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5 **IN THE COMPETITION**

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

6 **APPEAL**

7 **TRIBUNAL**

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

12 Wednesday 17th May 2023

13
14 Before:

15
16 Sir Marcus Smith (President)
17 Eamonn Doran
18 Professor Michael Waterson

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

21
22 BETWEEN:

23 **Applicants**

24
25 **Pfizer Inc. and Pfizer Limited & Flynn Pharma Limited and Flynn Pharma (Holdings)**
26 **Limited**

27 **v**

28 **Respondent**

29
30 **Competition & Markets Authority**

31
32 **A P P E A R A N C E S**

33
34 Mark Brealey KC & Tim Johnston (Instructed by Clifford Chance LLP) on behalf of
35 Pfizer

36
37 Jemima Stratford KC, Tom Pascoe & Alastair Richardson (Instructed by Macfarlanes
38 LLP) on behalf of Flynn

39
40 Josh Holmes KC, Conor McCarthy & Jennifer MacLeod
41 on behalf of the Competition & Markets Authority

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1
2 **Wednesday, 17 May 2023**

3 **(10.30 am)**
4

5 **Case management conference**

6 **THE PRESIDENT:** Good morning, everybody. Can I begin with the usual warning
7 regarding the livestream. These proceedings are being streamed on our website.
8 An official recording is being made and there will be a transcript but it is prohibited for
9 anyone else to either record, whether in audio or visual manner, photograph or
10 transmit the proceedings otherwise. Were that injunction to be breached, there would
11 be consequences. I know no one will but that is a standard warning I give before every
12 case.

13 More helpfully, can I thank on behalf of all of us the parties for their helpful written
14 submissions which we have read. We have also done some reading more widely. But
15 I think we should give a health warning about how much we have not read. We have
16 not, for instance, read very much into the experts' reports and that as it seems to us is
17 quite significant when we come to discuss expert evidence. I wouldn't want the parties
18 to think that we were speaking about expert evidence from a position of strength.
19 I think we are quite overtly speaking from a position of weakness, and we would
20 certainly be paying a great deal of heed to what the parties have to say about how
21 evidence ought best to be received at trial.

22 That may, and I know we'll be coming to this, be an indicator that we need to have
23 a further CMC when the Tribunal will be in a better position to indicate what it would
24 be assisted by. So I provide that by way of a health warning. In terms of agenda
25 we've got, perhaps to get it out of the way, the largely null question of privilege. We
26 understand this issue has gone, subject to the question of costs. We should say that

1 we are not particularly attracted by the idea of arguing about costs even if those have
2 been reduced into a costs schedule.

3 Our provisional thinking, and we don't want to cut anybody short, but our provisional
4 thinking is that both sides seem to have behaved in a sensible manner in resolving
5 what was clearly a difficult issue. That would indicate either costs in the case or no
6 order as to costs. One could I suppose put it differently. One could say that the parties
7 are equally at fault in failing promptly to articulate the key issue, namely was there or
8 was there not exculpatory material? In which case the appropriate order might be
9 reversed, no order as to costs or costs in the case. We are happy to hear the parties
10 further on this but I hope you'll take it as indication as to just how much we want to
11 hear on this.

12 Ms Stratford.

13 **MS STRATFORD:** My Lord, I don't want to interrupt now but if it's convenient, and
14 I very much hear what your Lordship is saying on that, you will appreciate we don't
15 accept that it's been dealt with sensibly on both sides. It has in the end, I fully agree,
16 been dealt with sensibly on both sides but that happened very late in the day and there
17 are costs consequences but I am not going to --

18 **THE PRESIDENT:** Ms Stratford, we are not going to cut you short on this. If your
19 client wishes to take the point, and we quite understand that they might, it will be the
20 first item on the agenda.

21 **MS STRATFORD:** I am grateful.

22 **THE PRESIDENT:** We'll deal with it that way. Is it just you and Mr Holmes addressing
23 this?

24 Mr Brealey, you are in no man's land on this one.

25 **MR BREALEY:** Yes.

26 **THE PRESIDENT:** I am grateful. That's item one. Item two is expert evidence, and

1 I won't go through our preliminary thoughts on this, but when we get to that item we
2 have some thoughts on which we would invite pushback from the parties as
3 appropriate and for them to articulate in light of those preliminary indications how they
4 see expert evidence being handled both at trial and in the run-up to trial.

5 Then thirdly and rather broadly we have things like software, trial timetable, other
6 mechanics which haven't been discussed in the context of expert evidence, and any
7 other business. But that was how I proposed to approach matters on the agenda,
8 which is slightly different from the agenda in the bundle, but I hope that doesn't
9 inconvenience anybody.

10 So with that introduction, unless anyone has anything to say before Ms Stratford gets
11 on her feet to talk about costs?

12 **MR BREALEY:** Just --

13 **THE PRESIDENT:** Mr Brealey, yes.

14 **MR BREALEY:** -- the CMA and Pfizer have agreed the way forward for the redactions.

15 **THE PRESIDENT:** I am very grateful. We saw that letter just before we came in.
16 Thank you very much.

17 **MR BREALEY:** We'll mention that when we come to whether there is a CMC or
18 something like that.

19 **THE PRESIDENT:** I'm very grateful, Mr Brealey. Thank you very much.

20 So, Ms Stratford, we'll hand over to you.

21 **MS STRATFORD:** My Lord, I am grateful. In light of the indication, we don't press
22 our application for costs. I think I have said enough already.

23 **THE PRESIDENT:** We are grateful for that. Do you have a preference about the
24 order, no order or costs in the case?

25 **MS STRATFORD:** No order.

26 **THE PRESIDENT:** No order.

1 Mr Holmes?

2 **MR HOLMES:** Sir, we are content with that.

3 **THE PRESIDENT:** I am very grateful to both of you for that. Thank you.

4 In which case on to the trickier question on which we have articulated some views in
5 our letter to the parties. We floated the idea of short position papers before exchange
6 of written submissions but postdating the expert reports, and to be clear, we would not
7 regard these position papers as expert reports in their own right. We have something
8 in mind of no more than 15 pages in length and we don't think it would be fair to the
9 experts to require them to sign an expert declaration because the nuance will
10 inevitably be lost in these position papers and we would not want experts to be
11 cross-examined on the basis that they had included or failed to include a nuance in
12 their position paper which was, strictly speaking, inaccurate because in order to make
13 an accurate representation you need more than 15 pages. So we would have in mind
14 something which paints a broad brush.

15 Equally in that spirit, we would have a desire, subject to what the parties have to say,
16 of some form of evidence from the experts which comes before cross-examination.
17 Whether that is examination-in-chief or a formal presentation by the experts we are
18 agnostic on.

19 But the more one hears about this sort of expert evidence the more we don't want to
20 lose sight of what it is that the experts are actually saying. Of course we will be reading
21 the written reports but we do think that there is something lost in moving straight into
22 cross-examination.

23 We appreciate that this would be quite an expensive in time terms option. We've got
24 probably about a day's worth of the trial timetable spent on this. But we think for our
25 part it is quite helpful.

26 Now, that may tie into the extent to which hot-tubbing is used and there's obviously

1 a sense of overlap between examination-in-chief and hot-tubbing. To be clear, we are
2 agnostic on hot-tubbing. We can certainly see some value in it, for instance the
3 question of substitutability, that may be a hot-tub subject. Our thinking is that we would
4 probably be unwise to go further than indicating a receptiveness to hot-tubbing and
5 that it probably ought to be discussed when the expert evidence is more advanced
6 and we've actually read it. That would probably be important so that we can work out
7 what topics we want to deal with in a hot-tub.

8 That brings me on to the Hydrocortisone note that was attached to our letter. Now,
9 two of the three of you will be very familiar with this note. Ms Stratford, you won't,
10 because Mr Jowell, who didn't like it, isn't here.

11 The parties all know that we've got two excessive pricing pharma cases in the pipeline.
12 We have Liothyronine, Mr Waterson was on that, and Hydrocortisone, which I dealt
13 with. No judgment has been handed down in either case, but it would be wrong I think
14 not to acknowledge that we've heard a great deal about excessive pricing in these
15 cases and whilst we will obviously decide this case on the evidence before us, we
16 would be kidding ourselves if we weren't bringing into the courtroom a certain amount
17 of thinking about excessive pricing. It is to articulate what, as we understand at the
18 moment, is likely to cause us concern and interest at the trial that I have raised the
19 Hydrocortisone note as something.

20 If I can just unpack, the three areas in relation to excessive pricing that worry us and
21 that we are going to have to grapple with in due course, not to argue about it today but
22 so that the parties with their experts can understand how best to answer the concerns
23 that we are going to have, are these.

24 They are all tests for working out excessive pricing that emerged from United Brands.
25 The trouble with United Brands is that it is so general in what it articulates that it is
26 uncontentious. The devil is in the detail.

1 Now, there are as we see it, broadly speaking, three tests for approaching excessive
2 pricing. First, there is the question of comparables. You may have a comparable
3 market abroad. You may have a comparable market in temporal terms. You may
4 have a comparable product which is in the same market where one can draw
5 inferences. We would only say on this that the clearer the data in relation to
6 comparables and the clearer they are laid out, the easier it is for us to work out whether
7 there is or is not something to be learnt from the comparables. So we would urge the
8 experts to the extent that comparables are being used to at least agree what the facts
9 are so that we can argue about their significance or not.

10 Now, we haven't looked at the expert evidence in any great detail. My sense is, and
11 I may be wrong about this, the comparables are quite low in the running order in terms
12 of how the excessive prices cases are run. I may be wrong about that but I raise it
13 because if it's being run, we do need to have the material in a clearly agreed way. But
14 comparables in a sense are the easiest of the three tests of excessive pricing.

15 Mr Brealey.

16 **MR BREALEY:** Just on that, I appreciate you have not read into the experts but the
17 comparables in this case we say are key, are core.

18 **THE PRESIDENT:** I am corrected already. So clearly then on that basis we are going
19 to want to have uncontroversial facts or delineated controversies so that we can get
20 into the opinion evidence about what is truly comparable and what isn't. So the point
21 was clearly better made than I thought and I am very grateful, Mr Brealey, for you to
22 highlight that.

23 The other two tests of excessive pricing are what you might call value and cost. We
24 raise these because they seem to us to be intrinsically almost philosophical but
25 certainly subjective questions. Take, for instance, the question of value which was
26 addressed in the note that we had in Hydrocortisone. Just how is the Tribunal going

1 to get a grip on value and its translation to price? We all value things differently. If we
2 are going to work out that a price can be justified by reference to value, we are
3 somehow going to have to understand what it is that drives an objective understanding
4 of what is and what is not value.

5 Now, we don't want to address this today but if someone is saying that a price of X
6 can be justified because actually the value is eight-tenths of X and that is why X is the
7 price, well we are going to be pressing the experts saying: how do they get to a value
8 of that level, and why is it that it isn't commonly agreed, is value a kind of objective
9 thing that we can test in some way or is it actually a subjective thing that depends upon
10 how each individual person or each individual buyer values something?

11 So that is the hard question as we see it arising in the context of value and it's
12 something which we anticipate we would be spending some time in a hot-tub debating
13 with the experts because we'd want to know whether they all agreed at least on how
14 one ascertained value if that is a case that is being run.

15 The other area that is philosophically difficult is cost. The problem with cost is it looks
16 spuriously objective and if you say: well, we are going to take a cost-plus approach,
17 that might actually be apparently a very easy way of working out excessive pricing.
18 But I don't think it is as simple as that, and again I will unpack that so that the experts
19 can take it away and think about it.

20 But let's take something which isn't a pharmaceutical product. Let's take a branded
21 T-shirt as an example of the problems that we get. So let's suppose that the cost of
22 producing a generic white T-shirts is 50p and the sale price of a generic T-shirt is
23 £2.50. But a branded T-shirt which is exactly the same except it has a brand stamped
24 on it is £45.

25 You have got immediately a huge mismatch between the marginal cost of producing
26 the T-shirt and the price at which it's selling. You might be able to defend the price of

1 the generic at £2.50 but £45 does look on the face of it excessive.

2 But that's looking at marginal cost. If you are saying: well, the cost of establishing the
3 brand over the last 20 years, speaking hypothetically, these costs were several billion
4 pounds because we had advertising, we had other products that we pushed, these are
5 all costs which we have to recover somehow, well does that get added into the cost
6 which you compare price with? If so, how? These are the questions which make the
7 cost-plus approach much, much harder.

8 I have mentioned advertising costs, there are all kinds of other common costs that we
9 need to get a grip of. There's the question, to move to, say, something closer to the
10 pharmaceutical industry, of the costs of failed products. Suppose you have
11 a pharmaceutical portfolio of ten drugs that you hope to market but actually nine of
12 them are complete flops and are loss-makers, it's the tenth that strikes big, and you
13 recover your sunk lost costs of the nine failures out of the tenth, well is that a legitimate
14 cost to compare with the price or is it not? I don't know the answer to that but that, if
15 a cost-plus approach is being run, is something we are going to have to get to grips
16 with because there are issues and we want the experts to be under no illusions that
17 somehow or other we are going to be asking them these questions to the extent
18 obviously that the parties are seeking to justify or attack the price by one or other of
19 these means, but we suspect that that is going to happen.

20 So how all that feeds into the in-chief examination, the reports, and the hot-tubbing
21 are matters that we are going to hand over in due course. But we would certainly be
22 grateful for the parties' initial views as to how to handle this. We do think that there
23 ought to be, in order to debate these matters more closely, a CMC at some point.

24 Now, it can't be the far side of the summer. That's too close to trial to be useful. Ideally
25 it would be after Liothyronine and Hydrocortisone had been handed down, which puts
26 a certain amount of pressure on me.

1 Without giving too much away, I don't think that we could have a CMC before really
2 the very end of July on that basis and it may be, given the other commitments that we
3 have in other cases, that we might have to encroach upon August in order to have an
4 effective CMC in this case.

5 I float that because we've just got our diaries and our other commitments in mind.

6 I have gone on far too long; I apologise for that but those were our initial thoughts.

7 I don't know who is taking the lead on the appellant's side. Mr Brealey or Ms Stratford,
8 do you want to have a first go at addressing your concerns and please go beyond the
9 points I have articulated.

10 **THE PRESIDENT:** Obviously we may have to just discuss this with everybody in the
11 room. Just in reverse order, August if we could make it September, I don't know
12 whether ... some long distance journeys back from ...

13 **THE PRESIDENT:** Would September work in terms of --

14 **MR BREALEY:** November is the hearing.

15 **THE PRESIDENT:** November is the hearing. The question is how far are the parties
16 happy to proceed down the framing of expert reports and things like that without
17 a further CMC? Because for our part if September works for the parties then I think
18 that's something we would rather enthusiastically embrace.

19 **MR BREALEY:** I think we'll definitely need a CMC.

20 **THE PRESIDENT:** Yes.

21 Mr Brealey, sorry to interrupt, would it help if we rose?

22 **MR BREALEY:** Yes, maybe.

23 **THE PRESIDENT:** Whilst having a debate in court between the three of you is
24 probably quite --

25 **MR BREALEY:** It's unfortunate.

26 **THE PRESIDENT:** It would probably be better if we rose. How long would you like,

1 half an hour?

2 **MR BREALEY:** 10, 15 minutes. Can I just float an idea and then I'll discuss it?

3 **THE PRESIDENT:** Of course.

4 **MR BREALEY:** Clearly there are three things. You have the one hour presentations,
5 and I can't believe anyone is really going to disagree with that, but we've got the
6 15-pager. I think that's fine. We've got the Hydrocortisone note. Now, there are some
7 pretty deep issues there that may not be addressed in the existing evidence and it may
8 well be that we will have to ask the economists to at least do a short 10-pager/15-pager
9 to address what is in the Tribunal's note. I don't know. But I float that now and it may
10 well be the Tribunal will want to consider that. For example, the portfolio pricing issue,
11 the comparables, the value and the cost. It may well be that the Tribunal will benefit
12 from a short, it will have to be short, note from the economists on these issues. We
13 may want to factor in the timetable for that.

14 **THE PRESIDENT:** I think this is something which certainly you should discuss out of
15 the court's doors in the next 15 minutes. But just to be clear, in a sense the
16 Hydrocortisone note of course feel free to address it, but the issues really are wider
17 than that. The Hydrocortisone note is identifying a concern that we have about the
18 question of value in that it seems to be an unsurprisingly subjective thing.

19 **MR BREALEY:** Mm-hmm.

20 **THE PRESIDENT:** And if that is right, then it's very difficult to have an expert come
21 into the witness box and say: well, the value is X. Now, it may very well be that that is
22 the expert's opinion from his or her point of view, or it may be that it is the average of
23 what a survey has produced in terms of how people value things. But at the end of
24 the day, if it is the case that the three members of this Tribunal will value the same
25 thing differently and all of those answers, all of those values are right, then for my part
26 I have great difficulty in seeing value as being a way of resolving an excessive pricing

1 case.

2 It's that question that is the difficulty.

3 **MR BREALEY:** Just to be clear, so we do have evidence on comparables, that is the
4 tablets, for example.

5 **THE PRESIDENT:** Yes.

6 **MR BREALEY:** We do also have evidence on value, this is a pharmaceutical drug
7 and we are coming to the Tribunal with what we call QALY, valuation evidence. So
8 there will be evidence concerning valuation of a pharmaceutical drug that has benefits,
9 et cetera, et cetera, and clearly, we have expert evidence, primarily from Flynn, on
10 cost.

11 But we do address all those three areas in this case.

12 **THE PRESIDENT:** Yes. Clearly you do. I think this is where unfortunately our failure
13 to get to complete grips with the expert evidence is telling. It may be that these points
14 are all dealt with, but we certainly would not be discouraging a desire to address the
15 points that have been articulated as philosophical problems from the parties.

16 **MR BREALEY:** Yes.

17 **THE PRESIDENT:** Because they are going to come up.

18 **MR BREALEY:** They are philosophical because, for example, in Hydrocortisone...
19 I remember the exchange you had: who is the consumer here?

20 **THE PRESIDENT:** Yes.

21 **MR BREALEY:** So when one is talking about consumer surplus, well who is that? So
22 there are some --

23 **THE PRESIDENT:** There are some very difficult questions and what we don't want to
24 do is duck them.

25 **MR BREALEY:** No.

26 **THE PRESIDENT:** So to the extent they have not been addressed, our view, and it's

1 a provisional one, is that we would be helped if they were addressed --

2 **MR BREALEY:** Yes.

3 **THE PRESIDENT:** -- before the trial rather than for us to be asking questions at the
4 trial and the experts saying: well, if only you'd asked me this three weeks ago, six
5 weeks ago, I would have been able to give you an answer. As it is, you've rather
6 caught me on the hop. But there we are. So that we want to avoid.

7 **MR HOLMES:** Before we rise, could I just plant one practical suggestion in everyone's
8 minds, including the Tribunal's?

9 **THE PRESIDENT:** Yes, of course.

10 **MR HOLMES:** It really concerns the practical logistics for further consideration of this.
11 We would respectfully endorse the suggestion of Mr Brealey that it would be preferable
12 to have a further hearing early in the course of September. It would, in effect, be
13 a combined CMC and PTR at which matters relating to expert evidence could be
14 further considered. In order to assist in that process, it sounds likely that we will by
15 then have the judgments in Hydrocortisone and Liothyronine, which will obviously be
16 a helpful point of reference.

17 The second practical suggestion would be that we could consider bringing forward the
18 position papers so that they are served prior to that hearing and the Tribunal has the
19 benefit of them when it hears submissions. As we understand it, there's no further
20 intermediate step in the timetable which requires those position papers to come only
21 a week prior to written submissions, and indeed that from our perspective already
22 sounds tight.

23 The position papers, if they came in time for that hearing, could usefully consider both
24 the comments that the Tribunal has very helpfully set out in the course of this hearing,
25 the contents of the note, and also the implications of the judgments in Hydrocortisone
26 and Liothyronine. We can discuss of course an appropriate length given the contents

1 that they will therefore need to combine but by tying things together in that way from
2 our perspective it does seem that we could have perhaps a more informed discussion
3 when we next come to meet.

4 **THE PRESIDENT:** That sounds like an excellent suggestion. Certainly the seed is
5 well planted.

6 **MR HOLMES:** I am grateful, sir.

7 **THE PRESIDENT:** I only say, speaking personally, it would probably have to be the
8 second half of September rather than the first half of September for this CMC/PTR.
9 I see some nodding.

10 **MR HOLMES:** That's well understood, sir.

11 **THE PRESIDENT:** We can debate dates. What I had in mind coming in was that
12 September in itself was probably too late and I am enormously reassured by the
13 parties' disinclination towards August. I mean, I think absent pending decisions and
14 diaries I would be pushing quite hard for July but that is simply not a doable proposition
15 for both diary and work product --

16 **MR HOLMES:** Yes.

17 **THE PRESIDENT:** -- going forward. So September does seem like a very good idea
18 and certainly your point about the position papers or the summaries of approach, well,
19 yes.

20 **MR BREALEY:** I had written that down as well.

21 **THE PRESIDENT:** Ms Stratford, I saw you were on your feet. You can have the last
22 word before we retire for a few minutes.

23 **MS STRATFORD:** Thank you. I was only going to ask, because it may just help to
24 inform these discussions, whether the idea of joint statements is off the agenda now
25 and we'll focus on this as an alternative constructive way to take things forward.

26 **THE PRESIDENT:** I certainly wouldn't want to rule anything out. The experience

1 I think that we have had about joint reports is that if one doesn't buy into the spirit of
2 eliminating points and simply goes through a box-checking exercise of narrow areas
3 of agreement and broad areas of disagreement, what one ends up with is another
4 150-page document that actually no one really looks at.

5 **MS STRATFORD:** Yes.

6 **THE PRESIDENT:** On the other hand, we do see considerable virtue in identifying
7 the broad themes of agreement and disagreement and the extent to which there is
8 actual disagreement on those points. So we certainly are not against joint reports as
9 a means of eliminating the chaff that can distract a Tribunal where it is either
10 unimportant or agreed but we don't want to be, certainly at this stage, overly
11 prescriptive in saying there must be joint reports.

12 So we are certainly not saying no. We are probably saying a somewhat qualified, yes.

13 **MS STRATFORD:** As you may have seen, we are the least enthusiastic about the
14 idea of joint statements in this particular case. Of course I entirely agree that they can
15 be very helpful and constructive. But here we have genuine concerns that it's going
16 to be inevitably a lengthy and costly process that won't produce results that are of the
17 greatest assistance to the Tribunal because we have this -- well, we have three parties
18 to start with but more importantly perhaps we have a slightly unusual mosaic of expert
19 evidence with experts from different disciplines but also fundamentally addressing
20 different issues.

21 Therefore it seems to us either the joint statements are going to be at such a high level
22 of generality that really it's, frankly, cost for not a proportionate benefit or they are
23 going to get very confusing and not of assistance. So I just thought before we have
24 this most helpful and practical discussion I thought it was important to air how the
25 two --

26 **THE PRESIDENT:** Ms Stratford, that's very helpful.

1 **MS STRATFORD:** -- things are going to fit together.

2 **THE PRESIDENT:** Who is the most enthusiastic protagonist for joint reports amongst
3 the other parties?

4 **MR HOLMES:** I think both myself and Mr Brealey suggested that they might be helpful
5 but we can see that there are different ways to skin a cat, if you will excuse the
6 colloquial expression, and I think there is a risk of overfreighting the process with too
7 many different ways of elucidating the expert evidence. So for my part, anyway and
8 without instruction, I would be slightly concerned that we might end up with a number
9 of overlapping documents and we should really opt for one or the other approach.

10 Once one moves away from the economic expertise, the other experts' reports, as
11 I think the Tribunal will find once it delves into them, are actually much more
12 straightforward and probably don't require joint expert statements in the same way.

13 So we certainly wouldn't die in a ditch in favour of joint expert statements if the Tribunal
14 prefers this model of position papers.

15 **THE PRESIDENT:** Well, Mr Brealey, before you rise, we need I think to ask ourselves
16 why one has joint reports and it is to cut back the extent to which the Tribunal needs
17 to consider material that prior to the report, the joint report, was perceived as
18 contentious. In other words, it's to enable the Tribunal to focus on the essential issues.
19 If in trying to do that one ends up with a document that is actually very hard to digest
20 such that actually in order to work out what is and is not contentious one needs to
21 minutely parse a whole series of anterior reports and then construe the joint
22 statements to see exactly what concession is being made, well it doesn't help.

23 That is very much the sense that I got from Ms Stratford's point, that one would not
24 get a helpful outcome. So, without closing out any options, we would be minded to
25 leave the parties to work out what is the best way of delivering a focus on the essential
26 issues, without necessarily agreeing the inessential issues. We can quite easily

1 say: look, if you go down a particular route, you are going to have to worry about the
2 following inessential points. But, frankly, the key thing is the detail that is much in
3 advance of this. If you decide one way, frankly all this detail is not going to matter,
4 don't worry about it. If you decide the other way, then, yes, there are a number of
5 questions which are contentious that you are going to have to think about.

6 Now, that sort of analytical approach is really very helpful to the Tribunal. It does not
7 involve agreeing anything. All it involves agreeing is the stage at which certain
8 controversial points may or may not be relevant and that I think is what we are looking
9 for. It's very hard to put down in an order and, to be clear, I don't think we are going
10 to be ordering anything along those lines today. What we want to get the parties
11 thinking about is the right mindset for themselves and the experts to enable us, as
12 efficiently as possible, to get to the right result.

13 Mr Brealey, unless you have anything to say?

14 **MR BREALEY:** No, except I feel rather faint because I agree with Mr Holmes.

15 **THE PRESIDENT:** Wonders never cease, Mr Brealey.

16 In which case, we'll resume at 11.30. That gives you 20 minutes. If you need more
17 time, do please say so because this is very important to, at least provisionally, get
18 right. But we'll resume at half past, unless you say otherwise. Thank you very much.

19 **(11.12 am)**

20 **(A short break)**

21 **(11.48 am)**

22 **THE PRESIDENT:** Mr Brealey.

23 **MR BREALEY:** I think where we got to, it's been very constructive, I think we've
24 agreed that we won't -- this is obviously subject to the Tribunal's direction.

25 **THE PRESIDENT:** Yes, of course.

26 **MR BREALEY:** No need for the joint statements at the moment. We are very happy

1 with the position papers.

2 On the timing, we believe they can be lodged early September, so they can be ready
3 for the late-September/mid-September CMC. They would, certainly from our
4 perspective, need to address the three disciplines we've got in this case, which is cost,
5 valuation and comparables.

6 The position papers, we can discuss how they pan out but whether they should actually
7 be signed because they may have to deal with a degree of new evidence in the light
8 of the judgments that the Tribunal notes. Clearly, we don't want to go down a whole
9 raft of new evidence but it may touch on new factors.

10 So there has been debate whether they should have a statement of truth as per normal
11 because they could well be evidence in the case. Personally I think that would be
12 advisable but that can be debated. So that's the position papers.

13 Then we have the CMC. We can decide whether we have hot-tubbing at that CMC
14 but I think we are broadly agreed that we don't need the hot-tubbing if we have the
15 teach-ins. Again the teach-ins would be on the three disciplines: the cost, the valuation
16 and the comparables.

17 The valuation, there are two essentially really. There's the QALY, the valuation, but
18 also the clinical. They produce benefits because we can't ignore the fact that this is
19 a pharmaceutical product at the end of the day.

20 So it's all the disciplines, which I just keep for the economists, and I can have a small
21 wager that when you read the QALY, the valuation evidence, you will appreciate
22 a teach-in.

23 **THE PRESIDENT:** Mr Brealey, on that basis I think you should consider that we will
24 be wanting that to be factored in so we can include rather than at the last minute
25 discover the burning need.

26 **MR BREALEY:** Yes. So I think it's pretty simple, I think. The position papers early

1 September. We can agree a date. CMC, mid/late, subject to the Tribunal's
2 convenience. Some teach-ins. And also the CMA I think has asked and we've agreed
3 that the skeletons can go back a week, so they would put their skeleton in one week
4 later because of what's going on. But subject to that, that's the broad brush. I will
5 leave others to say I have got it wrong.

6 **THE PRESIDENT:** Ms Stratford, do you want to go next and then Mr Holmes can
7 respond generally.

8 **MS STRATFORD:** My Lord, yes. There's not a great deal I need to add to that.
9 Starting at the end of what Mr Brealey was saying, the only thing I would say is saying
10 CMC date, I think several times he said, potentially late September, we do think if at
11 all possible, and obviously this is all subject to your convenience, mid-September
12 because even pushing the skeletons one week back, we just run into practical timing
13 difficulties.

14 So subject to the Tribunal, the parties' new proposed dates, just to be a little bit more
15 concrete about it, would be still trial bundle 31 July. We don't see any reason not to
16 stick to that. I think it would help everybody. Then skeletons for Flynn and Pfizer we
17 would now suggest 16 October. But you will immediately see that is not very long after
18 this third CMC that we are now envisaging.

19 Then the CMA's skeleton would then be due on I think by my maths 30 October.
20 I have not actually checked in the diary. I have just done some adding. So please say
21 if I am wrong. No. Mr Holmes is nodding. That's always very reassuring.

22 Then since I am going through these slightly prosaic dates, authorities bundles would
23 be lodged by 2 November. I am grateful. So that's still a week, isn't it, before the start.
24 I think that works. So I started to go into those dates just to stress that if at all possible
25 we do think it would be helpful to have this hearing really at the start of the window
26 that your Lordship was indicating.

1 **THE PRESIDENT:** Let me get my own diary up and see. We've discussed diaries
2 and my diary is the one that is the biggest problem. I think the earliest date that we
3 can feasibly do is 20 September, which is not ideal, but is that something which we
4 can at least provisionally mark in the diary? I agree with you, if it could have been
5 sooner, we would want it sooner.

6 **MS STRATFORD:** We can only do what we can do.

7 **THE PRESIDENT:** We can only do what we can do, exactly. So if we set that as
8 a moderately firm date, and work round that, it's making, you are absolutely right, the
9 skeletons tight but perhaps not undoably tight.

10 **MS STRATFORD:** I think we can just about live with that. But no more.

11 **THE PRESIDENT:** No more, no.

12 **MS STRATFORD:** What I would say is this is all proceeding on the assumption that
13 we are not going to be met with a barrage of new evidence. I hear and agree with
14 what Mr Brealey has said about the position statements needing to deal with whatever
15 judgments we have by then and with your Lordship's note, but if this starts to veer off
16 into lots of new evidence, then we do have concerns about how that would all work.

17 **THE PRESIDENT:** I mean, I don't want to interrupt you but the one point I really did
18 take from Mr Brealey's submissions that might be contentious was this new evidence
19 point. For our part, we are really on the very cusp of what the layperson would call
20 opinion evidence, rather than what the lawyer would call opinion evidence, and to be
21 clear we welcome that sort of debate because we don't want it happening sub silentio.
22 So if and to the extent there is a new take on how one discerns value, that is something
23 which we would want I think to have in rather than out. What we don't contemplate in
24 the position papers is several schedules of new data that will then have to be gone
25 through. That's something which really needs to be in before the summer.

26 But if and to the extent that any of the experts say: our answer to the cost-plus difficulty

1 or the subjective nature of value is this, then that is something which we would want
2 to have and we don't see that as being a major problem in terms of hard work to be
3 done between the filing of the position paper and the trial in the way that a whole series
4 of factual bits of data would be.

5 So if we can articulate the line that way, I hope no one has a problem with that.

6 **MS STRATFORD:** Yes, that's helpful.

7 **THE PRESIDENT:** The reason we made the point earlier that we didn't particularly
8 think that a signed expert declaration was necessarily desirable was we didn't want to
9 have an expert being trapped in cross-examination by having put their name to
10 a position paper which was inevitably putting things in a staccato and broad brush way
11 and to be told: well, you've said this in your position paper but you actually said that in
12 your 300-page report two months ago and it seems to us there is an inconsistency
13 here, that is something which we wouldn't regard as helpful. But of course these
14 position papers have to be the experts' opinions and provided they are treated in that
15 light, we don't have a problem in them being signed by the experts. What we want is,
16 in other words, the best of all worlds. We want the experts' genuine opinion but we
17 don't want them to be worrying that they are going to be tripped up in the witness box
18 and then criticised for having failed to unpack a nuance that can only be done in
19 a much longer report.

20 So it's that issue that is concerning us, not so much the new evidence, if any party
21 came along with vast amounts of new material that required work to address it, well
22 that really wouldn't be welcome.

23 **MS STRATFORD:** I am very grateful. That's very helpful. Yes, I am sure we all hear
24 what your Lordship says about the technical cross-examination of that sort frankly just
25 won't be welcome and is not what is being invited.

26 In terms of matters of new factual expert evidence or anything like that, of course the

1 position is that the expert evidence, the reports, are all in as at this point and we are
2 just talking about this extra add-on.

3 **THE PRESIDENT:** Indeed.

4 **MS STRATFORD:** So we should know where we stand in terms of the detail in those
5 experts' reports.

6 I don't think there is anything further that I need to say at this point. I am very grateful.

7 **THE PRESIDENT:** No, thank you, Ms Stratford.

8 **MS STRATFORD:** There is a question, sorry, just before I --

9 **THE PRESIDENT:** No, of course.

10 **MS STRATFORD:** There is a question about the length of the skeleton arguments for
11 the trial but perhaps we can deal with that separately.

12 **THE PRESIDENT:** We can but oddly enough we were debating this ourselves.
13 I've probably said this in open court before, I am not an enormous fan of ruthlessly
14 imposed page limits. The parties will know that the more they write, the less time there
15 is to devote to each page and for my part, we will obviously hear what the others have
16 to say, we would rather the parties concentrating on identifying the essence of what
17 the Tribunal needs to hear rather than worrying about whether they are going to be
18 prejudiced by putting their submissions into Times Roman 12 or Arial 10. So perhaps
19 you can take that as an indication as to where we are coming from on page lengths.
20 So length does matter, but I am not sure that a 25- or 30-page limit or whatever it might
21 be with an obligation to make an application for more length is particularly the way we
22 want to go in this case.

23 **MS STRATFORD:** I am very grateful. Sorry, having said I would finish, having
24 brought it up, as you may have seen, we are suggesting 45 pages here, assuming we
25 are to have some sort of limit or at least guide. Just to put it into context, for the first
26 trial Flynn's opening skeleton was 80 pages and Pfizer's was 95, so we are certainly

1 not suggesting we want to put in anything similarly lengthy here. Of course the
2 Tribunal's practice has moved on and it's fair to say that the pleadings are detailed
3 and quite long here.

4 But we do suggest that for a six-week trial involving so many experts and contentious
5 issues that the 30-pages that the CMA had in mind would actually do far more harm
6 than good and we would, as your Lordship wisely observes, spend an awful lot of time
7 fiddling with our margins and cutting out words and it's just not --

8 **THE PRESIDENT:** Don't disclose too many tricks of the trade, Ms Stratford.

9 **MS STRATFORD:** My Lord, that's all I think I need to say on length.

10 **THE PRESIDENT:** I am very grateful.

11 Mr Holmes.

12 **MR HOLMES:** My Lord, I can be extremely brief. I have no quibbles or qualms about
13 anything that has gone so far, save for one very small point. I think Mr Brealey
14 suggested that hot-tubbing was something that we had all waved goodbye to. For our
15 part anyway, we suggest that the format and timing of experts' evidence, including the
16 presentations and the question of hot-tubbing, be reserved for final determination at
17 the next CMC.

18 **THE PRESIDENT:** Well, I think that is something which we entirely accept in that for
19 our part we are going to be quite, and I think properly, Tribunal-oriented here. It's
20 going to be what is going to enable us best to get to grips with what's going on and
21 that is why at the outset I indicated that we would not want to be deciding these matters
22 today. We will take what you've all said about hot-tubbing under advisement. We will
23 look as much as we can and certainly we will have on board the expert reports before
24 the next CMC in September and I think the parties can anticipate that we would be
25 coming out to bat with a fairly clear articulation of what we thought would help for the
26 parties to push back on going forward.

1 We think there is an interesting question as to what goes into the evidence-in-chief or
2 presentations and the hot-tub in that there is bound to be a certain overlap and we are
3 not going to want to do the same things twice over, so to that extent I think Mr Brealey's
4 point is well made. But what goes into a hot-tub and what goes into in-chief is a matter
5 on which I don't think we can express any view at all at the moment.

6 **MR HOLMES:** I am grateful, sir.

7 **THE PRESIDENT:** Well, we are not inclined I think to make any kind of order here.
8 The matter is on transcript. The parties know where we are going. The composition
9 of the Tribunal remains the same, so we know where we are going. If there is any
10 issue or question that arises between now and September, then of course the parties
11 should discuss it amongst themselves and then raise it with the Tribunal and we will
12 deal with it on the papers. So I don't want the parties to think they have to save up
13 their concerns to 20 September. We will confirm that date, but you can take it as
14 a provisional date for the moment. If anyone has a problem in their diaries, of course
15 do push back. It's provisional on both sides but I think it's useful to have a date in
16 mind.

17 I think we would be a little concerned if it slipped significantly the wrong way and it
18 can't unfortunately be much or at all before then. So although it's provisional, it's
19 a pretty firm provisional.

20 We, for our part, will be looking at the expert reports in greater detail and if we identify
21 areas where we feel that there is an unanswered question, I am not saying there is
22 because we don't know, but we will raise that for our part with the parties so that they
23 can tell us where the answer lies so that we are briefing ourselves again before the
24 CMC, but that is standard Tribunal practice.

25 So that is all I think we need to say about what was broadly issue 2. That brings us to
26 the last area, which has already been touched on, which is essentially software and

1 trial mechanics.

2 What Ms Stratford was saying about trial bundles and authorities rather resonated with
3 something that we were looking at yesterday and I wonder if we could hand around
4 a draft order which I will walk you through now. Let me be absolutely clear, I have no
5 intention of making this order today. It is rather something that the parties can take
6 away and think about with a view to, if appropriate, taking it forward.

7 One of the problems that the move to electronic documents has entailed is that one
8 has a whole variety of processes by which the parties lodge the documents and
9 a whole variety of other processes by way of which the Tribunal then itself files those
10 documents on our internal IT.

11 The upshot is that when I ask to see the expert reports in this case, they are actually
12 all over the Tribunal system and it's very hard to actually find out what has and has
13 not been filed without significant work. So the aim of this order is to ensure that
14 everyone, the Tribunal, and the parties, have a common index of documents, with
15 a common reference to files within it.

16 So what we are proposing is that going back the parties file what we call a documents
17 index, which is simply a list of electronic documents in a form PDF searchable with
18 a file name that has a common root and then a sequential form of numbering
19 beginning with 00001 and going up to whatever number there needs to be.

20 So those documents are produced. When they are transferred on to the file system,
21 on to any system, the documents will run into a common order from one to 10,000 or
22 whatever. If one then has an index of those documents, you'll be able to know what
23 documents there are and you'll be able to look for, as it were, expert reports and other
24 documents in that essentially chronological index. You'll also have a common system
25 of reference so that if any party is saying: I am talking about document 33, everyone
26 will know, including the Tribunal.

1 Now, that may act as a shortcut to trial bundles themselves. One could do exactly the
2 same with authorities in the sense that, as and when one realises that an authority is
3 going to be relevant, one could file it electronically, give it an authority number
4 beginning with 1 and updating so that in fact one doesn't have to produce at the last
5 minute a set of electronic files of authorities, instead one has a common tabbed
6 reference which is accumulated over time where everyone can say: we are now talking
7 about authority 33 which is in common form for all.

8 The advantage from the Tribunal's point of view is that we get our trial bundles or the
9 documents that are important sooner because the expert reports that are in now will
10 have a common designation as of now. We will also be able to mark them up
11 electronically without having them superseded by the next iteration of electronic trial
12 bundles, which loses all the work that one does from here on in.

13 So that was a thought that we had. I am not going to invite submissions on this. What
14 I would like the parties to do is to have a think about the draft order that we've put in
15 circulation, raise practical questions as to whether it does or doesn't work and you can
16 then ascertain whether a system like this will fit in with. I think the parties are planning
17 to use Opus 2 as the trial management system. Well, we don't see any inconsistency
18 between that and this system. All we are doing is imposing a degree of discipline on
19 what the parties are already doing, namely filing documents as they are served on the
20 other parties.

21 The only extra cost is the fact that it would have to be a backward-looking job in terms
22 of identifying the key documents which have already been filed, giving them a common
23 format and file designation, so that going forward we can speak to the same document
24 using the same reference.

25 That's all I am going to say about that. I will hand over I think, Mr Brealey, to you to
26 say anything more that you want to say about the mechanics of trial and indeed

1 anything else that we haven't addressed so far.

2 **MR BREALEY:** No, I am very grateful, sir. I have nothing to add. I need to obviously
3 take this away, discuss it with the team and maybe with the other -- I know Mr Johnson
4 may have something to say, he was saying something to me -- go on then.

5 **THE PRESIDENT:** Mr Johnson.

6 **MR JOHNSTON:** My Lord, the suggestion is a very sensible one, which is that in
7 particular if you mark up documents electronically you don't then have to get a fresh
8 set. The only adverse consequence that struck me as you were describing it is that
9 you'll then have, as additional documents are added on, they won't be grouped
10 together with common documents, so what you won't have, for example -- I imagine
11 we had done this from the beginning, you would have pleadings and then you would
12 have letters and then you would have all kinds of other things which would be
13 numbered sequentially but then if you wanted to find the pleadings, they'd be scattered
14 everywhere, so in your new index it would be consistent but it would be scattergun.

15 Now, actually going back, it may be possible to remedy that to some extent with what
16 we've already got but everything going forward will not logically be grouped together
17 in sub-folders within Opus, it will be just a long string of numbered documents there.
18 So there is the advantage that you have it, you can mark it, you know where it is, but
19 the disadvantage is that you will have a totally disordered internal index.

20 **THE PRESIDENT:** You are absolutely right. That is the consequence. So going
21 back, yes, you can group them.

22 **MR JOHNSTON:** You can address it, yes.

23 **THE PRESIDENT:** Going forward it's going to be time-based. The way I think of
24 dealing with this is that all of the parties will have a facility of essentially giving the
25 Tribunal a reading list which would itself group documents. If one adopted this
26 process, you would be able to say, let us say in your skeleton arguments, the relevant

1 documents on this particular point are the expert reports on, let us say, cost
2 comparables, you must read documents 33, 58, 2022 and those are the documents
3 that you should read, and the grouping occurs that way.

4 But I do accept that you have a scattergun list which is essentially chronological, but
5 I think in terms of having the documents when they are produced in a manner that is
6 notable may be a price worth paying. But we are feeling our way here. So your point
7 is --

8 **MR JOHNSTON:** My Lord, you addressed the point that is always my personal own
9 frustration, which is they are all marked up and then I get a completely new set and
10 I have to mark it all up again. I suppose that is the obvious disadvantage that follows.
11 There may be a creative way of trying to create indexes that do group so there is
12 a numerical index and then a non-numerical. I mean, there may be solutions to it but
13 it struck me as the obvious difficulty.

14 **THE PRESIDENT:** You are absolutely right. The reason I have circulated this in draft
15 is because it is a thought in process.

16 **MR JOHNSTON:** Yes.

17 **THE PRESIDENT:** It's simply that at the moment an awful lot of work that everyone
18 does is lost because you don't -- I mean, it happened with paper bundles as well of
19 course.

20 **MR JOHNSTON:** Indeed.

21 **THE PRESIDENT:** You annotate the pleadings and then you get a fresh set of trial
22 documents and you either have to substitute them out or start again. We are getting
23 that problem again. But put it this way, if you have a solution to that particular
24 point -- we'll have a discussion.

25 **MR JOHNSTON:** We'll put our minds to it and see if there is a way of creating maybe
26 a second index that group things schematically or what it might be in order to try and

1 make it user-friendly in that respect. I am grateful, thank you.

2 **THE PRESIDENT:** No, thank you very much.

3 **MS STRATFORD:** The only thing we would add when we are all thinking about the
4 practicalities of this, and I should say we entirely share the sentiment and desire to
5 achieve something better, is of course we'll have confidential versions of many of the
6 documents so we'll have to think of -- assuming that something like this is going to
7 happen, we would have to think of a way to deal with that that wouldn't create further
8 confusion.

9 The only other thing I'd say is that because we will have Opus 2, it may be that some
10 of this could be achieved by giving early access to that document management
11 system. We want to ensure we are not reinventing the wheel.

12 **THE PRESIDENT:** No. I mean, again, that is an entirely fair point. Our experience
13 is that for entirely understandable cost reasons Opus tends to be coming online at
14 about the time that one gets the written submissions before trial and given the way the
15 Tribunal tries to work, that's usually quite late --

16 **MS STRATFORD:** A bit late.

17 **THE PRESIDENT:** -- in terms of preparation.

18 **MS STRATFORD:** Absolutely.

19 **THE PRESIDENT:** But there is always going to be a problem if we are annotating
20 these documents in this way how that interrelates with something like Opus 2 is an
21 unaddressed problem.

22 **MS STRATFORD:** Yes, I don't have any instructions but it may be that we need to all
23 take this away and consider whether early access to Opus 2, for example, could be
24 another way to go.

25 **THE PRESIDENT:** No, indeed. I mean, this was very much an opening bid for
26 discussion rather than an imposition of a process. So if you take it away in that spirit,

1 then my ends have been met.

2 **MS STRATFORD:** I'm very grateful.

3 **THE PRESIDENT:** Thank you very much.

4 Mr Holmes.

5 **MR HOLMES:** Sir, I don't have anything on this, only to note that in relation to Opus
6 2, for reasons of the procurement process which I understand my clients need to
7 undertake to obtain Opus 2, it may be helpful to have an order of the Tribunal. So
8 perhaps the parties could liaise and provide something by consent at some convenient
9 point between now and the next CMC.

10 **THE PRESIDENT:** Of course. I mean, certainly we are disinclined to allow
11 procurement difficulties to stand in the way of efficient case management. We take
12 the view that the latter trumps the former --

13 **MR HOLMES:** Yes.

14 **THE PRESIDENT:** -- for pretty obvious reasons. So if the parties have an agreed
15 way forward, then we will certainly sign up to that.

16 **MR HOLMES:** I am grateful, sir.

17 **THE PRESIDENT:** This is part of a conversation that we can take forward from here.
18 Unless there is anything more, we are not minded to make any formal order. If the
19 parties need us to make an order for reasons that Mr Holmes has articulated, of course
20 we'll do so. But I think we all know where we are going. For our part, we are very
21 grateful to the parties for assisting us in establishing at least some sort of route as to
22 where we are going and we can discuss it further on 20 September, if that is the date
23 we all agree upon.

24 Thank you all very much. We'll rise now.

25 **(12.22 pm)**

26

(The hearing adjourned)