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

Case No: 1524-1525/1/12/22

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

12 Tuesday 15 November 2022

13  
14 Before:  
15 Sir Marcus Smith  
16 (President)  
17 Eamonn Doran  
18 Michael Waterson

19  
20 (Sitting as a Tribunal in England and Wales)

21  
22 BETWEEN:

23  
24 PFIZER INC. AND PFIZER LIMITED  
25 AND  
26 FLYNN PHARMA LIMITED AND FLYNN PHARMA (HOLDINGS) LIMITED  
27 Appellants

28  
29 v

30 COMPETITION AND MARKETS AUTHORITY  
31  
32 Respondent

33  
34  
35  
36 **A P P E A R A N C E S**

37  
38 Mark Brealey KC, Tim Johnston and Sarah O’Keeffe (instructed by Clifford Chance LLP  
39 appeared on behalf of Pfizer)

40 Daniel Jowell KC, Tom Pascoe and Alastair Richardson (instructed by Macfarlanes LLP  
41 appeared on behalf of Flynn)

42 David Bailey (appeared on behalf of the Competition and Markets Authority)

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Tuesday, 15 November 2022

(10.30 am)

**CASE MANAGEMENT CONFERENCE**

MR JUSTICE MARCUS SMITH: Good morning. Before we begin, just a couple of formalities on the housekeeping front. Some of you will be joining us by way of livestream from our website, so I will begin with the usual warning.

An official recording is being made. An authorised transcript will be produced by my authority, but it is prohibited for anyone else to make either an unauthorised recording, audio or visual, to photograph or transmit these proceedings and a breach of that rule would be liable to be punishable as a contempt of court. So please don't do it. I am sure you wouldn't.

Thank you very much for the written submissions and the bundles. We have those and we have read them. We have the agenda documents but, running through what is on my list, we have: forum; interventions; confidentiality; evidence; pleadings; hearing together/consolidation; Dr Skedgel's report; CMA's indication of privilege; and the timing of the main hearing. Most of those seem to be largely uncontroversial. The timing of the trial is, as ever, the harder one.

What I propose is we trip through those in that order. There are two points that we have identified and I may as well raise those now. I don't think they will be a problem, but I would be grateful if the parties could deal with them as we go.

One is Panel constitution. This is two-thirds a new Panel from the first round, but Professor Waterson of course is present. Now that is because we have taken the view that there is no reason why he can't sit on Flynn/Pfizer 2 having sat on Flynn/Pfizer 1, and the reason you have a newly constituted Tribunal is not because of any question of recusal or appearance of bias, but because Mr Lomas has the pleasure of doing Trucks 2 next year and is largely out of action and Mr Freeman

1 has retired, requiring a new chair.

2 So I wanted to put that on the record, that Professor Waterson's presence is  
3 deliberate and we would have almost certainly continued with the old Panel had we  
4 been able to do so, but I would want objections to that heard now, so that if there are  
5 objections, we can deal with them and proceed properly.

6 MR JOWELL: We have no objections at all.

7 MR BAILEY: The CMA has no objection either.

8 MR BREALEY: Nor us.

9 MR JUSTICE MARCUS SMITH: I am very grateful. I assumed that would be it, but  
10 it is always better to have these things on the record.

11 The other point I am going to raise, but perhaps the parties could deal with them as  
12 we go through the points on the agenda, at some point, but not today, we will be  
13 discussing hot-tubbing and how the expert evidence is to be dealt with. Clearly, that  
14 is not for today. One of the things, though, we thought about in conjunction with  
15 a hot-tubbing order, if we make one, is whether there ought to be a closer Tribunal  
16 involvement in the joint expert reports and their compilation.

17 One of the things that we feel is, generally speaking, expert reports are very helpful.  
18 The joint reports tend to be rather disappointing, in terms of their failure to grapple  
19 with the issues that the Tribunal becomes very interested in later on. And we  
20 wondered whether there wasn't some merit in incorporating into the timetable  
21 a hearing at which the experts are present, where the Tribunal's hopes and  
22 expectations of what might be achieved in the joint report could be discussed.  
23 Counsel of course being present, but the main aim being what could be done to  
24 ensure that the areas of disagreement amongst the experts are most clearly  
25 crystallised.

26 So we thought we would raise that for the parties to consider and, if appropriate,

1 weave into any future timetable going forward. But that was the only other new point  
2 we had, and with that we will hand over to discuss forum.

3 I don't know who is taking the lead amongst the three parties.

4 MR BREALEY: I will look to my left. We are, basically, in agreement, I think, subject  
5 to the Tribunal's directions, so it is always a pleasure to listen to Mr Bailey first.

6 MR BAILEY: I am very happy to address you first, Sir. So far as forum is  
7 concerned, I agree with my learned friend, we all agree it is England and Wales.

8 MR JUSTICE MARCUS SMITH: Very good.

9 Interventions, none known of. Mutual interventions, Flynn/Pfizer, Pfizer/Flynn, no  
10 problem there. Very good.

11 No problem with the Panel, you discussed.

12 Confidentiality. The parties are applying BGL principles. It is suggested a further  
13 CMC probably in the new year. We agree with that. Clearly, the parties should liaise  
14 with the confidentiality regime that is consistent with a public hearing at the start of  
15 appeal.

16 The only point I put down before I hear from the parties is this: when discussing  
17 redactions to the decision and confidentiality of documents, what needs to be  
18 focused on is what needs to be protected when there is a public hearing of the  
19 substance of this appeal.

20 It is very likely that greater protection can be conferred during the interlocutory  
21 stages and the Tribunal will be very sympathetic to that, but when redacting  
22 materials you need to think about what has to be protected if one is at trial. And that,  
23 I think, is the only guidance that we can give at this stage, but if the parties have  
24 anything else that they want to put on the record as a marker or say, then of course  
25 we would be delighted to hear from them.

26 Nothing from Mr Bailey.

1 Mr Brealey?

2 MR BREALEY: No, thank you.

3 MR JUSTICE MARCUS SMITH: Mr Jowell?

4 MR JOWELL: Simply on confidentiality, there was of course already a confidentiality  
5 ring that was agreed and operated on the last occasion. For our part, we do  
6 consider there is some sense in not trying to reinvent the wheel and simply  
7 readopting the same confidentiality order as was adopted on the last occasion. But  
8 of course we are happy -- in other words that the parties should work from that  
9 already existing basis rather than create a new order.

10 MR JUSTICE MARCUS SMITH: We are always against reinventing the wheel  
11 provided it is adjusted, reinflated, perhaps, in order to accommodate the overriding  
12 objective of ensuring that we don't go into private unless absolutely necessary.

13 Mr Bailey, does that work for the CMA?

14 MR BAILEY: It does, Sir. We agree with my learned friend that the confidentiality  
15 ring order that was used last time round would, broadly speaking, be fit for purpose  
16 this time round, and we have no objection to the members of that ring either.

17 As I understood the point you were making, Sir, in light of the BGL ruling, was that  
18 when the CMA is reviewing the confidentiality regime that was in place during the  
19 remittal investigation, it needs to bear in mind that what one wants to do is to try and  
20 reduce to the absolute minimum those confidentiality representations consistent with  
21 a public hearing. And we hear you loud and clear and that is exactly the approach  
22 we are taking at this moment in time.

23 MR JUSTICE MARCUS SMITH: Well, the CMA have been in other matters helpfully  
24 responsive to that. The only message I would add to that is if there is a situation  
25 which may well arise where the CMA is being put into the position of articulating  
26 a case on confidentiality which it feels obliged to, but let's say it doesn't have its

1 heart and soul in it, then you should feel absolutely free to tell the parties that they  
2 need to come to the Tribunal and justify themselves, why there is a degree of  
3 protection. I don't want the CMA to be in a position of acting, as it were, as the  
4 human shield for points on confidentiality that really shouldn't be being made.

5 MR BREALEY: For example, in our skeleton we have two charts.

6 MR JUSTICE MARCUS SMITH: Yes, you have.

7 MR BREALEY: Now, the CMA have said they are subject to confidentiality at the  
8 moment, but when one looks at the dates -- there is nothing wrong with that, but  
9 when it comes to the trial, clearly the last piece of information is December 2016. On  
10 no view should that be withheld in a public hearing, and I think that is the message  
11 that we have got to take away. These charts cannot be confidential when we get to  
12 the actual hearing.

13 MR JUSTICE MARCUS SMITH: Yes.

14 MR BAILEY: As my learned friend knows, there is an ongoing process where we are  
15 reviewing all confidentiality claims. Sir, we do anticipate that insofar as there are  
16 claims that the CMA doesn't think to be meritorious, we will say to the parties or the  
17 third parties that they will come to the Tribunal. That process worked in  
18 hydrocortisone, as you know, Sir, and that is what we intend is to follow in this case  
19 too.

20 MR JUSTICE MARCUS SMITH: Mr Bailey, that is well understood. I completely get  
21 that the CMA has obligations to third parties, which require careful treatment, and as  
22 you say, it worked very well in hydrocortisone. It works if an early grip is being  
23 taken. It didn't work in BGL because an early grip wasn't taken. That was not the  
24 CMA's fault; it was, if anyone's, the Tribunal's fault for leaving it over too late.

25 So all I would say is if there is a problem, then we are here to resolve it, but we  
26 anticipate by talking about it now there will not be a problem. And as I say, if there

1 is, then bring it to us and we will do what we can to help.

2 MR BAILEY: My instructions are, Sir, that the CMA anticipates it will conclude its  
3 review by the middle of next month. It will then write to the parties and to the  
4 Tribunal to update it as to the position on confidentiality and we can take it from  
5 there.

6 MR JUSTICE MARCUS SMITH: That is very helpful. Thank you very much.

7 So in terms of evidence, there doesn't seem to be any opposition to the evidence  
8 filed. The CMA's desire to seek clarification as appropriate seems entirely sensible  
9 and I didn't detect any pushback on that.

10 Dates for pleadings are agreed. So I will not say anything more -- by the way, if I am  
11 overriding any objection or point, please do stand up and tell me.

12 Hearing together or consolidation, we will hear together but not consolidate? Good.

13 I have mentioned the pre-trial review of expert joint report and we can take that  
14 further as advised. The CMA mentioned the time to be taken to respond to  
15 Dr Schedule's report, although I didn't detect a problem, I detected a marker being  
16 put down about a potential problem.

17 MR BAILEY: Sir, that is correct. The background to this is that Pfizer served new  
18 evidence accompanying its notice of appeal from Dr Skedgel that deals with the  
19 quality adjusted life year analysis, which Professor Waterson will remember was  
20 raised during the first appeals.

21 We have sought to find and instruct an independent expert that could respond to that  
22 analysis. That requires the CMA, as a contracting authority, to comply with the  
23 public procurement regulations and seek approval from the Cabinet Office, all of  
24 which takes time. We are doing our level best to go through those requirements.

25 We are optimistic that we may fall outside of the procurement regulations insofar as  
26 the value of the services provided by the expert will fall under the threshold required

1 for an open procedure.

2 But we still need to get Cabinet Office approval; we still need to instruct the expert;  
3 they need to prepare their evidence. So we are pulling out all the stops so that it can  
4 be done by 21 December, but we thought it was prudent to ask the Tribunal if a  
5 longstop date could be put in if it is not possible, notwithstanding all of our best  
6 efforts to have such a health economist to provide their report, and do that by the  
7 end of January.

8 Now, I anticipate that the next point that arises is that if that were to happen, then  
9 what we would anticipate doing is serving any such evidence by the end of January,  
10 and also filing an amended defence insofar as any pleading needs to be put forward  
11 in light of that evidence. This is specifically concerned with Pfizer's second ground of  
12 appeal, and of course that would then make clear to the parties exactly what the  
13 CMA has done. Of course if they raise any objection, then it could be dealt with at  
14 a second CMC. But that is the backdrop, it is really a consequence of the  
15 procurement regulations that we are required to abide by. That is why we have  
16 asked for the additional time.

17 MR JUSTICE MARCUS SMITH: I would like to hear from the other parties about  
18 how disruptive an end of January 2023 filing might be, just so that I get a handle on  
19 the problems the longstop date might create.

20 MR BREALEY: Pfizer's position is we are sympathetic to that. It is a longstop, so  
21 don't go beyond 31 January. We have clearly margin in the timetable, subject to  
22 whatever is going to be ordered, but the parties are looking at the main hearing in  
23 either the autumn or January 2024, so the extra four weeks, in our submission, does  
24 not cause a problem with the timetable.

25 MR JOWELL: We don't necessarily agree with Mr Brealey in terms of when the main  
26 hearing would be. Of course that would be a matter for the Tribunal.



1 MR JUSTICE MARCUS SMITH: Indeed.

2 MR JOWELL: But we don't object to the end of January. I mean, we have not put in  
3 the type of evidence to which they are responding, so we are not really in a position  
4 to object. But I mean there may need to be a little more time for a reply on that  
5 particular point if they put in something surprising, but we don't object to 31 January  
6 in the circumstances.

7 MR JUSTICE MARCUS SMITH: Mr Jowell, that is very helpful, and thank you,  
8 Mr Brealey.

9 Mr Bailey, we are very sympathetic, but I am a little concerned that the procurement  
10 tail is wagging the procedural timetable to what is actually an important appeal, in  
11 circumstances where everyone agrees these things need to come on as fast as they  
12 fairly can.

13 Now, this is in no sense a criticism of the CMA. The CMA is obliged to operate  
14 according to the rules that apply to it. But if there should be a problem in obtaining  
15 necessary consents insofar as they are necessary, such that you cannot actually  
16 instruct the person that you are seeking to instruct, then I would want that official in  
17 the Cabinet Office to appear before the Tribunal to explain why there is a hold-up.  
18 So I am sympathetic to the CMA.

19 I am somewhat less sympathetic to there being a hold-up out of the CMA's hands.  
20 I am not issuing this as an invitation for the CMA to use if it sees fit. I am saying that  
21 you should pass on to those who have a veto over the CMA's ability to instruct  
22 an expert, a sense that we control the process here. The expert, at the end of the  
23 day, is someone produced by the CMA to assist the Tribunal in reaching the correct  
24 outcome.

25 So, yes, we will indicate a degree of receptiveness to a longstop date at the end of  
26 January 2023, but we would rather have the 21 December date preserved and we

1 would rather deploy such powers as the Tribunal has to assist the CMA in achieving  
2 that date than using the longstop.

3 MR BAILEY: Sir, I am grateful. What we would propose to do is take that very clear  
4 indication from the Tribunal and indeed pass that on to the relevant officials at the  
5 Cabinet Office, so that they are in no doubt of the Tribunal's position. And moreover,  
6 insofar as the CMA becomes aware of a procedural obstacle that is slowing us down  
7 and affecting our ability to meet 21 December, we will not hesitate to raise that with  
8 the parties and the Tribunal, so you are on notice well before 21 December, Sir, so  
9 one does everything that we possibly can to comply with the current deadline.

10 MR JUSTICE MARCUS SMITH: Mr Bailey, that is helpful. Thank you very much.  
11 That was Dr Skedgel and the response to that. Flynn have put down a marker --  
12 I don't think it is any more than that -- regarding the CMA's indication of privilege. It  
13 is a marker, I think, rather than --

14 MR JOWELL: It is a marker. We need to understand the CMA's position on  
15 disclosure, which should come in their response, and I think at that point it may be  
16 necessary to have a further hearing at which any further disclosure applications are  
17 made.

18 MR BAILEY: My learned friend is right. His solicitors wrote to the CMA earlier this  
19 month and have asked a number of questions relating to both the privilege issue and  
20 also disclosure of other documents. The CMA is actively working towards  
21 responding to each of those questions by the deadline that Flynn's solicitors gave,  
22 which was towards the end of the month, 23 November.

23 So we say that process should be allowed to unfold without troubling the Tribunal at  
24 least at this point. We hope to allay any concerns that the appellants have.  
25 Moreover, we will in our defence, be addressing the various allegations made by  
26 Pfizer about procedural unfairness, so that is another opportunity for to us set out the

1 position.

2 We do agree with Flynn in particular that it would be prudent to have a further CMC,  
3 so that if there is a dispute that cannot be resolved between parties, then that can be  
4 canvassed before the Tribunal.

5 MR JUSTICE MARCUS SMITH: That is very helpful, Mr Bailey.

6 Probably a good point to work out when we should have that CMC. My sense is  
7 some time in January next year; is that the general consensus?

8 MR BREALEY: It is just -- whether we are working towards a date that is the main  
9 trial, which is not going to be convenient to the CMA or to Pfizer, so in my  
10 submission we should be looking at the main hearing first and then working  
11 backwards.

12 MR JUSTICE MARCUS SMITH: That is fair enough, Mr Brealey. In that case, is  
13 there anything else that I have forgotten?

14 Let's move to the true bone of contention that, for understandable reasons, is a bone  
15 of contention. We note that four weeks is the position of two of the three parties and  
16 Pfizer says four to six weeks, so, entirely understandably, a bit more wiggle room  
17 being built into that, but there is no date next year that all three parties can manage.

18 So let me start by giving an indication of where we are coming from and then you  
19 can factor in our issues into your submissions.

20 So my initial thinking was that we needed to get this on as early as was practically  
21 possible, and that looked to me to be a July date for four weeks, which is a date that  
22 I can make, but on consulting my Panel members, for reasons I think Mr Bailey  
23 certainly knows of and probably others in this room, that is not convenient to either,  
24 in fact, of my Panel members.

25 I am not prepared to reconstitute a Tribunal, even if that were possible, because we  
26 have enough difficulties in terms of allocation of personnel. So that pushes us to the

1 far side of the long vacation that year. Where we ended up, which is a date that the  
2 Tribunal can make but we know the CMA cannot, which was October next year.

3 Let me just add a couple of points before I invite pushback on that. We thought we  
4 would say four weeks or the entirety of October from the beginning of term, not  
5 sitting Fridays. Fridays as a non-sitting day are helpful because there are various  
6 other demands that I certainly need to find time in the week to do and usually involve  
7 hearings, so a four-day week works very well from that point of view and is not  
8 unhelpful for counsel.

9 But the four weeks would include only oral openings and evidence. We would have  
10 a separate timetable for the submission of written closings and then, let us say, three  
11 days not included in the four-week budget, three days for oral closings at a date to  
12 be fixed at some point before the end of 2023.

13 So that is, I hope, helpful as an indication of where we came from, but it is no more  
14 than an indication.

15 Mr Bailey, you will obviously want to address us on this, but let me hear from  
16 objections that I am not anticipating before we go on.

17 Mr Brealey, you are on your feet.

18 MR BREALEY: We don't object to that. I know that there is the Epic v Google  
19 matter, which is before your Lordship, so that is on a date listed after 9 October, so  
20 that can be put back. But that means that I am available, Mr Holmes is available --  
21 who is also in -- he is leading in this case for the CMA, and Mr Bailey is available as  
22 well. Mr O'Donoghue, who is also for Pfizer, is available. So from Pfizer's  
23 perspective, that works, it works for the CMA and I will leave it to Mr Jowell, who has  
24 taken over from Ms Bacon, to make submissions on that.

25 MR JUSTICE MARCUS SMITH: We were not unaware of the Epic v Google  
26 problem, but two reasons informed my thinking that we could slightly double-book

1 my time, and indeed your time and Mr Holmes' time. That was, first of all, it is a not  
2 before date, so we can adjust it; and secondly, I have a sneaking suspicion that what  
3 happens in America may very well affect what happens in the United Kingdom. And  
4 that may be entirely wrong --

5 MR BREALEY: Just by -- "yes and no" is the answer to that because yes, there is  
6 some impact, but one must remember it is a jury trial, so there are going to be some  
7 questions and some answers and then that is it. It may have some impact on the  
8 relief, but actually from a substantive issue estoppel point of view, I think it is going to  
9 be not that informative.

10 MR JUSTICE MARCUS SMITH: I understand.

11 MR BREALEY: But certainly October 2023 is -- I think I speak for the CMA --  
12 convenient for them and it is convenient for us.

13 MR JUSTICE MARCUS SMITH: Mr Bailey, can you just confirm that.

14 MR BAILEY: Yes, the CMA assembled a counsel team that is larger than the one  
15 that will go to trial, specifically to have flexibility for a hearing date that suits the  
16 Tribunal. My instructions are that we are -- our silk would be available for that  
17 hearing, and up to two juniors as well. I think the position actually is different for  
18 Flynn, so it is really Flynn that now needs to address on you that issue.

19 MR JUSTICE MARCUS SMITH: Mr Jowell.

20 MR JOWELL: I appreciate of course that we are in the minority on this but --

21 MR JUSTICE MARCUS SMITH: No, but it is important.

22 MR JOWELL: But nonetheless it must be borne in mind that Flynn is a small  
23 company. It has been fined right up to the maximum of the 10 per cent turnover limit  
24 and it therefore -- these proceedings therefore have a disproportionate impact on it.  
25 It has been under investigation for a very long time and it has also already lost one of  
26 its previous leading counsel, Ms Bacon, to the bench.

1 October 2023 is going to be a very difficult time for it to find alternative specialist  
2 competition counsel because it is a very busy time for the competition bar and there  
3 are a number of large proceedings that are ongoing.

4 Therefore, we would prefer and would invite the Tribunal to order that the matter  
5 should be, if it is not prepared to hear this matter in July, Flynn's preference would be  
6 for it to be heard in early 2024, when at least Flynn will have a better chance of being  
7 able to instruct alternative leading counsel of its choice. Those are my submissions  
8 on this.

9 MR JUSTICE MARCUS SMITH: Thank you.

10 MR BREALEY: Obviously I am sympathetic to Mr Jowell's personal position, but one  
11 just has to point out that we are -- we understand that, whilst Mr Jowell cannot make  
12 it because he is in the Euronet v Mastercard case, his two juniors, Tom Pascoe and  
13 Alastair Richardson, are available. So it is only a matter of one leading counsel who  
14 has taken over, whereas myself and Mr Bailey have been in this case since about  
15 2011/2012. So we have been acting for Pfizer or the CMA for a long, long time. It is  
16 a brutal submission, but I make it, which is if someone has to go, it would have to be  
17 Mr Jowell. I have lots of sympathy, but in my respectful submission that must be the  
18 case.

19 MR JUSTICE MARCUS SMITH: Of course I understand what you say, Mr Brealey.  
20 I think Mr Jowell's point was less that his loss to the team, though considerable, was  
21 impossible to make up, and more that there are so few competition KCs in the  
22 market, that finding a like-for-like -- no one could be quite like-for-like Mr Jowell, but  
23 someone who was acceptable to Flynn would be very hard to find. I think that is the  
24 thinking.

25 MR BREALEY: Can I just, on that -- I am not sure that is necessarily correct  
26 because the --

1 MR JUSTICE MARCUS SMITH: Mr Jowell is not unique --

2 MR BREALEY: The Trucks litigation was scheduled for most of next year. That has  
3 now been truncated, so that is due to end at the end of July with a few weeks  
4 in September. So one of the reasons that I am available in October, Mr O'Donoghue  
5 is available in October and Mr Holmes is available in October is because Trucks has  
6 been truncated. One knows that Ryder sued five defendants; there is only one left  
7 now. So although I hear what Mr Jowell says about availability, there is quite a pool  
8 of talent out there who may be free because of the Trucks litigation going short.

9 MR JOWELL: On that, we are not sure that is strictly correct because of course how  
10 would counsel be able to get this matter up and fresh if they finished Trucks at the  
11 end of July -- Mr Brealey is in a slightly different position because, as he says, he  
12 has lived with this for many years, but getting this up entirely afresh effectively would  
13 mean persuading someone to forego the August vacation and so on at the very  
14 least, and it is going to be very challenging to Flynn.

15 MR JUSTICE MARCUS SMITH: Mr Bailey.

16 MR BAILEY: The CMA generally supports the Tribunal's instinct which was to bring  
17 these appeals on as soon as practicable. However, we are not without sympathy to  
18 Flynn's position, not just for Mr Jowell, but also for Flynn seeking alternative counsel.  
19 We would invite the Tribunal to have regard to counsel's availability particularly when  
20 they have been involved for a long time. For that reason, the CMA wouldn't object if  
21 the Tribunal were minded to accede to Flynn's proposal of having the hearing  
22 in January 2024. **(Pause)**

23 MR JUSTICE MARCUS SMITH: Thank you very much for your forbearance.

24

25 **Ruling**

26

For Ruling, see [2022] CAT 56

1 MR BREALEY: That leaves the CMC that may be --

2 MR JUSTICE MARCUS SMITH: That leaves the CMC. So the question then is:  
3 is January a good date for that and how long do the parties think they need?

4 MR BREALEY: Maybe the CMC should be after -- let's assume that the CMA lodge  
5 their evidence at the end of January, maybe late February or early March for a CMC,  
6 so one can take stock of what has been filed with the Tribunal.

7 MR JUSTICE MARCUS SMITH: That sounds sensible, but let me see what the  
8 other parties have to say. Mr Jowell.

9 MR JOWELL: I have to say, given a trial date of October or November, there is the  
10 luxury of a little more time and it may well be sensible to await the close of pleadings,  
11 so that any issues arising out of both sides' pleadings can be ventilated, in which  
12 case, possibly even late March would be a good date.

13 MR JUSTICE MARCUS SMITH: Mr Bailey.

14 MR BAILEY: I agree with my learned friend that it would make sense to do it after  
15 pleadings and any date in March next year would be convenient for the CMA.

16 MR JUSTICE MARCUS SMITH: Well, it sounds like there is at least consensus on  
17 that. We will work on the diary and take that out of this courtroom, but late March  
18 seems a sensible date for a one-day CMC -- we can always try to extend it if  
19 necessary --

20 MR BREALEY: There may be some disclosure applications from Flynn --

21 MR JUSTICE MARCUS SMITH: -- but I want to make clear that we are always open  
22 to resolve problems before March, so don't save the problems up. If we can assist in  
23 resolving matters early, almost certainly on the papers, then we would be delighted  
24 to do so. We certainly wouldn't want any party to come up saying, "We have lost  
25 a month or week or two weeks because there is a dispute which prevents us carrying  
26 matters forward". So bring those matters to us when they arise if they are holding



1 things up because, above all else, we don't want to have prejudice to the trial date.

2 Is there anything more that we need to address today?

3 MR JOWELL: Nothing on our part, Sir.

4 MR BREALEY: Nothing from us.

5 MR JUSTICE MARCUS SMITH: Mr Bailey.

6 MR BAILEY: No.

7 MR JUSTICE MARCUS SMITH: In that case, it remains simply for me to thank you  
8 all for your very helpful cooperation. Mr Jowell, I am sorry we will not be seeing you  
9 at the main hearing, but I hope your clients, more importantly, understand that we  
10 have not ridden roughshod over their interests. It is a matter of concern that we  
11 couldn't accommodate you. But there we are.

12 Thank you all very much. We will rise now.

13 **(11.14 am)**

14 **(The hearing concluded)**

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