

PRESIDENT: Could I have appearances, please.

MR R. MILLER: Good afternoon, sir. RODERICK MILLER, appearing on behalf of the CPSU(SPSFT), sir.

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PRESIDENT: Yes, thanks, Mr Miller.

MR W.J. FITZGERALD: If it pleases, I appear on behalf of Retirement Benefits Fund, FITZGERALD, W.J.

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PRESIDENT: Good. Thank you, Mr Fitzgerald. Mr Miller?

MR MILLER: Thank you, sir. It's auspicious today that we meet.

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PRESIDENT: Oh, no. Tell me why?

MR MILLER: In 1834, I think it was, sir, a judgment was handed down in a court in Dorset in England which sentenced seven persons to transportation for forming a trade union known as the Tollpuddle Martyrs, which you will no doubt recall -

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PRESIDENT: An auspicious day.

MR MILLER: Indeed it was, sir, for the trade union movement. And you will recall, sir, through your knowledge of history, one of those Tollpuddle Martyrs eventually found his way to Tasmania and worked at what was then the TTLT at Carolside - a Mr Loveday, I think his name was - for a short period of time.

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PRESIDENT: What was he doing?

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MR MILLER: He was gardening, sir.

PRESIDENT: Very good. Yes. Thanks for that, Mr Miller.

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MR MILLER: Thank you, sir. To the body of the claim. As a preparatory matter, sir, I would like to hand up an addendum to the application for all parties - an oversight on my part.

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PRESIDENT: So this is, again, to clause 7, is it?

MR MILLER: You will see from the application, sir, that the intent is, after the definition of employer in the application, to add the following clause or words to the variation. As you can see from the body of the addendum the words, controlling authority, occurs on many occasions throughout the body of the award and the amended application intends to strike out the words, controlling authority, where occurring and insert the word, employer. It's not to add a clause to the GCOE.

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PRESIDENT: This is - yes, I see. Delete from the award the words, controlling authority and replace with employer. I'll have to have a look at that. All right. You seek to amend your application in that form?

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MR MILLER: Yes. It's just for accuracy throughout the body of the text of the GCOE, should you see so fit to amend.

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PRESIDENT: Yes. Well, I'll leave it to the other side to inform me whether or not they object to the amendment. Mr Fitzgerald?

5 MR FITZGERALD: Look, can I just say at this stage, if I could just reserve our position there. I suppose it's probably desirable to allow it to proceed but subject to assessment of it. On the face of it, it appears to be okay but I'd just like to take some instructions on it but I don't think it should prevent the matter of proceeding here today but I'd just like to reserve the
10 position, where we agree to seeking leave to actually amend the application.

PRESIDENT: Yes. I must say I have some other concerns about it and I don't mind whether or not it's attached to your application as an
15 amendment or not but just on the face of it, without giving the other parties the opportunity to - the other parties to the award the opportunity to comment on it before the commission takes any action would not be desirable.

20 So, given that all the other amendments contained in your application have been circulated to the parties to the award.

MR MILLER: I beg your pardon, I may have misunderstood you. Do you mean this amendment that I've just handed up has been circulated to
25 other -

PRESIDENT: No. I'm saying that hasn't been, whereas the original application has been.

30 MR MILLER: Indeed, sir.

PRESIDENT: And if the other parties had wanted to come along and address your application, they could have, but since it didn't affect them, they probably thought there was no point but this may affect them and I
35 don't know, they might have a reason to want to be heard.

MR MILLER: Indeed, sir. I take your point. Whilst we are dealing with that, I've had a telephone call from Mr Darryl Pyrke of the Engineering Union, and I can't remember their correct title, and he has informed me
40 that I can appear on their behalf and I also have correspondence in front of me on behalf of Mr Mike Hall, the State Secretary of HACSU, that he advises that Mr Miller is authorised to appear on behalf of that union for the above matter listed on 18th March.

45 PRESIDENT: Yes.

MR MILLER: I can hand that up should you so wish.

PRESIDENT: Yes. I have a copy of the letter from the HSUA. I also have
50 a letter from Mr Pyrke of APESMA, who tells me that he supports your application but there's no indication here that permits you to appear for him. So, without a written authority I would not be able to acknowledge your appearance on behalf of APESMA.

All right. That perhaps disposes of most of the preliminaries but in respect of your request to have your application amended, we'll set that aside for the moment and see where we go with the rest of the material. Very good.

5 MR MILLER: The application, sir, is a flow from the previous application that was before this commission some little time ago at T.7290 of '97, the Administrative and Clerical Employees Award and I would submit to you, sir, that this application - the reasons for it fall on all fours with that previous application. Should you so wish, sir, I can take you through point
10 by point but it will only be my previous application to you and submission thereon, but should you see so fit, I'm more than happy to reiterate that submission made in 1997.

15 PRESIDENT: I think you should address the key points, without going into too much detail.

MR MILLER: Very well, sir. I'll try and make a brief synopsis. The Retirement Benefits Fund had new legislation introduced in 1993, which was named the Retirement Benefits Act 1993 by statutory rule 103 of '93,
20 effective as from 1 July '94. It wound up various acts and gave new entitlement to the board, the RBF, to run its particular act and its requirements. There were - at the time the board was acting under the auspices of the Department of Treasury and Finance, who were employing its staff as state servants under the State Service Act 1984 in accordance
25 with state service awards.

The statutory rule 83 of '94, clause 9(2) gave the agency employment powers separate from the State Service Act and subject to schedule 2 of the state statutory rule 93 of '94. Some more senior staff also had
30 contracts who were performance-based but we have no official knowledge of the content of the so-called contracts of employment. Since the introduction of statutory rule 83 of '94, the use of what is called, clause 9 - Contracts, has proliferated with some existing staff being given or enticed to give - to accept regulation 9 contracts and now only regulation 9
35 contract positions are being advertised for new posts.

PRESIDENT: Is that relevant to this application?

40 MR MILLER: I believe it gives you the history, sir, of the application.

PRESIDENT: All right.

45 MR MILLER: The board of the RBF has now various types of employees employed by the board. Some are still state servants, others are regulation 9 employees and others are contract award-free performance-based contracts.

50 PRESIDENT: While you're going through those papers, Mr Miller, and I hate to put you off the track, but is there any measure of consent by the other side?

MR MILLER: Not to my knowledge, sir.

55 PRESIDENT: No. Okay.

MR MILLER: With the enactment of the Retirement Benefits Fund Act, effective from 1 July '94, the Retirement Benefits Fund Board continued as a body corporate but with additional functions and duties to manage and administer the RBF scheme and to act as the sole trustee of the fund.

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The state superannuation office, a branch of the Department of Treasury and Finance, ceased to exist on that date. The employees at that time had the option of remaining state servants, whilst new employees and old employees wishing to do so would become employees of the board. The board has approximately 87 staff, 45 approximately still being employed under the Tasmanian State Service Act. The balance are employed under the Retirement Benefits Act. In fact, there are two employers, the Minister for Public Sector Administration, who is already cited in the GCOE Award and in the A & C Award and the board, who are the legal employees of approximately half each of the new staff at the board.

That in basis, sir, is the history which led to the application for the A & C Award, which was granted. The point then was and is now, that the only matter progressing from a government and employee employer perspective, is that there is some movement afoot to possibly alter the functioning of the existing superannuation scheme and that has led to an internal working party to attempt to come to some form of agreement on future working conditions et cetera.

The application for the A & C Award - the Admin and Clerical Award having been granted, incorporates into it at clause 9 of the A & C Award, the following statement:

9. Conditions of Employment

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(a) Unless specified otherwise in this award, conditions of employment applying to employees covered by this award are to be as prescribed in the General Conditions of Employment Award.

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It fell to me, through a conversation, that the General Conditions of Employment Award - the Retirement Benefits Fund Board was therefore, per se, bound by the General Conditions of Employment Award as indicated in clause 9 of the Admin and Clerical Award. It also appeared that to make application for a matter of dispute interpretation or otherwise under a matter contained in the General Conditions of Employment Award, that to make application so to hear that issue one would have to, perforce, make the application to the commission under the title of the Administrative and Clerical Employees Award and then revert to the General Conditions of Employment Award to have that matter heard, whatever it may be.

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PRESIDENT: What organisation would be constrained by that? What organisation would have to use the Admin & Clerical Award?

MR MILLER: If it was the CPSU, sir, who had an issue to do with a matter of employment which was contained in the General Conditions of Employment Award, then it would be either myself or my colleagues at the CPSU making that application to the commission.

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PRESIDENT: Yes. But why - you're not saying that you'd have to do that in respect of the Admin & Clerical Award, are you?

5 MR MILLER: No, sir, not for a matter that's contained under the Admin & Clerical Award because that's basically a salary award.

PRESIDENT: So, you don't think 9(a) does anything?

10 MR MILLER: No. I believe, as I said, 9(a) gives the ability to - or has the effect of roping in, as it were, the Retirement Benefits Fund Board and any other organisation which is mentioned in the A & C Award, such as the Tasmanian Development Authority to be bound by the General Conditions of Employment Award.

15 PRESIDENT: To have to apply those conditions?

MR MILLER: Yes, indeed.

20 PRESIDENT: Yes. But, I mean, your organisation is a party to the GCOE anyway?

MR MILLER: Indeed it is, sir.

25 PRESIDENT: Otherwise you couldn't make this application.

MR MILLER: Indeed it is but for administrative simplicity, I believe that it would be appropriate to ensure that there is minimal confusion as possible in ensuring that both the board, the RBF Board, and any other organisation
30 such as ourselves, were clear with the precise application of the award to any organisation and it was on that basis that the application was lodged.

If I can take you back slightly further to when the A & C Award was first heard in this place and a decision was granted. That was some little time
35 before Christmas of last year. On recognising the possible confusion that may arise in the future, informally I contacted officers of the board and advised them that it would be my intention to lodge application to remove and eradicate as much as possible that confusion which may exist, i.e. to seek to have RBF party to the General Conditions of Employment Award so
40 that both employees and employers were aware of the prescriptions of the awards.

I then was on annual leave for approximately five months -

45 PRESIDENT: That sounds normal. Carry on?

MR MILLER: I was then on annual leave for five weeks, which I haven't had any annual leave for three years so I thought it's about time I take some and on my return, again, I contacted the agency's representatives
50 and informed them that it was my intention to lodge, as soon as I got back into the swing of things - to put this application that we now see in front of us and that was what occurred.

PRESIDENT: And so what - are you going to relate for me the
55 negotiations that have taken place in respect of the application?

MR MILLER: Those negotiations, sir, were minimal because my belief was, with the conversations that I had, that there appeared to be little indication of any impediment to that occurring and I believe my colleague
5 at the end of the bar table will recite to you some matters that the board may wish to bring to your attention at a later time.

So, sir, the issue is, that the CPSU seeks to join the Retirement Benefits Fund Board to the General Conditions of Employment Award, as I believe it
10 is at the present time in any case and this application seeks purely and simply to remove any administrative confusion that there may be in any future application on matters to do with the Conditions of Employment. There are persons who are still state servants and a considerable number of them at the RBF -

15 PRESIDENT: Has anything changed from the date of the proceedings which dealt with the Admin & Clerical Award?

MR MILLER: Not to my knowledge, sir.

20 PRESIDENT: No. So, it's still approximately 45 people being employed -

MR MILLER: There or thereabouts, that is correct.

25 PRESIDENT: Under that award?

MR MILLER: Indeed, sir. There is some indication from government that at some stage in the future there may well be considerable change to the administration of the scheme due to commonwealth legislation which has
30 to be enacted and flowed down to the various state bodies. However, as you are well aware, neither you, in your capacity as president, the board in their capacity as administrators of the fund or any other person, government or otherwise, can with any certainty say that those issues being contemplated at the present time will in actual fact take place.

35 It may well be that there is some possibility that it may or may not do but there is no assurance that those issues will be enacted which makes it, I believe, all the more important for those persons who are employed at the present time and in the future, possibly, at the RBF Board to be assured of,
40 what I would call, a safety-net type award for matters to do with employment as I regaled to you at some length with - and you accepted with some patience. There is under way at the present time a group of people which the CPSU is involved with and the senior staff at the board attempting to come to some agreement on a more flexible arrangement for
45 work practices and working arrangements within the existing work force. That is not yet complete although we are, I believe, working steadily towards that goal.

50 So what I am putting to you, sir, is that this application does no harm to those persons there at present time. Indeed, it is a safety-net award because the vast majority of people whether they be, what is called regulation or clause 9 contract employees, persons who are employed under the auspices of the Retirement Benefits Act or the State Service Act '84, are being paid in accordance with the Administrative and Clerical
55 Employees Award and are also having entitlement to issues contained

under the General Conditions of Employment Award for such issues as higher duties allowances and first-aid certificate type issues and all of those things are at present in train and that is the status quo, certainly to the best of my knowledge.

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PRESIDENT: I'll hear from the other side on that point.

MR MILLER: Indeed, sir. In hindsight, I believe that had I have made the application mentioning both awards at the same time with the A & C Award, then obviously I needn't have been here today and that matter would have gone through on consent.

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The application of this award, as I believe, a reflection only of what is being undertaken at the present time. As I say, I believe the application of clause 9(a) in the A & C Award binds in any case and this is purely an administrative issue to clear up confusion which may or may not exist in the future. If the commission pleases.

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PRESIDENT: Yes. All right. Thanks, Mr Miller. Yes, Mr Fitzgerald?

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MR FITZGERALD: Thanks, Mr President. I will be foreshadowing an application for an adjournment pursuant to section 21(1)(g) and the commission of course can regulate some procedure and can adjourn. I submit, that it is in the best interest of all to adjourn these proceedings. I'm happy to put a submission in support of that application, although I think it may be better that we seek to elaborate on those matters in conference.

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I'm in your hands in that respect, Mr President. I'm happy to put some brief submissions in respect to our application for an adjournment. You've already asked the question, whether there is a consent to this application and Mr Miller has indicated no and I can certainly formally indicate that is the position on behalf of the board and there are very good and cogent reasons why we seek that adjournment.

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So I'm really in your hands as to whether I put submissions as pre-submissions as to why we seek an adjournment or whether we should go straight into conference.

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PRESIDENT: Yes. I'll ask Mr Miller a question first. Mr Miller, are you happy to go into conference on this matter at this stage?

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MR MILLER: Before doing so, sir, I think the record should show some indication of the concerns of the agency prior to going - before I make a full response to your question.

PRESIDENT: I thought that might have been the case but I just wanted to clarify it but I think it is appropriate, Mr Fitzgerald.

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MR FITZGERALD: I'm happy with that. No, I think that's fine. I just wanted to see where we could go but if there's no - I'm happy to put some brief submissions. I suppose in that regard, Mr President, if the matter does to come to I reserve the right to make further submissions but in support of the application for an adjournment, my instructions are, certainly, to seek that adjournment.

We would acknowledge our consent position in proceedings in December, I think it was, of last year in respect of the Administrative and Clerical Employees Award and we certainly would acknowledge very brief
5 discussions which I think Mr Miller has indicated - between Mr Miller and Ms Dumas from the board but they were very brief discussions and given the uncertainties which face the board, those changes which are occurring outside the control of the board, the board feels to proceed with a consent position in respect of this application could be somewhat dangerous as it
10 doesn't know what the effects of those changes which are outside the board's control will bring - what effect it will bring, so we are being cautious in that regard and we just simply want some time to be able to assess it.

15 It may be that the application does proceed by consent -

PRESIDENT: What sort of time period are you thinking of then, Mr Fitzgerald?

20 MR FITZGERALD: I thought that question might be asked. We suggest about one month and I don't think there's any prejudice in that. I will address that aspect in a minute. I think one month would make it - maybe the picture is a bit clearer following that. But those changes could in fact be very significant and it could have an impact on our position in respect of
25 these procedures.

In that regard I'd say, as Mr Miller indicated, to the best of his knowledge, that the awards have effectively been applied anyway and I understand that no-one is in fact prejudice if there was to be an adjournment of these
30 proceedings.

PRESIDENT: Can you tell me what your client's view is as to the effect of clause 9A of the Clerical and Admin Award?

35 MR FITZGERALD: I haven't had much of a chance to look at that but I am aware of this similar sort of issue in private sector awards and I'm sure you would be also, Mr President, and I'm sure this has been tidied up in the award review process in any event, where I understand that awards imported by reference terms are ones which are no longer going to be
40 permissible within the commission's guidelines and we would certainly agree with that sort of direction.

I would say, and I don't have the same view as Mr Miller in respect to the effect of clause 9 of the Administrative and Clerical Award. And I have the
45 view generally, particularly in respect of private sector awards, that where there is a simple reference to another award, that it wouldn't be necessarily sufficient to legally make the parties to this - the Administrative and Clerical Award as being parties to that.

50 In other words, I don't think you can just simply do it by reference. Again, my submissions here are fairly scant but without going to the particular provisions of the act, the powers of the commission to make awards are very specific and that involves the hearing of the parties and the making of orders et cetera and in that regard, a simple reference to another award by
55 buying parties to the Administrative and Clerical Award, those parties

haven't had the opportunity to put any submissions in respect to the General Conditions of Employment Award.

PRESIDENT: They haven't found to be illegal though.

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MR FITZGERALD: Well, that might be so but they're the doubts which I have.

PRESIDENT: I agree with your submission earlier, that the commission does not like those particular provisions and we have the corporate view that the awards ought to more specifically deal with those sorts of matters rather than have some referral mechanism but I don't think there's ever been an admission in this commission, that those referral provisions are invalid.

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MR FITZGERALD: Look, again, I draw some similarities in the private sector where there are awards like the Vegetable Preservers Award, which simply refers holus bolus by a referral mechanism to a federal award and our advice to our members in that regard is that that provision is simply unenforceable. I suppose until it's tested, we will maintain our position in respect to that advice.

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PRESIDENT: Yes, all right.

MR FITZGERALD: And I would see some similarity here. There's the general reference provision, in our submission, is not a valid one. On the face of it, it clearly looks like that it does bind but I think you need to examine it more deeply than that and it is our submission and we will maintain our position there - is that the reference provision by clause 9 of the Administrative and Clerical Award is in fact indeed an unenforceable provision.

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Apart from that, Mr President -

PRESIDENT: That might give added weight to Mr Miller's application.

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MR FITZGERALD: Well, may be. It may as well but I think the basis of our application for adjournment is that there are indeed some significant changes which are under way which will ultimately affect the board. They may have some impact in terms of this application or it may not. We don't know at this stage.

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It's our view that rather than proceeding headlong into this application, which Mr Miller, understandably, thought was going to proceed by way of consent, that the matter should be adjourned. We're happy to see whether some resolution can be explored in conference but if that's not an acceptable course, then we would seek that the matter be adjourned. If it pleases.

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PRESIDENT: Mm. Yes, all right. Mr Miller?

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MR MILLER: Thank, you sir. My concern with the sought for adjournment for one month is that there is, as I've indicated to you several times now, a significant effort by staff to come to an agreement with the board of

management of the Retirement Benefits Fund to have a registered agreement on matters of salary, conditions of service, et cetera.

5 My concern is, that a delay of one month is, I believe, far too long. It may well prejudice the outcomes of that agreement - that agreement that is being sought and that I believe the application for one month may only be being sought to enable various legislation which is being mooted at the present time to come into effect.

10 That being so, I still revert to my initial point, that these persons, I believe, if Mr Fitzgerald's statement could be said to be correct, that clause 9 and its import is not enforceable, then presumably some of those persons employed at RBF may well be said to be without any award coverage on matters of conditions, which I think is not a position in which either the
15 employee or the employers would wish to find themselves and as I have already indicated, I believe that this is no more than an adherence to the status quo.

20 I would reiterate that the employees and staff of RBF are not wishing to impede and indeed are working strenuously to ensure an agreement for the foreseeable future, which is indeed flexible to enable a change in client focus, shall we say, and to come to a position whereby positions, staffing and other issues may be retained in the foreseeable future.

25 Having made that submission to you, sir, I would reiterate that I believe that clause 9 is indeed enforceable and I think that the act under section 38 indicates that. However, in the interests of some compromise I would not necessarily impede a short adjournment to assist the parties in exploring those issues which may be of concern to my colleague at the end
30 of the bar table.

PRESIDENT: When you say, a short adjournment, what do you mean? To go into conference?

35 MR MILLER: Yes, to conference. I beg your pardon - a short conference, to see whether those issues are significant and if we can work them out over a short period of time.

40 PRESIDENT: Yes.

MR MILLER: My concern is for a protracted delay in the application of this variation, sir.

45 PRESIDENT: Yes. All right. Well, thank you for that. What we will do then is adjourn into conference and after we've had the advantage of that conference we will go back on the record and finalise whether or not there will be an adjournment of any extended length and we'll deal with that at that point, but at this stage we'll go into conference. Thank you.

50 **INTO CONFERENCE**

PRESIDENT: Well, we've had a fairly extensive period of conference, Mr Miller. Have you got any comments you want to make at this stage before
55 I report, as best I can, as to what's been resolved?

MR MILLER: Thank you, sir. I'd like to thank the parties for the adjournment and the content of it which has led me to come to the summation that the previously suggested addendum to the application be withdrawn to enable the award as it stands to have the definition of controlling authority thereafter and therethrough it. This is to ensure that no matter what may happen, as to whether persons are employed either by ministerial prerogative under the State Service Act or under the RBF Act 1993, that they are encaptured and encapsulated - I don't think that the parties are on disagreement that the RBF Board is a controlling authority under the State Service Act schedule 2 and as such is an employer of its right and entitlement.

So, therefore by leaving the controlling authority definition as it is enhances the proposition that it is an employer in its right.

PRESIDENT: Yes. All right.

MR MILLER: It would be appropriate to indicate that the CPSU is not adverse to a small adjournment to enable the parties to come forward - some discussion and return to you within a short period of time. If the commission pleases.

PRESIDENT: Yes. Thank you for that, Mr Miller. That's very good. And will you be making contact with the board's representatives for the purposes of that conference?

MR MILLER: I shall do so, sir, immediately after this meeting is dismissed and hopefully arrange some early meeting times.

PRESIDENT: Yes. All right. Well, if I can add at this stage, given the fact that Mr Fitzgerald has had to depart this place in order to attend to another matter and you're free, Mr Fletcher, to comment on behalf of the board if you want to, but I think all that remains at this point is for me to formally adjourn the proceedings until 11.00 am on 1st April, by which time I would expect the parties to have properly established their positions and I understand, given the nature of the conference, that if it is at all possible that the application can be consented to, that will be arranged and I would hope, if you can do that, if the parties could let me know prior to the day, on 1st April.

Thank you very much for your attendance and contributions. The matter is adjourned until that date.

HEARING ADJOURNED

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