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**IN THE COMPETITION
APPEAL TRIBUNAL**

Case No: 1334/4/12/19

Rolls Building,
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Fetter Lane,
London EC4A 1NL

21 November 2019

Before:

THE HONOURABLE MR JUSTICE MORRIS

(Sitting as a Tribunal in England and Wales)

BETWEEN:

ECOLAB INC.

Applicant

-v-

COMPETITION AND MARKETS AUTHORITY

Respondent

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APPEARANCES

Brian Kennelly QC and Paul Luckhurst (instructed by Cleary Gottlieb Steen & Hamilton LLP) for Ecolab Inc.

Rob Williams and Ben Lask (instructed by the Competition and Markets Authority)

1 Thursday, 21 November 2019

2 (10.30 am)

3 MR JUSTICE MORRIS: Good morning, Mr Kennelly.

4 MR KENNELLY: Good morning, my Lord.

5 MR JUSTICE MORRIS: This is the first case management conference in this case.

6 We have an agenda. I was proposing that we work through the agenda after

7 such introductions as you wish to make.

8 MR KENNELLY: Thank you, my Lord.

9 You have seen I appear with Mr Luckhurst for the applicant, Ecolab Inc. My learned

10 friends, Mr Williams and Mr Lask appear for the Competition and Markets

11 Authority.

12 My Lord, before we get into the agenda, you ought to have a very short skeleton

13 argument from us and a supplementary bundle.

14 MR JUSTICE MORRIS: Yes.

15 MR KENNELLY: And a letter from the CMA dated 20 November.

16 MR JUSTICE MORRIS: Thank you. I have read those, both those documents, and I

17 have looked briefly at the supplementary bundle.

18 MR KENNELLY: Thank you. You will have seen there that we agree, we have

19 reached agreement on everything apart from the timetable.

20 MR JUSTICE MORRIS: Yes.

21

22 Discussion re timetable

23 MR KENNELLY: One small correction to make in my skeleton. I said, at paragraph

24 7, in relation to evidence

25 MR JUSTICE MORRIS: Can I just find that paragraph. Yes.

26 MR KENNELLY: That the CMA had confirmed to us that it had no objection to the

1 admission of Ecolab's evidence. That is not correct. They do object. They
2 say bits are inadmissible, but they will deal with it at the main hearing.

3 MR JUSTICE MORRIS: Yes, I have read and taken that on board. I'm grateful for
4 that indication.

5 MR KENNELLY: In relation to forum

6 MR JUSTICE MORRIS: Can we just run through the agenda? I realise that the
7 issue is timetable. I think, as a matter of formality, we should just go through
8 the agenda to make sure those points are on the record, so to speak, then we
9 can turn to the issue. The provisional agenda is I am floundering around it
10 is at tab of my bundle, yes, it's the last tab.

11 MR KENNELLY: Yes tab 15.

12 MR JUSTICE MORRIS: It is agreed that the forum will be England and Wales. That
13 is agenda item 1. Agenda items 2 and 3, there have been no applications to
14 intervene so that goes by the way.

15 Item 4, confidentiality, I understand that that ring has now been the terms of the
16 order has been agreed.

17 MR KENNELLY: Yes.

18 MR JUSTICE MORRIS: That is right?

19 MR KENNELLY: Yes, my Lord.

20 MR JUSTICE MORRIS: No doubt, the final agreed form will be provided and will be
21 put in the order.

22 MR KENNELLY: Indeed.

23 MR JUSTICE MORRIS: Then 5, well, we understand the position about evidence
24 and admissibility of factual evidence, I suppose I am not sure that any order
25 needs to be made in respect of that. The position is made clear that the CMA
26 does have some concerns about admissibility of all or part of the witness

1 statement but that will be dealt with in the substantive hearing.

2 MR KENNELLY: Indeed, yes.

3 MR JUSTICE MORRIS: Then we get to item 6, which is the future conduct of the
4 application.

5 Can I indicate at the outset what I have worked out in respect of dates and
6 availability. It seems to me, subject to any observations, that we need to find
7 the date and work backwards probably. What I have identified and that I am
8 not sure is necessarily with full knowledge of all counsel availability is
9 potential dates for a two day hearing are within the week of 27 to 31 January
10 or within the week, but not the whole week, of 18 to 21 February.

11 That discounts, at the moment, March, in the sense that I am not saying there is no
12 availability in March, there probably is, but I am looking, at the moment, at
13 those dates.

14 Can I make two observations about that. The first is that, in general, given that this
15 is a merger case and given the need for certainty and swift resolution, the
16 tribunal's preference is to go for the earliest convenient date rather than the
17 later date. Taking that into account, the tribunal's preference is for dates
18 within the first of those brackets. I am expressing a preference at the
19 moment.

20 That is subject to two further observations and it is these: the first is that, at the
21 moment, I am involved in a criminal trial on circuit. I am reasonably, but not
22 wholly, confident that that trial will finish by 27 January. It is likely to.
23 Probably very likely to. But that may depend on jury deliberation and that is
24 an unknown quantity. But, having considered where I think that case is, I am
25 still putting forward that date.

26 The second observation, of course, is that, at this stage, we don't know the scope of

1 any dispute in relation to disclosure. If I may say at the outset, the more the
2 parties are able to resolve, and the sooner, the better for all concerned. But
3 there may be disputes. So the tribunal's current position is that, even with
4 those two observations, the first bracket is what the tribunal would like but
5 with the possibility that if either of those things eventuate, in other words if my
6 trial starts the jury has been out for two and a half weeks or two weeks and
7 it is still going and/or the disclosure issue mushrooms in such a way that it is
8 impracticable, then if that is practicable I think it is practicable for the tribunal
9 for the parties to keep that second date in reserve or available, then we would
10 go that way.

11 That is as far as I am able to say. I am happy to hear submissions, I haven't
12 decided.

13 MR KENNELLY: My Lord, if I may say so, that is a very helpful indication. Just so I
14 understand, is the tribunal's position that it is keeping the dates of the 18th to
15 the 21st free in case it is necessary?

16 MR JUSTICE MORRIS: I will check with the tribunal, but I believe it would be
17 possible to do that, to keep it available to see how things pan out in the next
18 I suppose before Christmas or just after.

19 I should say that of that bracket of the 18th to the 21st, the tribunal's preferred dates
20 are the 19th and 20th. The preferred dates in January because of the
21 possible uncertainty of my position, the preferred dates would be the last two
22 days of that week, which is 30 and 31 January.

23 MR KENNELLY: My Lord, if the dates in February are kept in reserve, and certainly,
24 from my side, those dates are available

25 MR JUSTICE MORRIS: Let's find out from the start. Can everybody on your side do
26 both those alternatives?

1 MR KENNELLY: Yes.

2 MR JUSTICE MORRIS: I don't know, Mr Williams, where you are in terms of those
3 dates.

4 MR WILLIAMS: Sir, the picture is a bit complicated, as far as we are concerned,
5 because I am quite unlikely to be able to deal with the final hearing, in any
6 event, but I appear today.

7 MR JUSTICE MORRIS: Yes.

8 MR WILLIAMS: The CMA is ascertaining counsel's availability for a range of dates.
9 At the moment, in the week of the 27th, the CMA's preference would have
10 been for two days between the 27th and the 29th because of counsel's
11 availability.

12 MR JUSTICE MORRIS: So if we put it back as far as possible from our point of
13 view, it is the 28th and 29th?

14 MR WILLIAMS: That is our position, but I can't say the 30th is impossible. That was
15 a preference. There's bound to be a struggle between these different
16 considerations.

17 MR JUSTICE MORRIS: Okay, but in terms of the January dates, the CMA, whether
18 it is you, you can get the team a team that you want

19 MR WILLIAMS: In that week.

20 MR JUSTICE MORRIS: in that week?

21 MR WILLIAMS: Yes, we've made ourselves available for that week.

22 As far as the second window is available, it seems likely that the CMA would have to
23 instruct counsel other than that in contemplation at the moment, if that week
24 were chosen, so that would cause difficulties, and the prospect of a late
25 change from a January date to a February date would involve some
26 disruption. But we hear you, sir, in the sense that your preference is for

1 January and that is a contingency and, in a sense, we may have to cross that
2 bridge if we get there.

3 MR JUSTICE MORRIS: All right.

4 Mr Kennelly?

5 MR KENNELLY: My Lord, I say right away that, as I said, the January dates suit us.

6 Our preference is, for the reasons I have given in the skeleton, the back end
7 of that week, which also appears to be more convenient for the tribunal.

8 MR JUSTICE MORRIS: Yes.

9 MR KENNELLY: Perhaps, while I am on my feet, Mr Williams can get confirmation
10 as to whether those because he was uncertain as to whether they could do

11 MR JUSTICE MORRIS: 30 and 31. I am presuming it is Miss Demetriou's
12 availability you are concerned about.

13 MR WILLIAMS: That is right. At the moment, she has a commitment on the 30th,
14 but we think that commitment may be moveable.

15 MR JUSTICE MORRIS: All right. Let's work on the basis, at the moment, that the
16 30th and 31st is possible or is what we are looking at, and then we will see
17 where we go. What we will then do is we are going to work backwards to see
18 how the other steps fit in, I think. Yes?

19 MR KENNELLY: In terms of the actual structure of the plan, if we have the 30th and
20 31st, I can see the sense in fixing the hearing for those dates, because my
21 reasons for asking for a later fixing is contingent on what might be ordered by
22 the tribunal in the disclosure application. If the parties and the tribunal keep
23 the February dates free, then that gives us some comfort, because, if it
24 becomes apparent when we get the disclosure that it will be impossible fairly
25 to prepare, then we will come back before you urgently and seek to have the
26 hearing relisted for the February dates. That would address, in large part, the

1 concerns that I have raised before you.

2 MR JUSTICE MORRIS: Yes. I see that and I take that on board. I also bear in
3 mind the observation Mr Williams just made a moment ago about the CMA
4 having to change counsel potentially, but let's I will hear Mr Williams on that
5 in a moment.

6 For the time being, if we work on the 30th to 31st or the 29th/30th I am not sure it
7 makes much difference is the next step to look at the steps involved and
8 look at the dates there and work through that?

9 MR KENNELLY: Indeed it is, yes.

10 MR JUSTICE MORRIS: I was going to use your skeleton.

11 It seems to me, if it were first of all, we don't know how much disclosure is going to
12 be in the dispute there. I have read or skim read the letters. I can see the
13 scope for dispute and I can see the scope for volume of material.

14 Would it not make a difference and I understand that everybody has Christmas
15 holidays, if, assuming there has to be an order for later disclosure post
16 defence, that that deadline for providing it happens before Christmas rather
17 than after? If that would happen, I mean maybe it is worth leaving until 6
18 January, maybe 6 January, but if it is said, which, as you were saying initially
19 Mr Kennelly, that if you don't get disclosure until 6 January, that makes a
20 hearing at the end of January tight, then either that proposition is not right
21 and, in fact, there will be enough time or the alternative is to bring forward the
22 date for the disclosure application so that the disclosure is provided before
23 Christmas. They seem to me to be the options.

24 MR KENNELLY: We are content to keep the disclosure date 6 January. The
25 concern we have you see in our timetable, you see we also allow ourselves
26 11 days, only 11 days, to deal with the disclosure by way of a reply to the

1 defence. The CMA suggests nine days so there's not much between us to
2 deal with the disclosure in a joint skeleton reply. So we think

3 MR JUSTICE MORRIS: Where is the nine days? Sorry, I see your 11 days.

4 MR KENNELLY: The CMA letter, if you look at that, it says that the disclosure is
5 provided any disclosure is ordered to be provided by 6 January, the same
6 date that we have suggested, and then our skeleton is to be lodged on the
7 15th.

8 MR JUSTICE MORRIS: Okay, so they say nine days.

9 MR KENNELLY: We say 11, they say nine, which demonstrates how much time we
10 think we need to deal with disclosure, even if it is voluminous. The key point
11 for us is, because we will be fully occupied, in a very tight window, dealing
12 with disclosure and explaining in the reply why it makes a difference to the
13 issues in the case and it could be voluminous, that is likely to be a difficult job.
14 There is real merit in having a separate skeleton argument later. It is too
15 much, we say, to expect us to do the skeleton, which is a very important
16 document in judicial review, at the same time as dealing with the disclosure.

17 If we did it separately, not only would it allow us fairly to do the skeleton, but also we
18 would produce a much more useful document for the tribunal. It would be a
19 very short document and, as the tribunal knows well, in a judicial review, if we
20 have any hope at all, it is a with a short, concise skeleton argument.

21 MR JUSTICE MORRIS: Punchy.

22 MR KENNELLY: Indeed, and it would be impossible to do that, mixed up with a very
23 long reply dealing with voluminous disclosure.

24 MR JUSTICE MORRIS: I was not initially attracted by the need for having different
25 deadlines for the reply and the skeleton. I might be more attracted by them
26 being different documents with a similar deadline.

1 Can we work backwards from, let's say, 30 January, as to what, in terms of
2 skeletons, could reasonably be done by and see what time that gives for I
3 am assuming that would we go with the normal 14 days before for applicant,
4 7 days before because we have got various things afterwards to be dealt
5 with, bundles and the like.

6 MR KENNELLY: Yes.

7 MR JUSTICE MORRIS: Am I right in thinking that we don't want to be truncating that
8 structure?

9 MR KENNELLY: Definitely not, my Lord.

10 MR JUSTICE MORRIS: So that would mean that your skeleton would be on roughly
11 16 January, wouldn't it?

12 MR WILLIAMS: I don't know if it helps, sir, we have got an outline timetable on page
13 3 of our letter which is not a million miles from the timetable that the tribunal
14 now has in mind.

15 MR JUSTICE MORRIS: Can I look?

16 MR WILLIAMS: Yes. It occurred to me that if we changed the last bullet to work
17 backwards, that might give you a framework, sir.

18 MR JUSTICE MORRIS: Mr Kennelly, do you have that?

19 MR KENNELLY: I do. I am I mean, to be honest, my timetable and the CMA's are
20 extremely similar, so it doesn't really matter which one you use.

21 MR JUSTICE MORRIS: Yes.

22 MR KENNELLY: Dealing with the point that you, my Lord, raised just now, 14 days
23 for our skeleton before the hearing and seven for theirs, it's very important to
24 keep that, because their skeleton is the first time we will see what their
25 answer is to our points on the new evidence, the new disclosure that we get.

26 MR JUSTICE MORRIS: That is fine. I think that has to be set in stone, and I agree,

1 which would mean that assuming it is the 30th well, we will leave it as 14
2 days before, but that would be the 16th and the 23rd I am assuming those are
3 week days the 23rd for respondent's skeleton, and the steps in between
4 bundles and the like, that can be worked out in the detail.

5 MR KENNELLY: Indeed.

6 MR JUSTICE MORRIS: But that then if disclosure is 6 January, that leaves ten
7 days for you to do your skeleton and do your reply to disclosure.

8 MR KENNELLY: Yes, my Lord. We are content obviously, we are content with
9 those dates, and also, although you have heard me on having staggered reply
10 and skeleton, but if you are against me on that, we are content to have two
11 separate documents on the same day. That period also allows us to come
12 back hopefully, we won't need to, but to come back to the tribunal to say
13 that the timetable no longer works because of the nature of the disclosure that
14 has been provided. But because of the extra days, the couple of days we
15 have been given, hopefully that won't arise, but we do still say the tribunal
16 should stick

17 MR JUSTICE MORRIS: Going back to Mr Williams' piece of paper, or the CMA's, if
18 we are looking at 'the Ecolab skeleton will serve as a reply, et cetera, et
19 cetera', it would be the 16 January disclosure ordered by the 6th.

20 You are content with the disclosure on the 6th?

21 MR KENNELLY: Yes.

22 MR JUSTICE MORRIS: The only other point, I wonder, is whether the timetable for
23 the application response can be truncated. So, for example, I am looking now
24 at your paragraph 8, Mr Kennelly, on page 2, and I will tell you why that might
25 be beneficial as well. Let me just the 16th is a Monday, isn't it, of
26 December? And the 9th December is a Monday. Yes?

1 I am just wondering, there is a bracketed period for the tribunal to deal with the
2 application between the 17th and the 20th. The 20th is the Friday before
3 Christmas. Who is however many people are going to be around the
4 following week, I am not so sure. The likelihood is that that decision will be a
5 decision that will be taken. It is unlikely to be a reasoned ruling in the course
6 of that week, given what else I am doing. My only thought was this: could
7 those dates of the 9th and 16th be brought forward to the 6th and 13th, such
8 that the response is received by the end of the week of the 13th rather than
9 on the Monday?

10 MR KENNELLY: My Lord, the first point to make, if you look at the CMA letter, is
11 that they have, themselves, advanced the date of 13th December for them to
12 respond.

13 MR JUSTICE MORRIS: Okay. Can I go to the CMA letter?

14 MR KENNELLY: Perhaps Mr Williams is right we should look at the letter. The CMA
15 to respond to any application by the 13th, so that is there.

16 MR JUSTICE MORRIS: But they are not insisting on your application being brought
17 forward?

18 MR KENNELLY: And necessarily, because, of course, we have no idea what we are
19 going to get in their defence.

20 MR WILLIAMS: I think, in fairness, we accept they have got to digest the material,
21 but it is our material, so

22 MR JUSTICE MORRIS: Assuming that you disclose some material.

23 MR WILLIAMS: They have got to digest the defence.

24 MR JUSTICE MORRIS: Maybe that works better then. Maybe we go with that. It
25 gives the tribunal more time to consider the application to get a decision out
26 as soon as possible, because the sooner the decision is out I don't know

1 what the decision if it got out I am not going to change the CMA's deadline
2 for providing the disclosure, but I would imagine the earlier the disclosure can
3 be provided and I would encourage that if it can be provided before
4 Christmas it would make everything, perhaps, easier and you might want to
5 do two staggered documents. I don't know.

6 MR KENNELLY: The CMA, of course, can provide documents whenever they like,
7 but we are in their hands in that respect. But, hopefully, they will all hear what
8 the court is saying.

9 MR JUSTICE MORRIS: That seems to me, then, to resolve it. I do think we will
10 need so looking at paragraph 8, if you want to do that, 8.1 and 8.2 would be
11 the same. 8.3 would be the 13th.

12 MR KENNELLY: Yes.

13 MR JUSTICE MORRIS: Then, I suppose, 16 to 20, tribunal deal with, rather than I
14 am not sure whether that needs to be whether I need to make an order
15 against myself, giving myself a deadline.

16 MR KENNELLY: No.

17 MR JUSTICE MORRIS: But I mean, I think we can put something in the order that
18 the ruling to be made before Christmas or whatever it is.

19 6 January for the disclosure, and then we are going to have 16 January, aren't we,
20 for Ecolab to file a reply to the defence, including to file (1) a reply and (2) a
21 skeleton argument.

22 MR KENNELLY: Yes.

23 MR JUSTICE MORRIS: And then well, actually, no, what we are going to do,
24 because we don't quite know precisely the hearing date, I am going to say 14
25 days before the hearing date in the order, because it might 14 days the
26 hearing date, and then 7 days so paragraph 8.7 will go, 8.8 stands, 8.9 stands

1 and 8.10 will be the hearing date will be well, I will think of the wording, but
2 on dates to be confirmed.

3 You have got something to tell me?

4 MR WILLIAMS: Just to be clear, sir, is the order that it is 14 days for the reply and
5 the skeleton?

6 MR JUSTICE MORRIS: Yes, it is. But by 14 days: (1) reply including any to
7 respond including any disclosure and (2), skeleton argument.

8 MR WILLIAMS: Yes. So the reply gets rolled into paragraph 8.7 rather than the
9 skeleton getting rolled into 8.6?

10 MR JUSTICE MORRIS: It does. That is a very good point, but, yes, it does.

11 Two other matters I have on my list.

12 I think the actual direction in terms of listing will be a two day hearing be listed or a
13 hearing be listed for two days in the period 28 to 31, and then we will wait for
14 confirmation. Would you rather me list it for 30th to 31st?

15 MR KENNELLY: I would, my Lord, yes, because I have been told by my instructing
16 solicitors they have a hearing until the 29th, so it means they are unavailable
17 to assist us. So the 30th to 31st is by far and away the more convenient
18 dates for the applicant.

19 MR WILLIAMS: We do understand the timetable is being organised around the
20 hearing date. I think our position is that we are content for the tribunal to
21 direct the 30th and 31st, and, in extremis, we can

22 MR JUSTICE MORRIS: You can reapply, have liberty to apply. Okay.

23 Two other issues: (1) is a list of issues, agreed list of issues shortly before the
24 hearing, and (2), an agreed chronology. I know that there is a chronology that
25 you have provided. It may be useful to have for the CMA to look at that to
26 add in and the like. It may be that that chronology might be modified in the

1 light of disclosure, possibly.

2 MR KENNELLY: That is what I was thinking, yes.

3 MR JUSTICE MORRIS: I am conscious that when one directs parties to agree
4 things, it causes more trouble than it is worth. Can I point out that if there is
5 any disagreement, I am very happy to have alternates put in different colours,
6 if needs be. You don't have to sort of argue it until the cows come home
7 because I know it takes a lot of time.

8 MR KENNELLY: Or only put in the bits we do agree which means it is a shorter
9 document.

10 MR JUSTICE MORRIS: I think the list of issues would be useful.

11 MR KENNELLY: Yes.

12 MR JUSTICE MORRIS: I have read the notice of application. I know that ground 1
13 goes to the substance of the SLC and the remaining grounds go to the
14 remedy and I know you put it in different ways.

15 Mr Williams?

16 MR WILLIAMS: In terms of the list of issues, sir, would you envisage that it is at a
17 greater degree of granularity than the grounds? For example, one or two of
18 the grounds break down into sub-grounds, but obviously one could then go
19 further and try to identify topics within those grounds. I mean, to some extent,
20 it is a case of seeing how it turns out, but I thought it would be useful to clarify
21 what the tribunal ...

22 MR JUSTICE MORRIS: Obviously, it has to be shorter than the grounds, or shorter
23 than the notice of application. It has to be a summary document. But if you
24 can agree that there are within, let's say, the remedy grounds and there is the
25 error of law point and there is the rationality point and proportionality, if there
26 are sub-topics within it that you identify and clearly agree between you that

1 they are sub-topics which need to be resolved, then, yes, the greater the
2 degree of granularity, the better, but I don't want a sort of I don't think it
3 warrants a five page or ten page document.

4 MR KENNELLY: That is a helpful indication again. I think we can do two or three
5 pages which are really the sub-headings.

6 MR JUSTICE MORRIS: It is headings.

7 MR KENNELLY: We can do that.

8 (Pause).

9 MR JUSTICE MORRIS: As far as we are concerned, the remaining issues are if you
10 could submit an agreed order from today's hearing, that would be helpful. Do
11 include something about the estimated time for the disclosure ruling, if
12 needed, and, secondly, a point about bundles, which is that, when preparing
13 any bundles, could we ask that they are not overfull? The application bundle
14 is a bit full.

15 I have taken various things out. It is very well prepared, but we all know about
16 dealing with lever arches and travelling with them and then they break and the
17 like.

18 MR KENNELLY: I apologise for the definitely overfilled application bundle, because
19 mine broke and we will make sure our bundles are transportable in future.

20 MR JUSTICE MORRIS: Is there anything else?

21 Anything else from you Mr Kennelly?

22 Mr Williams?

23 MR WILLIAMS: Only to clarify I think we had envisaged the disclosure application
24 being dealt with on paper.

25 MR JUSTICE MORRIS: Yes. It will have to be dealt with on paper. Yes. As I have
26 indicated, the likelihood is that you will get a decision and you will get a written

1 ruling later, assuming it goes ahead, which I don't know yet, do I?

2 Very good. Thank you all very much. Thank you for attending this morning. I saw
3 your submissions yesterday, and I took the view that it was necessary to have
4 everybody in the room together to sort it out. I know it hasn't taken very long,
5 but I think it has been useful.

6 Thank you all very much.

7 (11.05 am)

8 (The hearing concluded)

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