **MR KENNELLY:** You're quite right. The first description of it  
12 is there minus the names. The names were given at the  
13 oral hearing itself.

14 **THE PRESIDENT:** 16 August, written papers, remedy without  
15 names. Then the oral hearing on 27 August, the names are  
16 given.

17 **MR KENNELLY:** Yes. Then, critically, an enhanced and detailed  
18 version of the remedy proposal is made in the response to  
19 the Remedies Working Paper.

20 **THE PRESIDENT:** That's on 17 September; is that right?

21 **MR KENNELLY:** Which is behind tab 25.

22 **THE PRESIDENT:** We will come to that in a minute. Let's just  
23 look for a minute at tab 15 and how it was initially put.

24 **MR WILLIAMS:** I said 525. It starts on 524, sir.

25 **THE PRESIDENT:** Yes, it is that document.

26 In 3.12, page 528, apart from the name at the beginning of

1           that sentence, is the rest of that sentence confidential?

2 **MR KENNELLY:** It is hard to see how it could be, in view of  
3           what's been unredacted elsewhere.

4 **THE PRESIDENT:** That's what I thought. Perhaps you could ...

5 **MR KENNELLY:** It is hard to see how it could be, because the  
6           very same text is unredacted in later documents.

7 **THE PRESIDENT:** Perhaps you can get confirmation on that.

8 **MR KENNELLY:** I will get confirmation, yes.

9 **PROF WATERSON:** Could I raise an issue? I'm looking at  
10          page 526, 3.6.1 and 3.6.2. What I'm trying to get hold of  
11          in my mind is the extent to which these products are  
12          interchangeable between suppliers, because sometimes it's  
13          said that this is a diversified market, and then here it  
14          implies that it's a fairly homogeneous market. I'm  
15          confused as to quite what its status is.

16 **MR KENNELLY:** One sees different things in the documents. If  
17          I may take you to what the CMA finally says about that in  
18          the final report, sir, because they are homogeneous  
19          products, basically. You see that in the final report at  
20          paragraph 6.3, first of all. That doesn't help you. That  
21          simply describes formulated cleaning products, but you  
22          knew that already. In 7.34, do you see, sir, it says:  
23          "F&B customers seek to purchase a range of chemicals..."

24          Then this is the important part:

25          "The parties and major competitors we spoke to suggested that  
26          the range of chemicals they offer are broadly similar in

1 functionality (and usually in chemical composition) and,  
2 although they do seek to innovate, it is difficult to  
3 differentiate their offer in terms of the chemicals  
4 themselves."

5 **PROF WATERSON:** Sorry, it is the access to service and  
6 expertise that's the key differentiating factor, in your  
7 submission?

8 **MR KENNELLY:** Sir, yes. So the tribunal has by now read the  
9 first iteration of the parties' alternative remedy  
10 proposal delivered on 16 August which describes the  
11 important elements to make it attractive to the divestment  
12 customers, but omitting, at that stage, the particular  
13 identity of the purchasers which would satisfy the CMA  
14 that those purchasers were likely to be suitable for the  
15 purpose of taking over the contracts and being an  
16 effective competitor.

17 In the chronology, we have moved beyond that, 27 August, where  
18 they have been told who the prospective purchasers are and  
19 their global profile, their EU presence, their small  
20 growing presence in the UK. Now I ask you to turn,  
21 please, to the defence bundle, and to the raw material,  
22 the evidence-gathering exercise conducted by the CMA among  
23 the Ecolab/Holchem customers. I begin at tab 1.

24 Here we do run into some difficulty because not just the  
25 identity of the customer but all the contents of these  
26 documents is confidential.

1 **THE PRESIDENT:** These are the phone calls with customers?

2 **MR KENNELLY:** Phone calls with customers.

3 **THE PRESIDENT:** And potential purchasers?

4 **MR KENNELLY:** Yes. But I'm focusing in the first instance on  
5 the customers. I want to go through this bundle examining  
6 what the customers said in some detail. Unfortunately, at  
7 the CMA's insistence, the entire -- every one of these  
8 documents is confidential in its entirety, so I'm not able  
9 to say any of it out loud --

10 **MR WILLIAMS:** That's not quite right, sir. If you look at the  
11 final report, the section starting at 10.131, you can see  
12 that the material content of eight of the ten documents is  
13 set out there, but the names are redacted and occasional  
14 details are redacted. The underlying responses themselves  
15 have been put into the confidentiality ring to protect the  
16 confidence in the identity of the customer. But we don't  
17 say that the material that's in the public domain in the  
18 report is confidential in itself.

19 **MR KENNELLY:** The problem I have, sir, is that I need -- we  
20 strongly disagree with the CMA's characterisation of  
21 what's in the raw material. So I need to show you the  
22 text.

23 Now, if it is possible for me to refer to the language used by  
24 the customers when surveyed without referring to their  
25 identities or anything specific to them, I would be happy  
26 to proceed on that basis.

1 **THE PRESIDENT:** If you want to show us, as it were, the detail  
2 of what they said, I think that starts getting difficult  
3 because one never knows, and it may be very difficult for  
4 you to know what it is that might to an informed observer,  
5 who might want to, unusually, be interested in what's  
6 going on here and look at the transcript, pick something  
7 up. So I think it is better we go into closed session so  
8 you're not restricted in what you can say. I think that  
9 does seem appropriate.

10 Could I ask everyone who is not in the confidentiality ring  
11 please to leave the courtroom, and we will -- we can rise  
12 for a few minutes. We will keep the tape going. It is  
13 not being live streamed anywhere, so that's all right.  
14 For the purpose of the transcript, we have now gone into  
15 closed session.

16 **MR KENNELLY:** I'm grateful.

17 **THE PRESIDENT:** I assume your instructing solicitors know who  
18 should be here and who shouldn't and are satisfied.

19 **MR KENNELLY:** On our side, yes, we are.

20 **THE PRESIDENT:** I imagine for the CMA that's not a problem.

21 **(In closed session)**

22 **(5.00 pm)**

23 **(The hearing was adjourned to**

24 **Wednesday, 19 February 2020 at 10.00 am)**

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