IN THE COMPETITION APPEAL TRIBUNAL

Case No.: 1354/4/12/20

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP
(Remote Hearing)

Monday 6 July 2020

Before:
Peter Freeman CBE QC (Hon)
Paul Dollman
Tim Frazer
(Sitting as a Tribunal in England and Wales)

BETWEEN:

JD Sports Fashion plc

Applicant

v

Competition and Markets Authority

Respondent

A P P E A R AN C E S

Mr Brian Kennelly QC and Mr Alistair Lindsay (On behalf of JD Sports Fashion plc)
Ms Marie Demetriou QC and Mr Ben Lask (On behalf of the CMA)
Mr Aidan Robertson QC (On behalf of Frasers Group Plc)

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Monday, 6 July 2020

(2.00 pm)

(Hearing held via video/telephone link)

MR KENNELLY: May it please the Tribunal, I appear for the applicant JD Sports Fashion Plc with my learned friend Mr Lindsay, my learned friend Ms Demetriou appears for the CMA and my learned friend Mr Robertson appears for the applicant intervener, Frasers Group Plc.

THE CHAIRMAN: Just before you go on, presumably you would like to us introduce ourselves and for me to welcome to you to the CAT in this case, which I am very happy to do.

I am Peter Freeman, the chairman of the panel in this case. Can I ask my colleagues, two colleagues, to introduce themselves, please.

MR DOLLMAN: I am Paul Dollman, an Ordinary Member.

MR FRAZER: I do apologise, good afternoon, I am Tim Frazer.

THE CHAIRMAN: Thank you, Mr Kennelly, isn't it, you can go ahead.

MR KENNELLY: I am grateful, chairman.

We are very grateful for the agenda which was circulated to the parties and subject to any matters which the Tribunal wishes to raise with us, I propose simply to go through it in the order in which it appears.

The Tribunal will have had submissions from the CMA, from myself and from Mr Robertson. Therefore you will have seen that the forum is agreed.

THE CHAIRMAN: That is a relief.

MR KENNELLY: Although remotely it is not quite as terrible a prospect as it used to be.

Moving then on to interventions, sir. As you know there is an application to intervene before you from Frasers Group Plc. I think for this purpose I will hand over to

Mr Robertson to make his application.

THE CHAIRMAN: Yes, I would propose to hear Mr Robertson, then I would like to hear from JD Sports and then I would like to hear from the Authority. I think that would be the right order.

Mr Robertson, welcome, hello.

Application by MR ROBERTSON

MR ROBERTSON: Chairman, members of Tribunal, Frasers Group has requested permission to intervene pursuant to rule 16 of the Tribunal Rules. The CMA are unsurprisingly neutral to our application to intervene. JD Sports, equally unsurprisingly, oppose that application.

What I will deal with is first of all is the principles, very briefly, and then the two limbs to the test.

The principles are, starting with rule 16, paragraph 1, "Any person with sufficient interest in the outcome may make a request to the Tribunal for permission to intervene in the proceedings". It has been described as a threshold question which must be satisfied before the CAT may exercise its discretion. We have cited in our skeleton argument relevant authorities at paragraph 4(2).

If that threshold is met, it is then for the Tribunal to exercise its discretion, having regard to rule 4 of the Tribunal Rules. That will include ensuring that the case is dealt with justly and at proportionate cost. See Sabre paragraph 8.

A relevant factor in the exercise of the Tribunal's discretion to grant a request to intervene is participation by a party seeking permission to intervene during the administrative stage. That is set out by the Tribunal in its recent ruling in Sabre, paragraph 17, citing an earlier decision of the Tribunal in Tesco v Competition Commission.

I will deal with the sufficient interest threshold, sufficient interest in the outcome of the proceedings, first, and then I will turn to factors which we say are relevant to the Tribunal's exercise of discretion.

Our submission is that there could be no serious doubt that Frasers Group does have a sufficient interest in the outcome of the proceedings, for the reasons which we have set out at paragraphs 5 to 9 of our request.

As to our participation, the leading textbook in this area, Brealey & George, states at paragraph 3.04:

"A party is likely to have sufficient interest if it participated in the administrative procedure before the competition authority."

There are authorities cited at footnote 27 in the next chapter from Brealey & George, which is in the authorities bundle. I don't need to take you to it, but the authorities there cited are Albion Water, Aquavitae's intervention and Mastercard and the OFT, noting that the British Retail Consortium was given permission to intervene, having established a sufficient interest.

My learned friend no doubt will take the point against us that both of those cases are cases under the Competition Act, where there is a full appeal on the merits to the Tribunal.

But, as we point out at paragraph 7 of our skeleton, there are also previous cases in which competitors to merging parties, which have participated in the CMA's merger investigation process, have been given permission to intervene in support of CMA's merger prohibition decisions and therefore have established a sufficient interest.

The cases that we referred to in our request are Intercontinental Exchange, the order of 30 November 2016, paragraph 2 of that order giving Nasdaq Stockholm permission to intervene in support of the CMA. Nasdaq Stockholm was

a competitor of Intercontinental Exchange.

In the Eurotunnel cases, which, as the Tribunal will well be aware, had two rounds before ultimately ending up in the Supreme Court, DFDS was given permission to intervene in both rounds. DFDS, the ferry company who were a potential operator or actual operator of services between Dover and Calais, a competitor of Eurotunnel, a competitor of SeaFrance, were given permission to intervene.

So there is nothing unusual about participants in a merger investigation being given permission to intervene in the subsequent judicial review proceedings in the Tribunal.

In our submission, as set out in paragraph 8 of our skeleton, those orders demonstrate that the sufficient threshold test was met in those cases and it is submitted that the threshold test, sufficient interest in the outcome of the proceedings, is similarly met in this case.

As to what my learned friends from JD Sports submit in response, they argue that JD Sports' acquisition of Footasylum is not of direct importance to Frasers Group, or to our commercial operations, in the supply of the products in the market on which both JD Sports and Frasers Group operate, particularly footwear and apparel.

JD Sports rely at paragraph 17 of their skeleton on the CMA's finding that Frasers Group provides a limited competitive constraint on the merged JD Sports and Footasylum and then seeks to argue at paragraph 18 that whether the merger is allowed to proceed or not is a matter of commercial indifference to Frasers Group, which somewhat begs the question: what we are doing here making this application in the first place? Of course it is not a matter of commercial indifference to us.

We invite the Tribunal to reject those submissions. The correct factual position, as is clear from the final report, is that Frasers Group does compete, albeit to a limited extent as the CMA found, that is one of the matters in controversy between JD Sports and the CMA. The CMA found that we do compete in the market with the merging parties and this can affect us as a retailer when it comes to footwear and apparel. It is self-evident in our submission that in addition to customers of the merging parties, competitors are also affected by mergers in the sector, particularly mergers which on the CMA's finding lead to a substantial lessening of competition. That is why the CMA in any merger investigation seeks views and engages with inter alia the other marketing participants that compete with the merging parties and did so here. That involved Frasers Group participating fully and substantially in the process. We attended both the main parties' hearing, we attended the remedies hearing, we made several substantial provisions of evidence in response to requests for information from the CMA.

JD Sports in their paragraph 17 and 18 of their skeleton, they focus on individual findings by the CMA in the final report, but the test under rule 16(1) is whether Frasers Group has a sufficient interest in the outcome of the proceedings before the Tribunal. The outcome of the CMA's investigation leading to the decision that the merger will lead to an SLC and therefore must be prohibited and unwound does have an effect on other market participants, such as Frasers Group. It is therefore of direct importance to our commercial operations.

It follows that the outcome of this judicial review application to have that decision set aside is equally of direct importance to Frasers Group and its commercial operations.

That brings me to the Tribunal's exercise of discretion. Having dealt with the threshold question --

MR FRAZER: Mr Robertson, just before you go on to rule 2, just in relation to threshold, is it your submission that every competitor, because they are a competitor would be interested in the outcome and therefore passes the threshold test, which presumably would also apply to a supplier and a customer or are you thinking the difference -- it is not every competitor, but a competitor that somehow participated in the earlier administrative procedure?

MR ROBERTSON: My submission is based upon participation in the administrative procedure. If you are sufficiently important and of significance to the CMA's investigation, to have been asked to provide evidence to being asked to attend the main hearing, to be asked to attend the remedies hearing, then wherever the lower level of the threshold is, we are plainly well above that. We were directly and substantially involved during the investigation and we have set out in our request all those paragraphs of the final report where findings are made upon evidence that has been supplied by Frasers Group.

We are so obviously centrally involved in the ultimate final report and decision, that when it comes to JD Sports' application, ground 3 specifically mentions Frasers Group and its elevation strategy as being a ground where they disagree with the CMA's findings on that, they say they are irrational. That is obviously absolutely central to that ground of their application.

MR FRAZER: That is what distinguishes you from competitors at large, is that what you are saying?

MR ROBERTSON: Yes.

When it comes to the Tribunal's exercise of discretion, we submit that the Tribunal's

discretion to permit intervention is a broad one, it is to be exercised under rule 4 having regard to all relevant factors in order that the application may be heard justly and at proportionate cost.

JD Sports in their skeleton seek to persuade the Tribunal it ought not to exercise that discretion to permit intervention. It cites three reasons at paragraph 19 of its skeleton.

The first two are not of any substance at all, these are firstly this is a judicial review of the decision and not "a de novo investigation into the market". Of course it isn't, it is a judicial review into the decision based upon evidence that was before the decision maker at the time the decision was adopted. We don't say it is a de novo investigation into the market, that is not the basis on which we seek permission to intervene.

Secondly, they say, "It would not be appropriate or helpful to the Tribunal for Frasers Group to attempt to adduce new evidence".

We are not seeking to adduce new evidence. We are seeking to make submissions on the evidence that was before the CMA when it adopted the decision. So that is a complete straw man.

I think the heart of my learned friend's case is that the third point set out in paragraph 19, which is that Frasers Group have "Nothing to add to the submissions that the CMA is best placed to make as a decision maker".

Well, as I have already said in response to Mr Frazer's question on sufficient interest, the point I have already made is that the limited competitive constraint to the merging parties posed by Frasers Group on the CMA's finding is clearly a central element of the CMA's decision. That is demonstrated by the paragraphs of the final report that we cited at paragraphs 7 and 8 of our request, and as I have already said, forms JD Sports' ground 3 of challenge,

as we set out at paragraph 9 of our request.

It appears to Frasers Group from the summary of JD Sports' application published by the Tribunal, which of course the summary is all we have to go on at this stage. It appears to us that their application will inevitably involve at least in part a consideration of the evidence before the CMA that we provided.

Therefore, given that we provided that evidence, we may be able to respond to such criticisms as are likely to be directed at the CMA's assessment of that evidence by JD Sports in support of the CMA's defence. My learned friends for JD Sports, not being neophytes to this type of litigation, obviously recognise this would be a good reason for the Tribunal to permit intervention, because at paragraphs 13 and 14 of the skeleton they then seek to steer the Tribunal away from doing so by portraying their case on ground 3 as only involving matters of legal submission on the interpretation of the final report and decision. They present their case as if it is some black letter matter of legal analysis, and no more than that.

As we say at paragraph 23 of our skeleton, we submit that is a distortion of what their application will involve. It is evident from the summary of ground 3 of the application, set out at paragraph 13 of their skeleton, that JD Sports' attack on this element of the decision does focus on the CMA's assessment of the evidence provided by Frasers Group.

THE CHAIRMAN: Mr Robertson, I suppose the question is really what you and your clients can add to what we can read in the report about the CMA's assessment of your evidence. I mean it is hardly misleading of JD Sports to say that the judicial review application focuses on the CMA's assessment of the evidence. That is the essence of the JR, I think. I think I am following you when you are saying that obviously it is your evidence, so you know what you

submitted to the CMA. But the test in this case is going to be what the CMA made of it. The question for you I think is: what by intervening can you add to what we already have?

MR ROBERTSON: The heart of JD Sports' case will be the CMA wrongly interpreted the evidence in front of it. That is the evidence on the three matters that are set out in paragraph 23 of my skeleton.

The elevation strategy.

Whether Frasers Group's volumes of higher-tier products would increase to a level similar to either of the merging parties.

Then, finally, the findings as to what Nike and Adidas would have done in response to deterioration in PQRS and whether they would have supplied more through Frasers Group or other outlets.

On all of those JD Sports will have to refer to what the CMA found and explain why those findings are irrational. That is the test they have set themselves. That is a finding that no reasonable competition authority could have made. So JD Sports, as far as we can see, will mount an attack on the evidence. It may well be that the CMA's response is sufficient, in which case we will hold fire but it may be that we can give relevant context to the evidence that we provided. That is to say, if JD Sports say, "This evidence must be understood in such a way". We are in a position, as a market participant, to say:

"No, that is not the way we understand this evidence. As a market participant, with the industry experience, it is not to be interpreted that way, it is to be interpreted in a different way."

THE CHAIRMAN: You would agree that your view of the interpretation the CMA placed on it is not going to carry very much weight with us, is that right?

MR ROBERTSON: It will carry weight, in our submission, because they have to say

that the CMA was unreasonable in drawing the conclusions that it did. They will say, "The CMA is not a market participant, we are, we understand what this should be meant". What we bring to this is the ability to say, "As a market participant, we submit that the CMA's interpretation was a reasonable one to make on the evidence we supplied".

So it goes to rationality.

THE CHAIRMAN: You may not be able to answer this but obviously in relation to other aspects of the CMA's decision, like the position of Nike and Adidas, we are going to have to manage without direct evidence from Nike and Adidas. Is our consideration going to be any less effective as a result of that or not?

MR ROBERTSON: What you will have from us, and what the CMA did have from us, is evidence of our dealings with Nike and Adidas. So we were able to explain -- obviously we cannot go into the minds of Nike and Adidas, we are dealing with what they do on the market, so it is an objective consideration, and so --

THE CHAIRMAN: Indeed.

MR ROBERTSON: Because we do deal with Nike and Adidas, not to the extent that we would like to, but we do have dealings with Nike and Adidas, then we have the ability to explain how their actions have impacted upon us, and we can also observe their actions or their interactions with the merging parties to the extent that is visible to us.

THE CHAIRMAN: Okay, thank you.

MR ROBERTSON: What we bring is an ability as a market participant to give the Tribunal a view as to whether we think, or we are of the view, that CMA's conclusions were rational, because JD Sports will be arguing that they are completely irrational.

THE CHAIRMAN: Right.

MR ROBERTSON: The CMA have obviously imbued themselves as much as they can do during the course of the investigation, but as we all know in judicial reviews, when one gets to looking at rationality challenges and the interpretation placed upon evidence, sometimes points are made that are developments of or go further than points that were made during the investigation. JD Sports will rely upon those to say those are points that are not taken into account. We as a market participant can say, "Those are points that actually are not of relevance if you understand them in context".

I should say, it is a different context but Mr Dollman had experience in the previous merger case I appeared in in front of the Tribunal, in which Mr Dollman sat in a Tribunal chaired by Hodge Malek QC, a case called Tobii v Smartbox.

THE CHAIRMAN: I think Mr Dollman has already reminded us of that, Mr Robertson, thank you.

MR ROBERTSON: He has probably reminded – you that he had to sit through and listen to my submissions --

THE CHAIRMAN: He was scrupulously correct in everything he said.

MR ROBERTSON: The point I wanted to make was in that case, we found ourselves looking at questionnaires that had been disclosed pursuant to an order of the Tribunal, that the CMA had sent to NHS trusts. Then there were questions as to what interpretation would you place on those questionnaires on the responses. One thing that would have assisted, but we didn't have it in that case, was someone from an NHS trust saying, "That is what we meant by that answer". Some of the answers were quite short.

It is that sort of exercise, it frequently comes up in judicial reviews, particularly where there is a challenge to the assessment of the evidence, which is what is going

on here, as far as we can tell from the summary of application.

As I have said at paragraph 24 -- paragraph 24 was really a summary of what I have just sought to explain to the Tribunal in response to the chairman's question.

Finally in this regard, we have set out the authorities that JD Sports have cited against us, and we submit they don't assist JD Sports, they cite the phenytoin costs case in which Ofcom was denied permission to intervene. They only sought to intervene on the interpretation of a recent Court of Appeal judgment on costs in the business connectivity market review, and that was a matter which the Tribunal said can be completely dealt with by the CMA, a further legal submission from Ofcom is not going to assist.

It was a very limited issue. By contrast, the present proceedings are not limited just to matters of legal interpretation of a judgment. They are potentially much more far ranging according to the published summary of JD Sports' grounds.

B&M European Value Retail, an unsuccessful application by Tesco to intervene in B&M's application the CMA decision to designate it as a designated retailer under the groceries order. That was rejected on the basis that what Tesco was going to submit was entirely duplicable of the CMA's case. The purpose of our intervention, as I have sought to explain, is not to duplicate the CMA's case, but to supplement it where appropriate, having regard to the fact that it is a judicial review and not appeal proceedings. As we submit that is exactly the role that was played by Nasdaq Stockholm in the Intercontinental Exchange application and by DFDS in the Eurotunnel cases.

Finally, Sabre, a recent decision of the Tribunal, application by the American Society of Travel Advisers, ASTA, to intervene in support of the applicant challenging the CMA's prohibition of Sabre's proposed acquisition of Farelogix. Sabre the applicant was a member of ASTA, which represented customers to the parties

to the proposed merger, but importantly ASTA had not participated in the CMA's investigation. The Tribunal held at 13 that notwithstanding ASTA's non-participation, it did meet the threshold of having a sufficient interest in the outcome of the proceedings, but it declined to exercise that discretion to permit its intervention for reasons which the Tribunal gave and which were largely specific to the facts of that case.

For our purposes, it is important to note that the Tribunal took account at paragraph 17 of its judgment that ASTA did not participate in the administrative stage.

It contrasted this with the position of the Association of Convenience Stores in the Tesco v Competition Commission case, which was given permission to intervene and had been heavily involved in that investigation, just as Frasers Group has been heavily involved in this investigation.

That is why we submit the Tribunal ought to exercise its discretion to permit Frasers Group to participate in this application.

Finally, to meet a point that I anticipate my learned friends may make, we submit that Frasers Group shouldn't be limited to intervention only on ground 3. There have been attempts unsuccessfully in the past by parties to seek to limit an intervener only to one ground, BAA tried to do that in BAA so far as Ryanair were concerned. In that litigation, I think on the basis that Ryanair was an officious bystander when it came to other grounds, the CAT, chaired by Sir Gerald Barling, rejected that.

We also note the Aquavitae case in which the Tribunal ruled in that case that it didn't wish to limit the scope of Aquavitae's intervention, observing that there may be points, that arise during the course of the hearing, to which the Tribunal would wish to seek further submissions from all of the parties.

I have no way of knowing which way this application is going to go and be heard, we just flag up in our skeleton, paragraph 27, that it occurs to us that might conceivably include submissions as to the COVID-19 issue which is referred to in the second of JD Sports' grounds, so we just flag that up.

In conclusion, as to discretion, Frasers Group submits that this case is in substance no different to Intercontinental Exchange, the Eurotunnel and the SCOP Seafront cases, in which the Tribunal exercised its discretion to permit potentially effective competitors of the merging parties who have participated in the administrative process to intervene in support of the CMA.

Accordingly, we invite the Tribunal to permit our intervention.

THE CHAIRMAN: Thank you, Mr Robertson.

Do any of my two colleagues have any questions they want to ask Mr Robertson at this stage?

MR FRAZER: No thank you.

MR DOLLMAN: Not for me, no.

THE CHAIRMAN: Mr Kennelly.

Submissions by MR KENNELLY

MR KENNELLY: Gentlemen, I will take the points in order.

I will deal first with sufficiency of interest and then the exercise of the Tribunal's discretion.

On sufficiency of interest, it is clear that my learned friend's point is that participation in the administrative procedure is sufficient, he says, to establish a sufficient interest. The Tribunal will know that there is no authority for that proposition.

For the authorities that he cites, he fairly acknowledged that Albion Water and Mastercard were full merits appeals not judicial review cases, but in any event

the proposition that he advances is not supported even on the face of the authorities he himself cites.

Because, and this is on the face of his own skeleton argument, to which I refer the Tribunal, paragraph 6.1. Because all the Tribunal said in the Albion Water case is -- I'm quoting from my learned friend's skeleton:

"It will often be the case that persons with a sufficient interest to intervene in the proceedings before the Tribunal will have participated or will have sought to participate in the proceedings before the director at the administrative stage."

That is not the same, the Tribunal will see straight away, as saying when one participates in the administrative procedure, one thereby demonstrates an interest in the outcome of proceedings before the Tribunal. It simply doesn't follow.

Similarly, the Mastercard and OFT case referred to in 6(2) of his skeleton, there my learned friend fails to explain at all why Visa was given permission to intervene in that case, but of course as the Tribunal will be aware, that case concerned the assessment of whether multilateral interchange fees, the third-party payment model, was legal and the test that was going to be established would plainly apply to Visa's schemes, which also developed multilateral interchange fees in the same way.

It may be that my learned friend was possibly misled by the textbook that he cited because it is true that in that textbook, Brealey & George, it states at paragraph 3.04 that a party is likely to have sufficient interest if it participated in the administrative procedure before the competition authority, but the authorities which were cited for that proposition in the textbook are those two cases, Albion Water and Mastercard, neither of which actually supports that proposition.

So I am afraid that point takes my friend nowhere.

Then he argues that his case is on all fours with the interventions in Intercontinental Exchange and Eurotunnel. He said in terms that his case, the Frasers Group's intervention was no different, to quote him, from those cases. Having received the skeleton argument this morning, I sought to ensure that summaries of the Intercontinental Exchange case and the Eurotunnel were placed before the Tribunal. Since my learned friend cites them he will be familiar with them.

I simply refer to --

MR ROBERTSON: Chairman, may I make a point at this stage?

THE CHAIRMAN: Yes.

MR ROBERTSON: The additional authorities that my learned friend seeks to place before the Tribunal concern cases that were cited in our request to intervene and which my learned friend had the opportunity to respond to in his skeleton. His solicitors had agreed with the Tribunal that the authorities bundle would be agreed and submitted with their skeleton at 10.00 last Friday.

That was the point at which my learned friend could introduce these authorities, which I received less than an hour before we had to come online. If he had wished to refer to them, they should have been in his bundle of authorities and he should have developed his argument about them in his skeleton argument. He was put on notice by our request to intervene.

So we object to these additional materials going in.

THE CHAIRMAN: We are going to consider them, Mr Robertson, sorry.

MR KENNELLY: I apologise for not making the point I am about to make in my skeleton argument. I hope my learned friend will forgive me since I am referring to authorities which he himself cites and upon which he places such

heavy reliance, and I --

THE CHAIRMAN: I have to say to both of you, I don't think we are going to decide the question on the basis of these two cases. We are interested in what you have to say, and I would encourage you to move on, get on with it.

MR KENNELLY: Yes, indeed. I will indeed be very short.

THE CHAIRMAN: They are not unfamiliar to us in any case.

MR KENNELLY: Of course they are.

True it is, my learned friend says, that Nasdaq in that case was given permission to intervene, was a competitor of the exchange but it is plain even from the summary of the decision -- I refer the Tribunal to paragraph 41 of the summary, there is no need to turn it up because it is familiar ground. The finding in that case was that the merged entity would have the ability and the incentive to foreclose Intercontinental Exchange's rivals, so Nasdaq was facing the risk of foreclosure in that case, so obviously because it is at risk of foreclosure it had sufficient interest to intervene.

Similarly in Eurotunnel, my learned friend said that DFDS, the intervener, was a competitor, true. DFDS actually did operate a ferry service on the Dover to Calais route as the summary states and the CMA found that if the merger proceeded, DFDS would be excluded, it would be likely to cease operating services between Dover and Calais, paragraph 10 of the summary. Again it was not just a competitor, but it was at risk of being shut out.

Again, obviously, a sufficient interest was established and it cannot be said that those cases are no different from a position of Frasers Group, no such claim is made by Frasers Group.

So --

THE CHAIRMAN: Mr Kennelly, they are examples of situations where the Tribunal

has considered the evidence and taken a view --

MR KENNELLY: Yes.

THE CHAIRMAN: -- on whether there is a sufficient interest, so it is not as if you can just read across completely either way or the other.

MR KENNELLY: Sir, you have actually -- that is my point.

THE CHAIRMAN: Yes then we are agreed. That is good.

MR KENNELLY: I will turn to the point which is really the heart of the argument that my learned friend makes -- that their commercial operations will be directly affected by the outcome of the Tribunal proceedings. Here again my submission it is important to be precise. The outcome of the proceedings will be that the final report is upheld or omitted in whole or in part to the CMA.

Frasers Group is not contending that it will alter its business in any way depending on the outcome of the proceedings, it will carry on as before. Merely competing, merely competing with JD Sports is not sufficient. My learned friend didn't say otherwise when he was asked directly by the Tribunal. We say a fortiori, where the CMA's finding, which presumably Frasers Group supports, is that the constraint which Frasers Group provides is limited, so it is competing but to a limited extent.

In fact, if the CMA is right and the merger gives rise to an SLC, then prohibiting the merger would increase the competition faced by Frasers Group.

One has to ask, since my learned friend said we have to ask why are we here, well, why indeed is Frasers Group paying for two law firms and leading counsel to seek to uphold a decision which, on the CMA's reasoning, will increase the competition which Frasers Group faces.

My submission is this is simply not a coherent application and the required interests haven't been shown.

Moving then on to the added value question, the exercise that the Tribunal just referenced. My learned friend recognised that what is challenged is the CMA's assessment of the evidence which the CMA gathered, that this is not a de novo hearing where new evidence may be supplied. This is the key flaw in this application and why it should be rejected, because the most that is promised by my learned friend is that Frasers Group can defend the CMA's assessment of the evidence supplied by the Frasers Group. That is at paragraph 21 of my learned friend's skeleton.

But explaining and defending the CMA's assessment is a job best done by the CMA. Frasers Group has nothing to add to the CMA's explanation and defence of its own reasoning and its own assessment of the evidence before it. The point that the Tribunal put to my learned friend, about what can you add, and when pressed my learned friend said they can add relevant context, but all of the relevant context, because this is a judicial review, is in the final report and in the materials which were before the CMA at the time that it took the decision.

Anything else is new evidence which is not permitted.

THE CHAIRMAN: I think to be fair to Mr Robertson, what he said when pressed was that in relation to any given bit of evidence that Frasers Group had provided, they might be in a better position to explain what was a reasonable conclusion to be drawn from it and therefore to offer an opinion on whether the CMA's conclusion was reasonable or not. That, I think, was his argument.

MR KENNELLY: Sir, if it is no more than that, then that is not the added value which is required for the purposes of the exercise of the Tribunal's discretion, because the rationality assessment is focused on what the CMA made material and the CMA's view. The opinion of Frasers Group, even in relation to its own evidence is neither here nor there. What matters is the position that

the CMA adopted and the CMA's own reasoning.

The second point my learned friend made was, well, there could be questions that arise in relation to material that is not before the Tribunal, that there might be a gap that could be filled by Frasers Group if it were present in the Tribunal.

Again, to the extent that there are gaps, they are only material if they affect the ultimate rationality of decision. It is, of course, conceivable and may be part of our case that the CMA's evidence gathering was so insufficient, and the gaps were so large, that that is itself a species of irrationality and a ground for cautioning the decision. But that kind of gap, that material gap, cannot be filled by submissions from Frasers Group at the hearing. That would be inappropriate, that would have to amount to new evidence and that would not be permitted.

When ultimately pressed, sir, Frasers Group had failed to demonstrate what added value they could provide. This is not an immaterial thing. The merger process is intended to be streamlined and rapid, the participation of an intervener, even one that promises not to duplicate, with a substantial legal team, inevitably increases the complexity and cost involved in the procedure. So its involvement is disruptive and needs to be justified. Here that justification has not been provided.

Now, turning to the second layer of argument which is if the Tribunal is against me and you are minded to permit an intervention from Frasers Group, we submit that that intervention should be limited.

THE CHAIRMAN: Before you get on to that, can I put to you the point that is troubling us a little, which is that you are basing your objection to this application to intervene on, in part at least, the CMA's finding that Frasers offers only a limited competitive constraint.

MR KENNELLY: Yes.

THE CHAIRMAN: I think is that right, isn't it, you are saying that is what they found. That I think is what you are inviting us to decide is unreasonable. Is there not a slight contradiction in your position?

MR KENNELLY: No, sir, in the sense that, in relation to that debate, Frasers Group will have nothing material to add, because it is for the CMA to explain its assessment and for the CMA to justify it. Since Frasers Group cannot bolster the CMA's position with evidence, it simply offers submissions and perspective, that is not added value within the meaning of the authorities. The CMA is best placed to understand and explain the context and explain and defend its own assessment, even in relation to the position of Frasers Group as a competitive constraint.

THE CHAIRMAN: Does that answer my point about possible contradiction? I can see you want to pursue your different arguments in different segments but, is there not a contradiction between the two?

MR KENNELLY: Sir, I hope I have not misunderstood but there is no contradiction between the submission I have made, which is that we are plainly attacking the CMA's assessment of Frasers Group's competitive constraint but there is no inconsistency with saying at the same time that Frasers Group in a JR cannot add any value to what the CMA will say about that assessment.

THE CHAIRMAN: Your position on the substance is likely to be that they do provide an effective competitive constraint?

MR KENNELLY: If that's true, then we have to make that good on material that is before the CMA and which will be before you. That is the important point. We can only succeed on the basis of the material which is before the CMA. That is why the CMA is best placed to explain and defend it.

THE CHAIRMAN: It is not because you don't want somebody appearing next to you saying but we don't provide an effective competitive constraint?

MR KENNELLY: Well, if --

THE CHAIRMAN: Which is what will happen if we allow this application.

MR KENNELLY: That is not the concern, because all they could do is basically parrot what the CMA is saying. Anything else would be either new evidence or it is hard to imagine how they could offer a fresh perspective in a situation in which the CMA itself conducted the investigation and assessed the evidence, but they would add to the cost and complexity of the proceedings.

THE CHAIRMAN: Perish the thought, we do not want to add costs and complexity and we do not want to stray into merits review territory, but it is conceivable that it might be of interest in assessing the reasonableness of the CMA's conclusions to have the actual company that has provided the evidence on which they are in part relying, actually giving its own view on what the evidence means.

Are you saying that is really not going to help us at all?

MR KENNELLY: That is exactly what I am saying, sir, because --

THE CHAIRMAN: I thought that is what you were saying.

MR KENNELLY: It will not surprise you to know that that was the position I was taking.

THE CHAIRMAN: Yes.

MR KENNELLY: But joking aside --

THE CHAIRMAN: I was not joking, Mr Kennelly, I'm sorry.

MR KENNELLY: I'm sorry, neither was I.

The perspective that Frasers Group will offer is the perspective which they have already offered the CMA and which is reflected in the final report. That

perspective has been given to the CMA and it has been weighed and assessed by CMA. It is that weighing and assessing that is the target of our challenge and the focus of your examination. There is no need for you to look afresh in the Tribunal at the perspective offered by Frasers Group. That is done. That is in the report.

THE CHAIRMAN: Okay, I think I understand what you are saying.

You want to deal with limited permission now, do you?

MR KENNELLY: Yes, please.

If you are minded to permit Frasers Group to intervene, they really ought to be limited to this ground which concerns them, ground 3.1.

That is the ground which you, sir, have raised with me just now. If they are granted permission to intervene it should be related to that ground only. They have not come close to explaining what perspective or context they could offer in relation to the other grounds. There, really, they would be bystanders, not contributing materially to the Tribunal's examination. They should be limited to ground 3.1 if permitted to intervene at all. That has implications also for the material they see, because if they are permitted to intervene in relation to ground 3.1 alone, that means the disclosure which they receive, the highly confidential material which has been received from JD Sports, will also be limited in relation to that ground.

That is all they need in order for them to make the submissions that they seek to make in these proceedings.

My last point, sir, if you are again minded to allow them to intervene, in order to avoid disruption and an increase in costs, is to examine the extent of their intervention and their seeking to add their leading counsel and seven solicitors from two different firms to the confidentiality ring and the larger the

ring, obviously the greater the risk of some problem or error.

I am not for a moment impugning the integrity of my learned friend or any of the law firms instructed, but it is inherently more risky and certainly disproportionate for the intervener to be allowed eight lawyers in order to put its case, which as my learned friend said will not be duplicative of the CMA at all and will not involve any new evidence, but simply context and a different perspective.

THE CHAIRMAN: Right.

MR KENNELLY: I am just checking, sir, if I have any further instructions. As far as I can see, I have not, so those are the submissions on the intervention.

THE CHAIRMAN: Do any of my colleagues have any questions for Mr Kennelly?

MR FRAZER: Not from me, thank you.

MR DOLLMAN: Not from me.

THE CHAIRMAN: Ms Demetriou, over to you.

MS DEMETRIOU: Sir, you have seen the CMA takes a neutral position on this application. I wasn't really intending to make any submissions, unless there is anything I can say that would assist the Tribunal in its consideration of this application?

THE CHAIRMAN: Do you have anything to help us on the issue of confidentiality and limited disclosure?

Submissions by MS DEMETRIOU

MS DEMETRIOU: On the last issue that was just debated about the number of people in the room? I will have to take instructions on that point. Those instructing me can hear this so I would ask them just to send me their thoughts and I will then have to see what they say and update the Tribunal.

May I also just say for the record that Mr Ben Lask is also appearing for the CMA at

this hearing. There is no reason Mr Kennelly should know that, which is why he didn't feature in the introductions but it is right that the Tribunal should know that he is appearing as my junior.

THE CHAIRMAN: He is on a screen next to you, is he?

MS DEMETRIOU: He is in a different location. He has been told to have his video off so you cannot see him, but you should know he is appearing as my junior.

THE CHAIRMAN: Thank you, that is our loss not to see him.

Does anybody else have anything to ask on this?

MR KENNELLY: Sir, if you would indulge me before Mr Robertson replies.

THE CHAIRMAN: I was going to give Mr Robertson the very briefest of reply.

MR KENNELLY: I have been asked to make one further submission.

THE CHAIRMAN: Okay.

MR KENNELLY: Again, if you are minded to allow them to intervene, to do so by written submissions only, and that will have an impact on the length of the hearing and it may help with the timetable.

THE CHAIRMAN: Thank you very much for that.

Mr Robertson, very quickly, please, because we want to move on.

Submissions in reply by MR ROBERTSON

MR ROBERTSON: It should not be limited intervention. We are not just involved in ground 3, although we are specifically referred there by name. If the Tribunal looks at ground 1, subparagraph 2:

"The CMA erred in law or failed rationally to consider every aggregate constraint on the combined group posed by (1) suppliers and (2) retail rivals."

That obviously includes us, so we shouldn't be subject to limited intervention, we are obviously involved in ground 1, although the principal focus of our intervention

will be ground 3.

As to ground 2, COVID-19, I have already referred to it, it may be something of a moving target, and there is no reason to exclude us from that, see Aquavitae.

The second point is confidentiality. I have never had a party object to the size of a legal team involved in a confidentiality ring. There is no reason whatsoever to object to the number of individuals involved in a confidentiality ring. Each one of those individuals is a professional, bound by their respective codes of conduct, and can be relied upon to keep their information confidential. We strongly resist any attempt to put numbers on the confidentiality ring.

As to restricting us to written intervention only, well, he would say that wouldn't he. He doesn't want to have to argue this case in front of the Tribunal with us there. He has made that perfectly plain, but we say there is no principled reason for limiting us to written submissions only.

I hope that was sufficiently brief.

THE CHAIRMAN: Thank you. Right. Does anybody else have any questions to put to counsel?

Then we are going to retire to consider whether to approve or disprove this application to intervene. So the court is adjourned.

(2.59 pm)

(A short adjournment)

(3.10 pm)

THE CHAIRMAN: Welcome back, everybody.

We thought very hard about your application, Mr Robertson, but I am afraid the answer is the Tribunal does not accept your application and your request to intervene is refused. We will give reasons in writing for that.

Case Management Conference

THE CHAIRMAN: I think we need now to proceed to the next item on the agenda, which is I think confidentiality.

Mr Kennelly.

MR KENNELLY: Thank you, sir, yes.

We have a draft confidentiality ring order, which I understand to be agreed. Therefore that is not -- it is in the standard form and there is no dispute between ourselves on that. Ms Demetriou will tell me otherwise if I am wrong.

MS DEMETRIOU: No, that is correct.

THE CHAIRMAN: I think, Mr Robertson, we do have to say goodbye to you, I am very sorry.

MR ROBERTSON: Yes, I will take my leave of the Tribunal and ring off.

THE CHAIRMAN: Thank you, if you would be so kind.

My colleague, Mr Frazer, you had some question on the confidentiality ring?

MR FRAZER: No, I don't think I did, chairman.

THE CHAIRMAN: As to whether everybody in it was a lawyer.

MR FRAZER: Yes, I am so sorry. There were a number from Linklaters, I wondered if they were all lawyers or you had economists in there as well?

MR KENNELLY: The Linklaters names, unless I am told otherwise, are all lawyers.

MR FRAZER: All lawyers.

THE CHAIRMAN: Then I think we have no issue.

MR KENNELLY: That is confirmed by Linklaters; they are all lawyers.

MR FRAZER: Thank you.

THE CHAIRMAN: Right, so we can go ahead with the proposed confidentiality ring arrangements as agreed between you, is that correct?

MR KENNELLY: Yes, sir, yes.

The next item is evidence. We have obviously filed a witness statement with our notices of application and we note what the CMA says about that, but I don't understand, subject to their reservations, there to be any further argument about that from the CMA, but I will hand over for that purpose.

THE CHAIRMAN: Ms Demetriou.

MS DEMETRIOU: No, that is correct. We do not object to its admissibility.

THE CHAIRMAN: Music to my ears. Wonderful.

We have not seen the CMA's defence yet. Can I assume that this will not contain further evidence?

MS DEMETRIOU: Sir, no you cannot assume that. At the moment our present intention is to serve a witness statement.

THE CHAIRMAN: Is that witness statement something we are going to have to hear objections from the applicants about?

Mr Kennelly, do you have any idea what your position on this might be?

MR KENNELLY: We certainly will object if it is seeking to impermissibly bolster the reasoning in the final report, but I am afraid I can't say at this stage whether we will object or not, we need to see it and obviously as soon as possible.

THE CHAIRMAN: Yes, go ahead.

MS DEMETRIOU: I was going to say of course we completely understand the constraints about putting in evidence on a judicial review. It is not our intention to put in a statement which is non-compliant with those principles. But of course Mr Kennelly will have to look at it once we serve it and take a view.

THE CHAIRMAN: Okay, right, then there is nothing more we can really do about that other than to say you are all well aware this is judicial review and the

normal rules of evidence will apply in those cases.

My colleagues, any questions?

MR FRAZER: No, sir, thank you.

MR DOLLMAN: No, thank you.

MR KENNELLY: We are now on to future applications and the timetable. As you have seen from the letter from the CMA and my skeleton argument, there are some points of disagreement. The really key question is when the Tribunal will list the case for hearing, that will obviously have a major impact on the extent to which we are concerned about the timetable and the approach of the CMA.

THE CHAIRMAN: I thought that was all agreed?

MR KENNELLY: The dates?

THE CHAIRMAN: Yes. Sorry, am I living in a world of my own here?

From our point of view, the week beginning 21 September, less the 21 September itself which I understand is not free for Ms Demetriou, one and a half to two days during that week would appear to be the best candidate at this stage, certainly from our point of view.

MR KENNELLY: We are very grateful for that indication, sir. That does have an impact on the matters which are in dispute between myself and Ms Demetriou, because our submission is that as we now know the hearing is going to be on 22 September, it is very important that we get the materials as soon as possible. We strongly agree respectfully with the Tribunal's direction that the defence be served on 16 July and, as you have seen from our submission, the normal approach of the CMA in these proceedings is for the duty of candour material to be provided at the same time as the defence.

The Tribunal has seen that we anticipate there will be -- we hope there will be some

significant disclosure in that duty of candour material. When we see it, we need to review it in order to decide whether we need to make a disclosure application to the Tribunal, because it is perfectly possible that we will treat or will regard the disclosure provided by the CMA as insufficient and we will seek obviously to submit a properly informed and focused disclosure request to you, but that will also need to be done rapidly, and we have suggested five days after receiving the CMA's duty of candour material. In view of the hearing date, it is vital that we get the duty of candour material at the same time as the defence.

The CMA submits that that is excessively difficult for it, and suggests that it gives the duty of candour material five working days after 16 July. As you will have seen in our skeleton argument, that pushes any potential specific disclosure application by us into the days immediately before August and that is going to create difficulties for, certainly, JD Sports being forced unnecessarily into August and these things ought to be done if possible in July.

THE CHAIRMAN: Why does it cause particular difficulty for you, other than the natural effluxion of time?

MR KENNELLY: It's because of August, sir. Since the hearing will be on 22 September, our skeleton is going to be due three weeks before that, so we would have to file a skeleton in reply around 8 September. That places a real squeeze on any specific disclosure application, because if we received their duty of candour material five working days after 16 July, we will get that on 23 July. Then we will make any specific disclosure application by the 30th. The Tribunal would have to invite submissions from the CMA on that and obviously the Tribunal will need time in the middle of August to reach its own view.

If the Tribunal -- and we have to contemplate the possibility the Tribunal would be with me on any such application, we will need time to review such material and incorporate it and we will be seeing it for the first time in our submissions. The reply will be due only a couple of weeks later, on 8 September.

THE CHAIRMAN: You are the one who is stressing the urgency and the need to get on.

MR KENNELLY: Indeed and that is why, sir, we submit that the duty of candour material ought to be given at the same time as the defence, which is the normal approach.

That will allow us to review the candour material and make any applications for disclosure well in time for the Tribunal to review the application and determine it before the vacation.

THE CHAIRMAN: The Tribunal doesn't have a vacation, so we sit in August. So that is not a factor for us. It may be a factor for you, I am sorry if it is. Vacations are a bit odd this year anyway, as I am sure you appreciate.

MR KENNELLY: Indeed.

Sir, perhaps my better point is the one that if we don't get the duty of candour material until five days later, there will be a very difficult squeeze between the examination of that material, if we do get it, and the submission of our skeleton in reply. That will be to no one's benefit, it will not assist the Tribunal to clearly resolve these issues.

THE CHAIRMAN: I would like to hear what Ms Demetriou has to say about the five days, but just an immediate reaction is that we are talking about one and a half to two days within what is now a four-day period, so if we put the hearing at the end of that week, that is two of your five days straight away. I don't see quite why we are down to counting the individual days as a matter

of procedural life and death. It doesn't really seem to stack up to me.

Ms Demetriou, what do you have to say on this piece?

MS DEMETRIOU: I am grateful.

The CMA's position is this. Although the applicant has been at pains to stress the urgency, they in fact sought and received a two-week extension for service of their application. The CMA has been endeavouring to prepare its defence without seeking an extension. However, the difficulty is that the people that would be involved in determining what disclosure should properly be given as a matter of duty of candour, and reviewing that material and liaising with third parties to ensure that confidentiality is maintained, are the very same people who are going to be working on the defence.

We don't wish to be obstructive at all but we have given very careful consideration to the time limits and we do need the extra five days, both -- there are two related issues, sir.

The first is the duty of candour disclosure.

The second is that the applicants are asking us to do something else, which is to carry out a redaction or at least a partial redaction exercise on the decision straight away.

We say that both of those things are going to divert resources from preparation of the defence. What we would like, given the timescales, is we would like to serve our defence on 16 July. We anticipate that we will need all of the time between now and then to finalise the defence and use all available resources within the CMA in terms of people that have been working on this case, to finalise the defence by that date.

We would then like an additional five business days both to serve the duty of candour material and also to serve the partially redacted version of the

decision into the confidentiality ring. That will mean that we can comply with the 16 July deadline.

If the position is that our resources are going to have to be diverted away from the defence in order to be carrying out a document review exercise, then we will have to ask for an extension of time for service of our defence to accommodate the additional work. But we think that the most efficient and the most orderly way forward is not to do that but to serve the defence on 16 July, which is the deadline laid down by the rules, not to seek an extension but, instead, to deal with the document review exercises thereafter and within five business days.

That is what we think would be the most efficient way forward, but, as I say, if that is not to be the case, if we have to be disclosing documents in the meantime, which is resource intensive, then we would be asking for an additional amount of time to serve the defence in order to accommodate that additional work.

THE CHAIRMAN: Can you just remind me of the partial redactions that are being sought in the decision?

MS DEMETRIOU: Yes, so what is being said. If you have my learned friend's skeleton, you will see at paragraph 34 the CMA has indicated that it will disclose into the confidentiality ring a version of the decision that is unredacted as regards the paragraphs that are relevant to the areas in dispute. They propose that such disclosure is made within three working days of the confidential ring being set up, which of course would be very shortly.

What we say in relation to that is that really as part and parcel of our duty of candour exercise we need to have in mind what our defence is. Obviously that has not yet been prepared or finalised, and properly given proper consideration both to disclosure and to redactions that should be lifted in view of the issues that

arise in the case, in light of our defence to the appeal once it has been finalised. That can most efficiently and best be done at that stage. We are not talking about very much time, 16 July is 10 days from now, we are then seeking an additional week, five working days thereafter, to complete the exercise.

Sir, as I say, the difficulty is that if we have to do this sooner, then we will need to seek an extension --

THE CHAIRMAN: I understand you are saying that.

My understanding of the partial redaction issue was that I think the applicants thought it was easier for you to release a partially unredacted version which simply dealt with the relevant matters in dispute, rather than going through the whole thing. I think that was the purpose of that. I may be wrong, Mr Kennelly, but that was my understanding.

It is in the confidentiality ring, it is not being disclosed at large. What is the objection to simply disclosing the entire decision into the confidentiality ring?

MS DEMETRIOU: That is not generally how things are done.

THE CHAIRMAN: I appreciate that.

MS DEMETRIOU: The reason for that, sir, is that of course the report contained information which is confidential to third parties and which is not relevant at all to the dispute. Say, for example, the grounds of appeal do not, just by way of example, seek to attack market definition, which is the subject of chapter 5 of the final report. That chapter contains confidential information that is confidential to Nike and adidas, and the way the CMA approaches these things is to say yes it is a confidential ring but really we would have to consult with those third parties in terms of releasing information, even into a ring. In circumstances where there is information which is simply not relevant to the

appeal, because it is not touched upon by the notice of appeal, it wouldn't be right simply to unredact those passages without -- well, at all, because they are not relevant, certainly not without consultation.

THE CHAIRMAN: Equally, it is fairly obvious that they are not relevant to the issues in dispute, they are in relation to market definition, so it doesn't take very long to leave the redacting ink on. I don't really see what the great problem here is?

MS DEMETRIOU: Sir, I think the problem is that it would be one thing if what we were being asked to do is to go through the report and unredact those parts which arise on the face of the notice of appeal, so that would be one thing, but the exercise cannot stop there, because we would have to revisit the lifting of the redactions once we had filed our defence, because it is perfectly conceivable that the approach that we take now may not reflect the issues once we filed the defence. In a sense what we are trying to avoid is an iterative process whereby redactions are lifted once and then the process has to happen again some 10 days later.

That is what we wish to avoid and we say that the exercise will divert resources if it has to happen now and will be wasteful because we will have to revisit it in any event once the defence has been served.

THE CHAIRMAN: Do any of my colleagues have any views on this matrix of issues?

MR FRAZER: This is really rather difficult to envisage what will happen because there are so many different permutations, we need to be able to use this timetable efficiently, I am not quite sure how we can meet these two different demands.

MR DOLLMAN: The obvious thing would it not be to put it back then?

THE CHAIRMAN: The Tribunal's own timetable and diary is a matter of constraint,

particularly in October, I have to make that clear.

Can I suggest, as a way forward to both counsel, please, that if we push the hearing to the end of the week, 24 and 25 September -- I believe those days are available -- that gives you two of the days, arguably three if you take the 21st as well. What Ms Demetriou says is not unreasonable, I think there are these three tasks to be done, they have to be done in a certain order.

You presumably want to see the CMA's defence, Mr Kennelly, you don't want that deferred?

I quite appreciate you need to see the disclosed material as soon as possible. It does seem to me in the overall scale of things and given the fact that we are here to deal with any application for disclosure five working days after the service of the defence is not unreasonable.

I mean if you could live with that, that gives us an effective and efficient timetable which enables us to get this case heard before the end of September, which for a merger review is not bad going, I think.

MR KENNELLY: Sir, indeed.

If I may address you on the point which I have not addressed you on, which is the partially unredacted decision.

THE CHAIRMAN: Please.

MR KENNELLY: I can entirely understand the Tribunal's position in relation to giving the CMA an extra five days, the duty of candour material and pushing the hearing date back. I should stress that that still places really significant burden on the applicant and squeezes both the applicant but also the Tribunal in relation to any specific disclosure application and the review of that material which we will have to do immediately before putting in our submissions at the beginning of September. In those circumstances, it is even more important

that we get the partially unredacted version of the decision as early as possible, because that really does make a difference, a significant difference, to the applicant's ability to understand the approach of the CMA and --

THE CHAIRMAN: Is that more important to you than the duty of candour material?

MR KENNELLY: It is very difficult to say, because I really have no idea what the duty of candour material will provide, but --

THE CHAIRMAN: If you had to say now, hypothetically, Mr Kennelly, what would you say?

MR KENNELLY: I would probably ask for the duty of candour material to come earlier, because I really am worried about the disclosure application and how long we are going to have to crunch that material, if we do get it, while on the eve of lodging our skeleton argument, which is itself very shortly before the hearing itself.

THE CHAIRMAN: What about 21 July or whatever five working days would be, rather than 16 July, I have to say having done these cases myself, it is not an enormous difference of time. I know every day counts but --

MR KENNELLY: It is working days, sir, it is five working days, five clear working days after the 16th.

THE CHAIRMAN: Which takes us to where?

MR KENNELLY: Well, unless Ms Demetriou tells me otherwise, it would be the 24th. She can confirm but I think we are likely to get it on 24 July.

THE CHAIRMAN: So the 16th ... weekends are two days, aren't they?

MR KENNELLY: No, the CMA is asking for five working days later, so the weekends will not be counted on her approach.

Perhaps she could tell us, actually --

THE CHAIRMAN: I would rather do it by specific dates rather than days.

If the defence comes on 16 July, when is the CMA aiming to produce the duty of candour material and the unredacted decision?

MS DEMETRIOU: Sir, the 24th. The 24th.

THE CHAIRMAN: Okay. That still leaves a week of July.

MS DEMETRIOU: Sir, may I just interject to say that in a sense it seems rather like Mr Kennelly is putting the cart before the horse, because he is working from -- he is assuming a need for a specific disclosure application and assuming rather a lot of time for that to take place. Of course it is sensible to make provision for the possibility of that, but it may not be necessary at all.

In terms of reviewing the documents, there are two very large law firms who are both jointly instructed on this case, so I am sure that review can take place very quickly if necessary, but it may not be necessary to have a specific disclosure application at all, so it seems rather odd that that is driving their position on this.

THE CHAIRMAN: I was going to say to Mr Kennelly, and he probably won't like me saying this, that it might be more sensible in this case to see what the CMA produces, give them enough time in their own calculation to do so, and then the chances are they may produce more rather than less, but I may be hopelessly naive on this.

MR KENNELLY: Sir, the problem -- as Ms Demetriou knows very well -- is that the Tribunal is concerned with building a timetable that will handle all these eventualities and we cannot assume in the Tribunal timetable that we will not need to make an application --

THE CHAIRMAN: We are not assuming that.

MR KENNELLY: That is interesting.

THE CHAIRMAN: We are hoping you don't need to, because that would save time.

MR KENNELLY: Indeed.

THE CHAIRMAN: We have already declined to allow an intervention, that would have made your task even harder I think. We are as concerned as you and the CMA to bring this case to trial within an effective time. It is absolutely paramount in merger control cases, even this one in these strange times where the divestment is subject to some flexibility, it is still very important to come to a view on the upholding or not upholding of the report.

That seems to me the paramount consideration and we are arguing about one day/two days, and this doesn't seem to me to make sense. We have already given you two of your five days, and possibly three.

MR DOLLMAN: I am actually unavailable on the 25th. I can do 23rd, 24th or -- I am free from the Monday to the Thursday but --

THE CHAIRMAN: That is one day less.

The 23rd and 24th, but that still gives you the first part of that week to add to what you might otherwise have had.

MR KENNELLY: Sir, if I may, I can see the direction of travel and, if I cannot get more time for the duty of candour material, as I was saying a moment ago, that makes the need to get the partially unredacted decision even more important.

Here the Tribunal should be a little bit, in my submission, certainly closely scrutinise what the CMA is saying about the amount of time it takes to do these redactions. Because obviously they have had the notice of application since 18 June, the issues are very familiar to it. We entirely agree with what Ms Demetriou says about the fact that we are not asking for the whole unredacted version of decision, it is only the parts that are subject to the challenge which the CMA understands very well. There is a need to consult

with third parties but there are only by my counts three, Nike, adidas and Frasers Group. There is no reason at all why that cannot be done sooner and we say it should be done within three days of the confidentiality ring. If the CMA needs five days after that we wouldn't object. At the very latest it should be done at the same time as getting their defence. That really does make a difference and we have not seen yet from the CMA any good reason why that cannot be done sooner. I appreciate the CMA has, you know, manpower issues and Ms Demetriou says it is a lot of work, but we are all going to be working very hard and all through August on this case. We need some cooperation from the CMA as well for it to work.

THE CHAIRMAN: Can I ask, Ms Demetriou, does not the CMA as a matter of course consider what material might have to be redacted in relation to the publication of a decision? I mean when I was at the CC, that was done before the report was published but practices may have changed.

MS DEMETRIOU: Yes, sir, so the position is there is a redacted version at the moment of the report which of course has been seen and the question is which of those redactions can be lifted and so the two key issues really are relevance -- the primary issue is relevance, so we don't think it is right to redact material, and Mr Kennelly accepts this, which is not relevant to the appeal, which affects the commercial interests of third parties.

Then we would need to consult third parties and I think there are more third parties than three, and there may not be many more but there are more.

Really the issue here is twofold.

The first is that that process does divert resources, and we are talking about a few days, it would just be much more efficient and enable us to comply with the deadlines for the defence to be able to do that whole exercise afterwards

within very short order.

The second point is that it may need to be redone once we file the defence, because of course we know what the issues are raised by the appeal, but we would need to revisit the lifting of the redactions once we filed the defence to see if there were any further redactions which our duty of candour requires us to lift and so it then becomes an iterative exercise. We say given we are not talking about very much time in any event, it would just be much more efficient to do it all in one go.

THE CHAIRMAN: Can I just understand what you are saying. Each of the redactions in the current redacted version will stem from some interplay between the CMA and the provider of the evidence.

MS DEMETRIOU: Yes.

THE CHAIRMAN: Who will presumably have claimed confidentiality, and the CMA will have agreed to that. You are saying that in relation to any proposed lifting, you would need to go back to them and just say you have taken the view that the duty of candour requires this disclosure, do they have any objection?

That is the process you are talking about.

MS DEMETRIOU: Sir, that is the process but before we get to that stage, we would have to satisfy ourselves that lifting any particular redaction is relevant. We have to think about the issues in the case and I gave you the example about chapter 5. We would have to go through the report and in respect of every redaction ask ourselves whether it is relevant to the issues as they arise on the notice of appeal. If so, we would then have to go through the process that you have just described, which may not seem onerous but it is time consuming dealing with a variety of different law firms --

THE CHAIRMAN: I understand that, because I have experienced that.

I am slightly less sympathetic on the internal exercise of deciding what is relevant. That I feel is part of the basic assessment of case.

The CMA as master of its own decision knows it much better than anybody else, I think. Unless possibly the applicant now knows it very well.

MS DEMETRIOU: Of course that is correct but we are in the process of going through the notice of application and synthesising it, analysing it and deciding what our defence is. That whole process itself sheds light on the scope -- obviously there are some points which are plainly in play, but the process of formulating the defence sheds light on the outer bounds of what might be relevant in the appeal if I can put it that way. That is why we say that it is -- I don't want to overstate it, but it is time which we can ill afford at this stage.

THE CHAIRMAN: Yes, Mr Kennelly.

MR KENNELLY: My Lord, please, I interrupted you.

THE CHAIRMAN: I was going to say funnily enough the remote working that we are undergoing at the moment makes it possible to deal with an application for disclosure extremely quickly, so I don't think there is going to be any hold up on our side should you decide that candour is insufficient. Maybe you would like to build that into your thinking.

I was going to cut through this and say I think I and my colleagues need a couple of minutes just to discuss this and then I think we will come back and give you a ruling on the timetable.

MR KENNELLY: Before you rise, sir, there was one further point that is material to your consideration, which is that the CMA is currently asking for 10 working days to respond to any specific disclosure application that we make. So the CMA is proposing to give us their duty of candour material, 24 July. We will

have until 31 July to respond, and then the CMA is asking for 10 working days, so I count up until 14 August to put in its objections.

On the CMA's approach, the Tribunal will not consider the application, will not rule on it, until after 14 August. Even moving as quickly sir as you suggest, if you do order the CMA to produce the material, you probably won't do so, you will not ask them to do it instantly, they will need a number of days to comply with the order, and with only just over two weeks left before we have to file our submissions.

MS DEMETRIOU: Sir, I can see the force of that and on reflection, we wouldn't be seeking 10 working days, that does seem in the context of this timetable unnecessary. We would ask for five in principle. We may require less if in fact the scope of the application is more limited.

THE CHAIRMAN: Indeed when we made an order, we would probably -- if we made an order, we would probably stipulate the time for any objections to it.

MR KENNELLY: My objections are known in any event.

THE CHAIRMAN: Your objection what?

MR KENNELLY: Obviously I stand by my earlier points. That last submission was not to be read by the Tribunal as any concession.

THE CHAIRMAN: I can see concessions are few and far between at the moment.

We will just take a few minutes off, if we may.

(3.44 pm)

(A short adjournment)

(3.54 pm)

THE CHAIRMAN: I think the best thing to do is if I read out what I think is now an appropriate timetable.

If you, between you, could then agree a suitable form of order. We tried to take into

account everything you have each said.

Starting at the end, with the date for the trial, this is fixed insofar as anything can be fixed. In all likelihood as a remote hearing for 23 and 24 September, that is the Wednesday and the Thursday. It is not clear that we will need the whole of two days, but we certainly need to earmark those two days.

Then working back from that, we propose to give an extra two days for each of the skeleton submissions, so the 18th for the CMA's and the 11th for JD Sports', together with their reply if so advised.

I know that curtails things a little bit, it makes it all very, very immediate but that seems to me the fairest approach to trying to elongate the timetable at that end.

Coming back to this end, I think we are inclined to stick with 16 July for the defence of July, the 24th for the duty of candour material and the suitably redacted material to be disclosed into the confidentiality ring, so those dates have not changed.

JD Sports to be able at the latest to apply for specific disclosure by 31 July. I emphasise at the latest, if you want to do it earlier we will look at it very quickly.

The CMA, and I take what Ms Demetriou says, a five-day response at the latest, which would take us, at the latest, to 7 August.

We would then make an order very swiftly thereafter and we would specify in the order the date for compliance if we ordered any further disclosure. That date would take account of obviously what had been argued to us but also of the need for haste and to give JD Sports enough time to work that into their reply and skeleton.

We have the question of court bundles and hearing bundles. They are currently set

for 18 September, I think. I don't know whether there is any room for flexibility there, but we would be open to slight flexing of the dates for both the hearing bundle and the authorities bundles.

That is really for you to agree.

That is our view. Unless you object very strongly to that, I think that offers the best way of getting through this. We would invite you, please, to accept that and to present us with a draft order that we can then issue.

MR KENNELLY: Sir, I am grateful.

Unless I am told otherwise by those instructing me now, we are content with that and we are grateful for the time the Tribunal has taken to consider these difficult points.

On bundles, I am sure Ms Demetriou and I can work out a date that is convenient for both sides and the Tribunal, and so there is no need for the Tribunal to rule on that now. We have done this before, we can agree it between ourselves in a way that will be satisfactory.

THE CHAIRMAN: Is there anything else that anybody wants to get off their chest?

MS DEMETRIOU: Sir, the only other point was that we had proposed a page limit on skeleton arguments. That has been done in other cases successfully, given that pleadings are usually lengthier we would respectfully suggest that it might well be helpful to lay down some type of discipline so that skeleton arguments are briefer and therefore hopefully of more use to the Tribunal. We have suggested 25-pages, which we think should be ample in this case.

THE CHAIRMAN: Mr Kennelly.

MR KENNELLY: As Ms Demetriou knows very well, my submissions are always brief. The reason I seek to put in a reply as well as a skeleton is I intend my skeleton argument to be as short as possible, it is better from my perspective

if it is short but I would be grateful if the Tribunal would not limit me to a page limit now when we have not seen their defence or any of the candour material or anything else we are look likely to get, but I can reassure my learned friend and the Tribunal that our skeleton argument will be as short as possible.

THE CHAIRMAN: I think our view on this, and I have had this discussion with many of your colleagues, is that everybody's case is best served by a short submission, to which we are normally given the answer, "We have not had time to prepare a short submission so here is a long submission", but I think it doesn't work that.

I think we are going to say at this stage the requirement is 25 ordinary pages, not single spaced and not with the margins filled out. If, when you have seen the defence, you wish to ask us to review that, we would be willing to reconsider but at the moment we would like you to work on the assumption that the skeletons would be 25 ordinary pages. I am sorry if that sounds harsh, but justice has to be done.

MR KENNELLY: Indeed.

THE CHAIRMAN: Anything else anybody needs to say?

Ms Demetriou?

Mr Kennelly?

MR KENNELLY: Nothing, sir.

MS DEMETRIOU: No.

THE CHAIRMAN: In that case can I close the case management conference and thank you both for being extremely informative, helpful and reasonable.

I am sure we will crack this case one way or the other. Thank you very much.

MS DEMETRIOU: Thank you.

MR KENNELLY: Thank you.

(4.00 pm) (The hearing concluded)