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

Case No. : 1345/4/12/20

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9 Salisbury Square House  
10 8 Salisbury Square  
11 London EC4Y 8AP  
12 (Remote Hearing)

Tuesday 16 June 2020

15 Before:  
16 The Honourable Mr Justice Morris  
17 Michael Cutting  
18 Professor Robin Mason  
19 (Sitting as a Tribunal in England and Wales)

20  
21  
22 **BETWEEN:**

23 Sabre Corporation

**Applicant**

24  
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26  
27 v

28 Competition and Markets Authority

**Respondent**

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33 **A P P E A R A N C E S**

34  
35 Mr Tim Ward QC, Nikolaus Grubeck and Alison Berridge (On behalf of Sabre Corporation)  
36 Mr Rob Williams QC (On behalf of the CMA)  
37 Mr Richard Pike (On behalf of ASTA)

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Tuesday, 16 June 2020

(2.00 pm)

(Hearing held over video/telephone link)

Housekeeping

MR JUSTICE MORRIS: Good afternoon, everybody. The hearing is now in progress, taking place remotely by way of a Teams video. I am the chair of the Tribunal for this case, and I am Mr Justice Morris.

If I may start with, I will just invite the other two members of the Tribunal to introduce themselves.

Michael, perhaps.

MR CUTTING: Michael Cutting, I hope everyone can hear me.

MR JUSTICE MORRIS: Robin.

PROFESSOR MASON: Robin Mason.

MR JUSTICE MORRIS: Thank you very much.

By way of housekeeping, we will aim to have a 10-minute break after about an hour, around 3.00. If the person speaking at that time can remind me, or remind us. I hope we won't require a second break. We have been provided with an electronic hearing bundle. I personally also have the documents in hard copy. We have received submissions for the CMC from the appellants and the respondent, and from the proposed intervener. We have read those submissions and as much of the material as needed to follow the points raised in those submissions.

We propose to follow the order of the matters as set out in the agenda. As we understand the position, many of those items are not controversial. It seems to us that the main issues in dispute concern the application to intervene by

1 ASTA, issues concerning disclosure and the timetabling of the various steps  
2 leading to the final substantive hearing but it may be that matters since have  
3 resolved or narrowed and there may be other matters which have arisen.

4 Our initial view is that we should hear first the application to intervene before moving  
5 on to disclosure and timetabling issues. However, before proceeding in that  
6 way, I will invite Mr Ward for the applicant to introduce the parties and to  
7 comment, if need be, on the order in which matters should be taken. I will  
8 give an opportunity to Mr Williams to respond, should he so wish.

9 Mr Ward?

10 MR WARD: Thank you, sir. I respectfully agree with the approach you have just  
11 outlined. The only issues that remain in contention are the application to  
12 intervene by ASTA, then issues surrounding disclosure, although, as you will  
13 have seen, there is no live application for disclosure before you. There has  
14 been significant agreement and the remaining issues are really about how to  
15 most efficiently progress the remaining matters in dispute.

16 As to timetabling, again, there is a large element of agreement, subject, most  
17 importantly to the Tribunal determining when it could hear this application.  
18 Then in some of the matters of detail, there are differences of view between  
19 the applicant and the respondent.

20 As to the other parties, Mr Williams QC is here for the CMA and Mr Pike is here for  
21 ASTA.

22 Unless I can assist further, that is all I would say at this stage.

23 MR JUSTICE MORRIS: Thank you very much, Mr Ward.

24 Mr Williams, do you have any initial observations?

25 MR WILLIAMS: No, I have nothing to add by way of introduction, sir, and we are  
26 also happy to proceed in the way that you have suggested.

1 MR JUSTICE MORRIS: Thank you very much.

2 Just as a matter of formality, item 1 in the agenda is the forum and I think that has  
3 been agreed in a draft order, the forum being England.

4 That will take us to item 2.

5 Before I ask Mr Pike to make his submissions, can I just also indicate that it is our  
6 intention to rise, or to go into the retiring room, once we have heard the  
7 arguments on this, with a view to reaching a decision, because that decision  
8 is likely to have an impact on other matters.

9 With that introduction, Mr Pike, perhaps you would like to make your submissions on  
10 intervention.

11 MR PIKE: Thank you, sir.

12

13 Submissions by MR PIKE

14 MR PIKE: I am not proposing to repeat the contents of the request for permission,  
15 as you already have that. I am just going to go through and address the  
16 various objections that the CMA has raised in their submissions that were  
17 sent through to the Tribunal on Friday night.

18 MR JUSTICE MORRIS: Can I just turn that up, a moment.

19 MR PIKE: Yes, of course, sir.

20 MR JUSTICE MORRIS: I have it now, thank you.

21 MR PIKE: Thank you.

22 On the threshold issue of sufficient interest, we say first that with the exception of the  
23 merging parties themselves, it is difficult to imagine any parties that would be  
24 more directly affected by the contemplated transaction than the customers of  
25 the merging parties. As such, the CMA is right to concede that ASTA  
26 members may have been affected if the transaction had gone ahead but in

1 fact the concession doesn't go far enough. ASTA travel agent members here  
2 and overseas would have been affected by the transaction and have been  
3 affected by the CMA's decision to prohibit the transaction.

4 Going on to their objections, the CMA says first that it cannot see any points that  
5 cannot be fully and properly addressed by Sabre. But with respect, sir, this  
6 misses the point.

7 What ASTA offers is a different perspective. Anything that Sabre may say in the  
8 proceedings will, quite reasonably, be seen as coming from the perspective of  
9 a party that expected to do well commercially out of the transaction,  
10 regardless of the impacts on competition, or to paraphrase  
11 Mandy Rice-Davies, when Sabre says the transaction would be good for  
12 competition, there is bound to be a thought that they would say that, wouldn't  
13 they?

14 ASTA by contrast represents the views of travel agents, customers of Sabre and its  
15 competitors, who have nothing to gain from the transaction unless it increases  
16 competition or delivers other efficiencies that are valuable for them. ASTA's  
17 submissions can be seen as those of a genuinely neutral party as a result,  
18 and we would say it should be considered highly relevant when customers  
19 support the submissions of merging parties.

20 This point about the value of an intervener providing a different perspective has been  
21 acknowledged by the Tribunal previously. Now, I don't propose to turn it up  
22 unless the Tribunal wishes me to do so, but the reference for your note is  
23 paragraph 9 of the Tesco ruling that is at document 13 of the bundle for the  
24 CMC.

25 MR JUSTICE MORRIS: I am just going to mark that.

26 MR PIKE: Sure.

1 MR JUSTICE MORRIS: Which case is this?

2 MR PIKE: It is the Tesco case; it was an appeal against a report of the Competition  
3 Commission on a market investigation.

4 MR JUSTICE MORRIS: Okay, I think I have it. Yes, paragraph 9 of that?

5 MR PIKE: Paragraph 9, that's right, sir.

6 MR JUSTICE MORRIS: Okay.

7 MR PIKE: If you were to look at that ruling you will see that the party seeking to  
8 intervene was again a trade association, like ASTA. The Tribunal saw value  
9 in that association being allowed to intervene because it could represent  
10 parties whose voices would not otherwise be heard in the proceedings. That  
11 was despite I think in that situation the application having been made late as  
12 well.

13 MR JUSTICE MORRIS: That was a market investigation, wasn't it?

14 MR PIKE: It was, yes, sir. I believe the same principles are applied.

15 MR JUSTICE MORRIS: Okay, yes.

16 MR PIKE: Moving on, the CMA's next objection is that ASTA's interests would be  
17 fully protected by Sabre. It makes the point that Sabre is a member of ASTA  
18 and, certainly, sir, it is true that Sabre is a member of ASTA, but so too are its  
19 competitors, Amadeus and Travelport. More importantly, at its heart ASTA is  
20 a trade association for travel agents. It is an association with travel agents  
21 which suppliers can join as members, but it is dominated by travel agents and  
22 its mission is to represent their interests.

23 Sir, you will see that referred to in the request for permission at paragraph 12. That  
24 having been established, we say it is surprising to expect a supplier to protect  
25 the interests of its customers in merger proceedings. This is not the sort of  
26 case where the trade association is formed of other companies that are very

1 much like the applicant. The mere fact therefore that Sabre is a member of  
2 ASTA doesn't change anything.

3 The CMA says next that ASTA should not be allowed to intervene because it was not  
4 involved in the inquiry. Obviously, sir, there is no rule that an intervener must  
5 have been involved in the inquiry, and here, travel agents were involved in the  
6 inquiry instead. We suspect that includes several members of ASTA, indeed  
7 we know the supplier members of ASTA were involved, both Amadeus and  
8 Sabre, but we also suspect several other travel agents were, including at least  
9 some of the large online travel agents but we cannot see because the names  
10 are redacted at the moment.

11 In those circumstances we say that actually it is a lot more efficient for a trade  
12 association to be allowed to intervene to represent collectively the types of  
13 parties that were involved in the inquiry, rather than having each of those  
14 entities, in this case travel agents, apply individually to intervene.

15 On the basis of the proposed intervention, the CMA asks what ASTA can properly  
16 contribute on questions of jurisdiction. Just to clarify there, it is not ASTA's  
17 intention to comment on the relevant issues of fact, being the facts of the  
18 interline arrangement between BA and AA. Nor indeed do we propose to  
19 comment at any great length on the interpretation of UK legislation.

20 On jurisdiction, the point that ASTA wants to make is a short one, made from the  
21 perspective of a trade association, most of whose members are American. It  
22 is to raise a big picture point about why they should have to be here in the  
23 Tribunal, when the US courts found no reason to block the transaction. It is if  
24 you like a *cri de coeur*, but we say no less relevant for that when considering  
25 what the UK legislature might reasonably be thought to have intended when it  
26 passed the relevant provision.

1 On the SLC issue --

2 MR JUSTICE MORRIS: Sorry?

3 MR PIKE: SLC.

4 MR JUSTICE MORRIS: Yes.

5 MR PIKE: Specifically ASTA only wishes to comment on ground 6, and we have  
6 narrowed that as far as we can.

7 MR JUSTICE MORRIS: Yes.

8 MR PIKE: The CMA raises two objections.

9 They say first that if all we are going to do is make submissions then Sabre can do  
10 that just as well. Sir, you have my submission on that already, which is that  
11 ASTA offers a different perspective. Sabre's focus in its notice of application  
12 was understandably on the position of GDSs and airlines. ASTA can provide  
13 more of a focus on the position of travel agents, not raising new grounds of  
14 appeal but simply supporting Sabre's grounds but looking from that different  
15 angle.

16 MR JUSTICE MORRIS: Can you pause there for a moment, please.

17 MR PIKE: Of course, sir.

18 MR JUSTICE MORRIS: To that extent, your intervention would be confined to  
19 submissions supporting the grounds of appeal on ground 6?

20 MR PIKE: Yes.

21 MR JUSTICE MORRIS: Really from your perspective, or from travel agents'  
22 perspective?

23 MR PIKE: Yes, sir. In fact I was just about to come to the question of fresh  
24 evidence because the CMA has raised that point.

25 MR JUSTICE MORRIS: Yes.

26 MR PIKE: What I was going to say on that is we have not formed a concluded view

1 yet, because we have not seen an unredacted version of the final report, we  
2 have not seen the underlying evidence. It is possible there may be something  
3 in there which prompts us to make an application to submit fresh evidence,  
4 but at the moment, at least, we anticipate it is much more likely that we will  
5 just be seeking to make submissions on the proper interpretation of the  
6 evidence that was received.

7 MR JUSTICE MORRIS: One minute. (Pause)

8 Okay, on the issue of fresh evidence, obviously you will be aware of the very narrow  
9 strictures on the admission of new evidence, particularly on a rationality or  
10 Wednesbury challenge, rather than on a jurisdiction or procedural challenge?

11 MR PIKE: Yes, sir, absolutely.

12 MR JUSTICE MORRIS: Obviously I do not have any evidence in front of me that is  
13 being sought to be admitted but, yes, we are certainly aware that you might  
14 face an uphill struggle.

15 MR PIKE: Duly noted, yes, sir.

16 MR JUSTICE MORRIS: Yes.

17 MR PIKE: Those are the submissions on the issue of sufficient interest.

18 On your exercise of discretion, if we get that far, sir, the CMA contends that allowing  
19 ASTA to intervene will prolong the duration of the proceedings and they say  
20 that simply because they believe that the CMA should be able to see the  
21 intervention before filing its Defence and they rather assume that will take  
22 an extended period of time.

23 We have probably three responses on that.

24 The first is that we are not aware of any established practice of interventions coming  
25 before submission of defences. In fact my experience certainly in  
26 Communications Act proceedings is it is quite common to be the other way

1 round. We would say in this case that it would be more appropriate to be the  
2 other way round, because we as the intervener will only have one opportunity  
3 to make submissions if we just provide written submissions -- which is what  
4 we do plan to do. So it would be better for us to be able to see the CMA's  
5 submissions and address the points raised in that in one go, whereas the  
6 CMA is well positioned to either respond to our points in the skeleton  
7 argument or in the highly unlikely event that it feels it is something very  
8 significant that needs to be dealt with in Defence, they could amend the  
9 Defence at that point.

10 To support that as well, sir, the CMA itself admits that this is not a case where there  
11 is particular urgency, with the merger having been abandoned. It is itself  
12 seeking a trial in the second half of October and Sabre's timetable, with which  
13 we respectfully agree, allows for that just as well as the CMA's.

14 MR JUSTICE MORRIS: Okay.

15 MR PIKE: Sir, if you are against me on this point and if you think that the CMA  
16 should be able to see our Statement of Intervention before the Defence is  
17 submitted, we believe we could actually provide the Statement of Intervention  
18 by 29 June, provided we were able to see the relevant confidential documents  
19 in the next few days, but we could provide it before even on the CMA's  
20 timetable.

21 MR JUSTICE MORRIS: Okay.

22 MR PIKE: Then the final issue, sir, is on confidentiality, which is just a note that the  
23 CMA has opposed the inclusion of ASTA's legal advisers in the confidentiality  
24 ring, but it has not really provided any reasons for that position. Sir, on that  
25 we gratefully adopt Sabre's submissions on why ASTA's advisers should be  
26 added, and we would add only that we think there would be particular value in

1 ASTA's legal advisers being able to see more details of the travel agents'  
2 evidence.

3 Those, sir, are my submissions, unless you have any questions?

4 MR JUSTICE MORRIS: Thank you very much. Thank you.

5 Yes, thank you. If you will just give me a moment before I call upon Mr Williams.

6 (Pause)

7 Are you saying that either arguments or evidence was not placed before the CMA  
8 which you now wish to place before the Tribunal?

9 MR PIKE: No, sir. I don't think that is our position.

10 I have to hedge my bets slightly, because we haven't seen the full content of that  
11 evidence so far but it is not something that jumps out at us from the final  
12 report. It is more about the weight they put on it and how they have  
13 interpreted it.

14 MR JUSTICE MORRIS: Can I just draw to your attention, because I did get the  
15 impression from your request for intervention, paragraph 27, that somehow  
16 the CMA's investigation didn't elicit a fair reflection of the views of travel  
17 agents, we "represent the views of a much broader group... including  
18 many..." it "can present evidence on why it is not ... offer a broader evidence  
19 base".

20 Leave to one side the point about evidence, but can I draw to your attention,  
21 because I was looking just before the hearing started at what evidence the  
22 CMA did receive from travel agents. Paragraph 10/120 refers to the fact that  
23 there were questionnaires sent out, "Received responses from over 20 travel  
24 agents which in aggregate cover almost half of Sabre's bookings ..."

25 Then it said:

26 "In addition, the parties have referred to evidence from travel agents at the Delaware

1 proceedings and we have incorporated it into our assessment below."  
2 I don't know and I suspect that is because I do not have it immediately to hand, was  
3 ASTA itself represented in the Delaware proceedings as an association?  
4 MR PIKE: No, sir, it wasn't.  
5 MR JUSTICE MORRIS: It wasn't? Presumably quite a lot of your American  
6 members did put in material in those proceedings, or is that not the case?  
7 I have now lost Mr Pike, I think. Yes.  
8 MR PIKE: Sorry, sir, I have lost sound.  
9 MR JUSTICE MORRIS: I lost you for a moment. Are we back now?  
10 MR PIKE: Yes, we are.  
11 MR JUSTICE MORRIS: Perhaps you could tell us or me the position in the US  
12 proceedings as far as travel agency evidence was concerned and what that  
13 reference is, evidence from travel agents that the CMA plainly took into  
14 account?  
15 MR PIKE: To be perfectly honest, sir, I don't know exactly what travel agent  
16 evidence there was in the Delaware proceedings, or what was submitted by  
17 the parties to the CMA in that respect. I think that is probably something that  
18 Sabre can -- or the CMA could answer better than us. As I say, we were not  
19 directly involved and we have only had a very short period of time to prepare  
20 for this request to intervene.  
21 MR JUSTICE MORRIS: Right. The point I am making is that when you talk about  
22 that different perspective, it is possible that that perspective that you are  
23 representing, or wanting to represent here, was placed before the CMA via  
24 the material that was placed before the Delaware proceedings, from that  
25 reference at paragraph 10/120. It is not a question, I am making a statement.  
26 It is possible.

1 MR PIKE: It is possible.

2 MR JUSTICE MORRIS: And I understand you don't have further information.

3 MR PIKE: No, sir. That is also though why I say I don't think we will be wanting to  
4 submit additional evidence. I think having looked at it further, as I say, at the  
5 moment we cannot see any particular gaps in the evidence. It is more, as  
6 I say, the interpretation that has been placed on it by the CMA and the weight  
7 that they have given to it.

8 Although, the reference in paragraph 27 was to the very small number of UK travel  
9 agents that were included in the investigation. I appreciate that the CMA  
10 attempted to get more responses, but ultimately they had I believe less than  
11 30, for an industry which is obviously much, much larger than that. Also we  
12 say as well that ASTA with its thousands of members, many of whom are in  
13 the US and also in other countries, that we are providing a much broader  
14 perspective than those particular respondents. Whilst there was undoubtedly  
15 some evidence taken into account from the Delaware proceedings, that would  
16 not necessarily have addressed the same issues that the CMA was asking the  
17 travel agents in the UK.

18 MR JUSTICE MORRIS: Okay. Thank you.

19 Can I make this one further observation, before I go to Mr Williams I will ask my  
20 colleagues whether they have any particular questions of you, but the further  
21 observation I have is this, that you effectively seek to take issue with the  
22 conclusion at paragraph 10.153, I think, which is where the CMA effectively  
23 don't accept the submissions that were made, that are recorded at  
24 paragraph 10.151 and 10.152. My current understanding at the moment is  
25 that Sabre in its notice of application does not directly focus its attention on  
26 ground 6 in relation to paragraph 10.153. That is an observation I make.

1 Really, I suppose, perhaps for Mr Williams to address and I don't know  
2 whether even Mr Ward might have something to say about that. But as I read  
3 the appeal, there is no specific challenge to what was effectively a rejection of  
4 the parties' submissions on travel agents or a non-acceptance of it.

5 With that observation, I don't know whether Mr Cutting or Professor Mason have  
6 anything that they wish to raise at this stage?

7 MR CUTTING: I just had a question, I don't know whether you can hear me, which is  
8 that Mr Pike, you have referred us to the Tesco decision and the decision to  
9 allow ACS into the appeal. I mean, there is a difference of fact, isn't there,  
10 which is that ACS were heavily involved in that reference and indeed it was  
11 their judicial review that had led to the reference in the first place. In a sense  
12 you are not on all fours with ACS, are you?

13 MR PIKE: Not on all fours, sir, but as I say, in this case, our members were involved  
14 in the inquiry, so we believe, so we say it is sufficiently similar.

15 MR CUTTING: Okay, nothing more from me.

16 Robin, you are on mute.

17 PROFESSOR MASON: Am I now audible?

18 MR CUTTING: Yes.

19 PROFESSOR MASON: One question from me, notwithstanding the point that you  
20 made, which is noted that there is no rule that requires involvement in  
21 an original inquiry.

22 Do you happen to know why ASTA chose not to be involved in either the Delaware  
23 proceedings or the CMA inquiry?

24 MR PIKE: Sir, I am instructed it is because Amadeus and Travelport are also  
25 members of ASTA and they didn't wish to adopt a public position until they  
26 were clear on the position of Amadeus and Travelport and whether they would

1 object to it. That, sir, is my understanding. But they do believe that the vast  
2 majority of their members support the merger.

3 PROFESSOR MASON: Okay, thank you.

4 MR JUSTICE MORRIS: Thank you.

5 Yes, Mr Williams.

6 MR WILLIAMS: Thank you, sir.

7  
8  
9 Submissions by MR WILLIAMS

10 MR WILLIAMS: We have set out our position quite fully in the CMA's letter, so I will  
11 make some introductory observations on the legal framework and then try and  
12 focus on the points that Mr Pike has made. It is established in the case law  
13 that the test for an intervention or permission to intervene has two stages.

14 First, that of sufficient interest.

15 Second, the exercise of discretion.

16 We can take that from your judgment in the B&M case, which is in the bundle at  
17 tab 5. Although the basic test is well established.

18 Some of the points made in our letter could be seen as going to sufficient interests.

19 Some go more to discretion. We merely put the points in the round rather  
20 than on a limb-by-limb basis, because they all point to the same conclusion.

21 In the bundle, we have also included the judgment in the recent Phenytoin and costs  
22 litigation, which concerned an intervention by Ofcom in a proposed appeal on  
23 a point of law relating to costs. We have put that in together with the B&M  
24 judgment because they both go to the key point, which is that the proposed  
25 intervention must add something which is not already provided by the  
26 participation of the main parties in the proceedings. The way you put it in

1 B&M is that they must add value.

2 The point I want to emphasise, sir, is they have to add value in relation to the  
3 grounds of challenge. It is not enough for Mr Pike to say that ASTA has  
4 a different perspective. One has to understand how they are going to add  
5 value to this legal challenge on the grounds which are pursued by Sabre.

6 MR JUSTICE MORRIS: Mr Williams, can I interject there with this observation,  
7 because I was thinking about it beforehand. The rules require an intervener  
8 to state which party's position it supports.

9 Is it the case that an intervener, having identified the party it supports, particularly  
10 where it is the applicant or appellant, is confined to supporting the grounds of  
11 challenge of that applicant, or could an intervener bring in saying well, here is  
12 another ground why this decision was Wednesbury unreasonable or wrong in  
13 law?

14 MR WILLIAMS: No, sir, it is a cardinal principle that an intervention must be within  
15 the four corners of the main proceedings that are already before the Tribunal.  
16 So ASTA is at most confined to identifying a basis on which it can add value  
17 to Sabre's judicial review claim within the parameters of that claim.

18 MR JUSTICE MORRIS: Thank you.

19 MR WILLIAMS: I don't know if you want to look at B&M and the Phenytoin case.  
20 The proposition we take from Phenytoin is the basic point I have already  
21 made, which is the Tribunal said we don't see that Ofcom has any particular  
22 arguments or submissions on the issues before us that could not adequately  
23 be made by the parties.

24 MR JUSTICE MORRIS: Can you give me the paragraph reference of that passage?

25 MR WILLIAMS: Sir, the references I was going to give you -- tab 5 is the authority  
26 bundle.

1 MR JUSTICE MORRIS: Yes.

2 MR WILLIAMS: The first judgment is B&M and the paragraphs we rely on in B&M  
3 are paragraphs 16 to 18 on pages 6 and 7. The point that is made with  
4 reference to Umbro is that there was no need for an interested party to  
5 intervene if the interests of that party are already adequately protected by the  
6 position taken by one of the principal parties. Then it goes on to say:

7 "The proceedings were essentially between the appellants and the OFT, it was for  
8 the OFT to establish its claim and have the main carriage of the matter."

9 And you went on to apply those principles to the B&M case. Paragraph 18 is where  
10 you say, "We are not persuaded that this will add value to the issues in this  
11 case".

12 The next judgment is Phenytoin. That is then on page 12 of the bundle. It is  
13 paragraph 11:

14 "We do not see that Ofcom has any particular arguments or submissions on the  
15 issue before us that could not be adequately made by the parties."

16 Fundamentally we say that the proposed intervention doesn't get over that basic  
17 threshold of demonstrating that ASTA will add value within the parameters of  
18 the challenge and within the confines of judicial review principles. We don't  
19 dispute that the merger will affect ASTA's members, but that doesn't mean  
20 that their participation in this application is justified. Although Mr Pike says,  
21 well, you wouldn't expect Sabre to protect the interests of its customers, as we  
22 understand it, the points that ASTA wants to pursue are points which are very  
23 much aligned with the position Sabre takes. This is not like the ACS case  
24 where ACS was a contrary voice, it was the voice of small grocers in the  
25 context of a case that was about a market investigation focused on large  
26 grocers. Here, as we understand it, ASTA supports Sabre and supports the

1 position that Sabre takes, so it really is another version of the same voice.

2 Turning to the substantive grounds, ASTA -- as we understand it from what Mr Pike  
3 said today -- in fact only wants make submissions on what is a pure point of  
4 law. In our submission an intervention is not justified for that purpose.

5 Firstly, because it is not a matter on which a single corporate intervener can add  
6 value, it is a pure matter of law.

7 Secondly, because the Tribunal will have a full argument on those issues from the  
8 main parties and based on what Mr Pike said in his submissions, the point he  
9 wants to make is exactly the point that Sabre makes, albeit from the  
10 perspective of his client.

11 MR JUSTICE MORRIS: The US comity point?

12 MR WILLIAMS: Exactly, sir.

13 As far as SLC is concerned, the intervention relates to ground 6. I think it is just  
14 worth looking at the way in which Sabre concludes ground 6, which is tab 2,  
15 page 78.

16 MR JUSTICE MORRIS: Yes.

17 MR WILLIAMS: Because this is effectively a summary of the legal complaints that  
18 are made within ground 6, and one can see it says -- I beg your pardon, sir, if  
19 you need a moment?

20 MR JUSTICE MORRIS: No, I have it.

21 MR WILLIAMS: "In finding an SLC in relation to distribution, the CMA acted  
22 unlawfully in that it failed to have regard to the evidence, thereby failing to  
23 have regard to material considerations, provided insufficient reasons and to  
24 the extent that the CMA contends that an SLC arose in respect of pricing, ...  
25 standard of proof, due regard to the evidence, material considerations ..."

26 All classic public law grounds of challenge and one does ask what a third party can

1 bring to any of those arguments, which are all about the consideration of the  
2 material set out on the face of the report and the sufficiency of the material to  
3 support the conclusions which are reached.

4 MR JUSTICE MORRIS: Can I at that point -- sorry, finish your --

5 MR WILLIAMS: No, no, sir, that is by way of introduction. Sir, please if you have  
6 a question.

7 MR JUSTICE MORRIS: Whilst we were on that, I am just raising the point I raised  
8 a moment ago. Let us say that there is an argument that Sabre are not  
9 majoring on, a strand of ground A in paragraph 235, namely that actually,  
10 when it came to the finding in relation to travel agents, at 10.153, Sabre, let's  
11 say, could argue, could have argued, that the CMA failed to have due regard  
12 to the evidence in reaching the conclusion at 10.153, when set against the  
13 travel agent evidence that they had. Now, Sabre could have made that  
14 argument, it doesn't appear that they are expressly doing so. Why could not  
15 the intervener with a particular interest in the travel agent aspect of the  
16 investigation not make that additional argument, it being within the confines of  
17 the parameters of the grounds that Sabre have brought, in other words they  
18 would be adding value, it is not a new ground, it is just a different angle, why  
19 would that not be permissible?

20 MR WILLIAMS: The objection in that situation, sir, is that they are more than adding  
21 value. They are not simply contributing to the case that Sabre has advanced,  
22 but they are actually seeking to call into question findings that Sabre has not  
23 challenged and seeking to (Inaudible) effectively free-standing public law  
24 challenges to additional findings.

25 It is right to say that the scope for an intervener in a case like this where the  
26 intervener lines up essentially behind the main party, the scope for them to

1 add value to an intervention is to some degree limited, but if one thinks of  
2 other cases in which for example interventions have been permitted in merger  
3 cases, there was the Eurotunnel litigation where there was a question of  
4 jurisdiction in that case about whether the merger had created or involved  
5 a merger of enterprises in a case in which the assets, that is to say the ferries,  
6 were separate from the labour. In fact the party I represented, the SCOP,  
7 was not an applicant in the first round of proceedings. But they had a different  
8 perspective because they in fact represented the labour interest, whereas in  
9 this case, as we understand it, ASTA is essentially rowing in behind Sabre on  
10 the argument that is Sabre is pursuing.

11 So picking up the --

12 MR JUSTICE MORRIS: Sorry, your answer to my point is that it is outwith the  
13 findings that Sabre are seeking to challenge?

14 MR WILLIAMS: In that example, sir, yes.

15 MR JUSTICE MORRIS: Okay.

16 MR WILLIAMS: So, it does seem that having seen the way we put our objections,  
17 ASTA has to some degree repositioned its intervention, because the  
18 emphasis of the application was very much on the provision of new evidence.

19 MR JUSTICE MORRIS: Yes.

20 MR WILLIAMS: And we made our points about that, sir, as you have seen and you  
21 have made the point fairly that there would be an uphill battle for ASTA in  
22 seeking to produce new evidence on those matters. It does seem to us that  
23 that would fundamentally be an impermissible basis for an intervention.

24 What that leaves is Mr Pike's point that they want to contribute to an argument about  
25 the weight of the evidence and the interpretation of the evidence. With  
26 respect, it is not at all clear what ASTA as a proposed intervener is going to

1 bring to that debate that Sabre is not already bringing to that debate. It is in  
2 our submission undesirable that the Tribunal should admit a second set of  
3 representations or submissions as to whether the CMA's findings are  
4 supported by the evidence. That would introduce complexity into the  
5 proceedings really without adding value.

6 That leads really to the point we have made in our letter about practicalities, which is  
7 that, adding another stage into the process will complicate the proceedings,  
8 as a matter of procedure and timing. Given what has been said, we would  
9 need to consider questions of admissibility, not just in relation to new  
10 evidence but in relation to the specific arguments that are being developed.  
11 We might have objections to admissibility and as a matter of timing and  
12 process, we do say that the intervention would have to be provided to us  
13 before we file our Defence.

14 In our experience, the sequencing of the provision of pleadings depends on which  
15 party the intervener is supporting.

16 MR JUSTICE MORRIS: Yes.

17 MR WILLIAMS: If the purpose of the intervention is to support the application, we  
18 need to have sight of it before we file our Defence so that we can respond to  
19 the points that are made against us. Realistically we asked for a period until  
20 10 July to prepare our Defence, because we need that time and if more were  
21 to be put on our plate, in reality we would very likely have to ask for another  
22 extension. It does seem to us that the timetable will go back. We are not  
23 talking about timetable exactly at the moment, but as soon as one starts  
24 pushing back from a date that is already in the middle of July, one can see  
25 timetabling difficulties once one starts to get to August.

26 Sir, it is right in our submission for the Tribunal to take into account not only whether

1           ASTA can add value to the substantive arguments, but also the impact on the  
2           logistics of the proceedings.

3           In our submission, taking all of those points together, the arguments against the  
4           intervention are very strong in our submission.

5           MR JUSTICE MORRIS: Thank you very much, Mr Williams.

6           I will invite Mr Ward if he has anything to add, he may not have but I will invite him to  
7           do so.

8           MR WARD: Thank you, sir.

9

10          Submissions by MR WARD

11          MR WARD: I just want to add a few remarks on behalf of Sabre. As the Tribunal  
12           has seen, we do support this intervention. The starting point is the CMA's  
13           relevant description of services and just for your note, we need not turn it up,  
14           it is in the final report at paragraph 5.28. Indeed, it is quoted in our grounds  
15           on page 13 at paragraph 34.

16          It is the supply -- sorry, sir, if you are turning it up I will pause.

17          MR JUSTICE MORRIS: It is all right. 5.28 of the report?

18          MR WARD: Yes.

19          MR JUSTICE MORRIS: It is all right, I like to mark everything that is referred to, that  
20           is why. I have already marked it but here we are. I have it.

21          MR WARD: It is the supply of an IT solution to airlines for the purpose of airlines  
22           providing travel services information to travel agents to enable travel agents to  
23           make bookings. We respectfully agree with Mr Pike that his client, which is  
24           a major international industry association for travel agents among others,  
25           could not have a clearer sufficient interest.

26          The question then becomes whether as a matter of the Tribunal's discretion it should

1 admit the intervention.

2 The test for that is, again, set out in your judgment in the B&M case, sir. Again I will  
3 read it if I may. "It is whether allowing the intervention would be consistent  
4 with the just, expeditious and economical conduct of proceedings". That is at  
5 tab 5, page 5, paragraph 9.

6 We don't agree with Mr Williams at all that there is anything disruptive to the  
7 proceedings or that would extend the proceedings in Mr Pike and his client  
8 filing a single written set of observations.

9 On the wider question of what they can add, Mr Williams's submissions came quite  
10 close to foreclosing the possibility of supporting interventions in judicial review  
11 cases, because of course he is right to say the intervener must add value --  
12 we don't dispute that -- but he was also very concerned to say that they  
13 should not expand upon the grounds, but then to essentially pre-emptively  
14 criticise Mr Pike's client for, if you like, merely supporting what Sabre is going  
15 to say for itself.

16 This is where we respectively make effectively common cause with Mr Pike, because  
17 the answer here is emphasis and perspective. Travel agents are clearly  
18 significantly affected by this merger. Mr Pike's written submission used  
19 strikingly strong language about how the prohibition had adversely affected  
20 travel agents and their customers throughout the world, because of course  
21 this is in effect a prohibition on a transaction, a worldwide prohibition in effect.

22 The critical issue, of course, is the theory of harm, which relates to competitive  
23 pressure in distribution. In other words, the products such as GDS that are  
24 provided to travel agents and the CMA theory of harm is that the loss of  
25 an independent Farelogix would lead to a softening of competition and  
26 innovation incentives for GDS. That is precisely the product that travel agents

1 consume and indeed it reached that view despite Farelogix having  
2 an extremely small share of the market, but on the basis of a series of views  
3 collected from travel agents, airlines, other participants in the market.

4 Plainly this is an area where the travel agent industry body may have something  
5 useful to say. In terms of does it in some way relate to our grounds of  
6 challenge, we respectfully say it certainly does. There is the broad point  
7 about the reasonableness of the CMA's overall approach to the competitive  
8 dynamics in this sector, but if one is looking for a more precise and granular  
9 hook, I would invite the Tribunal to look at paragraph 211 of the Notice of  
10 Application, which is in tab 2 at page 70. I am afraid there is a certain amount  
11 of jargon in here, but depending on how well an opportunity you have had to  
12 read it so far, it may not make sense.

13 If I can just highlight it, sir.

14 MR JUSTICE MORRIS: Yes.

15 MR WARD: "The CMA's approach failed to have due regard to evidence that if there  
16 was any initial stimulus provided by Farelogix, this was in part due to  
17 an overestimate of the competitive threat posed by GDS bypass."

18 Pausing there, that means a direct connection between an airline and travel agents:

19 "... and that the parties had come to recognise this. It disregards evidence having  
20 committed to investigating in NDC solutions [that is the new technology]  
21 GDSs are subject to powerful incentives to maintain and enhance them,  
22 including other GDSs, airline.com and other direct connection providers."

23 That is to say competitive incentives to win the business of travel agents, such as  
24 those in Mr Pike's association.

25 Just finally, points of fact on the basis of instructions by email I have had while I have  
26 been making submissions.

1 In the Delaware litigation I am told that there were three travel agents who gave  
2 evidence. Of those, at least one is thought to be an ASTA member. That is  
3 not of course a corporate representation by ASTA on behalf of its entire  
4 membership, but that is all I can assist with on that point.

5 Sir, unless I can assist further, those are our submissions in support.

6 MR JUSTICE MORRIS: Can I just ask you the question I sort of posed earlier, that if  
7 you go to 235A, I am assuming you would agree with the proposition that it  
8 would be open to ASTA to support that ground, "... fail to have due regard to  
9 the evidence ..." by making the specific point in relation to the finding on travel  
10 agents at 10.153, which then fed into the conclusions at 11, which is not  
11 a particular -- yes.

12 MR WARD: Sir, yes, if I may put it this way, my instinct is that that is right. I accept  
13 that Mr Williams is correct, that in a judicial review there are constraints on  
14 what can be done by an intervener and it is confined to the scope of the  
15 appeal, but within those confines, evidently it is open to it to develop its  
16 arguments.

17 Now, if Mr Pike's client goes too far, it is evident that the CMA will raise objection and  
18 the Tribunal may have to decide upon it.

19 However, at this very early stage, all we have is an understandably broad indication  
20 from Mr Pike. He is handicapped as well because much of the  
21 travel-agent-related information is redacted, of course, because it is third party  
22 material and he only has the benefit of the public version of the decision. So  
23 there has been no criticism of him for not having a more developed position,  
24 but in my respectful submission any such criticism would be misconceived.

25 It is quite different from the B&M case where, sir, you noted that you had evidence  
26 and submissions from Tesco that made it clear what it was going to argue,

1           apparently in sufficient detail for you to reach a view about it.

2 This is a very different case and Mr Williams was not critical of Mr Pike in this

3           respect. Our submission is that given the obvious importance of travel agents

4           to this competitive situation, they ought to be allowed in. If they say

5           something objectionable, Mr Williams will have the opportunity to object to it.

6 Sir, unless I can assist, those are my submissions.

7 MR JUSTICE MORRIS: Thank you very much.

8 I will give Mr Pike the opportunity to reply, should he so wish.

9 MR PIKE: Sir, thank you but no, I have nothing to add.

10 MR JUSTICE MORRIS: Very well. Before we retire, I will ask my colleagues on the

11           bench whether they have any further questions.

12 Mr Cutting? You have muted I think.

13 MR CUTTING: I think probably not.

14 MR JUSTICE MORRIS: Thank you.

15 Professor Mason?

16 PROFESSOR MASON: Not from me.

17 MR JUSTICE MORRIS: Very well.

18 It is a relatively convenient moment. We will retire and we will consider our decision

19           on this point and we will let you know when we are ready. We can use this as

20           the break time anyway. Thank you all very much.

21 I am now going to attempt to move out of this room and into the next room.

22 Thank you.

23 (2.55 pm)

24 (A short break)

25 (3.20 pm)

26 MR JUSTICE MORRIS: I can see everybody. Can everybody hear and see me?

1 MR PIKE: Yes.

2 MR WILLIAMS: Yes.

3 MR JUSTICE MORRIS: Thank you very much.

4

5 Decision

6 MR JUSTICE MORRIS: We have before us at this case management conference  
7 an application by the American Society of Travel Advisers Inc to intervene in  
8 support of Sabre Corporation in the proceedings. That application being  
9 made under Rule 16 of the Competition Appeal Tribunal Rules 2015. Having  
10 heard argument and deliberated, the application for permission to intervene is  
11 refused. We will give written reasons for this ruling in due course.

12 Can I thank Mr Pike on behalf of the Tribunal for his attendance and his submissions  
13 and, Mr Pike, should he so wish, is free to leave the court. It is a matter for  
14 him.

15 MR PIKE: Thank you.

16 MR JUSTICE MORRIS: Having made that ruling, we can now proceed with the  
17 agenda.

18 Mr Ward, we I think are on to item 4, which is confidentiality?

19 MR WARD: Yes, sir.

20 MR JUSTICE MORRIS: We are content with the terms of the confidentiality ring  
21 order and are happy to make that order.

22 I am assuming there are no further observations that either party wish to make on  
23 that?

24 MR WARD: None from us, sir, thank you.

25 MR WILLIAMS: Nor from us, sir.

26 MR JUSTICE MORRIS: Let's move on to disclosure, and I will hear from the parties

1 on that. We understand the position. It seems to us that there is a difference  
2 as to timing in relation to the steps relating to disclosure and there may be  
3 a disagreement as to the process.

4 Mr Ward, would you like to kick off on disclosure?

5 MR WARD: Yes, thank you, sir.

6  
7 Submissions on disclosure by MR WARD

8 MR WARD: That is exactly the position.

9 Our concern is that the disclosure issue should be resolved in a way that does not  
10 risk impacting the trial timetable, or the fair disposal of the issues. The CMA's  
11 approach, which essentially postpones any disclosure or unredaction until  
12 10 July when it serves its Defence, is in our submission a recipe for difficulty  
13 because, of course, if in fact matters are not resolved to our mutual  
14 satisfaction, then if there are disputes, that will necessitate a contested  
15 process over the summer, possibly troubling the Tribunal. We may end up  
16 with further disclosure in the autumn.

17 The disclosure itself, of course, might conceivably lead to some kind of amendment  
18 to Sabre's case, if the CMA is not going to be caught by surprise by any  
19 arguments we make upon it.

20 Very informally, Mr Williams suggested to me that changes might be dealt with in our  
21 Reply, but of course he wasn't giving -- and I certainly wouldn't have asked  
22 for -- any kind of binding undertaking that the CMA would be satisfied  
23 depending on what the detailed circumstances were.

24 Our headline position is we want the disclosure procedure to move more rapidly.  
25 These are documents that have been requested since the pre-action phase  
26 and indeed some of them as long ago as February. It is very welcome indeed

1 that there is now movement, but what I would like to do if I may is talk about  
2 the disclosure documents first and then the question of redactions or  
3 unredactions of the decision second.

4 Starting with the disclosure, the Tribunal will have seen our proposal in our skeleton  
5 argument, and indeed draft order. In the skeleton argument, it is in tab 1 of  
6 the bundle on page 8, paragraph 19.

7 MR JUSTICE MORRIS: I have it.

8 MR WARD: Thank you.

9 The first thing is, as you will have seen, we are very glad that the CMA has actually  
10 agreed to give documents in five categories, but it still seems to be saying we  
11 have to wait until mid-July to get them.

12 Our first proposition is that we should have those straight away, or at least as soon  
13 as the confidentiality ring is established. Plainly I should say, for the  
14 avoidance of doubt, we accept that everything goes into the ring at least  
15 initially, whether we are talking about documents or unredactions.

16 Then we are concerned that the remaining material should not wait until 10 July for  
17 the CMA to decide what it wants to do, but rather 30 June, which we suggest  
18 is a date that would already be 11 days beyond the date they would ordinarily  
19 have for filing the Defence. The idea is simply that if there is a dispute, the  
20 quicker that dispute gets ventilated and potentially resolved the better and the  
21 less the opportunity is for the trial timetable to be derailed.

22 MR JUSTICE MORRIS: Mr Ward, can I just ask you a question. I am looking at  
23 your 19A, B and C.

24 MR WARD: Yes.

25 MR JUSTICE MORRIS: Just remind me, leaving to one side redactions and the  
26 report, a large amount of the disclosure has been agreed, the categories.

1 MR WARD: Yes.

2 MR JUSTICE MORRIS: Once that is disclosed, whenever it is disclosed -- you will  
3 provide the actual documents on your timetable --

4 MR WARD: Yes.

5 MR JUSTICE MORRIS: -- and the removal of the redactions is already agreed to.

6 Your B says:  
7 "A substantive response to the remainder of their disclosure requests."  
8 What is that remainder outwith? Is it 11C or something? Or is it at the bottom of  
9 page 4?

10 MR WARD: It is 11C. In other words, all of these disclosure requests go to the vital  
11 issue --

12 MR JUSTICE MORRIS: Of American Airlines.

13 MR WARD: ... arrangements. Obviously, sir, you have had the chance to read it.  
14 The basis of jurisdiction is the assertion that there was a supply of FLX  
15 services.

16 MR JUSTICE MORRIS: To British Airways.

17 MR WARD: To British Airways, despite the fact there is no contract between  
18 Farelogix and British Airways for the supply of FLX services. The CMA's  
19 analysis is that there was in substance a procurement of FLX services in the  
20 UK by British Airways, because of the arrangements British Airways entered  
21 into with American Airlines for the interlining of British Airways ticket  
22 segments.

23 Is it helpful to explain interlining?

24 MR JUSTICE MORRIS: From my point of view, you don't need to, I am reasonably  
25 on top of this argument.

26 MR WARD: Thank you.

1 You will appreciate we say that is effectively to conflate a supply to American Airlines  
2 with a supply to British Airways. There is detailed analysis in the decision and  
3 there is detailed argument in the grounds of challenge and the CMA has  
4 accepted the proposition that the specific documents we have asked for  
5 relating to BA's proposition should be provided.

6 The third category, really, is anything else they have which is relevant really to this  
7 critical issue, because of course it is very much third party material, as  
8 between American Airlines and British Airways.

9 We think this is so important that the sooner it is dealt with the better, and that is why  
10 we have sought to accelerate this on somewhat to 30 June, rather than  
11 waiting until 10 July, when of course summer is imminent.

12 MR JUSTICE MORRIS: I am just also clarifying that B.

13 As you envisage it, the second stage, when you talk about the remainder of Sabre's  
14 disclosure requests, I think you are talking about 11C --

15 MR WARD: Yes.

16 MR JUSTICE MORRIS: -- and, this is what I want to clarify, unredacting of the  
17 whole of the rest of the decision or not?

18 MR WARD: Can I turn to that now, sir, no. In a word, no.

19 MR JUSTICE MORRIS: Okay.

20 MR WARD: You may talk about the redaction question separately. It is absolutely  
21 right that Sabre initially sought unredaction of the entire decision, but we  
22 accept of course that not all of the chapters of it are relevant directly to the  
23 grounds of challenge and we would be content to receive the following  
24 chapters if I may.

25 Chapter 5, which is about jurisdiction, which is very obviously firmly in play.

26 Then chapters 7, 8 and 10 form the basis of the assessments of the merger in

1 chapter 11.

2 When one looks at chapter 11, which is assessment of the merger, there are  
3 repeated references back to: chapter 7, the nature of competition; chapter 8,  
4 evidence on other suppliers; and chapter 10, evidence from third parties.

5 Chapter 9, which I have skipped over, is evidence from the parties themselves,  
6 which of course is not redacted for our purpose.

7 So that is the material that really matters.

8 Our concern is that the CMA is proposing a process that will be slow, expensive and  
9 contentious. What they propose is that they will indicate which passages they  
10 are prepared to unredact by 19 June.

11 Then Sabre will reply by 26 June.

12 Then they will provide such unredactions as they think fit by the time they serve their  
13 Defence on 10 July.

14 It is not only the speed of this that we are concerned about but the approach,  
15 because the CMA skeleton, or I should say the letter, which they put in today's  
16 hearing, talks about Sabre having to justify specific requests for removal of  
17 redactions.

18 Now, there are a huge number of redactions and it is not always obvious even what  
19 is within the scope of the redaction. So it would be very, very onerous indeed  
20 if we were to have to go through and fine comb the decision. Indeed it would  
21 be a very onerous process for the CMA to evaluate what we are doing and  
22 reach a judgment on one after another.

23 In our respectful submission, all of that is unnecessary and inappropriate. Where we  
24 are today, the CMA obviously has at its disposal a fully unredacted version of  
25 everything, the decision and the appendices. In principle, it could disclose it  
26 as soon as the confidentiality ring is established. The Tribunal may recall

1 section 38 of the Enterprise Act says:

2 "The final report will contain the CMA's decisions on the statutory questions it is  
3 required to answer and such information as the CMA considers appropriate  
4 for facilitating a proper understanding of those questions and of its reasons for  
5 its decision."

6 The redacted material is all included for a reason, namely to explain and justify what  
7 it has done.

8 Generally speaking, the redactions fall into two categories.

9 One is information about competitor plans.

10 The other is information about airline and travel agent perceptions of the parties and  
11 the competing suppliers. So that is third party information, which of course,  
12 we do not have.

13 If one could put it at a very high-level of abstraction, the CMA has started with  
14 a merger that will create very, very small increments. Has concluded  
15 nevertheless there will be two types of SLC, heavily reliant on this third party  
16 material which is very substantially redacted. If it would be of assistance,  
17 I can take you through some examples. Our general point is it is obviously  
18 appropriate that within the confines of a confidentiality ring, limited only to  
19 external legal advisers, that the relevant sections should simply be provided  
20 unredacted in their entirety. That could be done in a matter of days, without  
21 the need for a highly contentious process and indeed a process which  
22 disadvantages my client to the extent that even the advisers cannot see what  
23 is redacted, and sometimes would have to guess, of course, by its very  
24 nature.

25 I should just say for completeness that some of the material now redacted was  
26 provided in what is probably the same form in the provisional findings which

1 were released into a confidentiality ring at the time, but of course it is a matter  
2 of guesswork and patchwork what is in the actual decision, which might match  
3 what was in the provisional findings.

4 In our respectful submission, our primary case is that those evidently relevant  
5 sections could simply be released more or less immediately. The CMA has it  
6 at its disposal and a very cumbersome process would be avoided and the risk  
7 of satellite litigation over what is and is not appropriately redacted would be  
8 avoided.

9 MR JUSTICE MORRIS: But --

10 MR WARD: Sorry, sir, yes?

11 MR JUSTICE MORRIS: Had you finished, Mr Ward?

12 MR WARD: Yes, I had. I had.

13 MR JUSTICE MORRIS: Yes. I am just trying to tie that in with the process that you  
14 identified in 19A and B.

15 MR WARD: Yes.

16 MR JUSTICE MORRIS: I had envisaged, because of the process that Mr Williams  
17 had mentioned, that there would have been an intermediate stage -- forget the  
18 dates for a moment -- they are going to provide disclosure of what they have  
19 agreed to disclose first?

20 MR WARD: Yes.

21 MR JUSTICE MORRIS: They are going to remove the redactions they have agreed  
22 to remove, also first.

23 MR WARD: Just to be clear, sir, those are very small areas of redaction in and  
24 around the documents ... understand.

25 MR JUSTICE MORRIS: What I had in mind, possibly, was that between A and B,  
26 you, Sabre, would then clarify what more it was that you wanted.

1 You are now -- sorry, let me finish. You are now saying effectively that the more that  
2 you want, you have identified now, because you have identified it as 11C, as  
3 far as documents are concerned, or information. I know Mr Williams has  
4 made the point this is information not documents, but 11C, plus chapters 5, 7,  
5 8 and 10 unredacted in whole. That is what you are asking for now.  
6 However, as you have said at the outset, there is no formal application for  
7 disclosure at the moment.

8 Is what you are envisaging that if you look at your 19A and B and let us say we  
9 agreed with your dates, that within three working days, or however many  
10 working days of the ring they would provide A, and they would provide the  
11 substantive response to the request for 11C and unredaction of chapters 5, 7,  
12 8 and 10 by 30 June and if that was not agreed there would then be  
13 an application?

14 MR WARD: Sir, yes, that would be absolutely satisfactory.

15 If need be, we could write to the CMA, as it were, in a step between A and B, to  
16 explain why we think 5, 7, 8, 10 and 11 should be unredacted, and we can  
17 give more detail than I have in the submission I have made just now.

18 MR JUSTICE MORRIS: All right. I just wanted to understand your position. That is  
19 helpful.

20 MR WARD: Thank you, sir.

21 MR JUSTICE MORRIS: Can I ask Mr Williams for your response.

22 MR WILLIAMS: You can, sir, now that I have unmuted myself, but I see Mr Cutting  
23 has his hand up.

24 MR CUTTING: Is it all right if I ask a question?

25 MR JUSTICE MORRIS: Yes, of course.

26 MR CUTTING: It is a question for you, Mr Ward.

1 I understand the confidentiality ring is external legal advisers only, so no one in-  
2 house, but just trying to anticipate these things, is there any category of  
3 business secret relating to -- on the first part, competitors and on the second  
4 part I suppose airlines? Is there any category of business secret that you  
5 would accept now the CMA might want to hold on to, even if it discloses the  
6 bulk or the rest of 5, 7 and 8 through 10?

7 MR WARD: Thank you.

8 My answer is no, I can't anticipate that at present. Of course, by their nature, we  
9 don't know what is under the redactions but we do know that what the report  
10 contains is an analysis of the competitive conditions in the marketplace for  
11 these particular IT products for airlines and travel agents.

12 It is very difficult to see why there is anything so sensitive that could not be disclosed  
13 to external advisers who have given the appropriate undertakings to the  
14 Competition Tribunal.

15 MR CUTTING: I understand that but, you know, I guess we may all be aware of the  
16 inadvertent errors that sometimes happen within confidentiality rings.  
17 I suppose one question is, you know, perhaps my reading between the lines is  
18 that there was material in there in relation to the particular financial  
19 circumstances of a couple of the players that may be super sensitive in  
20 relation to their corporate futures.

21 MR WARD: I confess I haven't picked up that level of detail. Mr Williams is probably  
22 better placed than I am to either confirm or deny the inference that you have  
23 drawn. Of course, it is, I accept, possible that there could be material that is  
24 both irrelevant and too sensitive, but you don't need me to say, sir, that in this  
25 Tribunal we are used to dealing with very sensitive material about  
26 arrangements between competitors who may be on opposite sides of the

1 Tribunal and all of us are experienced at conscientiously doing so.

2 MR CUTTING: All right, I just wanted to flush out where you stood on that. I am  
3 done, sorry.

4 MR JUSTICE MORRIS: Yes, Mr Williams.

5  
6 Submissions on disclosure by MR WILLIAMS

7 MR WILLIAMS: As you have said, the starting point is there is no application for  
8 disclosure before the Tribunal, we are here really to deal with the process  
9 around disclosure, not whether there should be an order for disclosure. The  
10 way Mr Ward has put most of his submissions, particularly on the report, have  
11 almost morphed into an application for an order for disclosure of those  
12 chapters of the Final Report now. We obviously resist that, whether or not we  
13 resist it on the merits, ultimately we resist it because that is not the matter that  
14 is before the Tribunal today.

15 In fact, we wrote to Sabre something like two weeks ago to actually positively ask  
16 what they were seeking, because we wanted to know whether there were  
17 issues we could resolve before this CMC, so that matters would be presented  
18 in an orderly way and we could plan the timetable on that basis.

19 We are not in a position really to deal with reformulated requests that have just been  
20 made in Mr Ward's submissions now.

21 In our submission, the way that has been presented in favour of written submissions  
22 made by Mr Ward does not quite reflect the way in which the issues have  
23 crystallised. I think probably the best way to show you that is if you look at the  
24 email we received from Sabre when we wrote to them and asked them where  
25 they stood on disclosure and what they were seeking, which is at tab 4,  
26 page 24.

1 MR JUSTICE MORRIS: Just give me a moment.  
2 This is Mr Batchelor's email, yes?  
3 MR WILLIAMS: That's right.  
4 MR JUSTICE MORRIS: 4 June?  
5 MR WILLIAMS: That's right.  
6 You can see our email is on the previous page saying if you could explain what it is  
7 you are seeking. You can see then that what is the request for disclosure is  
8 set out really under two headings.  
9 The first is an unredacted version of the final report. That is as you said, sir, it is the  
10 full report.  
11 Then the second is the specific documents.  
12 MR JUSTICE MORRIS: Yes.  
13 MR WILLIAMS: You can see then 1 to 5, running over the bottom of the page on to  
14 the next page.  
15 Then there is effectively a 6, which is the Final Report also relies on undisclosed  
16 evidence. We have treated that as number 6.  
17 MR JUSTICE MORRIS: Yes.  
18 MR WILLIAMS: Then we submit that this disclosure is just and necessary and so  
19 on, so that is the application and the request. After that it says:  
20 "We should also be grateful if you would indicate whether there is other evidence  
21 available to the CMA relating to British Airways' alleged procurement decision,  
22 for example notes of any discussions with British Airways and American  
23 Airlines."  
24 That is a request as to whether we hold evidence, which follows on from the request  
25 for disclosure under 1 and 2.  
26 MR JUSTICE MORRIS: That is what I categorised as 11C.

1 MR WILLIAMS: It corresponds to 11C in the sense that it is anything else --

2 MR JUSTICE MORRIS: Yes.

3 MR WILLIAMS: -- but that is not a request for disclosure, it is a request as to what

4 we have and whether there is other available to us.

5 We didn't read it, if I may say so, as a request for disclosure.

6 First of all because it doesn't say "please disclose".

7 But, without being overly literal about it, it is quite different from the other requests

8 which explain the nature of the material being sought and the reasons why it

9 is necessary in connection with the pleaded case, which is --

10 MR JUSTICE MORRIS: Just give me a moment, please.

11 Okay.

12 MR WILLIAMS: Just to be clear, we accept that that is very much in the territory of

13 the challenge, but as I say, we didn't read it as a disclosure request, and in my

14 submission it isn't one.

15 Anyway, we wrote back in relation to categories 1 and 2 and the residual category.

16 As far as the report is concerned, we accept --

17 MR JUSTICE MORRIS: I think we are having a bit of difficulty with the quality --

18 I am -- of your visual and sound, Mr Williams.

19 MR WILLIAMS: I am afraid it does come and go a bit, sir. If it breaks down again,

20 I don't know if you can hear me now.

21 MR JUSTICE MORRIS: I can.

22 MR WILLIAMS: If it breaks down again and you want to put your hand up I can try

23 and make another connection, but usually this is the best one.

24 MR JUSTICE MORRIS: Carry on, Professor Mason has --

25 PROFESSOR MASON: I wonder if that is true and if this persists, if you switch off

26 your video, we will no doubt hear you better.

1 MR WILLIAMS: Yes, if we have further problems I will do that. Thank you,  
2 Mr Mason.

3 As far as the report is concerned, I think the Tribunal has seen we have accepted  
4 that there is a basis for disclosure of at least aspects of the confidential report,  
5 but we don't accept there is a basis for blanket disclosure. We don't accept  
6 there is a proper basis for blanket disclosure of whole chapters either, not as  
7 a matter of principle. The way that this is usually done in my respectful  
8 submission is a request to see the particular paragraphs which are germane  
9 to the appeal.

10 But as a matter of practicality, as Mr Ward explained, we are not suggesting that  
11 Sabre does that now because we are going to give them a body of material  
12 which we accept we should disclose. That includes material that they have  
13 previously seen and it includes material going to the specific documents that  
14 we have agreed to disclose.

15 How much there is that will be outstanding once Sabre has that material is not clear  
16 at the moment.

17 MR JUSTICE MORRIS: Outstanding from their point of view?

18 MR WILLIAMS: Outstanding from their point of view.

19 MR JUSTICE MORRIS: Although of course Mr Ward says the rest of those chapters  
20 will be outstanding.

21 MR WILLIAMS: I beg your pardon, they will be outstanding but whether they will  
22 really be germane or material enough to be pursued by way of a freestanding  
23 disclosure application, that is a separate question.

24 As Mr Ward said, some of material he has referred to by way of the third party  
25 material is material they did see during the investigation and will see again  
26 when they get the provision of the report that we have indicated we will

1 provide.

2 MR JUSTICE MORRIS: My understanding therefore is that anything that was  
3 disclosed previously in the provisional findings will be unredacted?

4 MR WILLIAMS: That's right, sir, yes.

5 MR JUSTICE MORRIS: Okay.

6 MR WILLIAMS: We are not going to hold back material they have already seen.

7 MR JUSTICE MORRIS: No.

8 MR WILLIAMS: That is why we have proposed what we say is a practical way  
9 forward, in which we will identify the material that they are going to get by the  
10 end of this week. Then Sabre will tell us what else it needs/wants to see and  
11 why those particular references are material to the grounds of appeal. That  
12 would be a particularised request of the sort the Tribunal would expect to deal  
13 with and really to address Mr Cutting's point, it is certainly right to say that we  
14 would want to look carefully at whether all of that detail is relevant to the  
15 grounds of challenge, particularly where it is material of particular sensitivity.  
16 It isn't right in principle in my submission to proceed on the basis of blanket  
17 disclosure of entire chapters when one is dealing with third party material.

18 If we do it the way that we have proposed, the process will take a couple of weeks,  
19 but it will be ready to be provided with our Defence, which is only three weeks  
20 away anyway. We are talking about the difference, really, of between -- well,  
21 perhaps we will come to timing in just a moment, but there is a further  
22 advantage of the approach we have suggested, sir, which is it means that we  
23 can consider whether there is anything else in the report that we need to  
24 disclose as part of our Defence, background material. We are concerned that  
25 on Sabre's approach, we are at risk of having to prepare one version now,  
26 possibly another version again on 30 June and then a third version with the

1 Defence.

2 Each of those exercises is very time consuming, it is onerous and it is not efficient  
3 really, it is not efficient to keep producing bespoke unredacted versions of the  
4 report when one can see these different issues are going to arise in series.  
5 We are strongly opposed, sir, to producing multiple versions, not least  
6 because this is a fiddly exercise and one doesn't want to run the risk of  
7 making mistakes.

8 From our perspective, Mr Ward said at the moment he is proceeding on the basis of  
9 guesswork but we have indicated that before very long, we will be in  
10 a position where he doesn't need to proceed on the basis of guesswork. He  
11 will see what we are going to disclose. He will then be able to identify further  
12 passages beyond what we are willing to disclose and make particularised  
13 requests for those. Then we will be able to provide one orderly package  
14 around the time of the Defence.

15 MR JUSTICE MORRIS: Okay.

16 MR WILLIAMS: It does seem to us this is the sort of point where there are  
17 diminishing returns, which is to say no doubt we could produce versions by  
18 some date sooner, but one has to look at what the real advantage of providing  
19 that disclosure at that point in time is relative to getting the finished product  
20 some period of days or even one or two weeks later.

21 Turning then to the specific documents, that is the report. This is more  
22 straightforward, because we have simply agreed to provide them all.

23 MR JUSTICE MORRIS: Sorry, I have lost you. You said the specific documents --

24 MR WILLIAMS: I beg your pardon --

25 MR JUSTICE MORRIS: Sorry, partly because you are breaking up, my  
26 understanding -- if you would let me, we are cutting across, hello?

1 MR WILLIAMS: I have turned my video off, sir, in case that helps.  
2 I think it is better.

3 MR JUSTICE MORRIS: You have just been dealing with the report and  
4 unredactions. Are you now moving to the non-report documents?

5 MR WILLIAMS: I am sir, yes.

6 MR JUSTICE MORRIS: Okay.

7 MR WILLIAMS: I was dealing with (1) in the email and now I am dealing with (2).

8 MR JUSTICE MORRIS: Okay.

9 MR WILLIAMS: The only issue as far as that is concerned is one of timing. We  
10 proposed to provide them with our Defence for a couple of reasons.  
11 One is that the parties will get the documents together with the commentary in the  
12 confidential report, which as I have just explained is more difficult to provide in  
13 an orderly way before our Defence.  
14 And they would also get to consider the material together with our Defence, so they  
15 will have the whole suite of material which we rely on. That does to us seem  
16 the efficient way to provide the material and it will give Sabre on the  
17 timetables being considered, as we understand it, plenty of time to consider  
18 the material.  
19 We don't object strongly to providing those specific documents earlier, but it does  
20 seem to us that that would involve providing material in dribs and drabs and it  
21 is going to trigger a certain amount of additional costs reviewing back in  
22 isolation from the Defence, in isolation from any version of the decision that  
23 comes through later. Really it is just a question of proportionality as to  
24 whether the benefits of providing that material sooner are all that significant.  
25 So that is 1 and 2, sir.

26 MR JUSTICE MORRIS: Yes.

1 MR WILLIAMS: That then leaves the final category, which I described as further  
2 information. That was not intended to be a sort of hair-splitting point, sir. We  
3 were simply saying we didn't understand that Sabre were pursuing a request  
4 for all documents relating to BA's procurement decision. We didn't read it in  
5 that way and we don't think that that would be a properly formulated  
6 disclosure request.

7 I have indicated that we have agreed to provide the specific documents that Sabre  
8 has requested, and those are the documents that are cited in the report as  
9 supporting the particular findings which Sabre challenges. That means we  
10 are now into the realms of a different question, which is: is there anything  
11 else, anything else beyond the material that you have provided in those  
12 footnotes?

13 The test for disclosure, sir, is not: is there anything else relevant to the decision?

14 The test is: is there anything whereby disclosure is necessary and  
15 proportionate having regard to the grounds of challenge?

16 As far as that is concerned, sir, it is in the first instance for the CMA to decide what if  
17 anything else it thinks it should disclose, together with the Defence --

18 MR JUSTICE MORRIS: Under its duty of candour?

19 MR WILLIAMS: Under its duty of candour.

20 In my respectful submission, it would be quite wrong to bring that deadline if you like  
21 forward, the point at which we comply with candour, because the point at  
22 which we discharge that duty is as part of our Defence.

23 It is possible that when Sabre has seen the additional material it will want to make  
24 a residual formulated disclosure request on a more precise basis, it is  
25 possible it will want to do that when it has seen our Defence, but there is no  
26 such request at the moment and we certainly don't agree that the request as

1 to whether we hold any other information should now be treated as though it  
2 is effectively an application or a request for disclosure of all of that material.

3 So --

4 MR JUSTICE MORRIS: There is no application, is there?

5 MR WILLIAMS: No.

6 MR JUSTICE MORRIS: It is just envisaged that you would give a response,  
7 effectively the response you are giving now at some stage.

8 MR WILLIAMS: Yes.

9 MR JUSTICE MORRIS: Yes.

10 MR WILLIAMS: That's right, sir. We think we have responded to the requests. We  
11 have said that we will provide the specific material, we have explained our  
12 approach to the decision and we have explained that in our respectful  
13 submission, anything else is a matter of candour.

14 So on that basis, we won't be in a position to disclose anything beyond 1 and 2 in  
15 two weeks' time, which was the proposed deadline. We intend to take the  
16 time that the Tribunal has already indicated we will have to prepare our  
17 Defence and we are then, in our submission, into a question of really what if  
18 anything could be gained by providing material days in advance of the  
19 Defence, if that is where we got to.

20 In our submission, that is not the proper way to proceed in any event.

21 Whilst we completely understand that Sabre would like as much clarity as possible,  
22 as early as possible, it is not in my respectful submission practical to try and  
23 accelerate disclosure so that it is fully resolved ahead of the Defence. That is  
24 not the way judicial review works and it is not the right approach in principle,  
25 because of the position on candour as I have explained.

26 In the end, one cannot avoid a situation where there may be some residual

1 disclosure issue once the applicant has seen the Defence. That is  
2 an inevitable risk in judicial review proceedings. But I do stress we are in the  
3 realms already of residual disclosure, because we have already agreed to  
4 provide the specific material under 2 that Sabre has requested.

5 So the risk of storing up problems, in my respectful submission, does not really look  
6 all that high.

7 Ultimately, to sort of finish with the point that Mr Ward started with, he said, well, they  
8 are very concerned that the timetable shouldn't be derailed in this way by  
9 disclosure issues cropping up later on. I mean there is a question as to how  
10 great that risk is, given the progress that has already been made and  
11 ultimately that does to some degree come down to the timetable and the  
12 hearing date. If the Tribunal is looking at a hearing later in the window that we  
13 have been talking about, it does seem to us that the difficulties may be more  
14 theoretical than real. Because one then would have a period of time, even  
15 after the summer, if it came to it, within which to deal with these residual  
16 issues. It seems very likely the issues will have been defined before the  
17 summer, even if there is any sweeping up to do, there would then be a period  
18 of time in the autumn. We can fully see if one were aiming at a hearing at the  
19 end of September, the position would look more squeezed but, as I say, that  
20 is not the only sort of potential way forward.

21 Those are our submissions on the disclosure process.

22 MR JUSTICE MORRIS: Thank you.

23 I am conscious of the time, and I am conscious of not wishing to cut off Mr Ward but  
24 if you are going to be very short in reply, Mr Ward, then please be so but  
25 I think I would benefit from having a few moments' discussion with my fellow  
26 Tribunal members on this. We have discussed it before the hearing. We

1 have had certain thoughts. I think things have developed in the course of  
2 argument, and I would like to take the opportunity for us to consult, not least  
3 also to perhaps give you our thoughts on where we are on the overall  
4 timetable as well when we come back, so we can see how it all fits in.

5 Can I just say the one point that had not occurred to me before I heard Mr Williams  
6 was the point -- this is something you may wish to address, Mr Ward -- the  
7 point about creating multiple different unredacted versions of the report. That  
8 was a point that hadn't occurred to me.

9 MR WARD: Sir, thank you. May I make very brief points in reply in light of your  
10 indication.

11  
12 Submissions in reply on disclosure by MR WARD

13 MR WARD: Firstly, as to creating multiple versions, with the greatest of respect to  
14 Mr Williams, that concern appears to be overblown. The documents will go  
15 into a confidentiality ring for external advisers. Therefore the need for  
16 a fine-toothed comb is perhaps not as extreme as it would be if the  
17 documents were going into the public domain. There is broad obvious  
18 relevance of the chapters which bear upon the matters which are under  
19 challenge. It is right to say that we have made this request on 11 May, so  
20 there has been a long time already to consider this.

21 We don't accept that there would need to be multiple iterations at all.

22 On the specific point --

23 MR JUSTICE MORRIS: There would have to be at least two iterations, because  
24 there would be a disclosure in three days' time of the unredactions which they  
25 have agreed to make.

26 Then there would be another version with more redactions, possibly, or not.

1 MR WARD: Yes, forgive me, that is right.

2 To be clear, as far as I understand it, the redactions which are promised in the next  
3 three days are just a handle of passages of footnotes and a couple of snips  
4 from main texts which relate to the specific documents they have agreed to  
5 provide. It is not a wider exercise than that, unless Mr Williams corrects me  
6 on that.

7 That is true. That exercise would be very, very quick. It may be as few as 10  
8 different sentences or footnotes.

9 MR JUSTICE MORRIS: Okay, next point.

10 MR WARD: As to the specific documents, Mr Williams didn't really have a reason at  
11 all not to provide them now --

12 MR JUSTICE MORRIS: Okay.

13 MR WARD: -- other than a point on costs.

14 Then the residual category if I can call it that, 11C, the problem we have of course is  
15 we cannot make any kind of focused application without having information  
16 about what it is that they may have.

17 Finally, more generally, the CMA's approach is, with respect, an intricate one and the  
18 prospect of satellite dispute breaking out in the middle of summer is high. In  
19 our respectful submission, that is why there is really an imperative to get  
20 these documents and this unredaction process done as quickly as possible. If  
21 it would help, my solicitors have confirmed they are quite happy to provide  
22 some form of document to go between 19A and 19B of our skeleton, in  
23 an effort to progress this more quickly.

24 Sir, that is all I was going to say.

25 MR JUSTICE MORRIS: Thank you very much.

26 MR WILLIAMS: I am sorry, sir, I should say I think Mr Ward is under

1 a misapprehension, because the disclosure we have agreed to provide -- we  
2 have not agreed to provide it in three days, but what we have agreed to  
3 provide --

4 MR JUSTICE MORRIS: Never mind about the timing.

5 MR WILLIAMS: From the report, there are the two categories that are identified.

6 The material that has been seen previously.

7 And the passages relating to the new specific disclosure.

8 I don't believe that material does boil down to the small amount that Mr Ward is  
9 referring to. I think he is only talking about the additional passages that relate  
10 to specific documents.

11 MR JUSTICE MORRIS: All right. Thank you. We will go into the retiring room.

12 Thank you very much.

13 (4.05 pm)

14 (A short break)

15 (4.20 pm)

16 MR JUSTICE MORRIS: Thank you.

17

18 Decision

19 MR JUSTICE MORRIS: On the disclosure issues, we are broadly in agreement with  
20 the approach of Sabre. We consider that the matter should be moved forward  
21 somewhat more quickly than as suggested by Mr Williams for the CMA and to  
22 that end we are going to make directions along the lines suggested by Sabre.

23 The CMA should provide the documents they have agreed to disclose within three  
24 working days of the establishment of the ring, which means the order for the  
25 ring will be made but then it depends how quickly the undertakings are given.

26 We also consider, whilst we recognise the practical point made by Mr Williams,

1 nevertheless, we consider that at the same time the CMA should provide  
2 an unredacted version of the report making the unredactions that they have  
3 agreed to make, which comprise, as Mr Williams said, a combination of  
4 references to documents now to be disclosed and material previously, which  
5 was unredacted in the provisional findings. That should be done at the same  
6 time, unless Mr Williams makes a plea that he wants another couple of days  
7 or something, but effectively to be done along the lines of 19A.

8 We think that there should however be an intermediate stage thereafter where Sabre  
9 clarifies its position as to what further it requires. That is both in relation to  
10 further unredactions, which on the basis of what Mr Ward has said to us today  
11 it appears to be whole chapters, but which Mr Ward may wish to consider the  
12 observation -- we are not making any ruling -- of Mr Cutting about super  
13 sensitive material.

14 Also, clarify and -- I am going to use the word particularise, the nature of the 11C  
15 request. Whether it is a request for documents and if so identifying such  
16 documents as are able to identify, whether it is a request for information and if  
17 it is a request for information, the basis of that request. We would like that to  
18 be done by 23 June, which is a week today.

19 Then the CMA to provide its response to effectively that intermediate stage by  
20 30 June, which will either be, "Yes, here is some more", or, "No, not entitled  
21 for the following reasons ..." or a combination of the two.

22 There is a fourth stage, which is this. This does, I think, take into account  
23 Mr Williams's submissions based on tying things in with the Defence. We  
24 consider that any outstanding application for disclosure or unresolved  
25 disclosure matter should be deferred in terms of application until after the  
26 receipt of the Defence. It is possible that by that time Sabre will have seen

1 more and it is also possible that the Defence might give rise to further  
2 requests.

3 This takes us into the overall timetable. The Defence deadline will remain 10 July  
4 and we would direct that any application for disclosure, whether that is  
5 documents or information, be made within seven days of receipt of the  
6 Defence. That would be 17 July, with a view to possibly, depending on  
7 everybody's availability, resolving that issue by the end of July. If there are  
8 any, I mean one would hope the issues could be resolved or at least  
9 narrowed. So that is what we direct in relation to disclosure.

10  
11 Discussion on timetable

12 MR JUSTICE MORRIS: Can I then move on to the timetable more generally and tell  
13 you where we are, parenthetically, of course, provisionally.

14 Defence: 10 July.

15 Disclosure application: 17 July.

16 We wish to fix the hearing for a date in the first two weeks of October.

17 Let me add this.

18 First of all, the hearing, we will go with a four-day estimate. We think there are quite  
19 a lot of issues, each one of which I think will require a certain amount of  
20 delving into detail. The Tribunal will not be sitting on Mondays in that period,  
21 so we are looking at, I suppose, a Tuesday to Friday bracket or, I suppose,  
22 an overlap. We are aware of I think it is Mr Williams's difficulties in that period  
23 and we will do our best to accommodate Mr Williams. We don't really want to  
24 go into the second half of October as we think it is getting a bit late and there  
25 are other reasons as far as the Tribunal are concerned, but ultimately if  
26 Mr Williams's clash cannot be accommodated, then that might be a matter for

1 the CMA to consider. I know it is always difficult but at the moment our  
2 position is that we would like to fix it for the first two weeks of October.

3 Working backwards from that, we think that Sabre's Reply should be by 31 July so  
4 that that gives three weeks from the Defence. We had contemplated whether  
5 or not a Reply and a skeleton are both necessary. It is not always the case,  
6 particularly when there is a more truncated timetable on a merger case, but  
7 we are satisfied that if Sabre wishes to put in a Reply, then it can do so, but it  
8 should do so within three weeks.

9 Now, of course, it may be there are outstanding disclosure requests but anything that  
10 comes out of disclosure that might come later, we would have thought could  
11 be dealt with in skeletons. Skeletons we would happily follow the directions,  
12 I think, put forward by Sabre in their draft directions, save that we would like  
13 the agreed bundle for the hearing to be lodged at the same time as Sabre's  
14 skeleton. That is two weeks before, but not, we accept, that the authorities  
15 bundle will have to be lodged once the CMA's skeleton has been lodged.

16 I think, as far as we are concerned, that is the outline of the timetable. Obviously we  
17 are willing to hear any observations on that.

18 Mr Ward?

19 MR WARD: Sir, thank you very much.

20 The only point I would wish to make observations upon is the date for the hearing. It  
21 is simply this, I have a fixture in the Court of Appeal on Tuesday, 6 October  
22 and Wednesday, 7 October, so for me, the previous week is completely clear,  
23 but I see that Mr Williams has a slightly different constraint. So I recognise  
24 always the Tribunal has the same challenge of finding a way to accommodate  
25 all.

26 MR JUSTICE MORRIS: 6th and 7th ... actually I will get a diary out.

1 MR WARD: That is Tuesday and Wednesday. (Pause)

2 MR JUSTICE MORRIS: Yes.

3 Mr Williams, was it the 5th to the 9th or was it later?

4 MR WILLIAMS: It is the same week as that, sir. It is in the FP McCann appeal,  
5 which is in the Tribunal, commencing on the 5th.

6 MR JUSTICE MORRIS: What about the week of the 12th and the 13th?

7 MR WILLIAMS: It is not out of the question that FP McCann will overrun, we have  
8 a pre-trial review in September, and obviously that would run straight off the  
9 back of the trial. I think we are going to need to take the question of  
10 representation away, sir. If the Tribunal is going to list the hearing in those  
11 two weeks, I think it is going to cause difficulty for me either way. But I don't  
12 think we can probably resolve that now.

13 MR JUSTICE MORRIS: Am I right in thinking, if we started on 29 September, how  
14 would that affect the two of you?

15 MR WARD: For my part, that would be very welcome. I should say in answer to  
16 your question about the week of the 12th to the 16th, my diary is free but  
17 I have four days in the Tribunal on the boundary ticket class action  
18 certification matter in front of the president on Monday the 19th. If I am  
19 allowed to speak entirely selfishly, I would certainly prefer the week of  
20 29 September.

21 MR JUSTICE MORRIS: Mr Williams?

22 MR WILLIAMS: It is difficult for me to say, really, but that is a problematic week for  
23 me because I would be going straight from a four-day heavy hearing in this  
24 into a five-day merits appeal. I think these are matters we will probably have  
25 to resolve on the CMA side.

26 MR JUSTICE MORRIS: I wonder whether we ought to take it away ourselves and

1 give the actual dates some thought, rather than resolve it now. I think I would  
2 want it to be one of those three weeks -- the 29th, the 6th, the 13th.

3 Actually I think what you should both do, I think the CMA should take away its  
4 representation issue, and I think, Mr Ward, if you could write to the Tribunal  
5 exactly with your availability and then we will consider it and with our diaries  
6 as well.

7 MR WARD: Thank you, sir.

8 MR WILLIAMS: Sir, in terms of the other directions that you mentioned, I think the  
9 CMA -- as we stand, we are not sure when the confidentiality ring will be  
10 constituted but I think the CMA can provide the disclosure within five working  
11 days, effectively by this time next week, so that should allow time for the  
12 confidentiality ring to be constituted. I wonder whether three working days  
13 would cut it a bit short.

14 MR JUSTICE MORRIS: Actually, I am not sure my timetable works, having thought  
15 about that.

16 So you are saying that is the 23rd, isn't it? I had said that Sabre's response should  
17 be the 23rd, so I think, just having a look at the diary, if Sabre then makes its  
18 further request by the 26th, and you reply by the 30th to that further request,  
19 that might work in terms of timing, Mr Ward?

20 MR WARD: Yes.

21 MR JUSTICE MORRIS: I have lost your sound.

22 MR WARD: I said yes, thank you.

23 MR JUSTICE MORRIS: I thought from lip reading that is what you said but you may  
24 have a funny way of saying no.

25 MR WILLIAMS: Sir, so would that involve us getting the request on the Friday the  
26 26th and replying by Tuesday the 30th?

1 MR JUSTICE MORRIS: Yes, that is a bit tight, isn't it?

2 MR WILLIAMS: That is effectively two working days, sir.

3 Given that the Tribunal had indicated there is not going to be an application until  
4 after the 10th, in any event it does seem to me that giving us until the 3rd, so  
5 that Sabre has the response a week in advance of the Defence, but they are  
6 able to chew that over, that should not hold matters up, sir.

7 MR JUSTICE MORRIS: The reason we wanted that earlier is so that it gives Sabre  
8 time to formulate it if they are going to make an application, so they know on  
9 a rolling basis what is and is not disclosed.

10 Okay, I think that is right, I think the 3rd. Mr Ward, I think is nodding? Yes.

11 The first stage is the 23rd.

12 The second stage is the 26th.

13 The third stage is 3 July.

14 MR WILLIAMS: Thank you, sir. In terms of the other directions, in these cases,  
15 usually because the application bundles and the Defence bundles and Reply  
16 bundles tend to be quite sort of orderly packages, in my experience, those  
17 can very ordinarily be used for the purposes of the hearing together with any  
18 supplementary material. That does have the advantage that the parties are  
19 not rushing to get new material to the Tribunal or new bundles to the Tribunal  
20 close to the hearing date.

21 I think to the extent that we want to package up any further material or produce  
22 a core bundle, that is perhaps something that the parties can talk about but if  
23 we plan on the basis that we will use those materials as the core materials,  
24 I think that will mean that the Tribunal has that material in good time.

25 MR JUSTICE MORRIS: Yes, I don't think though there is anything within the terms  
26 of -- I am just looking ... Yes, a hearing bundle was what initially -- I am

1 assuming the hearing bundle, how you constitute it, the hearing bundle, you  
2 could say that section A is the application bundle, section B is the Defence  
3 bundle, however you wish to constitute it. There may be more detailed  
4 provisions and procedures -- I am looking across the room here, but I am sure  
5 that can be -- I am having a note sent to me. (Pause)

6 Right, I am being told that the Tribunal doesn't currently have any hard copy bundles,  
7 so everything is in soft. I think I will want hard copy bundles for sure for the  
8 main hearing, but how you constitute what is "the hearing bundle" I would  
9 have thought could be a matter for agreement. Actually if we don't already  
10 have them, I mean I have actually printed off large chunks but I do not have  
11 everything. I think we can leave that to your good sense, and I do think that if  
12 there are a lot of documents, then perhaps a core bundle might be useful.

13 I don't know whether Mr Cutting has any observations on this, because I know he is  
14 keen to --

15 MR CUTTING: Mr Cutting just likes his documents in good time, and a printed set  
16 as well as a soft copy would be great.

17 MR JUSTICE MORRIS: Thank you. Very well, is there any other matter? Does that  
18 cover everything on the agenda, Mr Ward?

19 MR WARD: Sir, I think it covers everything on the agenda.

20 The one thought I had was just a matter of mechanics in respect of the confidentiality  
21 ring, because as you will be aware, the standard form undertaking given in the  
22 ring is that the person signing it has seen the order as made by the Tribunal  
23 today. I wondered if it would assist if we offered to draw up the order in the  
24 first instance and naturally hope to reach agreement with Mr Williams and  
25 then, if I may respectfully say, the sooner it were able to be made, the sooner  
26 we could get the ring up and running.

1 MR JUSTICE MORRIS: You are talking about the order on the directions today or  
2 the confidentiality order itself or both?

3 MR WARD: Well it is really both but it is the order for the confidentiality ring that is  
4 most important, so I suppose formally that could be, as it were, made today,  
5 given that there is no dispute about the terms at all, and I think the Tribunal  
6 has endorsed them.

7 MR JUSTICE MORRIS: You have sent it in draft. I don't know whether we are --  
8 I mean I have it here. Whether we need any more than what you have sent  
9 us.

10 Sorry, I am just going to -- can I mute myself? I can, can't I? (Pause)  
11 Mute off. I am back on.

12 You need to send a Word version, with the names of the people in the ring and the  
13 order will be made tomorrow.

14 MR WARD: Thank you sir, we will do that.

15 MR JUSTICE MORRIS: As far as the main order for directions are concerned, if you  
16 want to draw that up and send it through, I don't know -- again, I am getting  
17 a nod. That would be helpful, thank you.

18 MR WARD: We will do that and of course speak to the CMA about it.

19 MR JUSTICE MORRIS: Very good. Any other matters from counsel?

20 MR WARD: No thank you, sir.

21 MR WILLIAMS: No, thank you, sir.

22 MR JUSTICE MORRIS: Thank you very much.

23 We didn't overrun too much. I don't know about your experience but my experience  
24 of remote hearings is they do tend to slightly overrun but that may be down to  
25 the Tribunal or the judge rather than remote hearings but we have done quite  
26 well.

1 Thank you all very much and I am now going to bring the hearing to a close.

2 (4.41 pm)

3 (The hearing concluded)

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