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4 record.

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

Case No:1432, 1434,1438 39/1/12/22

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

12 Friday 9<sup>th</sup> September 2022

13  
14 Before:  
15 The Honorable Lord Ericht  
16 Eamonn Doran  
17 Professor David Ulph CBE  
18 (Sitting as a Tribunal in England and Wales)

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20  
21 **BETWEEN:**

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23 Prochlorperazine Decision **Appellants**

24  
25 v

26  
27 Competition Markets Authority **Respondents**

28  
29  
30 **A P P E A R A N C E S**

31  
32 Mark Brealey KC (On behalf of Advanz)  
33 Sarah Ford KC (On behalf of Alliance)  
34 David Scannell K.C. and Charlotte Thomas (On behalf of Cinven)  
35 Aidan Robertson K.C. and Matthew O'Regan (On behalf of Lexon)  
36 David Bailey and Alexander Cook (On behalf of CMA)

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Friday, 9 September 2022

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**(10.30 am)**

LORD ERICHT: Good morning everyone. Some of you are joining us on the livestream on our website, so I must start therefore with the customary warning. An official recording is being made and an authorised transcript will be produced, but it is strictly prohibited for anyone else to make an unauthorised recording, whether audio or visual, of the proceedings and breach of that provision is punishable as contempt of court.

So with that introduction out of the way, we are shortly going to stand to observe a minute's silence in respect of the death of Her Majesty Queen Elizabeth. Few people remember a time when she was not our Queen. We all have our own personal memories of her, whether from seeing her in person or on television.

In her 1957 Christmas address, which was the first to be televised, she said this:

"I do not give you laws or administer justice but I can do something else. I can give you my heart and my devotion to these old islands and to all the peoples of our brotherhood of nations."

In memory of the generosity of that heart that beats no more and a life of service, we stand in silence.

**(Minute's silence observed)**

Grief is the price we pay for love. Now let all of us, members and staff of this tribunal, junior counsel and solicitors and king's counsel, resume our tasks of administering justice.

I thought I would just begin by outlining how I proposed to proceed today. The main issue before us today is to look at dates and timetabling and I'm grateful to all the work that's been done by parties so far in identifying a window and possible dates for that window.

1 What I propose to do is indicate now the availability of the Tribunal and then adjourn  
2 so that you can consider that and discuss that amongst yourselves and then liaise if  
3 necessary through the court. We're very grateful for the indications that have been  
4 given.

5 The Tribunal is available in August but we would not insist on sitting in August  
6 because I appreciate that is a traditional holiday time. But if parties wished to sit in  
7 August, we can certainly accommodate that. Otherwise, we would be looking to  
8 commence on Monday, 4 September. We would envisage a period of six weeks  
9 being reserved for this and we would envisage sitting four days each week.

10 We appreciate that a six-week period starting 4 September would include the time  
11 where Alliance interim results are out and that would put some constraints on the  
12 availability of Alliance, but we as a tribunal would be quite happy to work the  
13 timetable around that in respect of witness availability of Alliance's witnesses during  
14 that time.

15 So if we are going to have it on 4 September and the next six weeks, there will be  
16 other dates which follow on from that, so I will just give you an indication in relation to  
17 these.

18 The pre-trial review which has been suggested for three weeks before, three weeks  
19 before that would be in August. We are quite happy to accommodate it in August if it  
20 suits the parties, otherwise we may have to look earlier than that, perhaps even as  
21 early as late June or early July.

22 There's another timing issue which I raise just now while we're looking at  
23 timetabling -- we can leave the substantive discussion about it later -- but one of the  
24 things we'll be coming on to discuss is the position in relation to director  
25 disqualification. There is a possibility, and we say no more than that at the moment  
26 because the decision has not yet been made by the High Court, there's a possibility

1 that this tribunal will be asked by the High Court to deal with part of that process.  
2 We would propose holding a further case management hearing to discuss the  
3 implications of that, should the High Court transfer it to us. We are proposing for that  
4 Monday, 14 November and there would be skeleton arguments, et cetera, sent in in  
5 advance of that. That hearing might be in person here or it might be remote, it would  
6 just depend how complicated matters may be because I understand that it's not just  
7 the parties represented here who may have an interest in their directors and  
8 director's disqualification, because there is also potentially Mr Dey as well. If it  
9 comes to that at that case management conference, we'll have to look at the  
10 implications for our timetabling and how we're going to handle that. So that's really  
11 the indication I want to give you at the moment.

12 I now propose to adjourn so you can digest that and discuss it among yourselves.  
13 I'm quite happy that we deal with this as practically as possible. So once you've had  
14 a chance to discuss it, if you indicate to the usher what your views are, it may be that  
15 if this is all right to everyone, we can just come on and formalise it. But if there are  
16 issues, then it may be that we'll have some liaison between the usher, the  
17 referendaires and ourselves to try and narrow the issues a bit before we come on,  
18 because it can be very inefficient to try and deal with such timetabling matters with  
19 so many people in open court at the same time. That's the proposal. Does anyone  
20 have anything to say before we go ahead on that basis?

21 MR BAILEY: May it please the tribunal?

22 LORD ERICHT: Yes.

23 MR BAILEY: It's David Bailey. I appear with Mr Cook on behalf the CMA. I'm  
24 grateful for the Tribunal's indication of when you're looking to commence the trial, sir.  
25 Would it be possible to provide the parties with an indication of whether the three  
26 members of the tribunal have availability in any of May, June and July. It will help us

1 in our deliberations in terms of whether we can seek to persuade you to set the trial  
2 for an earlier date.

3 LORD ERICHT: Yes. Well, the reason we've suggested September is that it does  
4 not look practical from our point of view to have it before then.

5 If it had to be before then, we could look at that, but that would involve a  
6 consideration of other commitments which the Tribunal members already have.  
7 We're willing to look at that, but it's going to be very difficult. So we're really offering  
8 you September as the earliest available date which suits the Tribunal other than  
9 August. But, as I say, we don't want to insist that people come in in the holiday  
10 unless they want to do that.

11 Thank you. We're now adjourned.

12 **(10.42 am)**

13 **(A short break)**

14 **(11.42 am)**

15 LORD ERICHT: Thank you. We're very grateful for the indications we've been  
16 having through the usher and the referendaire about the state of your discussions,  
17 so it's appropriate now I think for us to reconvene. I'm just going to ask each of the  
18 parties in turn to address us on what their position is.

19 Can I just say that as this is being streamed and also because there's a transcript, if  
20 you could begin by saying who you are and who you represent. I don't know who  
21 would like to speak first, I'm happy for whoever.

22 MR BAILEY: May it please the Tribunal. My name's David Bailey and I appear with  
23 Mr Cook for the Competition and Markets Authority.

24 LORD ERICHT: Yes.

25 MR BAILEY: We're grateful for the Tribunal's indication in relation to when you  
26 would look to list the trial next September.

1 The CMA's position is as follows: the CMA is ready for this matter to be heard in May  
2 next year. The CMA is keen for this matter to be heard as soon as possible. That is  
3 something we say is in line with the Tribunal's governing principles for matters to be  
4 heard as expeditiously and as fairly as possible. The CMA is concerned about the  
5 prospects that a hearing in this matter will take place some 18 months after the first  
6 Notices of Appeal were filed in April of this year. Similarly, the CMA is also  
7 concerned that this may have a bearing on the determination of the director's  
8 disqualification proceedings which obviously will have to await the outcome of these  
9 appeals.

10 The second point the CMA would like to draw to your attention to is that it has  
11 already sought to be pragmatic and compromise in respect of the trial listing. The  
12 CMA originally instructed two leading counsel, Mr Williams KC for the appeals and  
13 Ms Addy KC for the disqualification proceedings. Neither silk can make a six-week  
14 trial in the first half of next year, nor indeed in August or September next year.

15 LORD ERICHT: Can I just clarify that when you say the first half, that means up to  
16 the end of June, so they wouldn't manage to make May either.

17 MR BAILEY: Correct, sir. That's correct.

18 LORD ERICHT: Yes.

19 MR BAILEY: In that light, the CMA instructed two of its standing counsel, who  
20 regularly appear for the CMA, myself and another senior junior, Mr Jones, as part of  
21 the counsel team. The CMA took that decision at the outset of these appeals.

22 The reason for that is that each of us have been involved at different points during  
23 the administrative procedure and if at all possible, the CMA would be keen to retain  
24 counsel that are not only familiar with the facts of this case but also its enforcement  
25 work more generally.

26 The other thing, sir, the CMA did at the outset of these appeals was to instruct two

1 junior juniors, if I can put it that way, Mr Cashman and Mr Leary, as part of their  
2 four-person counsel team, and it was the four juniors that were responsible for  
3 settling the defence in these appeals.

4 LORD ERICHT: Yes.

5 MR BAILEY: I hope that clears up a misconception that was raised in Cinven's  
6 skeleton argument. The CMA hasn't just recently instructed alternative counsel for  
7 the purpose of this CMC or the trial, actually the decision was made right at the  
8 outset of these appeals. So we have sought to make compromises and we are  
9 currently proceeding without a silk in relation to this matter.

10 LORD ERICHT: Just before we leave that, Williams and Addy, that's a bit of a red  
11 herring because they can't make May anyway so you're going to have to go to  
12 someone else, whatever happens.

13 MR BAILEY: No, sir. In my respectful submission, the CMA are prepared to  
14 proceed to the main hearing with the four members of its existing junior counsel  
15 team.

16 LORD ERICHT: Okay. I am leaving Williams and Addy out of it because it seems to  
17 me that it has no relevance to today if they're not available.

18 MR BAILEY: It has no relevance to the May to the end of the July window, no, sir.  
19 I just mention it purely by way of background to the way the CMA has approached  
20 this matter.

21 LORD ERICHT: Can I just say as well that it seems to me that the CMA has been  
22 working on the basis that they will decide when the hearing is, and not the Tribunal.  
23 I mean, for you to come now and say, "We've instructed these counsel so the  
24 Tribunal must be the other way", is that not the wrong way round? Should you not  
25 have raised it with us and found our availability before you went down that line?

26 MR BAILEY: We had certainly not considered that this would be listed to suit purely

1 the legal representatives of the CMA, of course the Tribunal's diary is relevant. The  
2 CMA had indicated in its skeleton arguments the availability of its legal  
3 representatives and had hoped that the Tribunal constituted to hear these appeals  
4 would be in a position to hear the appeals in the window when all parties were able  
5 to attend the main hearing.

6 If I may just elaborate on the --

7 LORD ERICHT: Just on that window, I had understood that the window in the  
8 papers we've seen was May until September.

9 MR BAILEY: The window, as I understood it as between the parties, that would work  
10 for all of the parties, I think except for the Advanz appellants, was from 22 May to  
11 30 June. That was the sweet spot of dates that would work for the existing counsel  
12 teams. Obviously that was subject to the Tribunal's availability, I'm mindful of that,  
13 sir.

14 Could I just actually turn, though, to explain why there are serious practical  
15 difficulties for the CMA in terms of the September date.

16 LORD ERICHT: Yes.

17 MR BAILEY: In relation to that, none of the existing CMA counsel team, so  
18 discounting the silks, none of the four existing junior counsel can do any date  
19 in September. The reason for that, sir, is that each of them have pre-existing trial  
20 commitments during that time and indeed in early October.

21 We have also in the adjournment, to try and fit the Tribunal's availability, contacted  
22 the competition members of the standing counsel panel -- the CMA has a regular  
23 panel of advocates which appear for it -- to see if any of those individuals could  
24 appear. They haven't been involved in this matter, but unfortunately I can confirm  
25 that none of those individuals either can do a date in September. That's in particular  
26 because of commitments in the Tribunal in the Trucks litigation, which you may or



1 | may not be familiar with.

2 | So as things stand, sir, the CMA has sought to find alternatives as rapidly as it could.

3 | If one were to list the matter in September, it would mean that we would have to find

4 | a completely new counsel team, none of whom would be on the standing counsel --

5 | LORD ERICHT: September is a year away and certainly a court or tribunal would

6 | normally expect that a party can find counsel given a year's notice.

7 | MR BAILEY: Well, one of the difficulties as I've alluded to, sir, is we won't be able to

8 | find counsel that are familiar with the facts of that case. This is a fact-heavy case --

9 | LORD ERICHT: I go back to the point that it's a year's notice. That should give

10 | sufficient time for any counsel to get to grips with the facts.

11 | MR BAILEY: Sir, in my respectful submission, the year cuts both ways. We would

12 | say we are concerned that a year, where actually there are really no steps to take

13 | place between now and skeleton arguments for the trial, is not as expeditiously

14 | moving forward with these appeals as they should.

15 | LORD ERICHT: In that case, what's your availability for January to April?

16 | MR BAILEY: Sir, in relation to January to April, there are difficulties -- and I think the

17 | appellants can also speak to some of this -- in relation to various counsel members,

18 | myself included, who are involved in other appeals against CMA decisions that run

19 | up to 23 December. There is a five-week trial, sir, which I'm instructed in, and I think

20 | other members of the bar here also are involved, which would preclude therefore

21 | going straight into January.

22 | As I understood it from the correspondence, and again my learned friends can

23 | address you on this, some of the witnesses, and Alliance witnesses are not available

24 | in March and April, which makes it difficult for a hearing in that period. If the Tribunal

25 | were willing to look at that earlier quarter of next year, then I would take instructions

26 | to see if there is --

1 LORD ERICHT: The reason I raise that is you seem to be suggesting that there's  
2 an element of urgency here and that the Tribunal is delaying in bringing this matter to  
3 a hearing by delaying it from May, when you say you're available, to September. If  
4 the urgency is so great, it may be that you have to instruct other counsel, not on a  
5 year's notice but on three months' notice, to deal with this earlier in the year.

6 MR BAILEY: Can I just take instructions in relation to that specific point?

7 LORD ERICHT: Yes.

8 MR BAILEY: Sir, I'm grateful. My instructions are, if that were the choice presented  
9 to the CMA, we would, yes, prefer the window January to April next year, that the  
10 matter is heard more swiftly, regardless of the existing counsel members'  
11 availability --

12 LORD ERICHT: So you can instruct new counsel for January to April, but you can't  
13 instruct new counsel for September. Is that your position?

14 MR BAILEY: Sir, the reason why we can't instruct new counsel is largely because of  
15 commitments in this Tribunal. Next year --

16 LORD ERICHT: I appreciate that, I understand that. But perhaps you could just  
17 answer the question.

18 MR BAILEY: Sir, either window, whether it's January to April or September onwards,  
19 yes, would require the CMA to instruct new counsel. But we would say that if one  
20 were weighing those two windows, the earlier is preferable. We would respectfully  
21 also ask you to take into account the possibility -- you may discount it, but we would  
22 ask you to take into account the possibility of whether the Tribunal panel itself could  
23 be reconstituted to see if it would then be able to hear this matter at a time which  
24 suits the parties.

25 Sir, unless I can assist you any further, that is the CMA's position in relation to the  
26 hearing.

1 LORD ERICHT: Thank you very much.

2 MR BAILEY: I'm grateful.

3 LORD ERICHT: Yes.

4 MR O'REGAN: May it please the Tribunal. My name is Matthew O'Regan, I appear  
5 on behalf of the Lexon appellants. Our position is relatively straightforward: both my  
6 leader, Mr Robertson KC, my solicitors, myself and my client are available broadly  
7 through the entire period from May through until December of next year. If I can take  
8 instructions on earlier in the year, I think we're available for that too.

9 Subject to checking with our client, who is a witness in these proceedings, we would  
10 also be available -- the legal team -- from January through until May and through the  
11 rest of the year. The only issue I'd advert for earlier in the year, sir, is the need to  
12 marry these proceedings with any transfer proceedings and whether or not transfer  
13 is likely before then, and that's something of course which is entirely in the hands of  
14 the High Court. Our preference also would be to sit for four days a week over a  
15 six-week window, rather than five days a week.

16 Unless I can assist you further, sir, that is our position.

17 LORD ERICHT: Thank you. I just indicate that the Tribunal's preference is to sit for  
18 four days a week and that is for two reasons. First of all, it allows a bit of flexibility --  
19 if there are unforeseen contingencies, there's a bit of flexibility without having to find  
20 completely new weeks at the end of it. And also, if we're down for six weeks and  
21 we're rather relaxed in the number of days in that because we're working four days,  
22 then if there is a transfer of the director's disqualifications, we should be able to  
23 accommodate that within the six weeks. But I am rather concerned if we go to five  
24 days and cut the time, we might not be able to accommodate director's  
25 disqualifications, so --

26 MR O'REGAN: I'm grateful, sir.

1 LORD ERICHT: Thank you. I just want to go back, please, to Mr Bailey to clarify a  
2 matter. Mr Bailey, are you able to assist us on the point that has just been raised,  
3 which is: is it going to be feasible if there is a transfer to deal with the disqualification  
4 between January and April?

5 MR COOK: I'm Alex Cook, I'm handling the director's disqualifications side on this.  
6 I think the answer is that clearly if the Tribunal lists the appeal for the first half of next  
7 year, it's a matter we would bring to the High Court's attention in support of having  
8 that hearing listed as a matter of urgency.

9 At the moment, the position is that we don't have a hearing date for that application,  
10 it's only just been made.

11 LORD ERICHT: Yes.

12 MR COOK: We are liaising with the other parties, we would hope to try and get it in  
13 in September, but it may not be possible to do that. But clearly if what we can report  
14 to the High Court is that the appeals are going to be happening in the early part of  
15 next year, that's a material fact if the court needs, for example, to expedite the  
16 hearing of that application. It's certainly something we would pass on and I would  
17 expect the High Court to be able to move expeditiously if necessary.

18 I'm afraid it's not a particularly precise answer to the question, but I would hope --

19 LORD ERICHT: I think that's very helpful. Well, let's think this through. We'll come  
20 to a date, whenever that is, when the High Court comes to a decision. If it does  
21 decide to transfer that element to us, presumably there will then have to be  
22 an element of preparation and procedure. I don't know what it would be, but  
23 presumably there would have to be some sort of defences lodged, there would have  
24 to be productions lodged, expert reports lodged, or whatever. How long would you  
25 need between a High Court decision to transfer and us starting a hearing which  
26 incorporated that?

1 MR COOK: Well, it rather depends on exactly what positions the directors take. As  
2 you will have seen from the reading, what we have is a situation here where CDOs  
3 are being sought against all the director witnesses, if I can put it that way, in the  
4 appeals, plus Mr Dey.

5 LORD ERICHT: Yes.

6 MR COOK: In previous cases where the transfer regulations have been used,  
7 what's basically -- and I can take you -- we have a supplemental bundle which shows  
8 how it worked, but basically there was a previous case where exactly Mr Sonpal was  
9 involved and Lexon was an appellant. Effectively what happened was that the  
10 transfer order was made and he relied on the submissions being made by Lexon in  
11 the context of the appeal. All that was directed in that case was that a skeleton  
12 argument be filed, but that may be the case in respect of the witness directors, if  
13 I can put it that way. Mr Dey obviously will require something else because at the  
14 moment he hasn't put in anything in response to the CDO proceedings. But what  
15 that will involve obviously is a matter for the Tribunal to be discussed at a  
16 subsequent CMC. But again --

17 LORD ERICHT: You're not really in a position today to tell us that the CMA is ready  
18 to go ahead in January if disqualification is transferred, which I think goes back to  
19 Mr Bailey's point about availability of the CMA during the first half the year.

20 MR COOK: Well, I could defer to Mr Bailey on that. As far as the CDO proceedings  
21 are concerned, I would be hopeful we could get the transfer application heard  
22 expeditiously if necessary and then it would be a matter for the Tribunal's availability  
23 to case manage it. I think the Tribunal earlier gave an indication that 14 November  
24 was the date which could be accommodated for the case management of the  
25 transfer proceedings in line with the appeal.

26 If not too much, as it were, needs to be directed on that occasion, there's every

1 reason to suppose that the parties could be ready for something in the early part of  
2 next year, perhaps not January, but there's obviously the matter of the Tribunal's  
3 availability as well. But -- I hope that's sufficient.

4 LORD ERICHT: Thank you, that's very helpful.

5 Mr O'Regan, do you have anything further to add before we move on to the --

6 MR O'REGAN: No, sir. I think my learned friend has set out the position as best as  
7 one can at this stage.

8 LORD ERICHT: Thank you very much. Yes.

9 MS FORD: Sarah Ford KC, for Alliance. We are content with the timetable outlined  
10 by the Tribunal which begins in September. We are grateful to the Tribunal for  
11 taking into account and accommodating the availability of Alliance's witness. The  
12 key period for those purposes is the period 19 to 29 September.

13 We envisage, on the basis of a trial starting 4 September, that Mr Butterfield's  
14 obligations could be completed in terms of his giving evidence before that date, and  
15 on that basis we would be content with a trial beginning 4 September.

16 In terms of the possibility of a trial in August, we would reluctantly accommodate that  
17 as a possibility if there is no other option. We do have concerns about it, however,  
18 and those are concerns in particular in relation to those that have young families.  
19 August is obviously the holiday period and it would mean that the opportunity to  
20 spend time with school age children would be lost if the trial were to take place in  
21 August. That is the concern we have, but we have indicated that if there were no  
22 other option, we could seek to accommodate it.

23 The Tribunal has also been canvassing the possibility of an earlier trial in the  
24 period January to April of this year. In relation to that, firstly, I am one of the counsel  
25 who is instructed in the Hydrocortisone appeals which finish on 23 December, so  
26 there would then need to be an opportunity to prepare in relation to an additional

1 trial. I also have short hearings in the diary 30 January to 1 February and 28th and  
2 29 March, which one would imagine accommodation could be made one way or the  
3 other in relation to those short dates.

4 The key concern we have in relation to that period is again the availability of  
5 Mr Butterfield, who is Alliance's key witness. He is Alliance's chief executive officer  
6 and he's given a detailed 70-page witness statement in support of Alliance's appeal.  
7 As the Tribunal will appreciate in his role as CEO, he has extensive ongoing  
8 obligations in respect of the company. Alliance is quoted on the Alternative  
9 Investment Market of the London Stock Exchange and its preliminary full year results  
10 for the year 2022 are due to be published on 21 March 2023. It's invariably the case  
11 that when full year and half year results are published, the CEO and the chief  
12 financial officer of the company hold meetings with all significant shareholders.

13 It's envisaged that those meetings would take place during the seven- to ten-day  
14 period immediately after the publication of those results. They are full days, they are  
15 usually 9.00 am to 5.00 pm at a minimum, and they usually take place in London or  
16 Edinburgh, and I'm told it is unheard of for the CEO not to be present for that process  
17 and it's expected by shareholders that he will be so.

18 I'm also told it's particularly true in the present financial climate that his presence  
19 would be expected. There have been difficult trading conditions in the current  
20 financial year arising from factors such as the Ukraine war and it will be necessary  
21 for the CEO to be present in order to explain both how the company has addressed  
22 those matters historically and how it proposes to do so in the future. There have  
23 also been recent announcements, including the CMA's announcement of the director  
24 disqualification proceedings, which will need to be addressed. In those  
25 circumstances, it's absolutely vital in terms of Mr Butterfield's role that he is present  
26 and able to engage with the shareholders during that particularly crucial period.

1 Those meetings are expected to take place over a two-week period from Tuesday 21  
2 to Friday 31 March.

3 Subject to the availability issues I've already addressed the Tribunal on, we envisage  
4 that one possibility would be that in the same way that the Tribunal has indicated it  
5 might be able to accommodate Mr Butterfield prior to the key dates, if his evidence  
6 could be completed in good time before the key dates in March, that would be one  
7 possibility.

8 LORD ERICHT: Yes.

9 MS FORD: Just in terms of the remainder of that period, obviously the Easter court  
10 vacation is from 6 April to Monday 17 April, the Tribunal will have that in mind. Just  
11 to fill in the blanks, we also have an availability issue in that I have a trial floating in  
12 the window 24 April to 5 May, which is why we indicated then that the window for our  
13 availability would begin from 22 May.

14 LORD ERICHT: Yes, good. Thank you very much.

15 MS FORD: I'm grateful.

16 MR SCANNELL: David Scannell KC for the Cinven appellants, and I appear with my  
17 learned friend, Ms Thomas.

18 In common with the CMA, we stand ready to appear in the window from early May to  
19 the end of July 2023. We cannot under any circumstances accommodate a trial  
20 in September 2023. That is because I am involved in a five-week trial which has  
21 already been listed by the Commercial Court to begin on 23 September 2023 and  
22 there would therefore be an overlap between these appeals and that trial.

23 I'm very grateful to the panel for indicating the difficulties that you are all facing in the  
24 period from May to July 2023. With those in mind then, I would suggest that the  
25 options that should be explored are these.

26 First, every effort should be made to enquire whether a slightly shorter trial could be



1 accommodated in the May to end of July period. It may be that six weeks are very  
2 difficult to accommodate, and no doubt they are, but that a shorter period might be  
3 possible. So sitting, for example, for five days a week would necessarily shorten the  
4 trial and you may be prepared to consider that in the extreme circumstances which,  
5 with respect, we are all facing.

6 I would also say this in relation to the length of the trial: the CMA has indicated,  
7 erring on the side of caution, I should say, that it requires 9.5 days to cross-examine  
8 all of the various witnesses who are going to appear in these appeals. It's also  
9 common ground between everybody before you today that six days will be required  
10 to close this case. So we are dealing there with 16 days.

11 As to the openings, they are very, very short as things stand at the moment. So  
12 each of the appellants, as agreed between all of us to date, will get one and a half  
13 hours to open this case, which is really very short indeed. As no doubt you are all  
14 aware, it's quite common in other courts, and indeed it has happened in the  
15 Competition Appeal Tribunal, to dispense with oral openings and have slightly longer  
16 skeleton arguments in lieu of oral openings, so that's another two days that can be  
17 possibly cut from the length of the trial. That's option A, a shorter trial within the  
18 preferred window from May until the end of July 2023.

19 We share Ms Ford's articulated concerns with a trial in August. We all, or I believe  
20 most of us, have children of school age and that does present domestic difficulties,  
21 let's put it no higher. Nevertheless, like Alliance, we are willing to accommodate a  
22 trial in August if it comes to it. I would re-emphasise, however, that September is  
23 absolutely impossible for the Cinven appellants because that would mean we would  
24 have to start, for example, on 31 July, which is a Monday, and conclude at the end of  
25 August which is, I would respectfully suggest, imminently feasible, given the 16-day  
26 core of the appeal I've just outlined.

1 The remaining options then are an early 2023 start. Obviously we are conscious of  
2 the Hydrocortisone case coming to an end -- I'm not personally involved in that case,  
3 but it's coming to an end on 23 December. We would be prepared to have the trial in  
4 early 2023 but sensibly that should start at the end of January 2023, rather than any  
5 sooner than that, to give everybody who is involved in Hydrocortisone an opportunity  
6 to prepare for that.

7 The final option, which is perhaps the nuclear option but you could consider it also  
8 given the extreme circumstances, is to have a trial in 2024, which we can also  
9 accommodate. Those are my submissions.

10 LORD ERICHT: Thank you very much. I suppose at the end of the day, you're  
11 maybe in a similar position to the CMA in that you have another commitment but that  
12 doesn't necessarily mean your clients couldn't instruct an alternative senior counsel.

13 MR SCANNELL: That is correct. However, I have been involved with the Cinven  
14 appellants throughout the administrative stage of this case for well over two years  
15 now. I was first instructed in 2019 by Clifford Chance, the legal representatives of  
16 the Cinven appellants. I've been closely involved all the way through the  
17 administrative process, including appearing in both of the oral hearings before the  
18 CMA.

19 It would be, in my submission, most unfortunate for the Cinven appellants to have to  
20 change counsel late in the day in the case, given that it is, after all, their appeal.  
21 They're appealing against this decision because they have been faced with  
22 an enormous fine. They've chosen their counsel, they've fought with that counsel for  
23 well over two years and they want to stick with them.

24 LORD ERICHT: In terms of continuity, if there were an alternative senior brought in,  
25 would Ms Thomas be available for September?

26 MR SCANNELL: Yes, she would.

1 LORD ERICHT: Has she had a similar length of involvement?

2 MR SCANNELL: No, she's been instructed latterly in the proceedings.

3 LORD ERICHT: Thank you.

4 MR SCANNELL: If I could just turn around, as the other side have done, just to see  
5 if there are any further points to make.

6 LORD ERICHT: Certainly, and I think Ms Ford has something to say after that. If  
7 you just let us see if there is anything more from Mr Scannell.

8 MR SCANNELL: Just to reiterate the final point which I made to the panel that those  
9 instructing me are very exercised indeed by the possibility of having to change  
10 counsel. They do not want to have to do that. I'm grateful.

11 LORD ERICHT: Yes, Ms Ford.

12 MS FORD: Sir, I just rise to make two short points which arise out of the  
13 submissions Mr Scannell has just made. The first concerns Mr Scannell's option A,  
14 which was the potential shorter trial.

15 In principle, we would welcome the possibility that, for example, the time for  
16 cross-examination might be curtailed. We do have concerns about the possibility  
17 that one might dispose altogether with the possibility of having opening submissions.

18 In our view, this is a case where the Tribunal would be assisted by hearing brief  
19 opening submissions before launching into the evidence and we consider it to be  
20 suboptimal to have a trial whereby the first thing that happens is the witnesses are  
21 called and heard.

22 LORD ERICHT: Yes.

23 MS FORD: The other point, I'm conscious I haven't addressed the Tribunal on the  
24 period of time which Mr Scannell described as the nuclear option, which would be a  
25 trial in 2024. The Tribunal may be aware that there's a large trucks trial commencing  
26 in April 2024 and running to December 2024 in which I am instructed. So in terms of

1 my availability, I would be unable to accommodate a trial which began later than the  
2 early part of the Michaelmas term 2023 because of the necessity to prep for that trial  
3 and then attend the trial.

4 LORD ERICHT: Yes.

5 MS FORD: We are in the same position in the sense that I have had extensive  
6 involvement in these proceedings on behalf of Alliance for some time and we would  
7 consider it extremely unfortunate if we had to instruct alternative counsel in order to  
8 attend. I'm grateful.

9 LORD ERICHT: Thank you very much.

10 MR BREALEY: Hopefully last but not least, Mark Brealey for Advanz. We have a  
11 strong preference for August. Listening to my colleagues, I think that is the slot most  
12 people can accommodate, maybe not ideal, but various people can't do September.  
13 But everybody, I think -- well, the CMA's junior counsel at least -- can do August.  
14 Going through from my colleagues' submissions, I think August appears to be the  
15 consensus. That would be our strong preference. I'm not available at the beginning  
16 of next year, or indeed at the end of next year. No one wants to change counsel, but  
17 Advanz would change counsel and would have to at the beginning of next year and  
18 late 2023.

19 So in my submission, it could be set for August and also in my submission we could  
20 do it within a four/five-week slot. I think six weeks is over-egging it, to a certain  
21 extent, and there is a risk that the CDOs are spoiling the appeal by the companies in  
22 this matter. It could well be -- we haven't even got to the stage where we know the  
23 CDOs are going forward. It should not be forgotten that that's the way it goes. You  
24 can't set something down until you know exactly what's happening.

25 So at the moment, you could set down the appeals in this case and then work out  
26 how it impacts later on the CDOs. It may well be the CDOs can be stayed, for

1 example. But the CDOs are still very much in their infancy, how these are to be  
2 argued and whether the directors have separate representation. It has happened in  
3 the Lexon case, but it's not a given that the Tribunal has to determine it at the appeal  
4 stage.

5 LORD ERICHT: Yes.

6 MR BREALEY: So August would be our preference.

7 LORD ERICHT: Thank you very much. I'm going to invite you all if you have  
8 anything to comment, but just before that, I'm going to ask my colleagues on the  
9 Tribunal if they have any questions for any of you.

10 We have no questions from other members of the Tribunal. So yes, Mr Bailey.

11 MR BAILEY: Sir, if I may, just three brief submissions in relation to my learned friend  
12 Mr Brealey's point about August being a desirable date. For the record, the CMA,  
13 both counsel and the legal service, share Ms Ford's concerns about seeking to list a  
14 date in that month next year.

15 LORD ERICHT: Yes.

16 MR BAILEY: The second point I wish to draw to your attention: Ms Ford mentioned  
17 trial 3 starting in April 2024. There is also next year trial 2, which is due to start  
18 on March of next year and it's listed for 24 to 26 weeks.

19 As I understand it, that is one of the reasons why a number of competition counsel,  
20 both ones instructed in this matter already, and indeed urgent enquiries looking to  
21 see the reason there is no availability of other members of the standing counsel  
22 during the period up until the end of September. The third point is related to the  
23 length --

24 LORD ERICHT: I don't think you're going so far as saying no competent competition  
25 law counsel is free.

26 MR BAILEY: Of course.

1 LORD ERICHT: All you're saying is a lot of them have other commitments.

2 MR BAILEY: All I'm saying sir, is that it will put the CMA in a difficult position and  
3 that there won't be ready alternatives available to it. We of course will do whatever  
4 we can to find alternative counsel once the Tribunal has listed a hearing.

5 The third point just relates to the length of the trial. The parties had agreed a six-  
6 week time estimate, sitting four days a week, as the Tribunal indicated. Certain of  
7 the appellants have questioned the length of time for cross-examination. Sir, it's  
8 always quite difficult to estimate, at least at this stage, exactly how long one might  
9 need with each of the witnesses. There are six witnesses of fact and, as Ms Ford  
10 says, some of them have given lengthy statements. Mr Butterfield's runs to  
11 70 pages. Mr Cresswell has given two statements.

12 I should also add, sir, that this is a case that does involve a number of disputed  
13 primary facts. There are multiple witnesses, multiple contacts over a five year  
14 period. So we've done the best we can with those broad estimates and we  
15 recognise there is a trade off. So if the Tribunal felt it appropriate to limit the time for  
16 the CMA's cross-examination, we will cut our cloth accordingly, of course, it being  
17 recognised that will require the CMA to focus on the key issues.

18 So in terms of an indication of how much we could cut it back, we think that anything  
19 beyond seven days for cross-examination would unduly limit our ability to challenge  
20 the evidence that's been adduced by the appellants and that's really only if the  
21 Tribunal insists on that to accommodate the request we have made about the listing.

22 Thank you, sir.

23 LORD ERICHT: Thank you very much. Yes, do you have any further --

24 MR O'REGAN: Yes, sir. May it please the Tribunal. In terms of availability, 2024  
25 works for us but obviously that is a long way out from where we are at the moment.

26 LORD ERICHT: Yes.

1 MR O'REGAN: In relation to Mr Scannell's suggestion regarding dispensing with  
2 opening statements, whilst that's also possible if extremely much larger and much  
3 longer skeleton arguments are permitted, our preference would be to remain to have  
4 at least some, albeit brief, opening.

5 Our preference in terms of sitting weeks is for four days rather than five. We're  
6 entirely in the Tribunal's hands on that one and secondly, and finally, sir, whilst  
7 August is not ideal, we can make that work for us if that's what the Tribunal so  
8 orders.

9 LORD ERICHT: Thank you very much.

10 MR O'REGAN: I'm grateful.

11 LORD ERICHT: Ms Ford, anything arising?

12 MS FORD: Sir, the Tribunal has my submissions.

13 LORD ERICHT: Thank you, very much. Yes, Mr Scannell?

14 MR SCANNELL: Nothing further from me.

15 LORD ERICHT: Thank you. Well, we're going to adjourn now to consider matters.  
16 This is a very difficult issue. Obviously, we want to progress as efficiently as  
17 possible with this. We don't want to delay this trial for any longer than has to be  
18 done.

19 The problem seems to be availability of counsel to a large extent and it may be that  
20 this is just one of the cases where the Tribunal asks parties to bite the bullet and  
21 obtain other counsel if it's in the interests of justice that this case proceeds to a  
22 hearing where the Tribunal and other parties are available.

23 I think we're probably going to be reluctant to impinge on August, because I think the  
24 family factors are important. But, even if they weren't, I don't think it necessarily gets  
25 us that much further forward, because that would only give us four weeks and even  
26 in a constricted timescale it would be difficult to see how we could do it in four weeks

1 without expanding into September, which means we hit the same problem as we'd  
2 have to deal with otherwise.

3 But that's just some general thoughts. We're now going to retire and consider  
4 matters.

5 **(12.22 pm)**

6 **(A short break)**

7 **(12.41 pm)**

8 LORD ERICHT: Well, we've been trying to find a path through this and we would  
9 just like to air a suggestion and then we can get your immediate reaction and then  
10 we can rise if you need to consider it further or take full instructions.

11 Our starting point is the CMA's skeleton argument which helpfully sets out a  
12 proposed trial timetable at paragraph 16. We would be prepared to dispense with  
13 our judicial pre-reading and do that in our own time so we hit the ground running on  
14 whatever date this is going to start.

15 Then if we look at what happens after that, we have oral opening submissions, two  
16 days, and cross-examination of ten days. Then a break for preparation of written  
17 closings and then oral closing submissions, six days. The proposal is that we would  
18 split the hearing and deal with the evidence, then we would have a break during  
19 which parties could prepare their written closings, and then we would reconvene at  
20 a later date for the oral submissions.

21 The way it would work would be like this: if you take the oral opening submissions,  
22 which is two days, and the cross-examination, which is ten days, that is a total of 12  
23 days. We could start on Monday 5 June and have a period -- I'm going to go into this  
24 in a bit more detail in a moment, but this just the overview -- we would have the week  
25 of the 5, 12, 19 June and the Monday/Tuesday of the next week, which is 26 and  
26 27 June, and during that time we would deal with the oral opening submissions and



1 the cross-examination.

2 We would then have our break and we would resume -- and we're open to  
3 suggestions on this, but we're trying not to impinge on August too much -- you've  
4 suggested six days for oral closing submissions. If we started these on, for example,  
5 Wednesday, 26 July and had six days, that would run into just the first few days of  
6 August but not impinge on the month as a whole. So that would be the overview.

7 Looking at that in a bit more detail: on the first part of that hearing, which would be  
8 where we deal with the evidence, the week of the 5th we would sit on the full five  
9 days. The week of the 12th, because of other commitments of the people of the  
10 Tribunal, we will probably sit for about two or three days, but we're not in a position  
11 at the moment to specify exactly which days. The week of the 19th, we'd sit for five  
12 days, and the week of the 26th and the 27th, we'd sit for the Monday/Tuesday, 26th  
13 and 27th.

14 We hope that would accommodate the current proposed timetable. We'd obviously  
15 look at matters again at the CMC we're going to have once we hear what the High  
16 Court is going to do with the disqualification, and we'd have that hearing on the day  
17 which has been identified in November. At that point, we'd have a more detailed  
18 consideration of the timetable for that evidential hearing. We'd have a consideration  
19 as to the disqualification aspect, how that would fit in with that, and how we might  
20 deal with timetabling that.

21 Hopefully by that time also, we'll be able to give you a bit more specification of how  
22 many days we can sit on the week of the 12th. We can also at that stage have  
23 a discussion in the light of all matters as to whether we need opening submissions or  
24 not. I don't think we need to discuss that today, but I think that can be looked at in  
25 the context of the whole matters.

26 I don't have a view either way. I'm happy to be guided by parties as to whether they

1 think it would be helpful and also whether we have time for it, depending on what  
2 else we need to do.

3 As you may guess by my accent, I come from a slightly different tradition where we  
4 don't have opening statements in Scotland in criminal trials or civil proceedings.

5 Although I'm sure they would be very helpful, I personally would not be at a loss if it  
6 was decided that they had to be sacrificed in the interests of getting the rest of the  
7 material dealt with in the time available.

8 Perhaps I could just ask people for a reaction to that and identify any immediate  
9 problems, and then we'll rise and allow parties to think through it a bit more  
10 thoroughly before we come to a final decision.

11 Yes, Mr Bailey.

12 MR BAILEY: Sir, the CMA is extremely grateful to the members of the Tribunal for  
13 their alternative proposal. The CMA is content with the dates you've indicated.

14 LORD ERICHT: Thank you. Yes, Mr O'Regan.

15 MR O'REGAN: Likewise, we're grateful for the Tribunal's proposal and it is one  
16 which Lexon can accommodate.

17 LORD ERICHT: Thank you. Ms Ford.

18 MS FORD: Sir, we're happy with that proposal.

19 LORD ERICHT: Yes.

20 MR SCANNELL: We're also very content with that. I'm grateful to the panel for  
21 putting the thought into that imaginative solution.

22 LORD ERICHT: Thank you very much. Yes.

23 MR BREALEY: I'm afraid we're not happy, but we're the odd ones out.

24 LORD ERICHT: I thought things were just too good to be true as we went along.

25 MR BREALEY: We'll sort things out.

26 LORD ERICHT: Thank you. Do we need to adjourn now or can we just take it on

1 the basis that that's what we'll do?

2 Good, well, we'll just proceed on that basis then.

3 If we just turn to the matters on the agenda for today and I think to a large extent  
4 there has been agreement on these. If you just bear with me, I'm just going to -- may  
5 I just borrow your copy of that, I've left it behind. Sorry, the other one. Thank you  
6 very much.

7 I think we have a draft order which deals with most matters, so I may just treat that  
8 as the agenda. The first matter on the agenda is steps to trial, including document  
9 platform and consequential directions. We do have our proposed order which deals  
10 with that and the Opus 2 Magnum case management system. Is that something  
11 which is agreed? Can we grant that order, which is paragraphs 1, 2 and 3, or do we  
12 need to have discussion of that?

13 MR BAILEY: That's agreed.

14 LORD ERICHT: That's agreed, so that deals with that. Perhaps it's easier rather  
15 than following the agenda just to follow the draft order.

16 The next item on the draft order is expert evidence. The Alliance appellants have  
17 permission to rely on evidence from the expert doctor, Dr Chowdhury. Is that agreed  
18 or do we need any discussion of that?

19 Just on that, I think it would be of assistance to the Tribunal if you could give us  
20 an indication of what the scope of Dr Chowdhury's evidence is, what he's going to be  
21 addressing us on in general terms; and also, I would like to hear from other parties  
22 as to whether they will also be leading experts and, if so, what's the timetable for  
23 production of their reports. Yes.

24 MS FORD: Sir, it's Ms Chowdhury. She has already produced a report which is  
25 appended to our Notice of Appeal. She essentially deals with the question of  
26 Alliance's forecasting evidence. There is an issue as between us and the CMA as to

1 | what can be derived from Alliance's forecasts and our position is that one can see  
2 | from the forecasts that Alliance anticipated generic entry by a generic competitor,  
3 | and the CMA disagrees with that.

4 | Essentially what Ms Chowdhury does is assemble all the figures in the forecast and  
5 | Mr Butterfield, from Alliance's factual perspective, then explains what Alliance's  
6 | position is, as to what they show.

7 | LORD ERICHT: Thank you. I'll just ask other parties: are they intended to lead  
8 | experts?

9 | MR BAILEY: For the CMA, we are not intending to adduce expert evidence. As  
10 | Ms Ford has indicated, the CMA does resist certain aspects of Dr Chowdhury's  
11 | opinion and intends to cross-examine her. The estimate the CMA has is half a day  
12 | and, as I understand it, that's agreed with the parties for cross-examination.

13 | LORD ERICHT: Thank you. Yes, Mr O'Regan.

14 | MR O'REGAN: Sir, we're not intending to lead expert evidence.

15 | LORD ERICHT: Mr Scannell.

16 | MR SCANNELL: The Cinven appellants will not be producing any evidence at all.

17 | LORD ERICHT: Thank you. Yes.

18 | MR BREALEY: Advanz neither.

19 | LORD ERICHT: Thank you.

20 | Thank you. The next matter on the draft order was the trial listing, which we will now  
21 | expand to cover what we've discussed.

22 | Subsequent case management conferences, there will be one on the date we've  
23 | identified in November. Is one hour going to be enough, do you think, if we're going  
24 | to deal with the disqualification issues as well, or I suppose it's just an estimate at the  
25 | moment. We can just leave it now.

26 | MR COOK: I think from the CMA's perspective, it might be sensible to table it for half

1 a day. It may be the parties can agree all of the issues, subject to the Tribunal's  
2 thoughts on what is proposed. But perhaps if we put it in for half day and aim to  
3 reduce it if it turns out that's appropriate, then that's what I propose.

4 LORD ERICHT: We'll put it down for half a day at the moment and we'll order  
5 skeletons in advance of that. We'll leave open the question at the moment as to  
6 whether that is in person or remote. We'll decide that once we see how controversial  
7 it might be.

8 We'll have another -- over the page, 6B -- another case management hearing in the  
9 week commencing three months prior to the hearing date. I think we'll -- do we want  
10 to fix a date for that now, or do parties want to look at diaries now we have the  
11 hearing date? I think we'll leave that to be sorted out behind the scenes and put in  
12 the pre-trial review three weeks prior to the hearing date. So if the hearing date is  
13 now 5 June, that's approximately the week beginning 22 May. Are parties generally  
14 available that week, or are there any dates in that week we should avoid?

15 MR BAILEY: Sir, so far as the CMA is concerned, we can do any date that particular  
16 week for the PTR.

17 LORD ERICHT: Yes, Mr O'Regan.

18 MR O'REGAN: I think three weeks before, with respect, is the 15th.

19 LORD ERICHT: I'm sure you're right.

20 MR O'REGAN: I think we're available in that week as well.

21 LORD ERICHT: Let's see. Yes, it's the 15th. Thank you.

22 MR O'REGAN: We can do either the week of the 15th or the 22nd as the Tribunal  
23 seeks.

24 MS FORD: Sir, we can accommodate either of those weeks.

25 LORD ERICHT: Thank you.

26 MR SCANNELL: As can we, sir.

1 LORD ERICHT: Thank you.

2 MR BREALEY: Well, I'm out of it at the moment, so I'm sure Advanz will find  
3 someone to do the CMC.

4 LORD ERICHT: I'm not going to fix a date just now because we have to liaise  
5 behind the scenes. But we'll fix it for some point that week.

6 Now, the next item in the draft order is skeleton arguments: the appellants, four  
7 weeks prior, limited to 30 pages and the respondent two weeks prior, limited to  
8 40 pages. I know this is an extension of the normal length of pages. I'm quite happy  
9 to extend it to the 30 and 40 which have been suggested and to make it the four  
10 weeks and two weeks prior to the hearing date.

11 I'm quite happy to do that unless anyone feels they would like to address me on  
12 either of these.

13 MR BAILEY: Sir, could I address you on one point on paragraph 8?

14 LORD ERICHT: Yes.

15 MR BAILEY: As I understood it from in particular Alliance's skeleton argument at  
16 paragraph 6, I think your draft order should say, "Their respective skeleton  
17 arguments", plural. At the moment, it seems to envisage a single skeleton, whereas  
18 I understood actually each of the appellants, unless my learned friends tell me the  
19 contrary, were intending to put in their own skeleton argument.

20 LORD ERICHT: Yes. Well, we can clarify the language just to make sure there's no  
21 doubt or ambiguity about that. Thank you.

22 Items 10 and 11, which are hearing bundles, the Tribunal has no difficulty with the  
23 wording suggested there. So unless anyone wishes to address me on that, we'll just  
24 make an order in these terms. Does anyone have anything to say about that? No,  
25 thank you.

26 The other thing, and you've been given notice of this, is the question of ambulatory

1 drafts. I know some of you have been involved with ambulatory drafts previously in  
2 another context, and that is the system which has been explained by the President of  
3 this Tribunal in a short interlocutory judgment which is issued, whereby there is a  
4 dialogue between parties and the Tribunal in advance of the hearing seeking to  
5 agree wording and reduce areas in dispute.

6 I'm fairly open minded about that, but I would like to hear parties' general thoughts as  
7 to whether they think it would be good in this case or not.

8 Yes.

9 MR BAILEY: As a general matter, the CMA is supportive of the ambulatory draft  
10 process and sees it as a helpful one insofar as the parties are able to co-operate and  
11 in some instances crystallise non-contentious matters. And as you say, sir, that  
12 seems to be the President's expectation in other appeals involving CMA decisions.

13 The CMA, however, does not consider that this is a process that ought to be  
14 imported into these appeals for three reasons: first, we say that this case is rather  
15 different from the other appeals in which the ambulatory draft process has been  
16 used. As you no doubt will have seen from the pleadings, there are a number of  
17 hotly contested points of fact. Indeed, if there's one thing that we can perhaps all  
18 agree on, it is that we disagree about the interpretation and the implications of a  
19 number of documents and conduct during the alleged infringement period.

20 Secondly, we hope and think the rather lengthy pleadings already set out each  
21 party's cases on the meaning and interpretation of these pieces of evidence and we  
22 currently don't feel it would assist the Tribunal to try and bring this together in one  
23 document.

24 Thirdly, sir, we do have a practical concern which as experience has shown that the  
25 ambulatory process can be an enormous undertaking as parties engage with one  
26 another, seeking to set out their stall understandably about the interpretation of

1 contacts and conduct. Just from -- I'm instructed in the other cases in which this  
2 process has been used. In the Hydrocortisone proceedings, there have been some  
3 five ambulatory drafts started at the end of January this year.

4 We are making progress, it's an iterative process, but suffice it to say, it's still  
5 ongoing. As I currently speak, there are more drafts to be submitted. It has been  
6 helpful in clarifying some common ground, but it has also revealed the extent to  
7 which the parties, as you no doubt would expect, strongly disagree with one another  
8 about certain aspects in those cases.

9 Sir, the CMA did have a fallback proposal. If it would assist the Tribunal. One thing  
10 we say the parties could prepare is a chronological sort of run of documents that at  
11 least one or more of them consider to be relevant to the issues raised by the appeals  
12 and defence, and we'd hope that that might be something which would be useful for  
13 the Tribunal's reading into the trial. But as matters stand, we would respectfully  
14 invite you not to embark on this process in this case.

15 LORD ERICHT: Thank you. When you say a chronological run, do you mean a  
16 bundle of all the documents filed in chronological order, or what do you mean by  
17 that? Or do you mean a summary of "This email is dated such and such a date and  
18 says, and this email is dated such and such a date" --

19 MR BAILEY: I was envisioning the former, sir. So to go through, the documents  
20 relied on in the decision and the notices of appeal and the defence and put those in  
21 a chronological order so the Tribunal can see for itself exactly how events unfolded.

22 LORD ERICHT: That would be very helpful. I must say, I was thinking that that  
23 would be in the bundle of documents we'd be getting anyway, that would be  
24 chronological, otherwise it's almost impossible for a tribunal to work it out if they're all  
25 in a random manner. But thank you for that suggestion.

26 Yes, Mr Scannell.



1 MR SCANNELL: Thank you. I've just passed a note to my learned friend saying  
2 I was happy to go next. I hope that's all right with the panel.

3 LORD ERICHT: Certainly.

4 MR SCANNELL: The Cinven appellants are opposed to the making of an  
5 ambulatory order, I believe this is the common view across the front row. I would  
6 make two points of principle, if I may, and then two practical points.

7 The first point of principle is that in determining these appeals, this panel must make  
8 its own case management decisions. You're not bound by the Hydrocortisone and  
9 Liothyronine order, and you should not feel encumbered by recollections of particular  
10 directions made in other appeals.

11 The second related point of principle concerns the practical difficulty identified by the  
12 Tribunal in the Hydrocortisone and Liothyronine ruling. That difficulty was identified  
13 in paragraph 11 of the ruling as being that it is difficult sometimes to distinguish  
14 between points of controversy and points of agreement arising from CMA decisions.  
15 That was said to be caused by the CMA's tendency to draft in a rather prolix and  
16 discursive way, which drafting does not lend itself to the sort of pleadings you may all  
17 be familiar with involving admissions, denials and puttings to proof.

18 The Tribunal hoped that the ambulatory draft process would solve that difficulty and  
19 has expressed the view that at least in the very particular circumstances of the  
20 Liothyronine and Hydrocortisone cases, the ambulatory draft mechanism would help  
21 to delineate the issues, and the view was expressed that that delineation on those  
22 facts was critical to an effective trial.

23 Now, this panel may very well take a different view and I will say in a moment that it  
24 should. You may well consider that even at the level of principle, before we get to  
25 the facts of our case, ambulatory drafts are actually not necessary to ensure  
26 an effective trial in all cases and that would not be a controversial view at all. Before

1 Liothyronine and Hydrocortisone, no other panel of this tribunal had ever expressed  
2 a view that the regulatory appeals they were called upon to decide were somehow  
3 ineffective, and this includes the Pay TV decisions and the Paroxetine appeals, each  
4 of which were far longer and more complex than Hydrocortisone.

5 In particular, you may take the view that the answer to the problem of long CMA  
6 decisions is to require the CMA to draft its decisions in a tighter way. In the  
7 Compare The Market litigation, the judgment of which was handed down last month,  
8 for example, the Tribunal accepted that there was some force in the submission that  
9 the CMA's 795 page decision involved a great deal of self-reinforcing repetition and  
10 the recycling of points and that that made it difficult to identify exactly what the CMA  
11 was relying upon in reaching the findings of facts that it did. But the answer to that  
12 problem in that particular case was not to attempt to redraft the CMA's decision in  
13 advance of the hearing by committee, as it were, but to set aside the decision and  
14 Professor Ulph will no doubt recognise the point.

15 This brings me then to the practical problems of ambulatory drafts and the  
16 inappropriateness of an ambulatory draft in this case. To cut to the chase, what we  
17 say is that ambulatory drafts will serve no forensic purpose on the particular facts  
18 and circumstances of this case, or at least there's a considerable risk that they will  
19 not. More certainly they will massively expand the documents in the case, they will  
20 impose an enormously time-consuming exercise on all of the parties, including the  
21 CMA, which cannot begin until January in any event, which I'll turn to, and they will  
22 inflate the already considerable costs of the appeal.

23 Looking at those practical problems, certain of the Cinven entities are parties to the  
24 Hydrocortisone and Liothyronine decisions. I'm not personally instructed in them, but  
25 they are represented in those appeals by the same firm of solicitors as instruct me in  
26 this appeal and their experience of complying with the ambulatory draft process in

1 those Hydrocortisone and Liothyronine proceedings is that it is extremely time  
2 consuming and extremely expensive.

3 The sections of the ambulatory drafts drafted to date in those cases have taken  
4 many months of work involving all of the parties to the case. They have excited  
5 vehement debate and disagreement over many months, much of it fruitless and at  
6 great expense, and that process has not resulted in a definitive identification of the  
7 issues in dispute between the parties.

8 The documents generated by the process are themselves massive. In  
9 Hydrocortisone, for example, there exist, as I understand it, two extant ambulatory  
10 drafts. One of them is 300 pages long and that is a document which purports to  
11 condense the pleadings in the case. The other document is 400 pages long and is  
12 not even agreed by the parties. So it's important to appreciate that although the  
13 ambulatory drafts may look like a document which adumbrates a list of issues with  
14 which the chairman will be very familiar for example, it is in fact nothing of the sort.

15 So in short, it's been a monumental task for all concerned to compile these sections  
16 of the ambulatory draft and it's unclear to what extent they will ultimately assist the  
17 Tribunal in Hydro and Lio. So it's therefore impossible to characterise the process as  
18 a proportionate one.

19 In the present appeals, yet further difficulties will arise. First, it will be impossible, at  
20 least for the Cinven appellants, but I assume also for Advanz, even to begin the  
21 process of drafting sections of ambulatory drafts before January of next year. The  
22 Liothyronine appeal is due to be heard in September and October, that's to say this  
23 month and next month. It will immediately be followed by Hydrocortisone  
24 in November running until 23 December. So realistically it will be impossible for  
25 those instructing me to devote any time to the production of an ambulatory draft in  
26 that time frame.

1 Finally, but perhaps most importantly, the merits of ordering ambulatory drafts in the  
2 Liothyronine and Hydrocortisone appeals, whatever they may be, are not present in  
3 the present appeals.

4 In Liothyronine and Hydrocortisone there are substantial disputes as to the  
5 regulatory framework in particular and the application of the relevant regulatory rules  
6 to market participants. There's also a vast documents pool in these cases which the  
7 Tribunal will somehow have to draw together in its judgments in those appeals.

8 Now, neither of those factors is present in the present appeals. There's no factual  
9 dispute at all arising from the regulatory framework and the documentary evidence  
10 relied on by the CMA is in fact strikingly narrow. Indeed, the panel may have seen,  
11 or had an opportunity to see, the pleadings in this appeal. If they have, they will see  
12 that it's a big part of my client's appeal to say that, although the decision is dressed  
13 up as though there is a very broad evidence base in support of the decision, the  
14 evidence base is in fact very, very narrow indeed.

15 As my learned friend Mr Bailey has pointed out, and I agree with him in this regard,  
16 the present appeals will turn on the interpretation of that limited pool of documents  
17 and whether the inferences that are drawn from them are fair and proper inferences  
18 for the CMA to draw. The authors of the documents will be called to give evidence  
19 and will be cross-examined by the CMA.

20 The penalty grounds of appeal don't depend on the documents to any significant  
21 degree, so I would respectfully suggest that the ambulatory draft process will not  
22 assist you in the task that now falls to you and for those reasons we oppose the  
23 notion.

24 I'm grateful.

25 LORD ERICHT: Thank you very much.

26 Yes, Ms Ford?

1 MS FORD: Sir, we agree that this is not a case which is amenable to the ambulatory  
2 draft process.

3 For Alliance's part, in many respects our appeal is really a very simple one. We  
4 simply say that we were neither party nor aware of any market exclusion agreement  
5 and we say that the CMA has simply got it wrong insofar as it concerns Alliance.  
6 The Tribunal will hear the evidence of our witnesses on that and they will say we  
7 were not involved in any market exclusion agreement and the Tribunal will determine  
8 the appeal at trial on the basis of the evidence that it's heard.

9 That is not in our submission a process which is particularly conducive to the  
10 production of an ambulatory draft.

11 We understand that the Tribunal's concern in Hydrocortisone was that there was a  
12 lack of clarity as to the matters in dispute in that case and, while that might be  
13 an issue in a complex regulatory appeal, in my submission it's simply not the case in  
14 relation to Alliance's appeal in these proceedings. It's a straightforward and  
15 traditional dispute of fact. The ambit of that dispute is relatively clear on the face of  
16 the pleadings and there's no particular reason to think that there will be efficiencies  
17 for either the parties or the Tribunal in engaging in the ambulatory draft process to  
18 the trial itself.

19 We also echo the concerns that have been expressed about the time and the costs  
20 involved in the ambulatory draft process. There is no doubt that it's a very time  
21 consuming and costly exercise. It entails a lot of liaising between the parties, and  
22 between the parties and the Tribunal in advance of the trial and our concern is that in  
23 a case such as this that is not going to be time or cost well spent.

24 LORD ERICHT: Thank you.

25 MR O'REGAN: Sir, on behalf of Lexon we adopt the submissions both of my learned  
26 friend Mr Scannell and also Ms Ford. We are also opposed to the use of ambulatory

1 drafts in this case for reasons they have given.

2 Very simply, as Ms Ford has just submitted to you, this a case of findings of fact  
3 based upon both documents and the inferences that can be drawn from them and on  
4 witness evidence and it's a fairly chronological procedure. It's to do with when things  
5 happened, when documents were entered it and what they mean and then what  
6 witnesses say about what they did or didn't do and those are matters that don't  
7 require ambulatory drafts and for the same reasons we would also oppose it.

8 We'd also agree with Mr Bailey's first three points regarding that this case is again  
9 very different from the two in which ambulatory drafts have been required and the  
10 pleadings set out the parties' cases extremely clearly and again the practical issues  
11 and the cost would indicate that this is not a suitable case for those drafts and,  
12 again, they would not assist the Tribunal.

13 LORD ERICHT: Thank you.

14 MR BREALEY: In short we agree. There is no need for an ambulatory draft in this  
15 case.

16 I do agree with Mr Bailey though that I think the Tribunal would be greatly assisted  
17 by a chronology and the relevant documents referred to in the chronology. So  
18 I think that is the limitation of any sort of ambulatory draft, a chronology, and I think  
19 the Tribunal would be assisted by that.

20 LORD ERICHT: Thank you very much. **(Pause)**.

21 Thank you. We're obliged to you all for your unanimous contributions and we agree  
22 with what you say. We're not going to order ambulatory drafts in this case. It doesn't  
23 seem to be an appropriate case for them.

24 However, we would find the chronology and the chronological bundle of documents  
25 very helpful, so we shall make an order for that to be provided in with the other  
26 matters in the timetable. Thank you.

1 | I think that brings us to the end of the agenda. Is there anything else anyone wishes  
2 | to raise today?

3 | MR BREALEY: I don't believe so.

4 | LORD ERICHT: No. Thank you. We're now adjourned.

5 | **(1.16 pm)**

6 | **(Hearing concluded)**

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