IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1586/4/12/23

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Monday 15th May 2023

Before:

Hodge Malek KC (Chair)

(Sitting as a Tribunal in England and Wales)

BETWEEN:

Applicants

Dye & Durham Limited and Dye & Durham (UK) Limited

v

Respondent

Competition and Markets Authority

&

Proposed Intervener

TM Group

A P P E A R AN C E S

Ben Lewy (Instructed by Dentons UK and Middle East LLP) on behalf of Dye & Durham Limited and Dye & Durham (UK) Limited

Ben Lask KC (Instructed by the CMA) on behalf of the Competition and Markets Authority

Robert O'Donoghue KC (Instructed by Fieldfisher) on behalf of the TM Group

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Monday, 15 May 2023

(10.30 am)

Case Management Conference

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

Thank you.

MR LEWY: Good morning, Mr Chairman. I am Ben Lewy. I appear on behalf of Dye & Durham or D&D. My learned friend Mr Lask appears for the CMA and my learned friend Mr O'Donoghue appears for TMG, the proposed intervenor.

The issues on the agenda are evidence, both expert and factual.

THE CHAIR: Yes.

MR LEWY: And then following from that how to deal with D&D's linked application for permission to amend its grounds in the event that permission to adduce that evidence is not given. There is then TMG's application for permission to intervene and if that is granted, issues about confidentiality. Then finally timetable. We are really in the Tribunal's hands.

THE CHAIR: Yes, but we have indicated that this is going to be heard in the second half of June, it's just a question of which of the dates and how long the estimates are going to be and that if counsel aren't available, well, they are going to have to find new counsel because it's quite clear that this is an application that should be heard as soon as possible for the reasons that Mr O'Donoghue has explained in his submissions.

So the dates that we are looking at are either 12 to 14 June or 26 to 28 June. Looking

at the papers, this should be a two-day hearing. We have done much larger substantive challenges to whole merger decisions in two days before. I would be surprised if it's going to take any longer than that. I have looked at all the material that's in the bundle. There's not a huge amount of material there. The issues are relatively -- I am not saying they are uncomplicated but they are not -- it doesn't involve a huge amount of evidence to get to the bottom of it. It's largely going to be submissions. So I think it's a two-day hearing. The choices are the 12th to the 14th or the 26th to the 28th. Those are the only two windows that we can offer. So probably the best thing is for people to indicate in the course of this morning, we don't need to fix it now, as to which dates most people can make.

I would be surprised if we can find a window that everyone can make but we'll go for whichever one that most people can make. Okay, so we'll come back to that.

Before we go any further, I do need to have clarity as to the case of the applicant. When you look at tab 5, that is the twin track proposal and that's the proposal that was put to the CMA. When you read that, there's no reference to having a parent company interposed between the D&D shareholders. But what it is, is that what is going to be applied for is an admission to AIM of the shares in TMG and those shares would be owned by the shareholders of D&D. That's what the proposal is.

You then move forward and you get the various copies of correspondence, you get supplemental submissions, the supplemental submissions don't refer to anything like a Spinco or the possibility of any entity other than TMG being admitted.

We then get the provisional decision which is at tab 8 and that is on 8 March and D&D is given until 5.00 pm on Monday 13 March to make any further submissions.

Then we get the further submissions at tab 10 and then that is the first, and I think the first reference, to having an allotment of shares in a newly formed Plc which would own TMG shares, so that's the first reference to a potential Spinco that I can see.

MR LEWY: Yes.

THE CHAIR: Then there is the possibility that the entities whose shares would be listed is not going to be TMG but the new parent, the newly formed Plc. That's not really expanded upon, it's just really referred to as a possible alternative, and you can see that, for example, at paragraph 4.5, "the CMA cannot rightly object to an AIM listing of TMG", and then in brackets it says "or its parents". We then look at the letter of 13 March 2023 from finnCap and that's all in terms of the entity whose shares that would be listed is TMG and it's not going to be TMG's parent company.

So that is where we are and there is nothing that I have seen whereby you say: forget the proposal that we've put, and that's the proposal you've got, the minded to decision, but we've got a completely new proposal, and then when I look at the submissions and the notice of application it's all about the spin-off and the proposal that is sort of adverted to but not really developed in any detail on 13 March.

So that is where we are. My question to you is: is there anything fundamentally different between the proposal that the CMA had before it, i.e. the position paper, the position proposal of 23 February 2023, and what you are now putting, which is the Spinco, and it's the Spinco shares that are being admitted to AIM, such that if the CMA's decision is correct on the original proposal, it would be correct in relation to let's say the revised version of it? Or is there something in the revised proposal that is so fundamental that even if the CMA would be correct in rejecting the original proposal, they would not be correct in rejecting the revised proposal? We need to have clarity on that before we go any further because on one view it doesn't really matter that if the CMA were correct to reject the original proposal, a fortiori they would be correct to reject one that just involves the interposition of a holding company because it shouldn't make any real difference in principle in the competitive considerations whether or not you have an intermediary company or they are being held direct.

So if we can have clarity on that then we'll know where we are going.

MR LEWY: Mr Chairman, if I could briefly take instructions on that point?

THE CHAIR: Yes, of course you can. Yes, yes. **(Pause)**.

MR LEWY: Mr Chairman, I have taken instructions. The first point we make is in our submission as a matter of economic substance and competition law analysis the interposition of a holding company is entirely irrelevant and when we consider the substance of the CMA's objections it makes not one iota of difference whether or not there was an interposed holding company.

Second, Mr Chairman, there may be a relevance to one of our grounds where we complain as to how the CMA applied the independence criteria. We complain that they applied the independence criteria to individual shareholders rather than Holdco. In that limited area there may be some difference but we --

THE CHAIR: It's not likely to be one of substance.

MR LEWY: It's not one of substance at all, Mr Chairman.

THE CHAIR: That's fine.

MR LEWY: If I can make one final submission though, Mr Chairman. It's not entirely correct to say we didn't raise Holdco prior to the decision. If I could ask Mr Chairman to turn to page 132 of the bundle.

THE CHAIR: Yes.

MR LEWY: You'll see, Mr Chairman, it's about a third of the way down that top paragraph:

"In any event the initial composition of shareholding at TMG or its parent on an AIM admission would not ...(Reading to the words)... or its parents."

THE CHAIR: I accept that. I referred to that when I looked at it. I looked at the equivalent further later on. But where it comes up for the first time is the letter of 13 March. That's the only point I wanted to make.

MR LEWY: Yes, Mr Chairman.

THE CHAIR: Mr O'Donoghue, thank you very much for your skeleton argument and your application to intervene. As I see it, subject to any of the submissions that we may hear from anyone else, that your clients do have a sufficient and direct interest in this matter, that your clients are privy to the undertakings given and that you may be affected by the corporate structure or restructuring that is envisaged in the proposal set out in the application. So unless anyone objects, I give you permission to intervene. No objection?

MR LEWY: Mr Chairman, we do object. We accept that TMG has sufficient interest.

THE CHAIR: Yes.

MR LEWY: We don't understand what usefully they can contribute.

THE CHAIR: We'll come to that in a minute of course. That's the next question. So I am going to give them permission to intervene. It's a question of what is the nature of the intervention. Mr O'Donoghue, if you can explain what you intend to put in your notice of intervention and then we'll go from there.

MR O'DONOGHUE: Thank you, sir. As you will have picked up from the written application, the primary basis on which the application to intervene is put is really a question of fairness --

THE CHAIR: Yes.

MR O'DONOGHUE: -- or justice to my client. Fundamentally what is being proposed is that the corporate structure of my client which has been in place since its inception in 1999 would be changed from a private to a public sphere. My client is opposed to such change. Our primary point is one of fairness, that the idea that this possibility of a significant corporate change being effected as a result of the decision being overturned without us having any say whatsoever --

THE CHAIR: You say you will be prejudiced by it, I understand that.

MR O'DONOGHUE: So, sir, as a starting point and with respect, I don't accept my learned friend's submission that in addition I need to show some unique added value.

THE CHAIR: No, but I think the point is different. It's that, yes, you can intervene and you've got standing and all that but it's what contribution can you make to this hearing.

MR O'DONOGHUE: Yes, what it would look like.

THE CHAIR: And what you would put in your notice of intervention.

MR O'DONOGHUE: Yes.

THE CHAIR: I know it's all fairly short-term but if you can just give us five minutes explaining what you'd like to do.

MR O'DONOGHUE: Yes, I can give you the gist of that. One caveat I should add is my client has not yet seen the witness evidence in support of the judicial review application so there's --

THE CHAIR: So what have you seen?

MR O'DONOGHUE: Well, I have seen a confidential version of the notice of appeal.

THE CHAIR: Yes.

MR O'DONOGHUE: My client has seen a non-confidential version and, as I understand it, nothing else.

THE CHAIR: Okay.

MR O'DONOGHUE: So we have a limitation to that extent.

THE CHAIR: Yes.

MR O'DONOGHUE: So, sir, in terms of the specifics, there are really three buckets or areas. First, as we've set out in paragraph 25A of our skeleton, we --

THE CHAIR: Can I just find that. Yes.

MR O'DONOGHUE: -- we have a specific concern about the point of independence of TMG from D&D under the AIM admission proposal and in particular the need for TMG as a competitor to D&D to be placed on a long-term stable footing.

Now, sir, if we can quickly turn to the decision at paragraph 63. It's in tab 11.

THE CHAIR: Yes.

MR O'DONOGHUE: It's internal page 17.

THE CHAIR: Yes.

MR O'DONOGHUE: You'll see at paragraph 63 there is a discussion of -- third and fourth line:

"Committed ...(Reading to the words)... ... credible plans of TMG for competing ..."

And so on. If you read on there, sir, and then look at footnote 64. So the CMA refers to comments made by TMG regarding the M&A activity in the market and then footnote 64 and it's really the final sentence of footnote 64:

"Has a clear and long-term investment strategy to manage associated risk ..."

And so on'.

THE CHAIR: I have that, yes, thank you.

MR O'DONOGHUE: We've already gone on record we have particular concerns given the M&A activity in this market as to the need for long-term investment strategy. That's picked up in the decision. In fairness to the CMA, it's not a point developed at length, so that's one area where we certainly can have quite a bit more to say.

THE CHAIR: Yes.

MR O'DONOGHUE: That's the first point. The second area, D&D is at least thus far keen to downplay the success of the private sale process and has in part sought to blame TMG for this.

Now, I need to tread carefully. This is in the evidence.

THE CHAIR: Yes.

MR O'DONOGHUE: It's 3.2 of Proud 1, it's in tab 13.

THE CHAIR: So you have seen that?

MR O'DONOGHUE: I have seen this. My client has not. So I need to be careful.

THE CHAIR: Let's have a look at it. So where is that?

MR O'DONOGHUE: It's in tab 13.

THE CHAIR: I printed out my own copy.

MR O'DONOGHUE: Paragraph 3.2.

THE CHAIR: Yes.

MR O'DONOGHUE: You'll see the last sentence, you can read that quickly, sir, the last sentence. There were disagreements between TMG and D&D. Then over the page at 3.5(d), if I can ask you to read that. Again there is a degree of finger-pointing, if I can call it that.

THE CHAIR: Yes.

MR O'DONOGHUE: Now, we obviously --

THE CHAIR: We don't want to have any criticism --

MR O'DONOGHUE: No.

THE CHAIR: -- of your clients without at least the opportunity to respond to that.

MR O'DONOGHUE: So it's more than a question of fairness. We actually see things from the opposite perspective, which is that D&D, including through the same admission process, they are the ones who have muddied the waters in the private sale by introducing this parallel track and the already apparent delay.

THE CHAIR: Won't they point to the fact that when they made their initial submission they said that you were sort of entirely supportive, if you --

MR O'DONOGHUE: Yes. Well, sir, we have fessed up to that in our written skeleton. That isn't quite right. First of all, things have moved on since February. As we now understand more about the AIM admission process we do have significant concerns. But secondly and even on a narrower point, if one looks -- I mean, the picture as put forward to the Tribunal has not been entirely accurate I'm afraid. Sir, there were two letters in fact. If one looks at tab 5, page 108.

THE CHAIR: Yes, thank you.

MR O'DONOGHUE: Sir, this is an unsigned letter.

THE CHAIR: Yes.

MR O'DONOGHUE: It attaches annex 3.

THE CHAIR: I have read that, yes.

MR O'DONOGHUE: Then over the page, the next tab, you have the signed letter and they are not the same.

THE CHAIR: No, I know.

MR O'DONOGHUE: So we felt this was overstated and some things had to be retracted. But, sir, in any event, this my final point.

THE CHAIR: Yes.

MR O'DONOGHUE: We pick this up in 27(c) of our skeleton.

THE CHAIR: Yes.

MR O'DONOGHUE: So the letter was in February and it was partly retracted. But in any event since February we've come to learn quite a bit more about the AIM admission process. Now, some of this is confidential but in a nutshell, sir, we have concerns as to timing, we have concerns as to additional costs, we have concerns as to dual regulation.

So the list of the AIM admission certainly is nowhere near as rosy.

THE CHAIR: The fact is if your clients are going to be prejudiced by this proposal if it goes ahead, you've got every right to make submissions --

MR O'DONOGHUE: Indeed.

THE CHAIR: -- upon that and it probably means that you may need to file a witness statement but I would hope that if you do, you know what the parameters are. You are an experienced practitioner, you know what Malek is likely to accept and not accept.

MR O'DONOGHUE: Sir, yes. There may be middle ground whereby there's been a lot of correspondence since February on these issues and it may be the correspondence speaks for itself. We certainly don't wish to burden the Tribunal.

THE CHAIR: Exactly.

MR O'DONOGHUE: Middle ground.

THE CHAIR: There may be middle ground. Let's just see if anyone has any objection to you at least having your notice of intervention covering let's say the points you've indicated today and you've indicated in your application and if there isn't any objection then we'll move on to more detailed things.

MR O'DONOGHUE: Sir, yes.

THE CHAIR: Let's hear from the CMA first.

MR O'DONOGHUE: Thank you, sir.

MR LASK: We don't have any objection to either the intervention or the proposed scope of it.

THE CHAIR: Thank you very much.

MR LEWY: Mr Chairman, we do object.

THE CHAIR: Let's hear it.

MR LEWY: The basis of our objection is that the proposed intervention is not relevant to any of the grounds of review. We say that and I will go through Mr O'Donoghue's points in turn.

THE CHAIR: Yes, of course.

MR LEWY: Mr O'Donoghue says there is a degree of finger-pointing and it's only fair that TMG is given an opportunity to respond. Mr Chairman, that degree of finger-pointing isn't in the decision. It's not a point we rely on in the notice of application. We don't say in the notice of application TMG is to blame for various things. We criticise the CMA's decision and the CMA's decision doesn't point fingers

at TMG. So, Mr Chairman, there is a lot of noise in that point but ultimately it's not relevant to the decision which this Tribunal has to take.

THE CHAIR: You want to take out those paragraphs in the Proud statement?

MR LEWY: I mean, Mr Chairman, we say it's useful background but ultimately it's not something that the Tribunal needs to decide one way or the other.

Then Mr O'Donoghue says that things have moved on since TMG sent that original letter and TMG has learnt more about the AIM listing process and the costs imposed on public companies. Mr Chairman, these are simply new merits arguments against the proposal that weren't raised prior to the CMA's decision. They are relevant, if at all -- if we succeed in this judicial review and the CMA is tasked with retaking the decision, then TMG can absolutely raise those arguments before the CMA again. But they are simply irrelevant to the subject matter of this review. Mr Chairman, in those circumstances we say that this proposed intervention would simply add noise and not contribute to resolution of the proceedings.

THE CHAIR: This is an application by TMG to intervene in these proceedings and to provide a notice of intervention covering the various points set out, particularly at paragraph 25 and 26 of the application to intervene dated 12 May 2023.

The principles on application to intervene are set out in rule 16 of the CAT rules. I don't need to cite that but that can be added in any transcript or note of this ruling. I am quite satisfied that TMG has standing to intervene in the present proceedings. It is a party to the undertakings in question. It is proposed that there be a corporate restructuring which would take TMG out of being private to being made public and it's only appropriate that they should have permission to intervene.

Now, as to what that intervention should consist of, I am quite satisfied also that the points Mr O'Donoghue has expanded upon today and are referred to in the application to intervene are proper topics for which they can make submissions. It may be at the

end of the day the Tribunal will be persuaded that those submissions carry no weight or are just noise or they are not ones that we should take into account when we reach our decision but I think at the very least Mr O'Donoghue and his client should have the opportunity of making those points.

It is said that as regards the point at paragraph 25(a) of the notice to intervene that this is just noise and that there is no finger-pointing in the application and so it is not relevant to the grounds of the review. The problem with that is that there is an element of finger-pointing at TMG in Mr Proud's statement in paragraph 3 which is going to be admitted because the CMA don't object to it and I have looked at it and I think it is material that the Tribunal may wish to take into account.

As regards the point being made by Mr O'Donoghue in relation to matters which have occurred since the decision or at least realisations as to what the impact is, I do understand that there should not be new merits arguments and any merits arguments should have been raised prior to the decision, if they were capable of being raised at that stage, and should have been appreciated, and that it is said: well, these can be raised before the CMA again. That said, I do consider Mr O'Donoghue should have the opportunity of raising those points and given the impact of having (a) delay through this process and (b) having a corporate restructuring going from private to public has a major impact or potential impact on TMG, it's quite proper that they should have the ability to deal with those points.

Mr O'Donoghue, in the light of that ruling, can we now discuss timing for your notice of intervention.

MR O'DONOGHUE: Sir, we will not delay, the only chicken and egg issue is, as I say, my client has not seen any of the underlying evidence so I don't know how quickly that can be rectified.

THE CHAIR: I am sure that can be rectified very quickly but the thing is that you have

seen the material. I would expect to have your statement of intervention relatively quickly.

MR O'DONOGHUE: Sir, of course. Of course.

THE CHAIR: You know this is going to be heard --

MR O'DONOGHUE: Quickly.

THE CHAIR: -- in the second half of June. So I am prepared to give you 14 days from today to file your notice of intervention -- I mean, your statement of intervention with anything else that you wish to add and that we'll need to hear before we go on any further as to the timing for the CMA's defence. You can sit down now. We'll listen to the CMA as to the timing --

MR O'DONOGHUE: Just before I sit down, that's absolutely fine. We are very grateful. The 29th is a bank holiday, so we would suggest --

THE CHAIR: We may need to change it. It may be, we'll have to speak to the CMA, but you may say: look, Mr Malek, let's wait until I've seen the CMA defence and then I can take a view as to what points I need to take and not take because I don't want to duplicate what the CMA are saying --

MR O'DONOGHUE: (Overspeaking).

THE CHAIR: -- so let's find out from CMA when they intend to file their defence because I want it fairly soon, obviously.

MR LASK: Sir, we would be quite happy for the defence to go before the statement of intervention. We can see the sense in that. The timing for the defence depends to some extent on the Tribunal's decision as regard to the admissibility of evidence. If the Tribunal were to align itself with the CMA's position, then we would be very happy to file a defence a week from today, which is the default deadline. If more of the evidence is allowed in, that may have an impact on the work we have to do.

THE CHAIR: What you are saying is: Mr Malek, let's just deal with the admissibility of

evidence now and we'll come back -- Mr O'Donoghue, you don't mind hanging around while we deal with the admissibility of evidence?

MR O'DONOGHUE: Sir, no, that avenue of pleasure is perfectly acceptable to me.

THE CHAIR: That's fine. Thank you very much. Let's look at the admissibility of the evidence. You can be confident that I have read the skeleton arguments. I have read all the bundle that you have given me. I may not have read every paragraph of the authorities in the authorities bundle but they are all familiar friends, if I can put it that way.

You know the approach of the Tribunal to witness evidence and I will be following the approach that I took in Tobii in relation to evidence and will apply the test set out there. Insofar as there is anything else I may -- you can point that to me. As regards the general principles of admissibility of expert evidence, I will be following the principles set out in Phipson. I think that is probably all I need to say by way of introduction. So it's down to you now. Yes.

Please don't repeat what you've already said in the submissions because you have done that already and they are clearly set out.

MR LEWY: Yes, Mr Chairman. I will repeat the submissions in the skeleton. I would just like to highlight three points.

THE CHAIR: Yes, sure.

MR LEWY: Point one: it really is the case that many of the CMA's concerns raised in the final report don't fully appear or at the very least aren't fully comprehensible merely from the provisional report. I have made those points in the skeleton argument. I would emphasise the importance of that point and in particular the reference in the final report, in the final decision, to the reasoning in the Dow and DuPont case, which is where a lot of this analysis seems to be coming from.

THE CHAIR: (Inaudible).

MR LEWY: Yes, Mr Chairman, it's in the final decision, which is at tab 11.

THE CHAIR: Yes.

MR LEWY: Then it's at footnote 56, which on page 161. You'll see, Mr Chairman, it's the footnote --

THE CHAIR: One of the points I wanted to raise with you really is that there may be decisions both at the European level and the international level that deal with some of the points that come up here. To what extent are any of the parties going to be saying: look, look at this decision? Because none of those decisions are going to be binding, okay? So on one level you can say what some other court or Tribunal or regulator has said is totally irrelevant.

On the other way, the other way of looking at it, and it may be this is the way I might look at it at the end of the day, is that if you point to let's say a court decision in another jurisdiction that deals with the issues in this case, you can say: look, you are not bound by it but look at the reasoning in that and that reasoning is good reasoning, and so although we may not be bound by that reasoning, if it sounds right then it's worth looking at and if it doesn't sound right then you can ignore it and often when you deal with points of law as a judge you are referred to a Commonwealth case or another case in a common law jurisdiction and you know you are not bound by it, no one is saying that you are bound by it but they are saying: look at that, look at that reasoning, is that persuasive?

So that may be something that the parties will need to consider, that when they come to filing their submissions that they may find other decisions that may be relevant, but if you are going to do that, cooperate with each other, tell each other, say: look, I want to refer to this decision, so everyone knows what they are talking about. I don't want ambush in the final skeletons, someone referring to some decision that hasn't come into the mix.

So when it comes to looking at this, for example, when I read this I thought: well, look it may be right, it may be wrong, that's their view, obviously the CMA have got to have their view and we have to figure out ourselves whether or not that's a rational view to have or whether -- or whatever, but it doesn't mean that we are bound to accept that reasoning or to reject it, it just means we can look at it for what it is worth.

I think that's just a point I wanted to mention and this is the right time to say that. So don't think that you are necessarily going to be boxed in at the final hearing and me saying: well, you want to look at this decision, and I say: well, no, because you haven't relied on it in the past. I think if there's a decision that is consistent with anyone else's position and that you think, any party thinks, we need to look at even if we are not bound but it has reasoning which is relevant for an assessment of the issues in this case, I am quite flexible. But I don't know what the other Tribunal members will say about that but I am all about trying to get the right answer and anyone who knows me knows that's what I have been trying to do here. As much help as possible is great.

It's the same when I looked at Mr Proud's statement, sections 2 and 3 on a strict basis I could say: well, that's just background, it's not necessary; but it was helpful and I am going to admit sections 2 and 3. But that's your first point anyway. Let's go on to the next point.

MR LEWY: Thank you, Mr Chairman. I should say we are grateful for the indication on that approach.

I would simply add to this Dow DuPont point that there is a vast hinterland hiding behind that Dow DuPont point.

THE CHAIR: I know that.

MR LEWY: Academic commentary, various points. I simply point out, Mr Chairman, none of that was raised in the provisional decision and I think it's fair to say D&D didn't appreciate that those were the real concerns raised until the final decision. So that's

all I will say on that point.

The second point, Mr Chairman, goes to timing. You'll have seen that Dye & Durham had only three days to produce its submissions in response to the provisional decision. It's a very accelerated timetable. The points I draw out of those, Mr Chairman --

THE CHAIR: When I look at those submissions, the submissions we are getting from D&D, these are high quality detailed submissions, that you are big boys, you are aware of what the issues are, you are able to respond quickly. I thought that that was a pretty detailed and considered response. I am not hugely persuaded by saying: well, we could have said more if we'd had more time. This process has been going on for some time and the key fundamental points are in there. When it comes to making your submissions you may want to expand on some of them, but the key points are understandable and they are pretty clear.

MR LEWY: But only, if at all, from the provisional decision, nothing before then and then from then we had three working days to provide final submissions. I don't think we could have produced expert evidence in that time on any basis.

THE CHAIR: We will come to -- yes, but the thing about the expert evidence is that, as you know, we don't normally admit expert evidence in these cases and that it's generally only when it's exceptional and that we are a specialist Tribunal and that when I look at -- to be quite frank when I look at Franklin Adams, to the extent that many of the points are already made in his letter of 13 March, they are there anyway and they were taken into account, some of it is stuff that we really are familiar with. You know, we are a specialist Tribunal. We don't need an expert to tell us some of the things that are in that statement.

So at the moment I am not inclined to admit that statement. But it's not a disaster because you've got the letter of 13 March which makes the fundamental point. It's got a few extra points. But none of those points are live or die points. I think that my

provisional view on that is to exclude that statement. It really would be unusual to admit that statement, and that what needs to be borne in mind is that there are distinctions between fact and opinion. If it's opinion evidence, it's only admissible by way of a witness statement if certain conditions are fulfilled, one of the exceptions, and the main exception, as you know, is expert evidence, an expert can give expert evidence, but then when you unwind that you have to say: well, is this really the sort of evidence that the Tribunal cannot understand or follow without the assistance of an expert? And that if it is a matter for expert evidence, are all the requirements for expert evidence fulfilled?

It's very difficult to say that when you don't have the normal declarations that one has from an expert. So there's actually quite a few reasons why I would be inclined to exclude that. But I don't think it's a disaster from your point of view because you've got the letter of 13 March and you've got a specialist Tribunal who do understand how these things work and that insofar as you want to explain how these things work, you can do that in your submissions as you have done.

I really don't need that evidence from Mr Franklin Adams to reach the decision that needs to be made. But I would like to make it clear that I am not questioning his ability or his professionalism. He obviously knows what he's doing. But that's where I am on that at the moment. You can try and persuade me to go away from that, but this is a CMC where decisions have to be made on a rough and ready basis and that by and large the way I take these things is that 90 per cent of your advocacy is done in all the written submissions, which in my case I do actually read them and go through them. I know as an advocate it's quite disconcerting because sometimes you don't know whether the judge has read it so you really do need to go through it but that's my view on that.

On the issue of Mr Proud's statement, at the moment I am probably going to exclude

paragraph 4. I will definitely exclude paragraph 5 because I think even you accept that that is submission and comment and argument rather than factual evidence which can be put in a witness statement.

Section 4, the problem with section 4 is that it's a mixture of a number of things. It's a mixture of comment, submission, opinion and argument but it's also fact as well. There's bits of fact in there. But insofar as it's fact, it's fact that is largely based on material that's elsewhere in the bundle and so you quite properly make the point that numerous of those paragraphs are taken from other bits that I have already seen, so I have looked at all the references you have given and you are right by and large -- there's some embellishment, there's some slightly different wording but at the end of the day the vast majority of 4, when I read that, I say I've read that already before because it's already there.

So insofar as it's already there you don't need it. The danger of allowing it in is that instead of the focus being what was before the decision-maker, I don't want the focus to be on a slight embellishment or a slight change from what was actually before the decision-maker. So Proud makes the same points but it's slightly different and I think it's more important that in a case like this I focus on what was actually said to the CMA, what was actually put to the CMA, rather than a slight reformulation by someone else. So I am at the moment probably inclined to take out paragraph 4 as well for that reason.

When it comes to Soliman, I can see there is some merit in having part of Soliman and I will explain why. You don't want it to be said that the rights and obligation of directors and shareholders vis-a-vis the company is a matter of foreign law, if you want to rely on that, and that you haven't proved what that foreign law is as a matter of fact. Although when I looked at Soliman I looked at some of the references in the statute, it seems 100 per cent clear that what he's saying in the first part of his report is very

similar to what we have here, but you do not want to be exposed to someone saying actually you haven't proved it.

So I am certainly inclined to include -- let me have a look. Yes, looking at 1 to 5, obviously that's fine. 16 to 37 should all be black-letter law. I doubt the CMA will want to contest it but they are perfectly entitled to put in an expert report. But the rest I don't really get much assistance from. So talking about spin-offs, we are pretty familiar with things like that and how spin-offs are done in Canada is really neither here nor there because it's not a Canadian company that's in issue, we are talking about TMG and a Plc in the UK.

So I really don't think it's going to help us in relation to that.

MR LEWY: Mr Chairman, if I could just comment on that last discrete point.

THE CHAIR: Yes.

MR LEWY: My learned friend Mr O'Donoghue in his skeleton argument for the proposed intervention has suggested that TMG would in fact be subject to Canadian listing rules if this proposal were to go ahead. That's paragraph 27(c) --

THE CHAIR: Let's have a look.

MR LEWY: -- of the skeleton argument.

THE CHAIR: If they are going to be relying on that and they are going to say that those listing rules make a huge amount of difference, they may face an uphill task on that in persuading me that that is material that they can rely on at this stage. But we'll see if they want to put that in. Probably if it's going to become an issue I would be inclined to allow at least to be included in the bundle the relevant listing rules from Canada, just the rules themselves, insofar as any party says that they are -- I don't want any commentary on them and I don't want an expert on them. But if any of the parties are going to say: look, we really need to look at these particular listing rules, I would be surprised if we do need to do it. I think as long as you write in and say: this

is what we want to rely on, then I can come back and say that's fine or not. But at the moment I would at least give everyone the opportunity to put that before the Tribunal at the end of the day to be at least considered and not excluded at this early stage.

MR LEWY: Yes.

THE CHAIR: Is there anything else you want to say at this stage?

MR LEWY: Mr Chairman, I would just add two points about the latter half of Mr Soliman's report.

THE CHAIR: Yes.

MR LEWY: Why we say they should also be before the Tribunal. Point one --

THE CHAIR: Let me just get it up again.

MR LEWY: Of course.

THE CHAIR: Yes.

MR LEWY: The first point I make, Mr Chairman, is simply that Dye & Durham is a Canadian company, the company doing the spin-offs. It's not TMG which is doing the spin-off. Thus, these principles are relevant to Dye & Durham which is doing it. The second point, it's a very short point, Mr Chairman, following from what you said earlier about you won't object if we or the CMA throw in other examples of foreign competition authorities' practice on spin-offs. There are pieces in this expert report which do discuss spin-offs used for divestitures.

THE CHAIR: I am not quite sure if I am saying that you can all put in details on spin-offs in other jurisdictions. I am not. Because this case doesn't really turn on the spin-offs. What I was really talking about is things that go to the heart of the case where other court decisions or regulators' decisions on the core issues -- the core competition issues as to whether or not having a divestment in this form is something that should be objected to or does this, or does this not, eliminate the significant lessening of competition. So I am not sure if I am going be assisted by that.

Look, please understand, we do understand how these things work. We have been doing this for years, okay? So having someone pointing to how it's done in some other country is not really going to help us. It's not going to the heart -- the core issue of the case is the one that you explained in opening which I can see that if you are wrong on that, you are wrong on everything; if you are right on that, you are right on everything. So going any further doesn't really help us.

MR LEWY: Thank you, Mr Chairman. I believe I have nothing else to add but may I take instructions?

THE CHAIR: Yes, of course.

MR LEWY: Mr Chairman, the only point I have been asked to raise is paragraph 61 of Mr Soliman's report.

THE CHAIR: Yes, have a look. Let's get it out.

MR LEWY: Page 210.

THE CHAIR: 61, yes.

MR LEWY: It does make a point relevant to the core competition issue you have just addressed. I don't know if you would like it included or excluded but we just wanted to draw that to your attention.

THE CHAIR: Yes. What I will do is I will exclude that paragraph but -- I am just looking at the footnotes, yes.

MR LEWY: Yes.

THE CHAIR: So it's paragraph -- I suppose it's footnote 40 you want to have in, don't you. And you'll want to have 41 and 42, won't you?

MR LEWY: I am just checking we don't also need -- yes, that's correct, Mr Chairman.

THE CHAIR: Yes. Let me make a note of that. Footnotes 39 to 41. Anything else on the documents?

MR LEWY: Mr Chairman, I believe it's --

THE CHAIR: You have the rest of the day. If you pick up anything else then we'll come back to it.

MR LEWY: It's 40 to 42, Mr Chairman.

THE CHAIR: 42. Let me look at 42. 42, yes.

MR LEWY: I am sorry, Mr Chairman, that was footnote 42 not the paragraph.

THE CHAIR: Yes, I have noted down paragraph 61, I am excluding 61, but I am allowing you to put before the Tribunal footnotes 39 to 42 and by that I mean the actual documents rather than anything else.

MR LEWY: Thank you, Mr Chairman.

THE CHAIR: Yes. Okay. That's fine. Mr Lask, do you have anything to say?

MR LASK: I do, sir. Given the indications you've made in respect of Proud and Franklin Adams, you probably don't need to hear from me.

THE CHAIR: Franklin Adams is out. Proud I am against you on 2.18, so that is going in unless you can persuade me otherwise, not least because you don't object to 3.5 which basically summarises what's in 2.18, and what's in 2.18 is stuff that you will find in other material anyway. So I am against you on the 2.18 point. If you want to try and persuade me otherwise, of course I will listen.

MR LASK: I am not going to press the 2.18 and I don't think there is anything else in Proud or Franklin --

THE CHAIR: On the Soliman, where I am at the moment, and you are always free to try and persuade me otherwise, is that paragraphs 1 to 5 stay in, which is basically saying his qualifications, okay.

Then 16 to 37 stay in. You are going to be perfectly entitled to say at the final hearing this is all irrelevant, it take us nowhere, okay. But what I want to do is let them have the ability to rely on these provisions of law which seem to replicate more or less the English law position if as part of their argument. Now, I don't see how the CMA is

going to be prejudiced. You can see most of it, as you know, it's by statutory provision in Canada, so it's not really case law based any more.

You can look at the statute. You'll see that this guy has fairly summarised it. But you are free to find a Canadian expert and ask him to say has he got anything wrong there, in which case you can come back and say: we want to put in a short report correcting something. But by and large I think you'll probably find – I am not saying you will find, but you'll probably find – there's nothing controversial in those paragraphs. It really shouldn't be a burden on you to do that.

MR LASK: Sir, I have heard your observations. If I may, I would like to try and persuade you to exclude those parts of Soliman.

THE CHAIR: Of course you can.

MR LASK: The case that's put by D&D is that the CMA in its decision was concerned about the impact that common shareholders may have on D&D's management, which is a Canadian company, and so evidence of Canadian law or submissions based on Canadian law at least are required to assess the rationality of those concerns.

THE CHAIR: You say that completely misses the point.

MR LASK: It misinterprets the CMA's decision indeed because the focus of the CMA's concerns was on how common shareholders might seek to influence TMG's behaviour, which as everyone accepts is an English company to which Canadian law doesn't apply. I can take you through the relevant parts of the decision to illustrate the point.

THE CHAIR: No, look, I understand that is what your position is, okay, and I will have to do -- or the Tribunal will have to make a ruling on that in its final decision. What I am trying to do is to leave both sides the ability to argue the points that they want to make on that specific issue. You may be right and obviously from the way you are saying it you feel you are definitely right, okay?

Your friend on the other side will say no, you are not right for the reasons that, you know, he has explained and so I don't want to shut anyone out on this one; you say irrelevant point, he says it's relevant, and that is part of his pleaded case. I am going to be very reluctant to shut them out now. I am sitting on my own, I am not sitting with a full Tribunal and I don't want it to be said that I pre-judged their application at a rough and tumble CMC.

MR LASK: Sir --

THE CHAIR: It's not in your interests that I make such basic errors.

MR LASK: Sir, if I may say so, you are absolutely right that we say that's clearly the correct interpretation of the decision. But we go further and if it's not already implicit in the submissions we've made in writing then I will say it out loud, the CMA is not intending to defend the challenge on the basis that common shareholders -- or that it was concerned about common shareholders influencing D&D's management. So whatever view one takes of the correct interpretation of the decision, we say our view is correct but beyond that we are not defending the challenge on that basis --

THE CHAIR: I understand that. Look, I have read your submissions, I fully understand where you are coming from and your fundamental point is this is just totally irrelevant and it misunderstands what we are saying and they are shooting at a false target, okay, that's what you are saying. You know what they are saying is that they don't agree with you on that, all right.

Now, you may be right, they may be right, but what I don't want to do, sitting on my own, at a hearing we are only going to have in June, is exclude something which is not going to take a huge amount of time, of your time to deal with and it's on a relatively narrow point. I do not want to exclude and make a decision on a fundamental point that you are saying now at the first CMC without the full members of the Tribunal. Because you can imagine as night follows day it will be said I have it wrong, I have

pre-judged the issue, so it's unfair.

MR LASK: Sir, we hear that and it may be that this is a matter for the final hearing as well but I will say it now if only to lay down a marker, which is that another of the CMA's real concerns about this is that it's opening up a whole new avenue of debate and enquiry that wasn't put to the CMA during its investigation and that wasn't dealt with by the CMA in its decision, so we do say that allowing expert evidence on Canadian law into the case risks straying out with the confines of --

THE CHAIR: I am trying to define it, as you know, and everyone understands what I am trying to do, but this isn't a case that's going to morph into something enormous. This is a two-day case. Whatever points you lot want to make, you have to make it within two days. I can see how the case has changed. Their case has changed from the proposal you got on 23 February to what we saw after you'd made your provisional decision what we get on 13 March and that's morphed into something else. I have got that, okay?

They will turn it on its head and they say: well, you were only focusing on what we'd put in our original proposal, you didn't address all the points that we made on 13 May and so you've got it wrong as well. So both sides have got something there. I don't know what the answer is today. I will know what the answer is after the hearing in June because both sides will have had the opportunity of expanding it in full in the light of written submissions and your defence. But as sitting here at the CMC, I am not going to make that decision today. Everyone talks about fairness and Mr O'Donoghue's submissions talks about fairness, but it means fairness to everyone, the CMA, TMG and D&D. Everyone has the right to have a fair hearing and I am not going to shut the door on that, okay?

MR LASK: Sir, we hear that. May I take a moment?

THE CHAIR: You can.

MR LASK: Sir, thank you. At a convenient moment we'd be very grateful if we could have 10 minutes to discuss the implications of that ruling particularly on the timetable going forward. It may not be now because there may be other issues that need to be dealt with first but if we could have that time.

THE CHAIR: This should not have any impact on the timetable because we are going to have the hearing in the second half of June.

MR LASK: I meant the timetable for the defence rather than necessarily pushing out --

THE CHAIR: That's fine, as long as you are not --

MR LASK: No.

THE CHAIR: As long as no one is saying we are not going to have a hearing in the second half of June I am very relaxed, it's fine.

MR LASK: We are as keen as everyone else to have it resolved.

THE CHAIR: It seems everyone wants to have it in June. Look, we will have a break so everyone can check their diaries and the three teams can discuss with each other to see which of those two windows I've offered work, but it will be one of them.

MR LASK: Yes.

THE CHAIR: It's not going to be by the basis of who has more people available on the day. I will just make a decision one way or other and we are just going to have to live with it.

MR LASK: Yes.

THE CHAIR: But I will try if I can to have it on days that everyone can make but it may not be possible. Okay, let me just -- what I'll do on the ruling is I will give my reasons now and then I'll issue a ruling setting out the background and what the relevant principles I am going to apply are, but you can be sure that the principles I will apply, as I said before, will be from Tobii and Phipson.

MR LASK: Sir, just so we are clear, the parts of Soliman that you are proposing to allow in are only paragraphs 1 to 5 and 16 to 37?

THE CHAIR: Correct.

MR LASK: And then the press releases referred to in those footnotes in the second part. So I don't think I need to address you on procedural fairness because I think that falls away but for the record we obviously don't accept the submissions that have been made in the applicant's skeleton --

THE CHAIR: Of course you don't. They don't accept a lot of what you are saying.

MR LASK: No, but I put it on the record because it was the first time it was raised, was in the skeleton we received late last week, so that's not been ventilated until now.

THE CHAIR: Yes. None of this is lost. Everyone is making their points. I am taking them on board. I am glad that these proceedings are being done in the right spirit because the last thing I want is everyone bickering. So the way this has been conducted today is exactly how I want it to be conducted for the final hearing. Okay, you can sit down now.

Ruling

THE CHAIR: Applications to review of merger decisions usually need to be dealt with promptly by the Tribunal. Ordinarily the Tribunal aims to have the substantive hearing within three months of the filing of the applications. Additional experts' reports and witness statements filed in support of an application require some scrutiny and it should not be assumed that they will be unopposed or admitted by the Tribunal. Whilst in some cases it may be convenient to leave questions of admissibility of such material to the substantive hearing, it is often preferable to deal with it at the CMC so the respondent knows whether or not it needs to respond to it. Unnecessary further expert and factual witness evidence can lead to additional costs and delay the process.

Whilst D&D has stated that there is no need for urgency in the Ttribunal resolving this application now that the CMA has agreed to extend time until after the Tribunal has issued its decision, both the CMA and TMG have submitted that the application should be determined as soon as reasonably practicable.

Indeed TMG submits that in the circumstances where TMG must be divested it is in its interest that such process is completed as soon as possible as delay risks adversely affecting TMG including as a competitor to D&D. The Tribunal has already indicated to the parties that it is minded to list the substantive hearing in the second half of June 2023.

The Tribunal takes a hands-on approach to case management. It also appreciates what approach to evidence and presentation of material that is conducive to it resolving disputes efficiently and fairly. The addition of evidence that was not before the respondent at the time of the decision under challenge should not be the opportunity to place before the Tribunal material that is repetitive or duplicative of what has already been submitted or ought to have been submitted if it was to be relied upon to the decision-maker.

Soliman expert report. By way of preliminary observation, the Tribunal usually does not admit new expert evidence in a judicial review of a CMA merger decision but such evidence can be admitted where appropriate and necessary for the fair resolution of the application for review. The Tribunal is satisfied that Mr Soliman is qualified to give expert evidence on Canadian law. He is independent and understands his duty to the Tribunal. Foreign law needs to be proved as a matter of fact and in general it is for an expert to set out the relevant principles and legal provisions of the relevant foreign law but not to give opinion evidence on the application of the foreign law to facts of the case nor give his opinion on the issues which the court or Tribunal has to decide, Phipson paragraph 33-94.

Paragraph 15 of Soliman is clearly inadmissible on that basis alone. The Tribunal gives permission to rely on Soliman's paragraphs 1 to 5 and 16 to 37. These set out basic propositions of Canadian law as to the roles, powers and duties of directors and officers and the roles and rights of shareholders. None of this is likely to be controversial and appears to reflect both case law and statute. On the other hand, the CMA has pointed out that on their case this material is wholly irrelevant to the issues on this review.

It should not be a burden on the CMA to obtain expert evidence on these points if it wishes to contest any of these propositions. Whilst this evidence may be regarded as not meeting the Powis test, it does fall within the Lynch extension as such principles of Canadian law needed to be proved as a matter of fact. Whilst these are very similar to English law, D&D do not want to be met with an argument that the Tribunal cannot recognise them as they are matters of foreign law. That said, at the substantive hearing it will be open to the CMA to argue that Canadian law is not relevant at all for the reasons set out in submissions referred to above.

The Tribunal refuses permission to rely on paragraphs 38 to 40 as these appear to apply the principles of Canadian law on the facts, provide argument and comment and are likely to be contentious. The Tribunal will not be assisted in its task by such evidence.

The remainder of section B of Soliman, that is paragraphs 41 to 53, is also excluded as such evidence is not necessary for fairly resolving these proceedings. This Tribunal does not need to get into securities law of Canada in dealing with a divestiture of shares in an English company by way of a spin-off into another English company to be admitted on AIM. The relevant securities laws restrictions on D&D whose shareholders are intended to be shareholders at least initially in the entity that will hold the shares in TMG will not be central to these proceedings.

D&D has failed to demonstrate that such evidence is truly necessary or that the circumstances are sufficiently exceptional to justify their admission. Further, as regards the evidence of spin-offs in Canada, the use of a spin-off as part of the process of divestiture does not feature at all in the proposal paper and was not developed in any detailed way in the submissions before the CMC. The term spin-off does not appear to have been referred to. The only indication that spin-off might be used as an alternative to the admission of TMG's shares comes in the final reply submissions and the finnCap letter dated 13 March 2023 where there are references, largely in brackets, to the shares of TMG or its parent being admitted for trading on AIM.

Section C, which relates to the use of spin-offs and plans for arrangement in Canada, is also excluded. This case relates to a divestiture involving admission of shares on AIM in the UK not Canada. Such evidence will not assist the Tribunal in resolving the application. When the CMA was referring to the novelty of D&D's proposal it is manifest that it was referring to its own experience of UK merger control. If D&D wish to rely on the use of spin-offs and listings as a means of divestiture in other jurisdictions, it could have raised these points, for what they are worth, prior to the decision.

Further, as noted above, the proposal paper itself made no reference to any spin-off and the possibility of shares in a newly-formed parent company being admitted in place of TMG's shares was only touched upon for the first time very late in the process in the final reply submissions on 13 March 2023 but was not developed.

I do give D&D permission to rely on, however, various documents which have been exhibited to Mr Soliman's report and in particular the documents referred to in paragraph 61 of the report and these are the documents referred to at footnotes 39, 40, 41 and 42. The Tribunal will of course not be bound by the reasoning of any other regulator or circumstance but if this material contains arguments or consideration

which the Tribunal finds persuasive, the Tribunal itself may wish to take that into consideration.

So for the reasons set out above and for further reasons which I am going to give, Soliman is excluded save for paragraphs 1 to 5 and 16 to 37.

Proud witness statement. The Proud witness statement does contain a helpful summary to the background leading up to the decision and sections 2 and 3 present this in a fairly neutral way. This type of summary, although not necessary, is not objected to by the CMA, save for paragraph 2.18. Paragraph 2.18 is unlikely to be controversial as being a representation of D&D's position and indeed the point is referred in summary form at paragraph 3.5(a), which is not objected to.

Whilst the evidence may not strictly fall within the matters of which judicial notice may be given without the calling of evidence, the Tribunal is well aware of the changes in interest rates and the impact on the mortgage market. Therefore sections 1 to 3 are to remain and may be relied upon at the substantive hearing.

Sections 4 and 5 are objected to by the CMA. It is not the function of a witness statement filed for the purposes of a challenge to a merger decision on judicial review grounds to use it as an opportunity to set out submissions, comment, argument or repeat points in material already submitted to the decision maker. Opinion evidence is largely inadmissible unless it falls within one of the exceptions as to expert evidence. To the extent that Proud amounts to opinion of Proud, it is inadmissible. It is clear that Proud does disagree with the CMA's decision and assessment but the proper place for much of his evidence is by way of submission in application or counsel's submissions at the substantive hearing. These paragraphs have references to what Proud considers, such as paragraph 4.2 and 4.7; and Proud's view, such as paragraph 5.1. It is the type of evidence that was excluded in Tobii at paragraph 70 of that decision.

Large portions of Proud repeat or at least are largely duplicative of the submissions and material put before the CMA in the proposal paper. The supplemental submissions dated 6 March 2023, finnCap's letter dated 13 March 2023 or other correspondence sent to the CMA, that is paragraphs 4.2, 4.4, 4.7, 4.14, 4.22 to 4.39 and 4.42, are submitted by D&D to fall within this category. It is said on that basis the evidence does meet the Powis test as it was material before the CMA. However, that does not really address why this type of material is objectionable. It is not necessary to repeat what is already in the papers in material provided to the CMA in a contentious witness statement. The Tribunal for itself can look at what was admitted in the light of the submissions being made in the application and by counsel at the substantive hearing. If admitted, no doubt the CMA may be tempted to file witness evidence in reply, which leads to delay and unnecessary evidence from both sides.

Also there is a risk of the distinction between what is new and what was submitted before the CMA being blurred. It is far better to work from the underlying materials. An example of this are references to Spinco and how a process involving a Spinco rather than admission of TMG shares would work, such as paragraphs 4.14, 4.17, 4.26 and 4.27. As noted above, it was not in the proposal paper at all and the possibilities of shares in TMG or its parent being admitted to AIM was not mentioned until the final round of submissions on 13 March 2023. On judicial review applications where there is a challenge to a decision, it is important to focus on primarily what was submitted to the decision-maker rather than additional material, explanations and expansions after the event.

Paragraph 5 is inadmissible and not helpful to the Tribunal. It is essentially Proud's view to the effect that he considers that the CMA reached the wrong decision. For the reasons set out above and for the reasons I will give further in a minute, the Tribunal excludes paragraphs 4 and 5 of Proud.

Franklin-Adams' witness statement. A significant portion of Franklin-Adams' statement amounts to opinion evidence based on Franklin-Adams' experience as a broker in corporate finance. Such evidence could in theory be admissible as expert opinion and D&D appears to concede that his statement is a mixture of expert opinion and factual evidence, and for the opinion evidence permission for expert evidence is required. No application for expert evidence from Franklin Adams was made in the application and the application is made for the first time in the skeleton argument for the CMC.

It is not satisfactory to file a statement such as this without clearly indicating what is fact and what is expert opinion and a statement without the usual declaration as to qualifications, conflicts of interest, expertise, independence and an express reference to the overriding duty to the Tribunal.

Here, Franklin-Adams cannot be described as independent as his firm is the nominated adviser and broker to D&D. That said, the lack of independence is not necessarily a bar to him giving expert evidence in circumstances where the Tribunal is satisfied he can give objective evidence on the basis of an overriding duty to the Tribunal, irrespective of his relationship with D&D; Phipson at paragraph 33-301.

The Tribunal is a specialist Tribunal and is familiar with how AIM works and the processes involved. A significant proportion of Franklin-Adams covers matters already made in his letter dated 13 March 2023 which was before the CMA or on matters on which the Tribunal does not need the assistance of an expert to understand. There is no need for evidence in the form of a witness statement which covers the ground already covered in the letter of 13 March 2023 which was before the CMA.

Further, the proposal is developed in a way not in his letter dated 13 March 2023 which is directed at the proposal to have the shares in TMG admitted to AIM. To the extent

that Franklin-Adams raises new points, then they fail to meet the Powis test or the Lynch extension and could have been made before the CMA made its decision.

For the reasons set out above and as I further explain below, the Tribunal will not admit Franklin-Adams' evidence. The Tribunal would like to make it clear that, in excluding the evidence of Franklin-Adams, it is not doubting the professionalism and ability of Franklin-Adams. However, it is not necessary for the fair resolution of the application for the statement to be admitted. Many of the points are already made in his letter dated 13 March 2023 but not necessarily primarily in precisely the same terms. In respect of such points, it is better for the Tribunal to work from the letter which clearly sets out the arguments on behalf of D&D.

As regards the evidence to be excluded, the Tribunal has taken into consideration the factors set out in rule 21.2 in determining that it is just and proportionate to exclude it, in particular:

(1) the standard of review is not a merits-based rehearing but a judicial review of the CMA decision;

(2) the substance of the evidence that the Tribunal has excluded from the two witness statements was, to a large extent, both available and submitted to the CMA, it is not appropriate or necessary to elaborate and repeat that in contentious witness statements which contain a significant amount of argument, submission and comment;

(3) the substance of Soliman was not before the CMA, this was no doubt because D&D was not relying on Canadian law principles and practice in relation to rights and duties of directors and shareholders or the approach of spin-offs and divestments in Canada or other jurisdictions. Had D&D wish to run these points, it could have done so. In reality, these points are not really central to the question of whether the CMA's decision should be set aside;

(4) D&D is not prejudiced by the exclusion of the evidence. As regards the witness

statements, much of what has been excluded repeats or is a reformulation or an explanation of what was put to the CMA and, to the extent they consist of submission, the place for submissions is in the application submissions by counsel. The admission of the evidence would prejudice the CMA as it would no doubt feel a need to respond to it by their evidence. Further, it is important to distinguish between what was before the CMA and the new material which is blurred in these statements. If D&D is correct in its fundamental submissions as regards the CMA decision, this additional material will not make any difference. If D&D is not correct on these key points, this material will also not make it a good case;

(5) all the material excluded is not necessary for the Tribunal to determine this case.

So that is my ruling on the evidence. We will take a break until 12.15 so the parties can think about the precise directions I am going to make for the hearing and that we can also liaise as to the two days to fix for the hearing. So I will rise until 12.15.

(12.00 pm)

(A short break)

(12.16 pm)

Discussion regarding timetabling and case management

THE CHAIR: Shall we try and get the date first and then we'll work backwards?

MR LASK: Sir, just in relation to that, I would ask that we finalise the timing for the defence first because it may have an impact on which of the hearing dates is achievable and in particular given the need now for the CMA to consider the Canadian law evidence, we would ask for an extra week in which to put in the defence and any responsive evidence.

THE CHAIR: Let's just see. Is everyone able to make both dates or is there a situation where one leader can't make one of the dates but can make one of the other dates?

MR LASK: For our part neither of us on the counsel team for the CMA can make the 12th, so we have a strong preference for the later dates in June.

THE CHAIR: Okay. Let's see if I have any preference before I hear anyone else's feelings. Yes, certainly for me the 26th to the 28th is easier but I'll just see what the convenience is for everyone else is first.

MR LEWY: Mr Chairman, Mr Beal, my leader, is in trial that week and will not be able to attend that week.

THE CHAIR: Which week?

MR LEWY: 26 to 28 June he's in trial.

THE CHAIR: We'll see if we can get it all into the 12th to 14th because he's obviously been involved but that's not paramount. Mr O'Donoghue, are you free for either slot?

MR O'DONOGHUE: Sir, I am, save that I am in this Ttribunal on the 13th and 28th but in terms of my participation --

THE CHAIR: We can --

MR O'DONOGHUE: -- for one day.

THE CHAIR: We can figure out which day you attend.

What about your availability for the week of the 12th to 14th?

MR LASK: Yes, neither of us are available on the 12th, my junior is not available at all that week but I think the more fundamental concern really about that date is the steps that need to --

THE CHAIR: We'll come back to that. What about the week of the 28th?

MR LASK: We are fine for that week.

THE CHAIR: So whichever way someone is going to be kicked out, it's either going to be one side or the other, which isn't ideal.

MR LEWY: Mr Chairman, I did not quite add my availability in there as well, which is for the week of the 12th, so the three days 12, 13, 14 June, Mr Beal isn't available on

the 13th, so were we to pick those two days, we would need to have the 12th and 14th and have a day in the middle if we were to list the hearing for that week. The days 26th, 27th, 28th I am attending a CMC in a different matter at the end of that week and my availability is limited then and Mr Beal can't attend at all. That's the full extent.

THE CHAIR: Let me write it down and figure out what the right decision is going to be. I know your timing point but what people can make. We are only looking for two days in these windows. So we have the 12th to 14th and then the 26th to 28th, yes, those are the two windows. Okay. So tell me your dates, so junior then leader, okay?

MR LEWY: So, Mr Chairman, I, the junior, can do the 12th, 13th and 14th.

THE CHAIR: I can put -- yes, you can do all of it.

MR LEWY: I can. 26, 27, 28 --

THE CHAIR: What about your silk for the 12th to 14th?

MR LEWY: Mr Beal can do 12th and 14th but not 13th.

THE CHAIR: Can do 12th and 14th. Yes. 26th to 28th, your availability?

MR LEWY: It's unclear, Mr Chairman, because I am attending a CMC on the Friday and I don't know whether I can take instruction on earlier days.

THE CHAIR: Of course you can. A CMC, that's fine.

MR LEWY: Okay, I can do them.

THE CHAIR: I am going to tick you as free. What about your leader?

MR LEWY: Mr Beal is not free that week.

THE CHAIR: Okay, so L no. Mr O'Donoghue?

MR O'DONOGHUE: My only issue is the 13th and 28th.

THE CHAIR: Okay, so I will put you 12 and 14. 26 and 27, yes? You can do that. Okay. CMA?

MR LASK: Sir, I am not available on 12th, my junior is not available 12th, 13th or

14th.

THE CHAIR: Okay, so your junior is not free at all, yes?

MR LASK: He is in trial that week.

THE CHAIR: You are free what date?

MR LASK: 13th and 14th.

THE CHAIR: Yes, then the following week?

MR LASK: The week of the 26th is fine for both of us.

THE CHAIR: Let's deal with the logistical point and then we'll factor it all in, okay?

MR LASK: Yes, sir, as I mentioned, given the ruling on the expert evidence, the CMA would ask for an extra week for the defence to give it time to consider the Canadian law points and if so advised put in responsive evidence with the defence, which would take us to the week of 29 May as opposed to the 22nd.

THE CHAIR: Let's just get it right. You say it's all irrelevant and you are going to make your points. If you want to dispute any of those propositions as a matter of propositions of law, I can give you permission to file an expert report after the time of your defence and that means your defence won't be delayed. So my inclination is to get your defence in in seven days, okay, so we have defence on 22 May.

Now, the next step -- and then any evidence in reply, reply on Canadian law, yes?

MR LASK: Yes.

THE CHAIR: By the 29th.

MR LASK: The 29th is a bank holiday.

THE CHAIR: Is it? The 30th.

MR LASK: The 30th is a Tuesday.

THE CHAIR: That's absolutely fine. As I said, I don't think this case is really going to turn on erudite points of Canadian law but you'll have an opportunity to do that. You can sit down now, please.

Mr O'Donoghue, let's now deal with you. Statement of intervention.

MR O'DONOGHUE: A week after the defence, sir. Also on the 30th.

THE CHAIR: 30th, yes, okay. And you will limit that in the normal way, you'll be sensible?

MR O'DONOGHUE: Of course.

THE CHAIR: As regards the amount of time you will have at the hearing, how much time do you think you'll need?

MR O'DONOGHUE: Sir, I would have to cut my cloth to measure. I think it would be extremely optimistic of me to pretend I could insist on anything more than 30 minutes and conceivably less. We may be in a better position once we've --

THE CHAIR: I am not going to tie you but as long as you are not going to be more than an hour --

MR O'DONOGHUE: Certainly not.

THE CHAIR: -- then it's fine, but what would be helpful is that when you serve your statement of intervention if the covering letter can say: Mr O'Donoghue now estimates that he is going to take however long it's going to be, if that's all right.

MR O'DONOGHUE: Sir, yes.

THE CHAIR: Ideally I would like you to speak after the CMA.

MR O'DONOGHUE: Yes.

THE CHAIR: Because I don't really want you to repeat anything he is going to say. So you listen to what he has to say and then you come in at that stage.

MR O'DONOGHUE: Sir, yes. That clearly make sense in terms of no duplication.

THE CHAIR: Then I don't expect to see any expert evidence from you.

MR O'DONOGHUE: No.

THE CHAIR: As regards factual witness statements, I think we've already discussed what the parameters can be on that but I don't want, if possible, it to be sort of lengthy.

MR O'DONOGHUE: I am certainly not treating it as an invitation. In view of the admissibility rulings, frankly it's now only section 3 of Proud.

THE CHAIR: On the facts, yes. I think that there are points that you could probably make in your statement of intervention which you don't necessarily need to put in witness evidence form. I know what you want to say.

MR O'DONOGHUE: Yes.

THE CHAIR: But I do think it is something that if there are criticisms being made of your client I need to know what the answer is because I will be giving a ruling, I will consider the points being made in Proud and I don't want to make anything that is let's say factually controversial. I need to know what your version of events is on that.

MR O'DONOGHUE: Sir, yes.

THE CHAIR: But also I think I need to understand what are the practical implications for your client if this goes ahead, if you see what I mean.

MR O'DONOGHUE: Sir, yes.

THE CHAIR: And also the practical implications for your client on the impact of delay and stuff like that because I think they are all things that may come into the mix when it comes to discretion. I am not saying they will do but at least I will have the material before me to take into account if at the end of the day I think it's relevant. But it's better you cover that.

MR O'DONOGHUE: Before I sit down, I just want to clarify, with D&D there are two redactions to section 3 of Proud which are said to be confidential, there was some confusion over this, I would like to understand, is that the full extent of redactions.

MR LEWY: Of Mr Proud's statement?

MR O'DONOGHUE: Yes. So in section 3 there are two confidential bidder numbers. I just want to confirm everything else can be shown to my client. Page 174, 3.2.

THE CHAIR: Mr O'Donoghue, it's probably an unfair thing for him to give any answer

now but so long as he gives you an answer today then it's fine.

MR O'DONOGHUE: Yes.

THE CHAIR: Will there need to be a confidentiality ring order? If so, can the parties draft that for me and I will consider it? But please agree it amongst yourselves and don't send it to me until you've agreed it. If there are bits that you don't agree, just put them in square brackets with the alternative wording so I can just do a quick ruling on that, and can I have the draft confidentiality ring order by close of business on Wednesday.

MR O'DONOGHUE: Sir, yes, because if there are things which are disputed, it may impact on my ability to hit the ground running.

THE CHAIR: Yes, and the response of D&D to that question as to which bits of Proud, please put it in a letter copied to the registry so I know exactly what's going on that.

MR O'DONOGHUE: Thank you, sir.

THE CHAIR: Is there anything else that I need to deal with on Mr O'Donoghue's position? Have we covered all the things that we need to cover with you?

MR O'DONOGHUE: Sir, I think so, yes.

THE CHAIR: Yes, I don't think there is anything else on my list for you. You will stay, will you? You are happy to stay? Yes, that's fine. Let's deal with the rest. We've dealt with confidentiality ring order. I presume there's no application for disclosure against anyone? But insofar as -- let's have another direction -- any party wishing to rely on any decisions or authorities which are not UK, then they need to notify the other side with copies and I think we need to have a timetable for that.

I think it's probably going to be, if you are going to file a reply, it's going to have to be at that stage. Are you planning to file a reply or is it just going to be in your skeleton argument?

MR LEWY: We would like to file a reply, Mr Chairman.

THE CHAIR: Okay, so let's deal with the reply then. When do you wish to file your reply?

MR LEWY: Would a week after the defence work?

THE CHAIR: Okay, so that takes you to, reply, 30 May 2023. Then if you want to say anything in reply to the statement of intervention, that should be done by -- so reply to defence on 30 May and obviously both parties can reply to the statement of intervention. So statement, I am not going to give that much time for this because it's not going to be very long or complicated, so it's cutting it a bit fine, is 2 June all right? It's cutting it fine but you've got a big team, you know what you are doing. This is only the statement of intervention. So everyone has until 2 June for any replies from either side to statement of intervention.

Okay, so it's quite clear that if we want to have the case heard on the window of the 12th to 14th we can and we can also have it on the 26th to 28th, so it's really a question of what do we go for.

MR LASK: Sir, if I may, with the earlier dates we'd just be a bit concerned about there being sufficient time for us to digest and respond to D&D's skeleton.

THE CHAIR: I am also concerned about the earlier date, which is I like to read everything before the hearing and this way the skeletons and the bundles would be coming pretty late. If we are starting on the 12th, this way I am not going to get the skeletons and the bundles until shortly before the hearing.

MR LASK: Indeed.

THE CHAIR: That's pretty tough.

MR LASK: We had been working on the assumption that the Tribunal would want our skelly in a week before the hearing. We would certainly want at least a week to respond to D&D's skeleton.

THE CHAIR: You are not going to get a week to respond to anyone's skeleton. That

doesn't work. You've got pleadings which set out what the issues are. You should know what the topics are. You don't need a week in a case like this to respond. You are not going to get a week.

MR LASK: All right, we'll come to that, that would be the starting point for us.

THE CHAIR: It may be your starting point for negotiation but it's certainly not going to be where we end up. Okay.

I now need to fix the hearing dates for the substantive hearing. The time estimate for the substantive hearing is two days. There are three sets of counsel. There is counsel for D&D, counsel for TMG and counsel for the CMA. The two possible windows that are convenient for the Tribunal for this hearing within a reasonable period of time are 12 to 14 June and 26 to 28 June, being the only dates within the relatively near future, i.e. within the next two months, that is available for all three members of the Tribunal. This is a matter that does need to be determined promptly for the reasons that I have already given and that are highlighted in TMG's skeleton argument for this hearing. Merger decisions need to be dealt with by the Tribunal promptly and it is the practice of this Tribunal to, where if practicable, have the hearing, the substantive hearing within three months of the notice of application. The notice of application in this case was filed on 21 April.

The case is not particularly document heavy. It is not a challenge to the merger decision as a whole. It is a challenge to remedies and how it is going to be implemented. So it is not a particularly complicated case such that if the counsel who have been dealing with the matter up until now are not available, no other counsel could be found to take it in and step into the breach.

Looking at the relevant dates, for the 12th to 14th junior counsel for D&D is available. Mr O'Donoghue is available for the 12th and 14th but not the 13th. The CMA's junior counsel is not available. As regards leading counsel for the D&D, he is only available

on the 12th and the 14th and the CMA's leading counsel is only available for the 13th and 14th, so there is a mismatch whichever way one goes.

On the other window, 26 to 28 June, junior counsel for D&D is available, junior counsel for the CMA is available, Mr O'Donoghue is available for the 26th and 27th, D&D's leading counsel is not available at all and CMA's leading counsel is available.

There is an additional factor that needs to be borne in mind. Ordinarily the Tribunal likes to have the material well in advance of the substantive hearing so we can prepare the hearing properly by going through the materials prior to the commencement of the hearing. It's only by doing that that the hearings can be done in a relatively short period of time. I am concerned that if the matter were to go in the earlier window, that I will not get the hearing bundle and the written submissions until too close to the hearing to give me the opportunity to properly digest and consider that material prior to 12 June.

So in the circumstances I am going to fix this hearing for two days on 26 and 27 June 2023. That is a date where Mr O'Donoghue is available, D&D's junior counsel is available, CMA's junior and leading counsel is available. Unfortunately, at least at present, D&D's leading counsel is not available, so one can either hope he gets freed up, because it clearly is desirable if possible that he does it because he obviously has some detailed background to the case, but if he's not available there's plenty of time to find someone else to take his place. I am sorry about that because I really wanted everyone to be at the hearing but looking at it, this does seem to be the only practical way forward.

I think we've agreed all the other directions on pleadings. We now need to look at things like skeleton arguments, as I think it's the next one to look at.

Can we look at tab 2 and the draft order and just tick through the bits we've done. So one is fine, it will be treated as proceedings in England. The defence we've agreed,

22 May, plus 30 May 2023 for any expert on Canadian law in response to Soliman. TMG have permission to intervene with a statement of intervention, including any evidence relied upon, to be filed on 30 May 2023.

The reply to the defence to be filed on 30 May 2023 and any replies to the statement of intervention either by CMA or by D&D to be filed on 2 June 2023.

Skeleton arguments. Given that we've now got a bit more time, let's have a date for the skeleton argument by D&D.

MR LEWY: Mr Chairman, if I could briefly take instructions?

THE CHAIR: Yes, sure, of course you can.

MR LEWY: We would suggest by 9 June.

THE CHAIR: Thank you very much. CMA? When I was giving my comments about the week, that was in the light of a possible draft of the 14th, so you can have more time. So that takes us to ...

MR LASK: If we were to have a week, it would take us to Friday, 16th.

THE CHAIR: Yes.

MR LASK: We'd certainly be grateful for that.

THE CHAIR: I am conscious -- I will want the skeleton of Mr O'Donoghue -- Mr O'Donoghue, how long will you need after seeing the skeleton of the CMA before you file your skeleton?

MR O'DONOGHUE: Three working days should be plenty.

THE CHAIR: If I say the CMA have to file on the 22nd, can you get it to us by close of business on the 26th? Wait, let me go back, I've got the wrong week. We are looking at -- let me just go back a bit. What I would like to have is yours a week before, so if we are -- let me write it down. So the CMA, let's say if it's on the 16th, can you get yours in by the 20th? Or do I need to move the CMA back by one day?

MR O'DONOGHUE: I think that gives us two working days, which may be a bit tight.

THE CHAIR: So you want me to put the CMA back by one day? I am happy to do that. We'll put the CMA back to the 15th, unless there's an objection on that.

MR LASK: At least a formal one, sir. If there is a week --

THE CHAIR: I just want to make sure Mr O'Donoghue has enough time because I do want his -- there's a lot to be done with bundles and stuff like that.

MR LASK: Yes, might I suggest that -- I think you've fixed the hearing for the 26th and 27th but perhaps it could be on the 27th and 28th and then you would have a week for TMG's --

THE CHAIR: Mr O'Donoghue is only free on the 26th.

MR LASK: Sorry, yes.

THE CHAIR: And I would want him to be at the hearing. So it's going to have to be the 15th. Mr O'Donoghue, yours is going to have to be 12 o'clock on the 20th.

MR O'DONOGHUE: Thank you.

THE CHAIR: So 20 June 12.00 pm on the Tuesday. All the others are 5.00 pm but that's going to be 12.00 pm as it's so close to the trial date. Okay. What about the bundles and stuff? When are we going to get the agreed hearing bundle?

MR LEWY: Mr Chairman, can we suggest the 22nd, the day after TMG's skeleton, two days?

THE CHAIR: It's too late.

MR LEWY: Too late.

THE CHAIR: I have to read it. It's going to have --

MR LEWY: One other option is we produce a bundle that contains all of the materials up to CMA's skeleton argument and then if TMG wants to add anything, we produce a supplemental bundle?

THE CHAIR: My point is let's look and see what the materials are going to be. You see, you have the underlying materials and the pleadings and all that, so you can have

all the bundles ready. It may be that insofar as there's sort of any extra materials, that can come a bit later. But what Malek needs is a file sooner rather than later that will be the actual file for the hearing, okay?

So once we've got the replies to the statement of intervention on 2 June, I would want fairly soon after that the bundle for the hearing because I've got to read it. This isn't the only thing I do, okay? Quite often barristers think 'he can read it over the weekend'. It doesn't work like that because I have other cases to deal with. But if it's possible to have a bundle, you can map out what you want in the bundle, you can say: I want the pleadings, the decisions, the correspondence, you can get all of that, we know what that core stuff is and that's going to be the main bundle. If there's going to be anything extra, then that can be dealt with extra. So what I would like is that relatively soon after the replies to the statement of intervention that there will be a bundle and that will be the hearing bundle and if you could speak to your solicitor, because you are going to have the burden of it, the parties are going to have to liaise with each other as to what they want and you could be sending draft indices before then, but I would hope that you can have the bundle done by Friday, 9 June.

MR LEWY: Mr Chairman, I just add that that is the date for filing our reply, so we will have quite a lot of work in the run-up to that. Sorry, skeleton, I apologise, the skeleton.

THE CHAIR: Yes, but --

MR LEWY: If I could take instructions just quickly. Mr Chairman, could we produce the bundle by the 7th?

THE CHAIR: Yes, that's fine. The whole idea is to give me the material that I can read and it's better for you that I have the material sooner rather than later. So that's a brilliant suggestion. So the bundle will be 7 June. That's the hearing bundle, okay. Now the authorities bundle, let's get that done. You've obviously got to have the skeletons for that. So the authorities bundle I will want on 21 June. So 21 June will

be the authorities bundle. The advantage of this is that the skeletons can cross-refer to the hearing bundle because you'll have the hearing bundle on 7 June, which is great.

Now, as regards the earlier point that we discussed, insofar as any party wishes to rely on any decisions which are non-UK decisions, you've got to notify the other parties on 30 May. So that is going to be at the same time as the statement of intervention because by then you should have had your act together and figured out what you are going to be using.

Unless there is anything else, I think I have gone through all the things on my list. Mr Lewy can you volunteer to do the draft order?

MR LEWY: Yes, Mr Chairman, I will do that.

THE CHAIR: So circulate it with the others. I want the draft order on Wednesday by 4 o'clock, earlier if possible. Any areas of disagreement just put the alternative wording in in square brackets and I can just finalise the order there and then. I will also obviously have the draft confidentiality ring order at the same time.

I will send everyone the draft ruling -- the ruling from today, tomorrow morning. If I can have any comments and corrections on that by a 4 o'clock on Wednesday.

MR LEWY: Right. Thank you.

THE CHAIR: I estimated this would be half a day. I think we kept to the estimate. I know you have something else on, Mr Lewy -- I thought you were only free for half a day today.

MR LEWY: I am heading off to Leeds in the afternoon.

THE CHAIR: Fine. That's good. Thank you very much.

(12.56 pm)

(The hearing adjourned)