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IN THE COMPETITION
APPEAL TRIBUNAL

Case No: 1407, 1411 - 1414

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Friday 4th November 2022

Before:
Sir Marcus Smith
(the President)
Simon Holmes
Professor Robin Mason
(Sitting as a Tribunal in England and Wales)

BETWEEN:

ALLERGAN PLC AND OTHER

Appellants

v

COMPETITION AND MARKETS AUTHORITY

Respondent

A P P E A R A N C E S

Tim Johnston (instructed by Addleshaw Goddard LLP appeared on behalf of Allergan plc)

Mark Brealey KC (Instructed by Morgan, Lewis & Bockius UK LLP appeared on
behalf of Advanz Pharma Corp)

Robert O'Donoghue KC and Emma Mockford (Instructed by Clifford Chance LLP appeared on
behalf of the Cinven Entities)

Sarah Ford KC and Charlotte Thomas (Instructed by Macfarlanes LLP appeared on
behalf of Auden/Actavis-UK)

Robert Palmer KC, Laura Elizabeth John and Jack Williams (Instructed by Linklaters LLP
appeared on behalf of Accord-UK Limited, Accord Healthcare Limited and Intas
Pharmaceuticals Limited)

Josh Holmes KC and David Bailey (appeared on behalf of the Competition and Markets
Authority)

Friday, 4 November 2022

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(10.30 am)

THE PRESIDENT: Good morning, everybody. I know we have an agenda, but reading the very helpful written submissions that we have received, I have a list of, I think, eleven items which we need to discuss, and we will go through those.

First of all, though, we will try and take a break mid-morning for the transcriber. But I would be grateful if whoever is on their feet could remind me to take such a break.

Also, we are streaming these proceedings, and if you are joining us by way of live stream, please do not make any recording, audio or visual, or photograph or transmit in any way what is going on. That would be a serious contempt and should not happen.

With those introductory remarks, let me just go through the points that we have identified for discussion.

I will give an indication where we think the point is uncontroversial, so we can keep discussion to a minimum, but I do not want to close anyone out. If I have mistaken the feel of the parties, then I am sure you will tell us.

So, first, publication of ambulatory drafts. We

1 have expressed the provisional view that that is not
2 necessary, and I do not see any pushback from any of the
3 parties. So unless anyone wants to say anything against
4 that, we will not publish, but we will use them in the
5 way we have suggested.

6 Secondly, then, the scheduling of Mr Stewart. We
7 have seen the proposed remote evidence protocol, and for
8 our part, we are happy that he gives his evidence
9 remotely in the manner that is most convenient to him.
10 Again, it seems to us that that is not a point of
11 controversy between the parties.

12 Mr Holmes?

13 MR JOSH HOLMES: It was simply to say that we saw the
14 suggestion in Allergan's skeleton as an alternative to
15 remote evidence that Mr Stewart be interposed following
16 the expert evidence. Given that he gives evidence on
17 a discrete point, which we think will not affect the
18 expert evidence, that appears to us a sensible
19 alternative, but it is obviously a matter for the
20 Tribunal when it would prefer to hear his evidence.

21 THE PRESIDENT: I understand. We are agnostic about the
22 approach, and we are -- if the parties are happy and in
23 agreement about how matters should be dealt with, then
24 we are ourselves happy. So if everyone wants him in
25 person but interposed later, then we will certainly

1 endorse that approach.

2 MR JOHNSTON: My Lord, I am very grateful for that
3 indication and for what Mr Holmes has said. I think
4 that is a sensible solution. We will discuss between
5 us, and whichever of those two options is most
6 convenient we will proceed with. But I think our
7 preference at this point as well would be to have him in
8 person and have him interposed in the expert evidence,
9 if that were possible. So I am very grateful.

10 THE PRESIDENT: Very good. We will proceed on that basis,
11 but this is the sort of question which we will be guided
12 by the parties. So if there is disagreement, we will
13 obviously need to hear about it, but if there
14 is harmony, then we will not seek to disrupt that.

15 Thirdly -- and this touches on a number of points --
16 there is the question of the timetable for the hearing,
17 and that we do understand is controversial. It is what
18 occupies most of the space in most of the skeletons.

19 So we have the CMA wishing to address us on the
20 change to the allocation of time within the hearing, and
21 that is opposed by the appellants in the most part. So
22 we will want to hear the parties on that. But there are
23 a number of related questions to the timetable which I will
24 mention now.

25 First of all, it did not crop up because the

1 timetable has changed over time, but I have -- I would
2 not say a need, but a fairly strong desire to have
3 1 December as a non-sitting day. The reason for that is
4 that is the day on which, for many months now, the CAT's
5 internal training has been arranged, and essentially
6 will get me out of hot water if I am able to attend that
7 rather than be here. So I put it as a strong desire
8 rather than a need, but I hope we can discuss that when
9 we are discussing the timetable more generally.

10 There is also, related to that, the hot-tub question
11 and the expert evidence.

12 Now, I probably was not clear enough last time, but
13 I was trying to be polite about hot-tubbing, and what
14 I said was we would not have a formal hot-tub, we would
15 have a day where the Tribunal might have questions of
16 the experts. That is simply borne out of our experience
17 that, generally speaking, we have our own questions to
18 ask of the experts, and that takes quite a bit of time,
19 which the parties inevitably have to give us because we
20 are the Tribunal and they are not, but it is through
21 a level of gritted teeth, because the parties have
22 budgeted for their own questioning and do not want to be
23 taken out of order.

24 So it is really a day that is intended for such
25 questions that we have which have not been asked by the

1 parties.

2 Now, there may very well be none. Equally, it may
3 very well be the case that we ask them in the course of
4 cross-examination, in which case the day will be used up
5 in that way.

6 So I do not want to overengineer the process.
7 I certainly do not want to have hot-tubbing protocols or
8 anything like that. All we want is to make sure that
9 there is time in the hearing to enable the Tribunal to
10 ask the questions that it wants. I hope that is helpful
11 by way of clarification of what we intended.

12 Again, I do not want to close anyone else out. If
13 there is a positive view that hot-tubbing should be
14 considered by the Tribunal, of course we will consider
15 it, but we are not ourselves pushing it as something
16 that we want to do.

17 There is also on timetable the question of the
18 timing of the CMA's opening. I think there is a desire
19 on the CMA's part to push the opening later on in time,
20 and that I think is something we ought to address in the
21 context of the timetable also.

22 Then, finally, on that, there is the question of
23 putting the case to all, and the CMA has, entirely
24 appropriately, raised the question of whether the same
25 point needs to be put to different witnesses. Let me

1 give a provisional indication there. I am quite sure it
2 is something we will want to discuss, but provisionally
3 our view is that where the matter being explored
4 involves an infringement which is quasi-criminal,
5 collusive behaviour, anti-competitive agreements, that
6 sort of thing, our provisional thinking is that that
7 needs to be put to every witness, because it is an
8 allegation of serious misconduct.

9 On the other hand, where it is a question of, let us
10 say, corporate structure, or something like that, which
11 is much less contentious, our provisional thinking is
12 that that really only needs to be put to one witness and
13 not each and every witness.

14 Now, again, that is something I am sure we will want
15 to hear about from the parties, but it might assist if
16 we explained our thinking, which I have now done.

17 So those were timetabling-related questions, and we
18 will want to hear from parties on those.

19 Moving through a few more uncontentious points. We
20 have a point that Auden raised about terminology, the
21 focal product. We entirely agree we need to nail and
22 kill off any ambiguity, and what we ought to do is agree
23 a set of references.

24 For myself, when I say "hydrocortisone", I am
25 referring to 10 and 20mg tablets, but I quite understand

1 that other people might regard the term differently. We
2 do not really care what the terms are, but we do care
3 that they are agreed, because that sort of ambiguity is
4 productive of enormous difficulty.

5 So whether the parties can, as it were, agree a set
6 of terms which they can use.

7 I did not particularly like Auden's suggestion; it
8 seemed a bit of a mouthful. But we are in the parties'
9 hands there. We would just like it agreed, and we are
10 grateful for it being raised, because we can see it as
11 being a problem later on.

12 So that was terminology.

13 The protection of confidential documents in Opus,
14 which is raised by Cinven in paragraph 27 of its
15 skeleton, that seems entirely sensible to us, and we do
16 not understand that to be controversial, but if it is
17 then the parties can address us on it.

18 Confidentiality representations we think have been
19 dealt with in the letter from the Tribunal, and so do
20 not need to be addressed any further.

21 Then, finally, a request from us. We have Opus up
22 in front of us and we see the file structure, but we
23 wonder if the parties could provide us with a printed
24 list of contents, just so that we know what is embedded
25 in each file on the electronic database; and we may,

1 though we will try to keep these requests to a minimum,
2 ask for some documents to be provided in paper form to
3 assist us in our preparation, but we will come back to
4 this separately.

5 So we think that the only area of controversy on
6 which we will want to hear the parties is the question
7 of timetable, and we think that it is probably best that
8 we hear from the CMA first and then a response.

9 But if you could address, Mr Holmes, all the
10 timetable points in one go, we will try and sort them
11 out that way, and then we will address separately any
12 other points that I may have missed out.

13 Submissions by MR JOSH HOLMES

14 MR JOSH HOLMES: Certainly, sir. Just briefly on the
15 non-controversial points, we will go away, the parties,
16 and agree a glossary of terms, as you suggest. We will
17 also provide a printed list of the materials, an index
18 of the materials on Opus; and of course, if the Tribunal
19 requires hard copies of any materials, the parties will
20 liaise to ensure that they are with you in good time
21 before the hearing.

22 On the timetable points, first of all, as regards
23 allocation of time within the hearing, the first point
24 that you raise, we have seen the reaction of the
25 appellants and there have been strenuous objections.

1 I should say immediately that our concern was just
2 to make sure that we had a workable timetable. It was
3 not to achieve any kind of forensic advantage. Equally,
4 we are not wedded to any particular solution to the
5 points that we raise. We just wanted to canvass them
6 and to kick the tyres, if I might use that rather
7 informal terminology, to make sure that the Tribunal was
8 content with the arrangements that were in place.

9 It may assist if we consider the point by reference
10 to the timetable which the Tribunal distributed before
11 the last CMC. I have as an Opus reference for that
12 {K/28.1/1}.

13 The point concerns the closing sections of the
14 trial, towards the foot of the page, weeks 4 and 5, and
15 the conclusion of week 3.

16 Our concern is simply that the written closings
17 provide a good way of focusing the parties' oral
18 submissions, and they can assist the Tribunal and the
19 parties to keep those focused and responsive. But the
20 timetable as it stands allows limited time for
21 finalising the written closing submissions after the
22 expert evidence, particularly if the evidential overrun
23 day is used, as often proves to be the case.

24 As the Tribunal can see, there is only one day
25 emerging from that process, which is clearly set aside

1 for the preparation of written closings; and, equally,
2 only one working day -- Monday, 12 December -- allowed
3 to read the written closings, which, as, sir, I think
4 you rightly anticipated could very well be voluminous.
5 Past experience shows that they can run into hundreds of
6 pages across the case.

7 Our concern is that that feels quite a congested
8 pinch point in the timetable, which may leave neither
9 the parties nor the Tribunal sufficient time to digest
10 what is said in writing, or indeed to commit the points
11 to writing; and that may not assist the Tribunal in an
12 optimal way to approach the closing stages of the trial.

13 Now, the solution that we have suggested would be
14 for both parties to give some of the time which is
15 currently allocated to oral closings so as to allow more
16 time in the timetable for preparation and more time for
17 reading of the written closings.

18 The particular solution we suggested, but as I say
19 we are not wedded to this, would be to take the Monday
20 for preparation of written closings and the Tuesday and
21 the Wednesday of week 4 for the reading of written
22 closings, and then the appellants would begin on
23 15 December and they would run through until
24 20 December. The CMA would have its closings -- sorry,
25 through until Monday, 19 December, as at present.

1 The CMA would have two days, the 20th and the 21st;
2 and then we would close with replies on 22 December.

3 Now, of course, that leaves a day of flex, and so
4 one could imagine different allocations, different ways
5 of approaching the point. But our main concern was to
6 ensure that you had enough time really to consider what
7 was said and we had enough time to make sure that it was
8 a considered document which was lodged.

9 So that is the first point on timetable.

10 The second point concerns --

11 THE PRESIDENT: Mr Holmes, I know I said you should address
12 all the timetable points together, but I think I might
13 float with you our immediate response to what you have
14 said, because --

15 MR JOSH HOLMES: I am grateful.

16 THE PRESIDENT: -- it is, I think, the most contentious
17 question, because I know exactly what Ms Ford is going
18 to say about this, because she said it last time, and we
19 had -- I do not want to call it a "dispute", but I think
20 it was a dispute, about how far the oral submissions
21 could effectively be replaced by written submissions,
22 and Ms Ford made the point very firmly that her clients
23 attached a great deal of weight to being able to put
24 their case orally, and we acceded to that, and it seems
25 to me that that is not a debate that we want to revisit.

1 That said, the point that you have made about the
2 integration of written processes into what is an oral
3 trial is well made.

4 What I have found in big cases generally is that
5 this is a problem that arises every time. You have got
6 never enough time to produce decent written closings.

7 What sometimes works, but it is usually opposed by
8 the parties, is to say: look, do not produce anything in
9 writing during the course of the timetable. By all
10 means produce speaking notes or whatever you want, but
11 do not feel obliged to. Have your oral submissions, and
12 then, after the event, put in some written closings
13 which deal with the points which are less headline
14 points but nevertheless important.

15 In the trial that I did before the summer, we had
16 two rounds of written closing submissions produced after
17 the trial. It worked very well. The problem was it
18 added -- well, in that case it added several months to
19 the timetable because we got written closings in August
20 and October. But it worked rather well, and the
21 documents were of course much more polished and
22 considered, and I think possibly even shorter, than they
23 would have been had they been produced essentially
24 overnight or over the course of a couple of days.

25 So what I am really raising is whether that might be

1 the answer to maximise the face-time that we have during
2 these five weeks, but to ensure that the parties have an
3 ability to put their written submissions in.

4 Now, it is not something I am minded to impose on
5 the parties, because we have not discussed it, but if
6 that is something which has general appeal, then we can
7 discuss it further.

8 MR JOSH HOLMES: That is a very helpful indication, sir, and
9 I am grateful for that. I am sure that we will all take
10 instructions on that point. It is obviously a delicate
11 balance, and we are minded of the need not to swamp the
12 Tribunal in further materials. It is obviously
13 a question for the Tribunal what it would find most
14 helpful.

15 Equally, there may be points which emerge during the
16 course of oral submissions on which you, sir, may feel
17 that you would find it helpful to have the parties
18 submitting further, more considered documents. So that
19 may be one way of proceeding.

20 I hear what you say, sir, about not re-opening the
21 question of the allocation of time to Ms Ford, and
22 equally to Allergan.

23 I would say, I read the transcript with some
24 interest in relation to that part of the CMC.

25 Ordinarily, in a trial with witness evidence, one

1 might think that the parties that had put their case at
2 length in writing but did not have witness evidence, did
3 not have any evidential matters that would be affected
4 by the course of the trial, would need less time for
5 oral closing rather than more. It is obviously for the
6 Tribunal to consider -- sorry, for the parties, the
7 appellants to consider the division of time amongst
8 them.

9 But we do have an oddity that those parties who have
10 witnesses are significantly more truncated than those
11 who are advancing purely written cases. There is really
12 no question as regards a fair hearing that the Tribunal
13 can control the balance between written and oral
14 submissions and can decide how matters are to be
15 balanced between the parties.

16 We have a somewhat quixotic division between the
17 appellants as a result of where the CMC took us, but
18 I do not want to -- if the Tribunal feels that that is
19 now set in stone, then there may be nothing more that
20 can be said about it now.

21 We did try and share the pain by cutting back the
22 time the CMA would have as well as ourselves -- sorry,
23 the appellants would have as well as ourselves.

24 THE PRESIDENT: You have put your finger on the key
25 question, and it is a question of what is and what is

1 not a fair hearing.

2 Now, it may be that we, the Tribunal, have certain
3 views about that. But I think the point which we did
4 decide last time was that Ms Ford put, in fairly stark
5 terms, the point that her clients regarded two days as
6 the necessary amount in order for them to be assured of
7 a fair hearing; and rather than decide the point one way
8 or the other, I acceded to that time, because it was
9 possible on the timetable, and because I did not really
10 want to have an argument about what does and what does
11 not constitute a fair hearing; and I do not think I want
12 to have that argument today.

13 MR JOSH HOLMES: That is understood, sir.

14 THE PRESIDENT: So that being the case -- I am not saying
15 who is right or who is wrong, I am ducking the issue.

16 Now, that may be not the right way to do it, but
17 since the timetable is workable on the basis of the
18 allocation last time, I am certainly prepared to
19 consider tweaking. But I am not, I think, prepared to
20 go into the point of principle, because I think if I cut
21 the time for oral submissions that were asked last time,
22 then we will have to have an argument about what is and
23 what is not a fair hearing, because otherwise, were the
24 ultimate decision to go against, for example, Ms Ford's
25 clients, I can quite easily see a ground of appeal being

1 articulated that "We did not get a fair hearing", and
2 I just do not want to go there.

3 MR JOSH HOLMES: Yes.

4 THE PRESIDENT: So that is the short answer. It is not
5 particularly principled, but that is the answer that you
6 are going to get on that.

7 MR JOSH HOLMES: That is well understood, sir.

8 THE PRESIDENT: It may be the answer is that we rise for
9 five minutes and give the parties a chance to decide
10 whether after-the-event written closings is something
11 that they want to consider, and we can then debate the
12 mechanics of that if the parties want to go that way.

13 For our part, we can see significant advantages in
14 that, but it is rarely completely uncontentious in
15 cases. Is that a good idea?

16 MR JOSH HOLMES: Very good. I would certainly be happy with
17 the opportunity to discuss, and we will see where we get
18 to, and perhaps I could report back and then update you
19 on the other timetabling points after.

20 THE PRESIDENT: That is very good. Let us rise in that
21 case.

22 MR JOHNSTON: My Lord, briefly, just before we rise, just to
23 clarify the suggestion. At one point you were
24 suggesting that there might be written submissions in
25 closing both during the course of the trial and

1 afterwards. Is that the suggestion you want us to
2 canvass, or is it to move the entirety of written
3 closings beyond the end of trial? Just so we are sure
4 we are asking for instructions on the right point.

5 THE PRESIDENT: No, that is very helpful. What I was saying
6 was that if the parties wanted to have a rough and ready
7 speaking note to hand up in the course of the trial, we
8 certainly would not stop them.

9 MR JOHNSTON: I am grateful.

10 THE PRESIDENT: But the plan would be that the formal
11 documents that would go in would be after the event, in
12 accordance with the timetable that was dealt with.

13 Whether one would have two rounds, so you have
14 a primary and a reply, or one round, well, that is a
15 detail that we would iron out. But you are quite right
16 to ask the question. It would be after the event, with
17 the option of putting something in if, in forensic
18 terms, you like that.

19 MR JOHNSTON: That is very helpful, my Lord. I am grateful.

20 THE PRESIDENT: Very good. We will rise I think for 10
21 minutes. 5 minutes goes by too fast. We will resume at
22 11.10, thank you.

23 (10.59 am)

24 (A short break)

25 (11.10 am)

1 MR JOSH HOLMES: Sir, on the part of all of the parties, we
2 are grateful for the opportunity to take instructions
3 and to discuss amongst ourselves. I am pleased to
4 report that there is a broad consensus view that it
5 would be better, if possible, for the case to be done
6 and dusted by the end of the trial, not least in view of
7 the holiday period which immediately succeeds it.

8 We are obviously mindful that there may be points on
9 which the Tribunal feels it requires further assistance,
10 and we will of course do what we need to do to assist
11 the Tribunal on those. But our proposal, respectfully,
12 would be to stick with written closings during the
13 course of the trial.

14 Just to close off that point, the only suggestion
15 that we would make, and this, I should say, is for the
16 CMA not for the other parties, so you should hear them
17 on this, but without re-allocating any time for the oral
18 closings, in view of your indication, we wondered
19 whether it might be possible to submit written closings
20 by, say, 4.00 pm on Saturday.

21 While that seems somewhat anti-social, it was the
22 approach that was taken in Liothyronine, and as one of
23 the counsel in that case, I can report that the extra
24 time was invaluable in finalising the document given the
25 tight turnaround. But obviously we are in your hands

1 about that.

2 THE PRESIDENT: So instead of 9 December, you would say the
3 10th?

4 MR JOSH HOLMES: Yes, sir.

5 THE PRESIDENT: We will hear what the other parties have to
6 say about that.

7 MR JOSH HOLMES: I am grateful.

8 Shall I rattle through the other points on --

9 THE PRESIDENT: Yes.

10 MR JOSH HOLMES: Thank you, sir.

11 The next point was the question of the Tribunal's
12 questioning of the experts. We are very grateful for
13 the clarification as to what the Tribunal has in mind.
14 On that basis, we do not suggest any change to the order
15 of proceedings.

16 Can I just check that I have correctly understood,
17 though?

18 The Tribunal has a desire to reserve time in the
19 timetable for questions, and on a rough-and-ready basis
20 has suggested up to a day be reserved.

21 Would the intention be that the experts should give
22 evidence in relation to those questions on a concurrent
23 basis, or would they each be called separately, or would
24 that day be distributed across the cross-examination
25 with time allowed at the end of each expert's evidence?

1 THE PRESIDENT: I think the short answer is we will see how
2 we go. The fact is, we have not, at this point in time
3 got any areas where we think we will want to do the
4 probing.

5 The reason I thought it prudent to include this day
6 was because of my experience in the BGL case, where we
7 were all troubled about the approach that needed to be
8 taken to two-sided markets. What we felt we had to do
9 was actually take the better part of a day with the
10 expert economists, which was unbudgeted for, to go
11 through these points, and it caused considerable
12 difficulty to all of the parties that we took so large
13 a chunk of their time. It is with that experience in
14 mind that we have allocated this day.

15 I think for prudence sake, the parties should make
16 sure that all of the experts are available on
17 8 December, if that is the date that we have. But it
18 may well be that we simply interweave the questions, as
19 one ordinarily would do, in the course of the
20 cross-examination, and it is used up that way, and we
21 will try to tell the parties as early as we can what we
22 have for this spare day.

23 So I do not think we can be any clearer than that.

24 We want the parties to make sure that the experts
25 are all available on that day, but we will try to

1 release them as early as we know that they are not going
2 to be required.

3 MR JOSH HOLMES: Sir, that is a very helpful indication. We
4 will all make sure that our experts are available on
5 that final day with that in mind.

6 Indeed, it may be prudent to ensure that the experts
7 are all present for the entirety of the period of expert
8 evidence given uncertainties as to when one expert will
9 finish and another will begin.

10 Two immediate reactions arising out of that, if
11 I may.

12 The first point is that if the Tribunal does have
13 any big picture concerns which could affect the
14 cross-examination of the expert witnesses, it would
15 obviously be helpful to have some intimation of that
16 before the commencement of the expert evidence, so that
17 we can shape our questioning in the light of any
18 concerns of that nature. I fully appreciate that the
19 Tribunal is not in a position to give any indication of
20 that kind now, but any advance notice would be very much
21 appreciated.

22 The second reaction is that there may inevitably be
23 lines of questioning that the parties' counsel would
24 wish to put arising out of the Tribunal's questions,
25 particularly if they were of a higher level -- order

1 level, or indeed the answers that are given by the
2 experts during that wrap-up session, and we would be
3 grateful for that opportunity.

4 THE PRESIDENT: Mr Holmes, you can take it, first of all,
5 that if we identify anything that is an unanswered
6 concern, we will raise it with the parties so that they
7 can address it appropriately. So what we will do is, we
8 will write to the parties or raise it at the hearing if
9 we think we are not getting the material that we need to
10 resolve matters.

11 Secondly, we absolutely agree there would be no
12 question of us leaving evidence from the experts
13 unaddressed by the parties calling them. When it comes
14 to Tribunal questions, the parties absolutely need to
15 have the last word to ensure that their cases are
16 properly put.

17 So if we have on 8 December the experts coming back
18 in again, then you can take it that we will ensure that
19 the parties have the last word.

20 The more one talks about it, the more I very much
21 hope that in fact this day will be spent in the course
22 of the previous few days by way of an expansion of the
23 evidence they are giving, but you just never know.

24 MR JOSH HOLMES: Yes, that is fully understood, sir, and
25 I am much obliged.

1 The next point was the day of 1 December. We of
2 course are in the Tribunal's hands. We will take that
3 away, sir, and perhaps we could suggest a reallocation
4 of the timetable to deal with the point.

5 THE PRESIDENT: I am grateful.

6 MR JOSH HOLMES: The time for written openings. Our
7 concerns in relation to this have been somewhat reduced
8 by the indication by Advanz that it does not intend to
9 produce any further written opening submissions. Our
10 main concern is that we try and produce a document that
11 is properly responsive, because that is going to be most
12 useful to the Tribunal.

13 Perhaps we might leave it like this, sir, if it is
14 convenient to the Tribunal. We will see what comes in,
15 particularly from those parties that are opening their
16 case, that is to say, Intas and Cinven. If there is
17 a deluge of material given the absence of a page cap and
18 we feel in genuine difficulty in responding, then
19 perhaps we could write to the Tribunal for a direction
20 that the deadline be set back by a modest amount, whilst
21 still allowing a week before commencement of the trial,
22 but we do not press you for any modification of the
23 directions today.

24 THE PRESIDENT: Well, that seems very sensible.

25 MR JOSH HOLMES: I am grateful.

1 Then, finally, in relation to putting the case to
2 all witnesses, we are grateful for your indication about
3 that. We propose to use our judgment in the light of
4 that indication, and we do not see any need for a formal
5 direction, but it is very helpful, the distinction that
6 you draw and one that we apprehend and understand.

7 THE PRESIDENT: I am grateful. Mr Holmes, I am very
8 grateful.

9 I suppose what I should ask is, does anyone have
10 anything that they, first, want to push back on; and,
11 secondly, whether there are points that are unaddressed.

12 Submissions by MR PALMER

13 MR PALMER: Sir, thank you. Just one significant point
14 which I wanted to stress. It may be that what you said,
15 sir, was inadvertently referring to the wrong day, a day
16 other than you had in mind, but just looking at the
17 timetable, you referred to Thursday, 8 December as being
18 kept available by all experts. That cannot be --

19 THE PRESIDENT: Oh no, it is evidence overrun, sorry, it is
20 the 7th.

21 MR PALMER: Wednesday, 7 December, yes, that is the expert
22 evidence window that the Tribunal identified last time.
23 As we said last time and put in writing back in July,
24 Mr Bishop is just not available; he is not in the
25 country on 8 December.

1 So were there to be any overrun or danger of any
2 overrun, we would have to manage that evidence so that
3 at least it was not Mr Bishop's evidence that was
4 overrunning, it was something else, such as expert
5 evidence on the agreements, or something which Mr Bishop
6 is not concerned with at all. I am sure that could be
7 managed, but I just wanted to put it beyond doubt.

8 THE PRESIDENT: Thank you for that correction. It is in
9 fact here in black and white: Wednesday the 7th --

10 MR PALMER: I thought that was the case, but was obviously
11 concerned to make sure.

12 So on the other matters, on the closing submissions
13 we entirely endorse what Mr Holmes has said; nothing to
14 add on that.

15 On openings, we do question whether in fact it is
16 necessary for an extension for the CMA. We hear they
17 are not pushing the point today, but it was not, I do
18 not think, within the contemplation of the Tribunal that
19 there should be a further round of exchange of
20 submissions and responsive submissions at this stage
21 before trial. So we would strongly urge that the CMA
22 serve its opening on the date already allotted to it, so
23 that we have time to consider the CMA's case before the
24 oral stage begins, and that is our concern.

25 One other marker, no more than a light marker, to

1 put down in relation to cross-examination, related to
2 what Mr O'Donoghue says at paragraph 16 of his skeleton
3 argument, as to the possibility or otherwise that any
4 appellant may need to cross-examine another appellant's
5 factual or expert witnesses.

6 We say that is slightly -- what Mr O'Donoghue says
7 slightly undersells the possibility that that might be
8 required, acknowledging, as he does, there is a possible
9 exception in the area of market definition, where he says
there

10 is some tension in the appellants' cases. As the
11 Tribunal may or ought to be well aware, different
12 appellants' cases go in completely different directions
13 on market definition.

14 THE PRESIDENT: Paragraph 16?

15 MR PALMER: That is paragraph 16 of Cinven's skeleton
16 argument.

17 THE PRESIDENT: Yes. Certainly it became clear during the
18 course of the drafting of the ambulatory draft that
19 there is not merely a different view of events between
20 the appellants and the CMA, which is what one would
21 expect, but also between the appellants themselves.

22 MR PALMER: There is, yes.

23 THE PRESIDENT: We do understand that, and obviously we are
24 not in the business of shutting out but wanting to hear
25 such tensions being articulated.

1 MR PALMER: We would expect of course the CMA to
2 cross-examine any witness first, and then we would not
3 be seeking obviously to duplicate anything which the CMA
4 has already challenged. That is why it is only a light
5 marker at this stage. It may not be necessary at all.
6 It may be that it is. If it is, it is, as Mr O'Donoghue
7 anticipates, very limited. But it may not be, it may go
8 slightly further than that. So I just again put down
9 that marker.

10 On the non-sitting day, sir, from our --

11 THE PRESIDENT: Let me just put down our own marker about
12 this, because, to be clear, we do not want appropriate
13 questioning to be shut out, and we will endeavour to
14 shape the hearing so that everyone leaves the courtroom
15 on the basis that they have been able to put their case
16 in the best way possible.

17 That does, I think, require a high degree of
18 communication out of court between the parties. So if
19 you identify an area which is going to be a material
20 take-up of time in respect of any witness, then that
21 really does need to be flagged up well in advance, so
22 that the timetable can be managed accordingly.

23 We have absolutely no difficulty in being flexible
24 about the timetable, but we all know everyone has other
25 commitments. You have just mentioned Mr Bishop being

1 available on certain days. That is why discussion needs
2 to take place.

3 MR PALMER: That, sir, is totally understood. Obviously our
4 position is, if one takes, for example, Dr Newton's
5 evidence, were that to be left unchallenged by the CMA,
6 well, then, we would want to challenge it.

7 It may well be that the CMA does wish to
8 challenge -- it. They have certainly indicated they are
9 going to cross-examine Dr Newton -- and having heard
10 that cross-examination, it may well be we do not have
11 a single further question to ask because it has covered
12 all the relevant points.

13 So it is difficult to say in advance we will need
14 a certain amount of time, because it will be entirely
15 responsive to how much has already been done or has not
16 been done. But certainly a high degree of communication
17 within those limits, yes, sir, that is to all parties'
18 advantage without doubt.

19 The only other point I was going to mention was in
20 relation to the non-sitting day.

21 Sir, from our perspective, we have no difficulty
22 with accommodating 1 December, provided that there were,
23 in effect, a straight swap with 5 December, the Monday,
24 5 December, so that we do not lose a day in the
25 timetable. So if the Tribunal wanted to shift that

1 non-sitting day from the Monday to the -- backwards to
2 the Thursday, no difficulty. What we would be concerned
3 about is losing any time, because we fear that would put
4 pressure, for example, on the expert evidence and the
5 time for it, and that would be undesirable. But if the
6 net effect is the same, from our perspective --
7 I appreciate there may be others who that does not
8 suit -- but that would work well.

9 THE PRESIDENT: No, I think that is the problem. The
10 difficulty is that the reason we have Mondays as
11 a non-sitting day are because one of us has commitments
12 on that day which will make it difficult to simply
13 adjust.

14 We will look at the Mondays, but I fear the swap
15 that you have quite sensibly proposed is not one that is
16 a no-brainer. What I was thinking was that we might
17 have to task 8 December as the date for the concurrent
18 evidence, which immediately brings us into difficulties
19 with Mr Bishop.

20 MR PALMER: It does, exactly. That is our concern, is not
21 to put pressure on that date, because he just cannot be
22 here.

23 MR BREALEY: Can I just raise some things?

24 THE PRESIDENT: Of course.

25

1 Submissions by MR BREALEY

2 MR BREALEY: 1 December is out. So you could have Wednesday
3 the 7th as just a half day of hot-tub, and then you
4 could start the experts early, say at 10.00 am, so you
5 actually gain a couple of hours.

6 THE PRESIDENT: Sorry?

7 MR BREALEY: What I am trying to do is find space for almost
8 a day. If we started early on 29th, 30th, 2 December
9 and Tuesday the 6th, that gives us two hours, and then
10 you have half of the hot-tub. That way you have your
11 day, more or less.

12 THE PRESIDENT: I understand.

13 MR BREALEY: That is the only way I can see of fitting it
14 in.

15 THE PRESIDENT: I think, Mr Brealey, you have hit on the
16 answer. So that if we said we would have, what, a 10.00
17 or 9.30 start?

18 MR BREALEY: Whatever the parties want, but 10.00 and then
19 if, really, the second day people say "We need 9.30", we
20 can start at 9.30. I am sure it can be accommodated.

21 THE PRESIDENT: Mr Holmes?

22 MR JOSH HOLMES: Sir, it was just to say, these are helpful
23 suggestions.

24 Perhaps we might see how the timetable runs when we
25 are into the trial. It may be, for example, that the

1 factual evidence requires slightly less time than at
2 present. But it might be sensible if the experts were
3 to attend on at least 29 November as well as the
4 subsequent days, because we may be able to catch up time
5 there.

6 THE PRESIDENT: What we will do, we almost always do do this
7 in the hearings, which is adjust both the starting time
8 and the ending time to accommodate needs.

9 What we will do is we will take it as read that the
10 Tribunal will be receptive to early starts. We will
11 provisionally say that the periods delineated for expert
12 evidence will be 10.00 starts, because we have put
13 a line through 1 December. If we need to start earlier
14 or run later, then we will do so, and we will ensure
15 that the diary of Mr Bishop and the difficulties that he
16 has on 8 December are respected, and I think if we leave
17 it at that, we can deal with any difficulties on an
18 ad hoc basis.

19 MR JOSH HOLMES: I am grateful, sir, but on 29 November it
20 occurs to me that it would also be sensible if the
21 experts attended, given that Mr Stewart is now being
22 interposed at the end of the expert evidence in any
23 event.

24 THE PRESIDENT: I think that is very sensible. One needs to
25 ensure, and it is true of the witnesses of fact as well,

1 that one has the next witness but one ready to go, in
2 case someone goes short, because it does happen.

3 Mr O'Donoghue.

4 Submissions by MR O'DONOGHUE

5 MR O'DONOGHUE: Sir, thank you.

6 Just to pick up on the point Mr Palmer made on the
7 scope for parties to cross-examine the other parties'
8 experts, I think we are in violent agreement on that.

9 We hear loud and clear the Tribunal's point that
10 there will be a need to fess up as early as possible if
11 substantial questioning is envisaged. From my
12 perspective, I will be cheering Mr Holmes, or whoever it
13 is, from the sidelines if they are doing things to my
14 satisfaction, and if I have to engage in a bit of
15 armchair quarterbacking and ask some questions, well, so
16 be it. But we take that on board, sir.

17 On timetabling, on written closings I would suggest
18 the problem, if there ever was one, is accommodated by
19 the suggestion that we spill into 4.00 on Saturday for
20 written closings. That seems to me to give Mr Holmes
21 a bit of extra time.

22 But one does have to keep this in perspective.
23 First of all, there is an element of brutality in all
24 written closings, that is what it is, and you have got
25 to suck it up, as it were. But second, of course, in

1 this case, it is very unusual, they will have two of the
2 written closings next week, and those responsive
3 submissions could indeed be ready even before the trial
4 is commenced.

5 It is worth recalling that in relation to Mr Brealey
6 and myself, there is substantial overlap in substantial
7 parts of our cases. My grounds one and two to a very
8 large extent overlap with Mr Brealey's, because we are
9 a former parent company. On ground C and object we have
10 a slightly different case.

11 So it is not the case that in written or oral
12 closings for the first time there are sort of three
13 discrete, novel cases presented. It is effectively two,
14 or maybe two and a half. That does need to be borne in
15 mind. Of course, Intas are not concerned with the
16 agreement. So one does have to keep a sense of
17 perspective as to the vista faced by the CMA.

18 They have a large and able team, external and
19 internal, and one has to keep a sense of perspective.

20 Then, in oral closings, as I understand it, there is
21 no dispute left. But for the avoidance of doubt, the
22 three and a bit hours we were allocated was not a sort
23 of opening bid. We have three meaty substantive issues,
24 a lot to say on penalty. In the context of a quarter of
25 a billion pounds of fines, even avoiding prolixity,

1 three hours and a bit is not a lot of time, and I would
2 be deeply concerned if that were cut back further.

3 Then, finally, sir, on putting the case, I think the
4 position we set out in our skeleton is effectively where
5 we have ended up. We entirely agree that on these
6 serious allegations they have to be put; and if they are
7 not put, there may well be consequences.

8 THE PRESIDENT: Anyone else with any points?

9 The only point that I should push back on is the
10 Saturday proposal that Mr Holmes raised.

11 The reason I am pushing back is one of us has
12 a difficulty with Monday, 12 December, that being
13 a reading day. What it means is if we get closing
14 submissions at 4.00 on Saturday, that day which could
15 have been a reading day is lost.

16 That said, we really do not want to put the parties
17 under undue pressure. It is already a very tight
18 timetable in a very heavy case. If Mr Holmes says that
19 this extra day would be beneficial, then we will grant
20 it, because we know that such requests are not made
21 lightly. Therefore, even though it is actually not
22 ideal from our point of view, if you want 4.00 on
23 Saturday, then you can have it.

24 MR JOSH HOLMES: Sir, I am extremely grateful, and I do
25 appreciate the challenges that the Tribunal faces also

1 grappling with the large volumes of material.

2 I think the additional time would be invaluable to
3 the CMA if the Tribunal is prepared to accommodate us.

4 THE PRESIDENT: We will do so.

5 Well, thank you all very much. I am anticipating
6 that there is nothing more because everyone is sitting
7 down. In which case, can I simply thank you all for the
8 very helpful way in which you have enabled us to cut
9 through these matters, and we will rise and we look
10 forward to seeing you on the first day of the
11 substantive hearing.

12 Thank you very much.

13 (11.38 am)

14 (The Tribunal adjourned)

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