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IN THE COMPETITION
APPEAL TRIBUNAL

Case No: 1432, 1434, 1438, 1439/1/12/22

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Monday 14 November 2022

Before:
The Honourable Lord Ericht
Eamonn Doran
David Ulph CBE
(Sitting as a Tribunal in England and Wales)

BETWEEN:

Advanz Pharma Corp and Others

Appellants

v

Competition and Markets Authority

Respondent

“Prochlorperazine Decision”

BETWEEN:

Competition and Markets Authority

Claimant

v

Sonpal and Others

Defendants

“Transferred Proceeding”

A P P E A R A N C E S

Mark Brealey KC (On behalf of Advanz, Mr Cresswell, Mr Brown & Mr Duncan)

Sarah Ford KC (On behalf of Alliance)
David Scannell KC & Charlotte Thomas (On behalf of Cinven)
Christopher Buckley (On behalf of Mr Butterfield)
Cameron Firth (On behalf of Mr Dawson)
Aidan Robertson KC & Matthew O'Regan (On behalf of Lexon & Mr Sonpal)
Hannah Bernstein (On behalf of Mr Dey)
David Bailey & Alex Cook (On behalf of the CMA)

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Monday, 14 November 2022

Case Management Hearing

(10.30 am)

LORD ERICHT: Good morning. Some of you are joining us on the live stream 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 that is the introduction I have to make.

Today we have an agenda which has been circulated in advance and I would like to express the Tribunal's appreciation to the parties for the work that they have done in agreeing an order which we've seen.

This is a case management hearing, so notwithstanding the order that was agreed, the Tribunal took the view that there were various management matters which could be usefully dealt with at the hearing. So we just propose to follow the

agenda and the first item on the agenda really deals with the matters which have been set out in the draft order which was produced by the parties.

If I may just make some general observations on that. In broad terms the Tribunal is content with that. There's a couple of very minor amendments which we would propose to make and the first is in paragraph 1, in the third line it says:

"and arguments advanced by and on behalf of the Appellants in the Appeal ..."

"Appeal" is singular, so we propose to add an "s". Just for clarification, in item 4, it says:

"The Defendants shall file and serve any skeleton arguments."

We propose to add "related to the Transferred Proceeding."

That is just for clarification.

The other matter which has, I think, been agreed by everyone in their skeletons, is that the date of the Pre-Trial Review will be 15 May. So if anyone disagrees with that, if they could let me know at some point during their submissions today.

So there is just one matter that we'd like to go through with you in relation to the draft of the consent order. It's just so we can understand what is proposed. Item 2 has the defendants in the disqualification proceedings confirming whether they intend to adopt the evidence and filing any further evidence. Then item 3 has any response to that. We weren't quite sure how that actually works because it seemed to us that what that envisages is that the Defendants put forward their defence and then there's any response to that defence. But what wasn't clear to us is at what stage the CMA puts forward its case. In other words, it's a bit cart before the horse that you have to put your defence before you see what the prosecution case is. So perhaps I can ask the CMA just to address me on how that will work as a matter of practice.

MR COOK: Yes, thank you. Alex Cook appearing for the CMA, along with Mr David

Bailey. The way it works is as follows. Obviously, we had an affidavit that was filed in the High Court in support of the Competition Disqualification Order. That affidavit explains the CMA's case in respect of both the First Condition and the Second Condition. In respect of the First Condition what it does is it effectively adopts, or incorporates by reference, the decision as constituting the CMA's case on the First Condition. So one is concerned, so far as the First Condition is concerned, with the decision. And I think one sees that at paragraph 15 of the affidavit, which I believe has been uploaded to the Tribunal's file.

So that stands, as it were, as the CMA's statement of case on the First Condition.

Then the way it is intended to work is that by paragraph 2 obviously one has the defendants, the individual directors, filing such evidence in response as they should wish to. Many of the directors have indicated that they don't intend to do any more than rely on the evidence they have already filed in these proceedings in support of the appeals.

Then when one gets to paragraph 3 it is effectively at the reply stage. What it is designed to do is to give each party including the CMA -- one sees about halfway through the sentence the CMA -- to file effectively its reply to the evidence that the defendants have filed in response, as it were, to the decision. That is how it is intended to be understood.

LORD ERICHT: Thank you very much. I follow that now. One of the points that's made by Advanz, in paragraph 12 of their skeleton, is they are asking the CMA to set out separately exactly what evidence it relies on that is specific to each defendant director, so there is no misunderstanding. That is another aspect of at what stage does the prosecution case get fully set. What is your position on that? Do you propose to do that, and if so when?

MR COOK: So, in my submission that is misconceived, the request, because it misunderstands the nature of the transfer of the First Condition, which is concerned only with the question as to whether the undertaking has committed a breach of competition law, so in this case Advanz, and that's the only question that the Tribunal is concerned with on the First Condition. So one is focused on the actual undertaking on whether there has been a breach. The evaluation of the directors' individual conduct for the purpose of determining unfitness is a matter for the High Court when dealing with the Second Condition.

But in any event, getting to the substance, obviously as I mentioned just now the decision is itself incorporated by reference into the First Condition, so the directors have a very detailed exposition of the case against them by reference to the decision. Obviously, insofar as the Second Condition is concerned, they have the affidavit that particularises the case there, so they know what is coming in the High Court.

So in my submission there shouldn't be any additional requirement. The CMA has particularised its case in great detail, as the Tribunal will already have seen. So they know exactly what it is they are going to be pleading to. And furthermore, it's not quite clear to me whether what Mr Brealey is asking is for the CMA to do so at stage 3, which would be slightly strange because as I've already submitted, that's really the reply stage. So at that stage, obviously, the CMA is hoping to reply to whatever evidence the directors put in.

LORD ERICHT: Thank you very much. Well, that was the original question I had. I don't have anything more for you at the moment.

I think what I propose to do then is to ask Mr Brealey to address us on this matter, and then after that, I will open the floor to the rest of you for any observations on the

draft order before we move on to the next item of business. Thank you.

MR BREALEY: It is essentially -- if one goes to our skeleton, it is 7, 8 and 9.

LORD ERICHT: Yes.

MR BREALEY: We were just trying there to assist the Tribunal, because it's the conduct of the director which is relevant. So paragraph 8:

"By the order, the determination of the First Condition has been transferred."

Then 9, "the following disadvantage", this is that the two conditions, the first and second, are closely aligned, and if the CMA sets out the conduct of each director it assists this Tribunal in determining the conduct which is said to allege the company to breach the First Condition. Otherwise this Tribunal is in a very unfortunate position, it's making a determination against the company, but what it says about the individual director will have a direct bearing on the Second Condition.

All we were trying to do is to assist this Tribunal -- it is quite unfortunate for the CMA to say we are not going to do it, to set out -- it's not difficult -- to set out the evidence against each director separately so that this Tribunal knows what the case is against the director.

I appreciate, and it is obvious from paragraphs 7, 8 and 9 that the First Condition is only concerned with the company. But, as I say, section 9A really has the First Condition and Second Condition, and the conduct of the director is very relevant to the determination of the First Condition.

What we can't have is a situation where this Tribunal is oblivious, essentially, to what it is saying about the conduct of the directors, because clearly whatever happens, if it ever goes to the High Court again, whatever this Tribunal says will be of direct relevance to what the High Court says about the conduct of the relevant director.

And we are talking about very grave consequences for some of these directors. As

I say, it is their family and personal life. It is a director's disqualification. In my respectful submission it is quite unfortunate for the CMA just to say "Well, it's all there" and they can't, in six pages of a skeleton argument, just summarise what conduct is specific to each director, which they then say leads to the First Condition. In other words, we will see, I am sure, at the trial, the CMA saying you have to look at the evidence in the round, you have to do this, there are inferences here and inferences there. But if the CMA wants the First Condition to be transferred to the Tribunal so it is binding on the High Court, in my submission the CMA has to be -- it can't be so cute as to say, well, we are not really bothered with the Second Condition. Because clearly on the terms of section 9A, the conduct of the directors is highly relevant to whether the First Condition is satisfied and that was the purpose behind our suggestion. It is to assist the Tribunal and also to protect the directors.

LORD ERICHT: At what stage do you think this should be done? Because I could see an argument that it should be done at an early stage, so that we could leave the Defendants to do their stuff by 1 February, as suggested, but we could maybe -- if we were going to order this, we would order the CMA to do this by, I don't know, something like 1 January or whatever. But I notice in your skeleton you say "in response", and I was not quite clear when you thought this was going to be happening.

MR BREALEY: To be fair, we took the view that the CMA should do this, pursuant to paragraph 3, in response, but we do take on board the suggestion by the Tribunal that really it is for the CMA -- if they are having this condition transferred -- they should do it first. What we had envisaged, that the directors would set out what they perceived the evidence to be against them by 1 February, and then the CMA would come clean and either agree or disagree and do that by 1 March.

LORD ERICHT: Yes.

MR BREALEY: But I would welcome, for obvious reasons, this was done by consent, but I would welcome for obvious reasons if the CMA set it out first.

LORD ERICHT: Thank you very much.

Is there anything else you wish to add about the draft order?

MR BREALEY: No.

LORD ERICHT: Thank you. I am just going to go along the line now to see if there are any other observations on the draft order and on the point about further specification. And then Mr Cook will have an opportunity, at the end, to come back if required.

MS FORD: Sir, we are content with the terms of the draft order. We do not seek to press the CMA to expand its case any further. As far as we are concerned, we consider the case made against us is as set out in the decision and we do not consider it either necessary or appropriate for the CMA to be elaborating on that.

LORD ERICHT: Thank you.

MR BREALEY: I think Ms Ford only acts -- she doesn't act for the directors.

LORD ERICHT: I appreciate that. Thank you.

Yes, Mr Scannell.

MR SCANNELL: Sir, the Cinven appellants have already expressed their agreement with the terms of the draft order. We do not request that any further elaboration of the CMA's case be made. That said, the Cinven appellants have not, to my knowledge, had the benefit of seeing the CMA's section 9A case against the defendants in the High Court. We have not seen, in particular, the affidavit to which reference has been made. Subject to --

LORD ERICHT: I am not too clear how that works, because I understood that the

Tribunal has seen it. How could the Tribunal see it and the parties have not seen it.

MR COOK: My understanding -- I can take instructions -- is it has been uploaded to the Tribunal's file. The delay in providing it to the parties is due to waiting for this order to be made that incorporates those proceedings into these proceedings. But what I have with me, in case it is of assistance, is a copy of the table of contents of that affidavit, because I was going to address the Tribunal on the level of detail that is already in that document in the context of discussing the submission of Mr Brealey. I can certainly hand that out.

LORD ERICHT: We will just leave it just now. I was just trying to clarify why we had seen something when the parties appearing before us had not, which in my experience is highly unusual.

Yes, Mr Scannell.

MR SCANNELL: One final point in relation to the drafting of the draft order. The Tribunal may have seen from paragraphs 5 and 19 of the skeleton argument, which the Cinven appellants have filed, that we do make a point in relation to the costs of today's hearing. I propose that that can be dealt with as any other business.

LORD ERICHT: We will deal with that under any other business so we don't need to take up time with that at the moment. Thank you very much.

Yes, Mr Buckley. Sorry, we will take it in the order -- the order of my list is slightly different from the way you are sitting, so perhaps you could just -- we will come along this way, but if you could just introduce yourself when you stand up, please. So who is next coming along this line.

MR ROBERTSON: I think it is me, your Lordship, Aidan Robertson acting for Lexon and Mr Sonpal.

You will have seen from our skeleton that we are content with the terms of the draft

order and we have nothing to add.

LORD ERICHT: Thank you very much.

MS BERNSTEIN: Hannah Bernstein appearing on behalf of Mr Dey. Mr Dey is also content with the terms of the draft order and also has nothing to add.

LORD ERICHT: Yes, thank you very much.

Yes?

MR FIRTH: Cameron Firth appearing on behalf of Mr Dawson. Mr Dawson is content with the terms of the draft order and the changes that have been suggested this morning and we have nothing further to add, thank you.

LORD ERICHT: Thank you. And eventually --

MR BUCKLEY: Good morning, sir, I appear on behalf of Mr Butterfield. One, we are content with the draft order, but we don't think it is necessary for the CMA to expand upon their case.

The reason why is because I simply agree with Mr Cook that the conduct of the directors is not something that is before -- in the terms of the disqualification proceedings, is not something that is before the Tribunal. The only way the High Court can make an assessment of fitness in the disqualification proceedings is by itself reaching a view as to the directors' conduct. You can't make an assessment of unfitness in a vacuum. So the High Court will have to reach its own view about what each director knew and what they ought to have done and what they didn't do. So in my submission that's not something that you are concerned with.

LORD ERICHT: Thank you very much.

Yes, Mr Cook?

MR COOK: I have very little to add, really. I of course echo what Mr Buckley has said. Clearly Mr Brealey is conflating the two conditions. And the First Condition, as

I said before, is only concerned with what the undertakings have done and their breach of competition law.

There is another issue which is that trying to salami slice what, as it were, the directors have done does not really work in this case, because the question obviously before the Tribunal concerns the conduct of many directors and their interaction with one another. So it is another way in which this suggestion is totally unworkable. In my submission it would just lay a further cost and complexity on the proceedings which is not desirable for reasons that other counsel have alluded to as well. So in my submission the Tribunal should leave the order as it is, as has been agreed with the parties.

LORD ERICHT: Thank you. I think you were going to give us a commentary on the affidavit. I don't know -- it is not in the bundle. So if you have a copy --

MR COOK: I am happy to. I can certainly hand it up. All I was going to say is that by reference to the index it is absolutely clear that it is an extremely detailed document which sets out the CMA's case in detail. Of course, in respect of the First Condition it is also incorporating by reference, the decision, which is itself an extremely detailed document.

I can hand it up or --

LORD ERICHT: Thank you. I think we should see this. We will see it and then it may be that we then retire once we've seen it, to take a view as to how we deal with this. So if you could hand that up. Unless you think there is any reason not to, if you could also give it to the other parties at the same time.

MR COOK: So to avoid voluminous documentation, this is just the table of contents. What one can see is that the First Condition takes up a relatively small proportion of the document. That's because, as I said before, I think it is paragraph 15 of the

document itself, refers to and incorporates the decision as being the CMA's case on the First Condition. Then certainly in respect of the Second Condition, one can see quite detailed contents thereafter in respect of each of the directors. So it's not a matter for this Tribunal, but the directors do know what the case is against them in respect of unfitness in any event. But looking at the First Condition only, that's obviously, as I've said, concerned just with the undertakings.

LORD ERICHT: Yes.

So if I've understood this correctly, then you say this: even apart from the technical aspect of what we are dealing with, the High Court is dealing with it, in terms of knowledge and fair notice, you don't need to produce a separate document summarising it, because it is all in this already, which we have?

MR COOK: Absolutely. Everything the directors need to know about the case against them is in this affidavit, and read together with the decision, in my submission. It is totally unclear to me what it would add to require the CMA to produce an additional document, which for the reasons I have already expressed would not sit well either with the overarching evidence of the conduct of all of the directors. In this case, not all of them are subject to the CDO proceedings.

LORD ERICHT: Thank you.

Mr Brealey, having said this, does this --

MR BREALEY: I appreciate all this. But it is still the case that the Tribunal's finding as to a director's conduct will have some bearing on the application of the Second Condition.

I am rowing upstream here, I can see that. But one has to think this through. What happens -- obviously we hope that the appeal is going to be allowed and we do not get to that stage, but let's assume that there is a 400-page judgment with a summary

of the various directors' conduct. What is the position when it goes back to the High Court? Is it a free for all? And if it is a free for all, what is the purpose of transferring the First Condition in the first place, really?

I mean, clearly there will have been a determination that a company has breached. But are we then going to have a completely new trial with the directors giving evidence so they can explain their conduct? And we just ignore the Tribunal's judgment in this case?

I don't believe -- in my submission, I don't think this has been thought through. I aired it last time that there are some dense questions about transferring the First Condition. It is said, well, don't salami slice, but it has been salami sliced, and the trouble is that the two are closely aligned when one looks at the act.

LORD ERICHT: I suppose it might have an effect on how we go about writing our decision --

MR BREALEY: Absolutely. That's why --

LORD ERICHT: -- in the sense that it may be given a director's disqualification, we maybe spend more time on things the directors were involved in than we would have done had there not been director's disqualification. In which case it could be said that in terms of notice for our benefit, as much as anything else, we need to have a very clear picture in our head as to how it all fits together, even if ultimately we are not deciding on the Second Condition.

MR BREALEY: When I first made my submission, I said it is to assist the Tribunal. That was actually my first point before preserving the rights of the directors. But that was, I perceived, to be a real problem when the First Condition gets transferred.

LORD ERICHT: Yes.

Thank you. I think we should rise just to consider this. But before we do, does

anyone have anything they want to say on this matter?

Yes, Mr Cook.

MR COOK: Just to add in response to what Mr Brealey just said, it is quite difficult to see how the CMA can be any clearer about its case. It is obviously set out in some detail. The danger is, if it is being forced to limit its case in some way, or indeed expand it, I am sure that would be objectionable for other reasons. So it is still unclear to me. Obviously one hears what Mr Brealey says in terms of principle, but obviously the CMA has already set out its case.

LORD ERICHT: I don't think we are talking about limiting. What I have understood is something more in the nature of a skeleton or a map so that the Tribunal has a full understanding of how this fits together, rather than anything you said in such a document limiting your case.

MR COOK: I had understood it to be something in the form of a pleading. But if that's not what he's proposing, then -- I am not sure that was his submission.

MR BREALEY: The skeleton is quite clear that it would be not a pleading, it would be a skeleton, any responsive statement to assist the Tribunal on matters which are specific to a particular director. It is quite clear.

MR COOK: But if this is going to be something to which the directors are responding, it's not clear -- the directors have to respond to the CMA's entire case. It is not going to be just limited to responding to what is set out in such a skeletal document. That would be to limit the scope of the CMA's case on the First Condition.

LORD ERICHT: Thank you. We will retire and consider this.

(11.00 am)

(A short break)

(11.19 am)

LORD ERICHT: Well, we have had an opportunity to discuss matters and in particular to look at the index to Mr Granshaw's first affidavit, which sets out various headings in relation to the position of each of the individual directors.

In the light of that affidavit being before the Tribunal, we are not going to make the order which has been requested on behalf of Advanz, Mr Cresswell, Mr Brown and Mr Duncan in their skeleton argument. We have taken the view that the information which is needed should be in this affidavit and we are not going to make a separate order for production of it.

Having said all that, Mr Brealey, we do recognise the significance of your point, and its implications for the task facing us. I can assure everyone we are very alive to this. It seems to us that this might be something we have to come back to at the Pre-Trial Review, by which time all the skeletons and -- well, most of them -- will be in, and it may be that it will be useful to have a discussion about this issue and how it is going to work in practice at that stage.

So, moving on to the second item on the agenda, which was implications for the introduction of the Transferred Proceedings on the timetable running up to the hearing of appeals and the existing time estimate for the appeals and the timetabling within the hearings. They all run into each other.

Our initial view is that we don't think we will necessarily need another case management conference round about March. I think we should manage to manage this case on the basis of today and the Pre-Trial Review, but we are open to any suggestions people might have today, and indeed, when it comes to March, if parties think it would be useful to have another case management conference at that point, then an appropriate motion can be made and we can consider it then.

So on this second item of the agenda, I think I will invite Mr Cook or indeed whoever is speaking to speak to us on that, yes.

MR BAILEY: May it please the Tribunal. So far as the first part of item 2 is concerned, the CMA's position is that the existing timetable, which was set out in the Tribunal's order of 9 September, taken together with the draft consent order which you have just considered, provide the steps at the appropriate time and don't need to be modified. If it will assist the Tribunal I can summarise those, but they are, in essence, the steps we have just considered for the defendants to consider whether to file additional evidence and then any party to respond to that.

Your previous order, sir, indicated at the beginning of March that all documents needed to be uploaded to the Opus 2 platform. That would be three months before the hearing is due to start. Then according to the draft consent order, the appellants and defendants will serve skeletons in early May and the CMA would then follow suit on 22 May. We see for our part there is no need to vary any of those steps to trial.

If it will assist the Tribunal, I can address you on the trial timetable itself, or alternatively we can come back to that once you have heard from the other counsel.

LORD ERICHT: I think it will be helpful to hear from you on the trial timetable now.

MR BAILEY: You may have seen, sir, that we had put together a draft of a possible timetable that was appended to our skeleton argument. That is to be found at page 34 of the CMC bundle.

LORD ERICHT: Yes.

MR BAILEY: In essence, we say that the existing allocation of time -- which is essentially 20 sitting days -- ought to be sufficient, subject to two points. The first is we agree with my learned friend for Advanz that at this moment we haven't seen any additional evidence that may be served by the defendants. In particular, I am

mindful of Mr Dey who hasn't served any evidence in the course of the appeals.

So it may be prudent to take stock in terms of what evidence is filed and whether we need additional time.

What the parties and the CMA had agreed last time round was that we would budget two additional days for dealing with issues arising from the transferred CDO proceedings. Sir, it may be helpful, do you have the timetable in front of you?

LORD ERICHT: I do, thank you.

MR BAILEY: You can see that the way we have structured things, the opening submission, the parties previously agreed to have openings across two days. If my reading of the skeletons is correct, my understanding is that it may be necessary to have an additional day by way of opening. That is because Mr Dey has asked for half a day for him to address the Tribunal in opening --

LORD ERICHT: So the two days that you have put in here, what is your proposal for the breakdown of that?

MR BAILEY: For the two days at the moment the way it broke down was that each of the appellants and the CMA would have two hours in which to address the Tribunal.

Of course, what the defendants say, in relation to Mr Dawson, is there is no additional time to be allocated. The same is made in relation to Mr Butterfield. The same is made in relation to Mr Sonpal, although I note that in their skeleton they refer to half a day, which would be slightly longer than two hours.

LORD ERICHT: Yes.

MR BAILEY: The same is made on behalf of Messrs Cresswell, Brown and Duncan, together with Advanz, they also wanted half a day. Then Mr Dey, he wanted for his own part half a day. If my calculations are right, when you take that together it

means that the openings would actually require three days rather than two days.

LORD ERICHT: Yes.

MR BAILEY: The CMA has no objection to that, if that accords with the Tribunal.

LORD ERICHT: Yes.

MR BAILEY: Then in relation to the factual witnesses, you will see, sir, we have set out just an indicative running order of the different factual witness that the CMA intends to cross-examine. Of course it will be for the appellants to decide which witnesses to call in which order, but the time estimates are the CMA's estimates based upon our review of the witness statements before the Tribunal.

Sir, the known unknown is Mr Dey. His skeleton simply says that there is an opportunity for him to file any evidence on the transferred First Condition. It also says that he doesn't, at the moment, anticipate significant time being allocated either to cross or re-examination. So for our part, we think that it would be possible to accommodate Mr Dey on the 27 June, which you see is currently reserved for any issues relating to the CDO claim. Of course as I adverted to earlier, we have not seen his evidence yet and nor has he seen any response we might make to it. So at the moment I can only address you on a somewhat contingent basis. But for our part, we don't see any need to adjust the timetable for that reason.

Lastly, sir, in relation to closings, happily the parties agreed that each appellant should have a day to close but the CMA should have two days to close. Again, looking at the skeletons, Mr Sonpal is going to fit within a day with Lexon; Mr Dawson, as I understand it, doesn't wish to address the Tribunal separately. Messrs Cresswell, Brown and Duncan also fit within a day with Advanz, so the additional time, really, again is Mr Dey. He has indicated he would like half a day to address the Tribunal in closing.

As you will see, sir, on page 35 at the end, at the moment the CMA has tentatively raised the possibility of half a day for replies. That wasn't really within the previous timetable. But, sir, if that is amenable it would mean that one would need to use 4 August, the day in reserve, to deal with closings. That is really the CMA's position in relation to the trial timetable.

LORD ERICHT: Thank you. Can you help me with the evidence? If I have understood you, these are the witnesses that you expect to be called by other parties and you would then cross-examine. Are you intending to lead any witnesses?

MR BAILEY: No, sir. We have filed our defence, and our defence relies upon a broad range of material, contemporaneous documents, interviews done by the CMA with various witnesses, circumstantial evidence as well, set out in the decision. We have not called any factual witnesses. So our case will rest on the matters set out in the decision, as Mr Brealey says, taken in the round, and we will then cross-examine each of the appellants' witnesses.

LORD ERICHT: Thank you.

One thing that would assist us just in understanding how it would work, is that in your decision, there's reference to various emails which you found your case on, and these emails could be taken to have one meaning or they could be taken to have another meaning, and you have taken them to have one meaning and the other parties take them to have another meaning.

Now, one would have thought that one way to resolve some of these issues was to hear from the people who had written these emails, as to what the circumstances were. But you are not proposing to lead any evidence on that, you are just proposing to go on the inferences without leading the primary evidence of the people who wrote them?

MR BAILEY: Sir, that's not entirely correct, if I may. Of course, some of the principal emails upon which the decision relies are authored and received by the individual director defendants.

LORD ERICHT: I entirely take that point. I was more concerned with ones authored by other people.

MR BAILEY: Sir, in relation to emails sent by other employees, it is true that we rely upon the contemporaneous email itself and that the meaning, we say, is clear, and that it is not necessary for us, therefore, to call the author or recipients of those emails in order to persuade the Tribunal of its probative value. So it is correct, sir, that we are not calling all the other individuals that were party to communications at other times. We rely upon the documents, which we say are clear, together with the factual evidence which we will cross-examine, and of course also the broader context which we say is an important aspect of the way in which the communications between these undertakings is to be understood.

LORD ERICHT: Thank you. That's clear. But I think I would say that as far as I am concerned, in assessing evidence, it is really quite difficult to assess evidence if you say, "here's an email, it means something", there is an ambiguity and you are not leading the person who wrote the email to explain what it actually means. We would just have to proceed on the basis of what evidence you choose to produce.

MR BAILEY: Sir, the CMA did of course interview a number of different individuals. You will have the transcripts of those interviews in front of you as part of the material before the Tribunal.

Of course, the various individuals that you are referring to, sir, they are not within our control. They are employed by various of the companies concerned. Our case is as set out in the decision. It is not to be embroidered by reference to other factual

witnesses. Of course if the Tribunal wishes --

LORD ERICHT: Are you saying this Tribunal does not have any power to compel witnesses?

MR BAILEY: I was just about to address you, sir. If the Tribunal so wished and wanted to hear from any of those particular individuals, the Tribunal does indeed have that power under Rule 22 --

LORD ERICHT: Or if you wished to lead evidence from these witnesses then we could compel them on your behalf.

MR BAILEY: That's understood, sir. I will have to take instructions so far as the CMA position on that.

LORD ERICHT: Good, thank you.

Yes, Mr Brealey?

MR BREALEY: There is nothing much to add. I basically agree with Mr Bailey. The only point is whether we need a third day for opening.

LORD ERICHT: Yes.

MR BREALEY: Frankly, whether it is two hours or two and a half hours, clearly we can't go to the stake on that. We can certainly make submissions for two hours.

But if the third day for opening was not too inconvenient, then I suppose then it would assist everybody if we had the extra third day for opening.

LORD ERICHT: Yes.

MR BREALEY: But certainly for the sake of 30 minutes I don't want to put anyone to too much inconvenience.

LORD ERICHT: Yes. In terms of the witnesses here, does this cover all the witnesses that you propose to require?

MR BREALEY: Yes. In actual fact, on page 34 of the timetable, Messrs. Brown,

Cresswell and Duncan are Focus' -- Advanz's witnesses.

LORD ERICHT: Yes. I appreciate there will be cross for them, but do you have any comments on the amount of time which these witnesses will be required, or are you happy to go with what's suggested here?

MR BREALEY: Really, the cross is for the CMA.

LORD ERICHT: Indeed.

MR BREALEY: I think there should be a little bit of leeway for any examination. It probably would not be cross-examination. It would be examination by any of the counsel for the other directors, if another director was to say something they disagreed with. So it may well be within the timetable. So, for example, we see Mr Sonpal has a day and a half. I am not saying we are going to do, but it may well be that there should be a little bit of wriggle room for the other parties to be able to ask Mr Sonpal questions. In short, that time is not simply for the CMA --

LORD ERICHT: Yes.

MR BREALEY: -- because clearly what he may say may have an impact on somebody else.

LORD ERICHT: Yes, thank you.

Yes, Ms Ford?

MS FORD: Sir, as we indicated in our skeleton, in some respects we are in difficulty commenting on the potential implications given we have not yet seen any further evidence. I do echo Mr Brealey's point that we do see the need to reserve our position as to whether it might be necessary for us to pose questions in the light of any further evidence that comes out.

In terms of opening, we simply make the point, we do envisage that the Tribunal will be assisted by oral opening submissions in this case. We ask that our allocation in

our submission shouldn't be constrained by the fact of the introduction of the transfer of the First Condition.

LORD ERICHT: Yes.

MS FORD: Insofar as it might prove necessary to add further days into the timetable, we would respectfully ask if the Tribunal could accommodate that within the period 27 June 2023 to 26 July 2023, for reasons which were canvassed with the Tribunal last time round.

LORD ERICHT: Indeed.

MS FORD: Our general counsel is unavailable after 4 August in the light of the directions that were given previously.

LORD ERICHT: Thank you. But as far as this is concerned you don't anticipate leading any witnesses which are not listed in this at present?

MS FORD: Sir, we don't. Our two directors are already witnesses and the cross-examination of them has been provided for in the timetable.

LORD ERICHT: Thank you very much.

Yes?

MR SCANNELL: Sir, I have very little to add to what has been said. On the CMC in March, of course that is a sensible order that there not be an additional CMC in March.

On the timetable, we've seen the timetable at appendix 1 to the CMA's skeleton argument, and we are agreeable to that. If there is two days for opening submissions that's fine. If there are three days for opening submissions, that, too, is fine.

Our main concern throughout, as the panel will have seen from both of our skeleton arguments to date, is that we not be constrained by the transfer of the First Condition

in respect of our closings. It is imperative that we have one day to close our appeal.

LORD ERICHT: Thank you.

MR SCANNELL: We have no witnesses, is probably the follow-up question you are about to ask me.

LORD ERICHT: Yes it is.

MR SCANNELL: We have no factual or expert witnesses to call, so we are not covered by the table but that is as anticipated.

LORD ERICHT: Thank you very much.

MR SCANNELL: Thank you.

MR ROBERTSON: From Lexon and Mr Sonpal's perspective, we would like to press for half a day for opening and therefore we do support three days in total for opening.

As regards witnesses, we have two witnesses, Mr Sonpal, who the CMA have indicated they wish to cross-examine, and Mr Richard Neale, who gives evidence in support of our second ground of appeal, which is the appeal against the level of penalty.

LORD ERICHT: Sorry, I didn't catch that surname. Richard?

MR ROBERTSON: Neale. N-E-A-L-E. The CMA have not indicated they wish to cross-examine Mr Neale and therefore we invite his evidence to stand as evidence-in-chief.

LORD ERICHT: And do we have an affidavit to stand as his evidence-in-chief at present, or is that something --

MR ROBERTSON: His witness statement has been served with our notice of appeal.

LORD ERICHT: So we have that, thank you.

MR ROBERTSON: In terms of closing, we would invite the Tribunal to give us a day to close. That's on behalf of both Lexon and Mr Sonpal.

LORD ERICHT: Thank you.

MR ROBERTSON: The final point is cross-examination of, as it has been indicated that other parties, other appellants may have questions for Mr Sonpal, we may have questions for other witnesses as well.

As we've said at paragraph 6 of our skeleton for today, we don't anticipate that involving significant time but plainly that is a possibility. I imagine that's something that we can revisit, if there is a March CMC, and try to put some time on it. Or more likely at the May Pre-Trial Review. I think all parties will be in a position to be much more specific about how long they are going to take with each witness.

LORD ERICHT: Yes. Thank you.

I think that's a good point you make about being more specific then. One place where we may end up, once we have been along the row and also had a chance to discuss it with the other members of the Tribunal, is that we order parties to agree a detailed timetable and lodge it seven days before the Pre-Trial Review. That may be where we end up at the end of this.

MR ROBERTSON: We completely support that suggestion.

LORD ERICHT: Thank you.

Yes, Ms Bernstein?

MS BERNSTEIN: Mr Dey is in a slightly unique and unusual position in that he doesn't have a company appellant represented, and on that basis we say that justifies there being more time for Mr Dey than you might otherwise expect. There are significant reputational consequences for him, serious consequences for his employment prospects. That's why we would also agree that half a day be allowed

for Mr Dey in openings and the total be increased to three days.

We don't anticipate significant cross-examination will be required, although this is very much a provisional position in light of the fact that Mr Dey has not yet had an opportunity to file or serve any evidence. In terms of closing submissions we request half a day.

LORD ERICHT: Thank you.

Yes?

MR FIRTH: Mr Dawson, as will be apparent from our letter to the court, Mr Dawson's evidence is tightly caught up in the company's evidence and we have been attempting to ensure we do not duplicate the company's openings for Alliance, and the same will go for closings. I think the current order provides for Mr Dawson to put forward written openings if so advised. We don't envisage any cross or re-examination of Mr Dawson by anyone from the company, ourselves separate to the company. However we may, I note, if it is of assistance to the court I think the order doesn't currently provide for any written closings on behalf of individual directors. I don't know if that is a matter which may need to be addressed at a later stage but it may be that that is a more efficient way for somebody like Mr Dawson, any further submissions he may have to be put forward in written closings, but of course again Mr Dawson would not wish to duplicate anything put forward on behalf of his company, Alliance.

LORD ERICHT: Thank you very much. That point, of which I am very grateful you raised, is about whether we need to make an order about written closings. I can't recall just offhand whether we have actually made an order for that already. Let me see if we have it.

I stand to be corrected, but I think in tab 11 we have the order. I don't think we got

as far as ordering written closings. I am quite happy to rest on that at the moment. We've built in a gap between the evidence and the closings, so I think at the end of the evidence we can make whatever specific order we need to make about written closings at that point.

MR FIRTH: I am grateful. It was simply to make the point --

LORD ERICHT: The whole point of case management is we flag up things at an early stage and make sure that we have them covered. So thank you very much.

MR BUCKLEY: Sir, for Mr Butterfield it is not currently envisaged that we need to make any opening submissions, although that was before we had the discussion with Mr Brealey about each director's conduct.

What I asked is that an hour window be built into the timetable. So if it was increased to three days that would allow for that. In my submission that's more important now given what has been discussed today about the possibility of the Tribunal being more engaged on each individual director rather than less engaged, if you like, which is what I pushed for. But if the Tribunal is likely to want to make findings about individual directors, then I think it is more important we do have the time I have asked for. So I ask for an hour for opening and an hour and a half for closings. So if the proposal is that 4 August goes to closing for directors who are separately represented, then that would be sufficient. But then there would not be any time for replies. And a third day for opening. Thank you.

LORD ERICHT: Thank you very much.

Thank you. That's been very useful to hear, the parties' position on this timetable. It looks as if the timetable should still be about the right length. As far as the Tribunal is concerned, we would expect parties to arrange matters so that the timetable can be complied with, without any extensions, unless they are absolutely necessary.

And we can look at that if that arises, cross that bridge when it comes to it. What I propose to do is us having had this discussion, not to make any detailed order as to timetabling today, but just as I've indicated, to order that parties produce an agreed detailed timetable seven days before the Pre-Trial Review.

We can note that parties are likely to require three days for opening submissions.

Now, then, there is the other issue of Mr Neale. So, Mr Bailey, you have heard what was said there. Shall I just order that Mr Neale's witness statement stand as evidence-in-chief and note there will be no cross or is it more complicated than that?

MR BAILEY: That is correct. The CMA does not intend to cross-examine Mr Neale. Of course we do reserve the right to make submissions about the relevance and the weight of his evidence but we are not intending to cross-examine him.

LORD ERICHT: Thank you very much. Then we will make the order in the way that I've just suggested.

Now going back to the agenda, I think that exhausts item 2 on the agenda.

Item 3, the Pre-Trial Review. We have already fixed a date for that. So we are now on any other business which we know is expenses, but is there any other business apart from expenses that we should be looking at?

No one is jumping up so I shall take it that that's not the case.

So expenses. So I think we have a motion for expenses.

MR SCANNELL: Thank you, sir. The point is really a short one, if I can just explain where we are coming from in seeking the costs of the CMC from the CMA. It arises because had the CMA issued the directors' disqualification proceedings at an earlier point in time, and consequently applied to transfer the First Condition to the CAT at an earlier time, this panel would have had the benefit of knowing at the first CMC when it was listing this case for hearing, which parties would be participating in the

proceedings and the full scope of the issues to be determined.

More specifically, the consequential directions necessitated by the transfer, which we have been speaking about in the course of the morning, could have been considered at the first CMC along with everything else. As it is, the consequential directions have had to be considered at this hearing. In other words, the Tribunal and the appellants might have been spared this hearing but for the CMA's delay. And the way we put this point is that unless the CMA can give the Tribunal and the appellants some explanation for its delay, there really is no basis for the more typical order that costs be in the case.

The CMA's conduct has created the need for this CMC, and so it should bear the costs of it. As matters stand, the CMA has given no reason for its tardiness and so we maintain the situation.

LORD ERICHT: Thank you.

MR SCANNELL: I am grateful.

LORD ERICHT: So that would be your costs. Are there any other motions for costs or is this just in relation to the Cinven costs?

MS FORD: For our part, we gratefully adopt the submissions made on behalf of Cinven.

LORD ERICHT: Thank you. Any more motions? No.

Thank you. Yes, Mr Cook.

MR COOK: Unsurprisingly, we oppose that motion. Dealing first with the issue about the delay or the alleged delay. The fact of the matter is, as the Tribunal will appreciate from having looked at the detailed affidavit that was prepared for the purposes of the CDO proceedings, there is a close connection between these proceedings, these appeals, and the CDO case. To that end, what we were waiting

for was the close of pleadings in these proceedings. So the Tribunal has made orders for the filing of evidence or filing of the parties' statement of case in these proceedings and the replies to the CMA's defence in these proceedings were filed I think on 26 August. That was pursuant to a date that was agreed between the parties.

So the CMA for its part, was waiting until the pleadings in these proceedings were closed before finalising its case on the CDOs. Of course that was our --

LORD ERICHT: Why was that necessary?

MR COOK: Because obviously we wanted to see the state of the pleadings at the end. The CMA has filed its defence and then we get the companies' responses to that in terms of the replies. In my submission it was obviously right and sensible, given the close connection between the two sets of proceedings, to wait for that before actually finalising that and preparing --

LORD ERICHT: What you are really saying is once you had the whole pleadings and had seen the defences it might have been that you might have taken a decision not to go ahead with the directors' disqualifications based on a full understanding of the position?

MR COOK: I think what I would say is we would obviously want to reserve our position until we had seen the last word on the pleadings before making a decision, and indeed in terms of the content of the case against the directors, it might be affected by anything the companies might have said in reply to the CMA's defence.

LORD ERICHT: Yes.

MR COOK: So it happened very quickly after that. So obviously 2 September is when we launched the claim. We made the application for transfer on the 5th, I think, or 6 September. Then obviously we acted with due expedition to get the

matter before the High Court on 17 October. Now, obviously, we are back before the Tribunal.

Of course, the Tribunal will appreciate from having looked at the index it was clearly a detailed exercise to get to that stage and to produce the affidavit which we have produced, which we obviously had to do with great care.

The second point really is this, and it is about my learned friend's suggestion that we have somehow caused this additional CMC. In my submission, it's not quite correct to characterise this as being solely attributable to the CDO proceedings. As the Tribunal knows obviously, the agenda dealt with matters going much broader than just the CDO proceedings. We have discussed a number of other things, including the trial timetable generally, the schedule and the PTR. I would hasten to add that one of the benefits of having today's hearing is that we have done away now with the March CMC, which would otherwise have taken place. So we have had two CMCs, but that would, in my submission, otherwise have been the case in any event with a March date. So it has been a productive hearing in that regard because we are saving, as it were, the trouble of going to that hearing. The next hearing for the Tribunal will be the PTR. So in my submission this hearing has been worthwhile and it is certainly not wasted costs which the CMA should bear.

The final point I suppose I would make is this. Obviously the CMA has worked very closely and cooperatively with the parties in the run up to this hearing. We, as the Tribunal will have seen, agreed the consent order with all of the parties. It has been our objective throughout to minimise the costs associated with the management of this case and the integration of the CDO proceedings into this case. Clearly, we at all stages sought to avoid the incurring of extra costs. So in my submission the Cinven parties should simply stick to the proposed order that they agreed to and the

consent order, and the order should be the normal one which is costs in the case.

LORD ERICHT: Thank you. I will give Mr Scannell and Ms Ford an opportunity to respond if they wish, and then we are going to adjourn to consider the position.

MR SCANNELL: I am grateful, sir. The first point I would make is that if I understand Mr Cook correctly, he relies on the CMA having acted with due expedition between 2 September and 6 September when they applied to the High Court to transfer the First Condition to the Competition Appeal Tribunal.

But of course, the problem begins with the delay before 2 September. The delay in launching the section 9A proceedings in the High Court.

Thereafter, Mr Cook relies on the detailed affidavit. Now, I repeat the point. We have not seen the detailed affidavit. The CMA has not seen fit to share that document, at least with my client, and possibly also the other appellants. So with the best will in the world, I cannot accept that as a good point against us.

But the other point in relation to the affidavit is that, if I understand the CMA's submissions from earlier this morning correctly, they rely on the affidavit as simply making the point in respect of the First Condition that it doesn't expand on the decision. That it is simply more of the same of what is said in the decision. So the affidavit doesn't actually provide a good reason for any delay on the part of the CMA to launch the section 9A proceedings in the High Court.

Penultimately, the point is made that this hearing has been a useful hearing. Of course, I do not disagree that this hearing has been a useful hearing, but that misses the point entirely. The point is that but for the delay, the useful discussion that we've had today would have happened at the first CMC. In particular, the decision could very well have been taken -- and would no doubt have been taken at the first CMC -- that we do not need a CMC in March, that the PTR in May suffices.

The final point I would make is that insofar as the CMA now seeks to explain its delay orally through Mr Cook, it would have been the courteous thing to provide that explanation sooner. We flagged this point in the skeleton argument that we filed in advance of the first CMC. We reserved our position in respect of costs and we repeated it in our skeleton argument for this hearing. We expressly said in that skeleton argument that we make this submission pending an explanation from the CMA. The CMA could have reached out to us to provide an explanation but have not done so. I am grateful.

MR BREALEY: Sir, I beg your pardon. I am instructed also to adopt the submissions.

LORD ERICHT: Thank you. Let's do this one by one.

Ms Ford, did you have anything you wanted to say in response? No one apart from Mr Cook has anything else they wish to add, so --

MR COOK: Just a point of clarification. Mr Scannell suggested that I was relying on the expedition between 2 September and the 5th, when we filed the transfer application. Of course I say we acted expeditiously there, but I was more referring to the time between the closing of pleadings, which was my point, and the commencement of the CDO proceedings very shortly thereafter.

LORD ERICHT: Thank you. We will just adjourn now to consider matters.

(11.58 am)

(A short break)

(12.12 pm)

LORD ERICHT: We have considered carefully the submissions we have heard on costs. I think it is in many ways regrettable that, just the way things have worked out, that we are in this position that we have had a second CMC today. On the other

hand, the normal position with case management conferences are they are there for the benefit of the Tribunal and everyone in regulating the future of the case. We have had a useful day in relation to that today which has not been limited to the directors' disqualification matters.

Those of you who were here last time will recall a great deal of time was set out trying to work out an overview timetable and what days we could sit and what days we couldn't, and we didn't get into the level or kind of granular detail which we've been looking at today in terms of what was happening on particular days, so this has been useful. We would have had to do that at some time, possibly in March, so we have done it today instead.

So in these circumstances, the motions for costs are refused.

Is there anything else we need to deal with today?

Thank you. We are now adjourned.

(12.14 pm)

(The case management conference concluded)