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

Case No: 1428/6/12/21

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

Friday 14 January 2022

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14 Before:  
15 The Honourable Mr Justice Marcus Smith  
16 (Sitting as a Tribunal in England and Wales)

17  
18  
19 BETWEEN:

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21  
22 Airwave Solutions Limited & Others

23  
24 -v-

25  
26 Competition and Markets Authority  
27  
28  
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30

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

32  
33 Brian Kennelly QC and Paul Luckhurst (On behalf of Airwave Solutions & Others)  
34 Josh Holmes QC and Ben Lewy (On behalf of CMA)  
35 Anneli Howard QC (On behalf of the Home Office)  
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2  
3 **Friday, 14 January 2022**

4 **(9.30 am)**

5 **Case Management Conference**

6 **THE PRESIDENT:** Good morning, everyone. Before we properly begin, can I just  
7 check that we have good communications.

8 Mr Kennelly, I can see you. Can you hear me?

9 **MR KENNELLY:** Yes, Sir, perfectly, thank you.

10 **THE PRESIDENT:** Excellent. And Mr Holmes?

11 **MR HOLMES:** I can, Sir.

12 **THE PRESIDENT:** Very good. And Ms Howard?

13 **MS HOWARD:** Yes, I can, thank you.

14 **THE PRESIDENT:** Thank you very much.

15 Next, I make this warning before every remote hearing, you will have heard it many  
16 times before, but although this is a remote hearing, it is otherwise as if in open  
17 court and the usual rules and courtesies apply. In particular, there is to be no  
18 recording, transmission or photography of these proceedings. This hearing is  
19 being live-streamed, and that injunction applies to those people who are  
20 watching remotely, and you are very welcome, but please observe what  
21 I have said.

22 More helpfully, can I thank the parties for their written submissions, which I have  
23 read, and the other material, which I have also read. In particular,  
24 Mr Kennelly, I have read your application and the background  
25 correspondence you provided with your skeleton. I am therefore well up on  
26 the matters which are before me today.

1 Really, the question is: how quickly can we get this on? In a sense, it's probably best  
2 if I give the parties an indication of where I am coming from so that you can  
3 just see how painful the process that I have in mind is going to be and push  
4 back, rather than me hear from you why, you know, the CMA says 28 January  
5 is the date it needs. I mean, I have got that on board.

6 I'm going to make this suggestion, having taken on board what everyone has said:  
7 what I want is for this matter to be heard before me, and two other persons  
8 who will have to be found, on the 1st February. Now, that means that the  
9 date for the CMA's defence will have to be earlier than 28 January; it will have  
10 to be, I think, on the 21<sup>st</sup> January, with a reply coming in later, but not much  
11 later than, say, the 25th or 26th.

12 Now, I know that the CMA say that that is a date they can't do, but I want to get  
13 a sense of whether that is actually the case, given the fact that I can't see that  
14 there is going to be any need for evidence; this is all going to be submission,  
15 as far as I can see, and I don't really understand why the CMA's defence  
16 can't, at the same time, be a defence and a skeleton argument, and for the  
17 response of the applicant to be a skeleton argument done, let us say, on 26<sup>th</sup>  
18 January.

19 Now, what I am going to do, I think, is hear first, Mr Holmes, from you. I know that's  
20 not the usual order, but, Mr Kennelly, you've pressed for an earlier date for  
21 the defence, and I think I do need to hear first from Mr Holmes because this is  
22 not what he wants.

23 The reason I am keen on the 1<sup>st</sup> February is because it seems to me it ducks the  
24 question which you, Mr Kennelly, have raised in your submissions about  
25 interim relief. I am extremely unkeen to allow your application to derail the  
26 decision of the CMA to proceed for obvious reasons. What it does is it

1 basically gives you, on the interim basis, that which you shouldn't have unless  
2 you succeed on the absolute application. So the reason I have gone for the  
3 1<sup>st</sup> February is, first of all, it's a date that I can just about fit into my diary, but,  
4 secondly, it is a date that means that if you, Mr Kennelly, succeed, we scrap  
5 the 10<sup>th</sup> February oral hearing as a matter of right, you will have won; on the  
6 other hand, if you lose, I think that you will be batting on a pretty sticky wicket  
7 to say that the matter should be put off. Now, I'm not saying you won't get  
8 a re-adjustment on the timetable, but I think it's fair to say that you would have  
9 significant difficulties.

10 So that's where I am coming from.

11 **MR KENNELLY:** Before Mr Holmes speaks, very briefly, we are content with that  
12 timetable, Sir. We understand exactly what you said to us, it comes as no  
13 surprise to us, and although that's a very tight timetable, we can work within it.  
14 We can manage the date that you, Sir, have mentioned, and so we are  
15 content with your proposal.

16 **THE PRESIDENT:** Mr Kennelly, that's very helpful indeed.

17 Mr Holmes, before I hear from you, I probably ought to hear from Ms Howard.

18 Ms Howard, you're here by indulgence more than anything else. I think I should put  
19 my cards on the table that this sort of appeal, entirely properly made, like the  
20 BMA case which I dealt with many years ago, needs to be handled with the  
21 utmost expedition, otherwise the sort of challenge that is very properly  
22 advanced by Mr Kennelly's clients' becomes unduly disruptive, and I have to  
23 say my starting point in this sort of thing is that I don't really see what  
24 Interveners bring to the party.

25 I can quite understand the interest that your client has in the investigation itself, and

26 I can quite understand that you want the investigation to move as swiftly as

1 possible, but, at the end of the day, this is a question the CMA will say is for it,  
2 and I don't see, really, why your client has anything relevant to say about  
3 timing at all.

4 Mr Kennelly's clients' position is absolutely clear; they're saying: we ordinarily would  
5 not have anything to say about the timing of the market investigation, but in  
6 this case the CMA has got things so wrong that they have to intervene. Now,  
7 that's a point which obviously has to be dealt with and I understand it, but if  
8 you have anything short of that, I just don't really see why I should give you  
9 house room. Sorry, I am being a little blunt about this, but perhaps you could  
10 explain to me why you're here and we can move on from there, and then I will  
11 hear from Mr Holmes.

12 **MS HOWARD:** Yes, of course.

13 I'm sorry, we had no awareness of what the agenda of today's hearing was, so we  
14 were preparing our intervention in the main proceedings and prepared that  
15 overnight, obviously thinking this was the first hearing that we could get our  
16 intervention in, and we didn't want to be late for that.

17 I don't have any specific instructions on timing yet because this is the first we have  
18 heard. We haven't seen the skeletons.

19 **THE PRESIDENT:** Okay.

20 **MS HOWARD:** We don't know what the subject matter of this hearing was. But  
21 obviously we're an Intervener; we will have to take the timetable as it is in any  
22 event for today.

23 **THE PRESIDENT:** All right. Well, that's fine. I mean, I'm more than happy,  
24 Ms Howard, for you to sit in and I will hear from you.

25 I think, Mr Kennelly, before we hear from Mr Holmes, we would have to abridge the  
26 time for interventions. At the moment, I think, the deadline for interventions

1 would be 26<sup>th</sup> January. I would I think be minded to abridge that to something  
2 like 18<sup>th</sup> or 19<sup>th</sup> January, because obviously I think the CMA would be entitled  
3 to understand what is coming in, and I wouldn't have a problem I think in  
4 doing that because, frankly, these things need to be dealt with quickly, and all  
5 of the parties, including any potential Interveners', will have to cut their cloth to  
6 fit that sort of timetable.

7 So, Mr Kennelly, do you have any problem with an abridgement like that?

8 **MR KENNELLY:** I have no problem, Sir, with the abridgment, but in view of the very  
9 tight timetable we have, may I suggest that the Home Office put forward  
10 its application to intervene which should be the whole of their case. They  
11 should put forward whatever they want to say, and that should be the sole  
12 document they put in.

13 There's a question mark over whether they should be putting in any evidence at all in  
14 a case like this, where we have adduced no evidence. So I suggest they  
15 shouldn't be given permission to put in evidence. Their intervention should be  
16 the submissions they want to make. It's not clear whether they need to  
17 actually make any oral submissions at all. That's a matter for the Tribunal,  
18 obviously. But, in my submission, whatever they put in on the 18th should be  
19 the whole of their written case and limited to that.

20 **THE PRESIDENT:** Ms Howard, I know you're buying a pig in a poke here because  
21 you haven't seen the material, but what I am suggesting actually is for any  
22 Intervener, including your client. It seems to me that the 18th is unbelievably  
23 tight, but if we are to get this done properly by the 1<sup>st</sup> February, that is the  
24 sort of date that we need to be thinking about.

25 **MS HOWARD:** So can I just be clear. Sorry, I am obviously just spring-boarded into  
26 this. We put in our request to intervene last night, which I just sent to my

1 Learned Friends to make sure they had a copy, and we just set out the areas  
2 on which we would hope to intervene and the scope of the permission that we  
3 would have to participate. We're obviously flexible on exactly how we  
4 participate, whatever is going to assist the Tribunal, and we would obviously  
5 want to avoid any duplication with the CMA.

6 So what I was assuming was, if permission to intervene were granted, that we would  
7 put in a short written statement, presumably after the CMA has gone. So in  
8 the timetable that you're proposing, if the defence skeleton was given on 21<sup>st</sup>  
9 January, the Home Office would put in a short statement on, say, the 24th,  
10 which then the applicant could take account of in their reply on 25th/26th. But  
11 I think trying to go first and put in a detailed statement of intervention on the  
12 18th, without having sight of the CMA's position first, is quite difficult, I think,  
13 simply because I don't want to overlap and say things that the CMA is capable  
14 of saying and cause unnecessary duplication.

15 **THE PRESIDENT:** Yes, I see.

16 **MR KENNELLY:** Sir, may I just very briefly cut in there?

17 **THE PRESIDENT:** Yes, of course.

18 **MR KENNELLY:** The Home Office has had our application since the 10th, so they  
19 really ought to be able to produce their own response to that earlier. In view  
20 of the very tight timetable, a degree of duplication will be forgiven. There isn't  
21 the usual time for co-ordination from the Home Office and the CMA. It's much  
22 more important that we get the Home Office's line, whatever it is, as soon as  
23 possible, and they have had everything from us, which really is everything in  
24 the case since the 10th.

25 **THE PRESIDENT:** Yes.

26 Also, of course, I don't want to anticipate the nature of any other interventions, and

1 Ms Howard made very clear that her intervention will be in favour of the CMA.  
2 It is possible that there are going to be interventions which go against the  
3 CMA's proposed timetable and are supportive of your clients', Mr Kennelly.  
4 I have no idea whether that's realistic or not, but it's theoretically true.

5 What it seems to me is that I am minded but I will want to hear first from Ms Howard  
6 and then from Holmes, who has been very patient with me, -- my thinking is  
7 that we have a date of 4 pm on the 26<sup>th</sup> January for applications to intervene  
8 which are double-barrelled; they are both the application to intervene and the  
9 substantive intervention. I will then rule on whether I will take them into  
10 account, but if I do take them into account, there will be nothing more than the  
11 submission on the 26<sup>th</sup> January.

12 I think the question of duplication is something which I will take a robust view on.  
13 You can have duplication, because these documents won't be that long, this  
14 isn't a heavy case in terms of reading at all, and if, in light of what is submitted  
15 on the 26<sup>th</sup>, I take the view that it would be helpful to have oral submissions  
16 from the interveners, then I will make that indication. But my thinking at the  
17 moment is that written submissions ought to be enough, given the subject  
18 matter. So that's my thinking.

19 I will hear, Mr Kennelly, if you have anything to add to that, from you first, then I will  
20 hear from Ms Howard, and then, Mr Holmes, at long last, you will get  
21 a chance to push back generally on everything.

22 **MR KENNELLY:** Sir, just to be clear, we are now discussing the substance, we're  
23 moving on from the timetable?

24 **THE PRESIDENT:** Sorry, no. What I was dealing with was purely and simply the  
25 question of a date for intervention. I misspoke; I said 26<sup>th</sup>, which was  
26 an error. What I meant to say was the 18<sup>th</sup> January, 4 pm, for an intervention

1 which is both a combined application to intervene and substantive argument  
2 for intervention from not only Ms Howard's clients', but from any other person  
3 sorry, -- the use of the 26th was profoundly unhelpful on my part.

4 **MR KENNELLY:** Sir, we're content with that.

5 **THE PRESIDENT:** Very good.

6 Ms Howard.

7 **MS HOWARD:** Sorry, I have a slight delay because I am trying to take instructions  
8 by WhatsApp and I'm just waiting for confirmation. Maybe if you hear from the  
9 CMA, then --

10 **THE PRESIDENT:** Okay, that's fine.

11 Mr Holmes, you've been presented with an awful lot, and take your time in  
12 responding, and feel free to push back if you think a later date is appropriate,  
13 because I don't think -- it's obvious -- your timetable can fit with a 1st February  
14 hearing date. We would have to push it off. But I'm obviously more than  
15 happy to hear you on that.

16 **MR HOLMES:** Thank you, Sir.

17 So let me begin by saying we will try and make this work. We're not resisting your  
18 timetable. We have a strong desire for this case to be heard expeditiously.  
19 We understand entirely where you're coming from.

20 You have seen that the CMA is concerned that delay may be perpetuating a situation  
21 in which there is a competition problem which is costing the taxpayers millions  
22 of pounds a month, and that is the basis for the suspicion which led to the  
23 reference, and we would not want this litigation to impede the investigation or  
24 to delay matters more than is necessary. The reason why we proposed  
25 a later date is because of the time we felt we needed, on the basis of careful  
26 consideration, to take instruction and to prepare a Defence to meet all of the

1 points that are advanced.

2 The Tribunal will appreciate that Motorola took all but one day, I think, one working  
3 day, of the period allowed for their application, just shy of two months. The  
4 application landed immediately prior to the Christmas period and, with the  
5 best will in the world, it was not possible to work at anything resembling full tilt  
6 for the two weeks which followed that. So, in reality, we have had a week with  
7 the application under normal working conditions, and what is being said now  
8 is that we should serve our Defence a week later, in circumstances where  
9 Mr Kennelly's clients' had the opportunity to abridge time for their own notice  
10 of application, gave very little notice of their intention to apply, and have not  
11 brought any application for interim relief, in circumstances where they know  
12 and are well advised that there is no automatic suspense of effect to their  
13 application.

14 But, nonetheless, in the interests of moving matters forward, we will endeavour to  
15 meet the timetable. If necessary, there is the liberty to apply, and we will  
16 need to avail ourselves of that if a problem arises, but we will do our best.

17 The Defence may be in short form, it may be more rough and ready than  
18 the Tribunal is used to, and it may offer an abbreviated response, but I think  
19 that's simply the inevitable consequence of the need to move forward swiftly.  
20 I apprehend, Sir, that you intend to stick to an early hearing date and, with  
21 that in mind, we will do our very best.

22 **THE PRESIDENT:** Mr Holmes, that's very helpful.

23 Let me be clear: I take entirely the points you make about the difficulties that the  
24 CMA has been put under. This is not a criticism at all of Mr Kennelly's clients';  
25 the timetable and time periods that exist, exist for a reason, and clients/parties  
26 are entitled to avail themselves of it. So I don't take anything that you say as

1 a criticism of Motorola; it's simply an articulation of the difficulties that the  
2 CMA have faced, given the timings, and I entirely understand that.

3 If you were to say the CMA was comfortable with a later hearing, then I would give  
4 that considerable weight. The fact is, though, the CMA, quite rightly, wants  
5 this done as quickly as possible, for reasons that are pretty obvious, and this  
6 case, fortuitously, and perhaps it is true of this kind of application generally,  
7 this sort of case is susceptible of the kind of broad-brush approach, rapid  
8 approach, which most cases before this Tribunal are not. I mean, if this was  
9 a price control matter or a pharmaceutical appeal, there is no way I would be  
10 suggesting this kind of timetable because it would not be doable. The fact is  
11 that, as you've indicated, the need for me to delve into the merits of a case  
12 are significantly less in this case than in another case, and I think it's worth my  
13 putting on the record how I see this, because if I am wrong then I think I need  
14 to know now.

15 The fact is Mr Kennelly has made, in his notice, a number of points where the point  
16 is that the CMA have got things badly wrong in terms of, for instance, the  
17 contractual position. Now, I don't see it as my function to work out whether  
18 the CMA is right or is wrong about these points. It seems to me that is  
19 a matter which I absolutely should not be resolving. The question is whether  
20 the CMA has got things so badly wrong that the impact of that error means  
21 that the decision to run the investigation in the way the CMA has chosen is  
22 undermined.

23 So it seems to me that I'm going to be approaching things in an altogether un-  
24 granular way, if I can put it that way, rather than the sort of granular way that  
25 would be approached if there was, let us say, a later challenge to the outcome  
26 of the market investigation in due course, where one would have to actually

1 work out what, for instance, the contract meant. That's why I am pretty  
2 relaxed, if I can say that, about the notion of a broad-brush Defence, because  
3 you're not going to be saying -- I don't want you to say, "We are right for the  
4 following 106 reasons". What we want is, we want you to say- "Well,  
5 Mr Kennelly is wrong to say that we have made a fundamental mistake".

6 **MR HOLMES:** Yes.

7 **THE PRESIDENT:** "He may at the end of the day be right that we have made  
8 a mistake, but the mistake is sufficiently nuanced and not obvious not to  
9 undermine our decision to have an investigation in the very rapid timeframe  
10 that we are running."

11 I pick that as simply an example of the way I see things. We are talking about  
12 a basic discretion in the CMA to run its business the way it sees fit, and the  
13 question is whether that basic discretion has been so fundamentally got  
14 wrong that I need to intervene.

15 **MR HOLMES:** That's a very helpful intervention, if I may say so, Sir, and we agree  
16 with your way of seeing things. This is, of course, a Judicial Review, it is not  
17 a merits appeal, and the question is whether we have acted outside the range  
18 of reasonable choices that were available to us, given our discretionary  
19 powers. With that indication in mind, we will endeavour to meet the timetable  
20 that you have set. I doubt there will be any difficulty. If there is, we will come  
21 back to the Tribunal as soon as we can.

22 **THE PRESIDENT:** Well, that's very helpful, Mr Holmes. Thank you very much.

23 Mr Kennelly, you have heard what I say. Nothing that I have said is intended to  
24 restrict the arguments on the 1st February. But as an indication of the issues  
25 that are before me, do you have any fundamental disagreement? Because if  
26 you do, then I'd better hear it now. I don't want you to go to the merits of the

1 point, but as a rough articulation of how the argument is going to go, am I in  
2 the ballpark?

3 **MR KENNELLY:** Sir, you're in the ballpark, in the sense that we all agree that it's  
4 a Judicial Review. We set out in our Notice of Application the standard which  
5 we have to meet, and there are well recognised grounds of Judicial Review.  
6 This is not a merits appeal.

7 We will make submissions about Judicial Review based on error of fact. The  
8 contract and the construction of the contract is a question of fact. But, plainly,  
9 materiality is very important, and we need to demonstrate to you just how  
10 material and fundamental the errors are that the CMA ought not to have  
11 proceeded with the Market Investigation in the first place. But we will address  
12 you on all that in due course.

13 **THE PRESIDENT:** Indeed. I think we are on the same page. I mean, clearly, I don't  
14 want to anticipate or confine anyone's submissions, but I think Mr Holmes has  
15 enough comfort as to what he needs to produce for his Defence. And by  
16 Defence, I mean it's a Defence and Skeleton Argument, it's everything rolled  
17 into one.

18 Well, Mr Holmes, unless you have anything else to say, I will let Ms Howard have her  
19 say about the timetable. But before I do, do you have anything to add?

20 **MR HOLMES:** Nothing further from me, Sir.

21 **THE PRESIDENT:** Very grateful, Mr Holmes.

22 Ms Howard --

23 **MR KENNELLY:** So sorry, Sir, perhaps --

24 **THE PRESIDENT:** So sorry, Mr Kennelly.

25 **MR KENNELLY:** Is it the 25th or 26th?

26 **THE PRESIDENT:** What day is the 25th? Let me get my diary up.

1 **MR KENNELLY:** If I may, before you check that, Sir, may I make a plea for the  
2 26th. 26th is a Wednesday, and I understood that to be the day that you said  
3 we would put in our Skeleton in Reply.

4 **THE PRESIDENT:** Mr Holmes, do you have a preference between the two?

5 **MR HOLMES:** No, we are happy with the 26th. I would say, Sir, (inaudible) I have  
6 been asked to ask you to consider whether we might have until 9 am on the  
7 Monday morning, looking at the days of the week?

8 **THE PRESIDENT:** The 21st is a --

9 **MR HOLMES:** Friday, I think.

10 **THE PRESIDENT:** Yes.

11 **MR KENNELLY:** Sir --

12 **THE PRESIDENT:** Friday, yes.

13 **MR KENNELLY:** -- We need that weekend --

14 **THE PRESIDENT:** No, you can have it as late as you like on the 21st, and I'm afraid  
15 Mr Kennelly's clients' will have to use the weekend, but I think the weekend  
16 needs to belong to Mr Kennelly's clients'.

17 **MR HOLMES:** That's understood.

18 **THE PRESIDENT:** But you can have any time before midnight --

19 **MR HOLMES:** I'm grateful.

20 **THE PRESIDENT:** -- on the 21st. I'm not sure you should be that grateful for that,  
21 I'm not giving you very much, but I think that's where the line needs to be  
22 drawn. So, yes, any time before midnight on Friday, but not, I think, 9 o'clock  
23 Monday.

24 But I'm happy with the 26th rather than the 25th for Mr Kennelly's Reply, and to be  
25 clear, that will be a Reply that will be both a Reply and Skeleton, because  
26 I don't really see very much difference between the two documents in this

1 case.

2 Well, thank you both very much.

3 Ms Howard, you have seen which way the wind is blowing, but if you want to press  
4 for a date other than the 18th, feel free.

5 **MS HOWARD:** I think we will need more time than the 18th. Obviously, we have  
6 come into this very cold. We were preparing what was going to be our  
7 request to intervene thinking we had the normal three-week deadline. We  
8 managed to turn that around last night. I myself only saw the notice of  
9 application last night for the first time. We have only had a redacted version  
10 of it. We haven't had any annexes or supporting materials.

11 And just standing back, obviously we have reacted very, very quickly, but we are  
12 aware that there are potentially other parties who are not even aware that this  
13 hearing is taking place. I am thinking Devolved Administrations, perhaps,  
14 who -- because obviously the Home Office is only responsible for certain of  
15 the contracts and within Great Britain, but Devolved Administrations have  
16 responsibility for the contracts in the devolved areas. Also, the blue light  
17 customers may also have an interest to intervene because they have  
18 separate contracts.

19 I'm not trying to enlarge the scope of interventions, and I am obviously aware of your  
20 comments earlier, but I'm just saying, from their perspective, they're obviously  
21 going to hear about this hearing for the first time this afternoon, and then to be  
22 expected to apply both to request to intervene and put in their substantive  
23 Submissions by Tuesday I do think is rather tight.

24 Given that obviously we would try to scope our interventions, taking account of the  
25 very helpful remarks you have made, but if there isn't a pressure to avoid  
26 duplication in the same way, we would ask for more time next week in order to

1 get that combined request and Statement of Intervention in, potentially the  
2 20th or 21st, which shouldn't impact on the timetable for the other parties'  
3 because they will be able to take them into account, and the CMA doesn't  
4 need to take our submissions necessarily into account in its own submissions.

5 So I would respectfully ask for a longer period than the 18th if the Tribunal can  
6 accommodate that?

7 **THE PRESIDENT:** Yes. The difficulty I have is I don't really understand what you or  
8 other people would have to say on this point. I mean, the thing is, you can  
9 either say, "Yes, the CMA has a broad discretion and I shouldn't intervene in  
10 it", which Mr Holmes is perfectly capable of saying and will say on his client's  
11 behalf, or you can come back and say, "Yes, the CMA have behaved on the  
12 basis of an error of law and unreasonably, and therefore what appears to be  
13 a decision well within their competence is something that needs to be  
14 intervened in", which Mr Kennelly is perfectly capable of saying and will say in  
15 due course.

16 What are you bringing to the party? The trouble is, I can see in some cases that  
17 an Intervener has a different plough to furrow, or different furrow to plough,  
18 perhaps, and that's why they come in. The mere fact that you are concerned  
19 to achieve a particular outcome isn't a basis for intervening. I can quite get  
20 why your client wants Mr Holmes to win, which is your position, and I quite  
21 understand in theory why some other person might want Mr Kennelly to win,  
22 but that doesn't give a right to intervene.

23 So at the moment I'm at the stage where I'm not prepared to assume that all  
24 interventions will be in favour of the CMA -- I know that's your position -- so it  
25 seems to me the timing has to be before the date of the CMA's Defence.

26 But, more to the point, I'm just not clear --

1 **MS HOWARD:** Perhaps it would help if I gave just a couple of examples?

2 **THE PRESIDENT:** No, of course, please do.

3 **MS HOWARD:** In the Notice of Application, the Applicant has made several  
4 allegations about the strength of the negotiating power between the parties.  
5 Obviously, they are one side of the contractual arrangements. The other side,  
6 the party to those contractual arrangements, is not the CMA, obviously,  
7 because they're the Independent Assessor, but the Home Office. So,  
8 Motorola is making allegations about how those contractual arrangements  
9 work, what the parties' understandings were, what levers the Home Office had  
10 in order to actually defer the Agreement or to negotiate and press for a lower  
11 rate. Now, obviously the Home Office was actually the party that was there at  
12 the time and understood those arrangements and was involved in those  
13 negotiations, so in terms of whether the CMA's assessment was reasonable  
14 or not or took account of the relevant considerations, the Home Office just  
15 wants to give its understanding of the events.

16 In Ground 2, again, they're talking about the IRR and what the Home Office's  
17 understanding of the IRR was at the time. Well, it's just that the Home Office  
18 could support by explaining what that understanding was at the time, just to  
19 show the rationality of the decision that has been taken. So it's not going to  
20 be, you know, a detailed supporting, -- it's just supporting material to show  
21 why the CMA's decision was correct, given that we were the party directly  
22 involved.

23 **THE PRESIDENT:** If this was a hearing on the merits, then I would absolutely  
24 understand where you are coming from. But, frankly, if I find myself in  
25 a position where I feel the need to hear from the Home Office about the merits  
26 of the case, I think the CMA will be well on the road to losing the Application, if

1 I'm brutally honest, because what you're saying is if I need to hear fairly  
2 granular factual submissions from a party who absolutely, I agree, has the  
3 best ability to articulate the bargaining power that it had, together with  
4 Motorola, if I feel the need for that sort of material, I think Mr Kennelly will be  
5 sitting in a very happy position, if I can put it no higher than that. Now, that,  
6 I think, is really why I'm seeing this as a very much JR question rather than  
7 a merits question.

8 I mean, I think, perhaps, Mr Holmes, can you help me on this? You obviously could  
9 deploy assistance from the Home Office anyway in your Defence, but is this  
10 sort of material actually going to assist the CMA?

11 **MR HOLMES:** Sir, I should say immediately I haven't seen any correspondence yet  
12 from Ms Howard's client's, and so I haven't seen any written materials which  
13 describe the scope of their potential intervention.

14 For our part, we see matters very much as you have described them, Sir, that this is  
15 not a question that will turn on a factual inquiry in which the Tribunal needs to  
16 involve itself; it will turn on the reasonableness of the CMA's exercise of its  
17 discretion based on the materials that were before it. For that reason, we're  
18 not sure that there is a place for factual evidence of a detailed nature about  
19 the comparative negotiating strength of the Home Office and of Motorola.  
20 This is ultimately a straightforward Judicial Review, assessing whether we  
21 have overstepped the limits of our discretion and have acted in any way  
22 outside the bounds of reasonable conduct, and that turns on the material we  
23 already had before us.

24 **THE PRESIDENT:** Mr Kennelly, if you have anything to add, I will hear from you and  
25 then I will hear from Ms Howard.

26 **MR KENNELLY:** Just to say we agree with what Mr Holmes said for the CMA. We

1 go rather further and say what Ms Howard is describing is after-the-event  
2 evidence, which is normally inadmissible in a Judicial Review, and therefore it  
3 shouldn't be entertained.

4 The Tribunal will base its decision on the material before the CMA, as Mr Holmes  
5 said, that's what's material.

6 **THE PRESIDENT:** Ms Howard, what do you say?

7 **MS HOWARD:** Obviously we do understand the remit of the Judicial Review being  
8 based on the evidence that was before the CMA at the time. What our  
9 concern was, at the moment, with the Notice of Application, you're hearing  
10 a very one-sided interpretation of events from Motorola. Now, it's not that  
11 we're wanting to put in loads of new evidence that wasn't there, we just  
12 wanted to support, -- to give the other side of that contractual relationship, that  
13 was all, not through new evidence but just to support the evidence that was  
14 already before the decision-maker and to show why that was correct. It's  
15 a much more limited scope than an Appeal on the merits, of course.

16 **MR HOLMES:** I hesitate to interrupt, but if I might just say, we will of course liaise  
17 closely with the Home Office. We're not at all resisting their Application to  
18 Intervene, and it may be that any points that they would wish to make in  
19 support of the CMA will already be dealt with in our Defence in such a way  
20 that it won't in fact be necessary for Ms Howard's client to pursue an active  
21 role in the proceedings.

22 It may be sensible if we--clearly, you know, this is a late development, and we  
23 haven't really had an opportunity to consider what's being said. Perhaps we  
24 could pick it up in correspondence after today's hearing.

25 **THE PRESIDENT:** Indeed.

26 Well, thank you all very much. I mean, I'm not going to close out any intervention.

1 What I am really talking about is the date by which an Application to  
2 Intervene -- which is, as it were, a rolled-up Application which contains not  
3 merely the Application to intervene but all of the material that is going to be  
4 deployed, subject to the discretion in the Tribunal to allow further material to  
5 come in, but I'm giving a fairly clear indication that that discretion is likely to be  
6 exercised as a no rather than as a yes, but one should never say never.  
7 What we're talking about is the date for that rolled-up submission, and I am  
8 not persuaded that it should be any later than the 18<sup>th</sup> January. I am quite  
9 prepared to extend to all Interveners the midnight deadline that I have  
10 afforded in the different context to the CMA, but these Applications to  
11 Intervene, as a rolled-up Application, need to be in by midnight on the 18<sup>th</sup>  
12 January, and I will consider them then.

13 The reason I am abridging time for all Interveners', not just, Ms Howard, your client's,  
14 is because I can't see any particular interest that would justify an intervention.  
15 On the other hand, if there is an interest that does justify an intervention, it  
16 seems to me absolutely critical, given the very telescoped timetable that I am  
17 imposing, that those interventions come in early as a matter of fairness to  
18 both the CMA and to Motorola.

19 So that's the date.

20 If the CMA was more enthusiastic about the value of an intervention, my decision  
21 might be different, but the CMA's position seems to be exactly how I see the  
22 matter, and so midnight on the 18th it will be. I appreciate that that is a very  
23 short timeframe because we're, you know, 10.15am on Friday now, but there  
24 it is.

25 Is there anything more that I need to address in order to ensure that the parties have  
26 absolute clarity as to where this is going?

1 **MR HOLMES:** Can I check one point, Sir?

2 **THE PRESIDENT:** Of course.

3 **MR HOLMES:** Are we listing for one day?

4 **THE PRESIDENT:** Yes, it's going to be a one-day Hearing. You're very lucky in  
5 terms of my diary, because that date happens to be the date where parties in  
6 a Patents Trial that I am doing are drafting their Closing Submissions, so  
7 I have been able to slot you in in the middle of a Trial that I am doing  
8 otherwise, so it will be a day.

9 I'm going to try -- I am making no promises -- to deliver an Unreserved Judgment on  
10 the 1st. Whether I am able to do that is -- well, I have stated my intention;  
11 whether I can meet it is a different matter altogether because this is not  
12 a straightforward matter. It's hard, not easy, but it does seem to me that, if  
13 I do have to reserve, we then run into problems regarding the 10<sup>th</sup> February  
14 Oral Hearing and that's why, obviously, I want to get a decision out sooner  
15 rather than later. But I don't think that is a matter that we can debate further  
16 today; it's simply an indication of my thinking but, yes, you will have the whole  
17 day on the 1st February.

18 **MR HOLMES:** Thank you, Sir. Should we perhaps liaise to agree a division of time  
19 for the Hearing and submit that to the Tribunal in advance; and if that would  
20 be helpful should we allow time in case it is possible to give an Unreserved  
21 Judgment?

22 **THE PRESIDENT:** Please do liaise and, yes, bear in mind that I will be wanting to  
23 try to deliver an Unreserved Judgment but, equally, I don't want either party --  
24 or, indeed, any Intervener, should permission be given to an Intervener to  
25 participate, which I have already expressed a view on -- I don't want anyone  
26 to feel that they are getting short shrift on a matter so I would be prepared to

1 sit late on the 1st or, indeed, start early if that was necessary. But the parties  
2 should bear in mind that at some point the law of diminishing returns sets in  
3 and one simply ceases to take on board points if one is sitting for too long. So  
4 short is always better, but I'm going to leave it to the good sense of the parties  
5 to work out how best to deploy their time.

6 **MR HOLMES:** Thank you, Sir.

7 **THE PRESIDENT:** Could you attempt, the two of you, to agree an Order and we will  
8 obviously review it and make it as soon as we get it?

9 **MR KENNELLY:** Yes, Sir, thank you.

10 **THE PRESIDENT:** Thank you both very much and, Ms Howard, thank you also.  
11 Unless there is anything more I will end this Hearing now.

12 Thank you very much.

13 **(10.21 am)**

14 **(The Hearing Concluded)**

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