IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1587/1/12/23, 1588/1/12/23

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Wednesday 4th October 2023

Before:

Bridget Lucas KC
Derek Ridyard
Eyad Maher Dabbah

(Sitting as a Tribunal in England and Wales)

BETWEEN:

Squibb Group Limited

And

Appellant

Keltbray Limited & Keltbray Holdings Ltd

-v-

Respondent

Competition and Markets Authority

A P P E A R AN C E S

Fergus Randolph KC (Instructed by TupperS Law) on behalf of Squibb Group Limited.

David Gregory (Instructed by BCL Solicitors) on behalf of Keltbray Limited & Keltbray Holdings Ltd

David Bailey on behalf of the CMA.

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(10:30)

Wednesday 4th October 2023

THE CHAIR: Good morning. I have to read the customary notice which you'll know off by heart. It still unfortunately needs to be done. So, some of you are joining us live stream so 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 this proceedings and breach of that provision is punishable as contempt of court.

MR RANDOLPH: Good morning. I appear on behalf of Squibb. My learned friend, Mr Gregory, appears on behalf of Keltbray and the CMA is represented by Mr Bailey. We're in your hands to an extent. You'll have got our skeletons. You'll have seen the very helpful, if I may say so, correspondence that was initiated by Mr Bailey's clients and we're ad idem as you will have noted in relation to a number of issues. I'm perfectly happy, although I'm the Appellant, for Mr Bailey to make the running in terms of the order, not least because they started everything going. They have the draft directions up, and it may be easier for them to do that. All I would suggest, if you're with me on that, is that after each item, insofar as it's not agreed, we have the opportunity to address the Tribunal, rather than wait until the end and then try and catch up with all their -- but aren't that many unagreed items.

THE CHAIR: There aren't. That means that you're proposing to save up the exciting debate until last, which is confidentiality.

MR RANDOLPH: Actually, no, I was going to take it in order, I was going to suggest

one takes it in order. So (4) interveners, then we get to the interesting topic of confidentiality. But I'm in your hands.

THE CHAIR: Yes, let's do it in that order, then: (4) interveners, then confidentiality, and then I think we could usefully go through the dates in the order. But I think we should deal with confidentiality, first, of the issues to be reflected.

MR BAILEY: May it please the tribunal. The draft order we prepared in light of the correspondence with the appellants is to be found at tab 21 of the CMC bundle at page 667. It may be helpful if members of the Tribunal have that to hand.

THE CHAIR: Yes.

MR BAILEY: Over the page, one can see the first agenda item, it is agreed between all parties that the forum is and should be England and Wales. We respectfully invite the Tribunal to direct that. In relation to interventions, the draft order doesn't make any provision. As far as the parties are aware, we're not aware of any requests for permission to intervene.

Then moving to the question of confidentiality, there is a degree of common ground here between the CMA and Keltbray, you'll have seen this at paragraphs 8 of the CMA skeleton and 6 of the Keltbray skeleton that no confidentiality ring is necessary.

Now Squibb takes a different view and considers that one is necessary. Can I just briefly, first of all, explain the CMA's position and then briefly address Squibb's concerns. The CMA's position is that in line with the Tribunal's ruling in the BGL case, which, Madam Chair, you were a member of, the CMA has proactively sought to review all requests for confidential treatment in relation to matters in the decision. It

began that exercise in February of this year and it anticipates, as the draft order sets out, that we should be able to complete that exercise by 13 October, middle of this month.

The CMA has not identified any information that is said to be confidential by either Keltbray or Squibb in any of its pleadings or evidence before the Tribunal. It should be acknowledged that the CMA has identified small amounts of information that is said to be confidential which pertains to parties not before the Tribunal, so the proposal is that that information is redacted.

To give the Tribunal an indication of what that involves, it's largely individual names, personal data for individuals that are not involved in any of the infringements; for example, those that acted for consultants that organised the tenders that were subject to the bid rigging. What we propose to do is to provide a version of the decision that has all the information in it that can then be referred to at the hearing in open court and only redact information that is irrelevant to the issues and confidential to a third party.

Similarly, the CMA has been going through all the documents cited in the decision which are relied on by any of the parties, either appellant or the CMA, and gone through a similar process, and we propose to provide that to the Tribunal a week after on 20 October, so it may allow the Tribunal members to read and look at the underlying documents in good time before the hearing.

Subject to the preference of the Tribunal, that's what we propose to do. Insofar as Squibb's concerns, as we understand them, Squibb has set out in paragraph 11 of its skeleton argument a concern that insofar as the Tribunal hears these appeals together, that one appellant may refer to a confidential document, thereby requiring another appellant and his representative to leave the room. We can see the theoretical concern but as I've just explained, we haven't identified at this side of the court any

information which is actually confidential, so we don't see that that arises.

They also rightly did point out that Keltbray when they filed their notice of appeal on a provisional basis did highlight certain information to potentially be confidential. But the CMA has engaged with Keltbray about that, and that concern has fallen away.

That leads the final concern Squibb has raised, which is essentially one relating to the experts and the extent that they may wish to disclose underlying data which is confidential. Again, the CMA hasn't identified any such data as matters currently stand. Of course, if and when such data needs to be produced and it is confidential, then we absolutely would be ready to prepare a draft order for the Tribunal's consideration. We say it's premature at this moment and we have really in mind paragraph 8 of the Tribunal's ruling in BGL which emphasised the need for open justice, in that proceedings before the Tribunal should be as transparent and in public as possible.

So we say although it's easy to establish a ring, we don't think one is necessary at this moment in time. Those are the CMA's representations on confidentiality, madam.

THE CHAIR: Yes, thank you.

MR GREGORY: The only thing to add from Keltbray is -- we're in the Tribunal's hands -- we did mark those passages as confidential on a precautionary basis. If the Tribunal would like us to refile that with no confidential markings, of course we're happy to do so.

THE CHAIR: Yes, thank you.

MR RANDOLPH: Madam, I can take this quite shortly. I'm very grateful for Mr Bailey's

summary of the position. I'm also grateful for his confirmation that were there to be a pressing need or a need for confidential protection, then a draft order could be put in place.

Now our concern, and this is a concern mirrored by Keltbray, because paragraph 8A of their skeleton, the end of 8A, says this:

"If confidentiality concerns do arise in the future, these can be resolved by way of a ring."

I think everybody is agreed that if there are issues that need to be protected, then a confidentiality ring should be put in place.

BGL was obviously -- and madam, you of all people will know this, paragraph 7 of that ruling makes it clear that the confidentiality ring in that case was "extremely broadbrush". We're not looking at extremely broadbrush here, that was a very particular type of confidentiality ring. There are two appellants in the CMA, there are no interveners. It would be to protect information that is confidential to the parties, I would suggest, not least because as we've heard from Mr Bailey, any third-party information will already have been redacted, apparently, when we get the new form of the decision that's going to go before the Tribunal.

Squibb does not in any way quibble with the proposition that open justice is the best way to proceed, absolutely we want our case heard in public. But we are concerned about the potential for confidential information to leak out absent the protection of a confidentiality ring. My learned friend Mr Bailey went through paragraph 11 of my skeleton but skipped over 11(iii), which is in large part the key part of it, where I make reference to the letter of the CMA dated 15 September which was sent to your registrar, which we appended to our skeleton.

One can see from that indeed from paragraph 11(iii) that the CMA states that many of the key documents they have referred to that they are going to look at are going to be

comprised within the new non-confidential version of the decision are not presently relied upon by any party to these proceedings. I make the boring but forensic point that if many of these key documents are not presently relied upon by any party, then some of them must be.

So that extent -- we don't know what those key documents are. Having thought about this since we received the skeletons, and obviously just to make the point, we didn't know about the Keltbray position until we saw their skeleton, so we made the point: oh, look, there's a confidential version. We didn't know there had been discussion between the parties, so I apologise for wasting the Tribunal's time, but we weren't to know.

But having thought about it and looked at the skeletons, we're very happy to proceed on the basis that if the Tribunal isn't with me, our primary case is one can put in what I call a prophylactic confidential ring order now, very straightforward, because time now is not of the essence. But come the replies, which would be 1 December, and if the Tribunal is able to fix a trial date -- and we will come to this in a moment -- shortly after 1 March, which is the start date, then time gets quite short. There's quite a lot for the parties to do on the basis of the present timetable as put before the Tribunal. So time will be more of the essence at that period, and what one doesn't want, I would suggest with respect, is an additional thing to do, an additional potential piece of grist that might throw the machinery out.

So why not, not with the aim of precluding open justice at all but in the aim of good case management, put in or least start the process of a confidentiality ring to ensure that, as all the parties before you have said, if there are confidential matters, then they can easily be protected by something that's already in place, rather than arrive at a situation in say January, where lots of people have got quite a lot to do, and then all of a sudden a confidential document arises, something happens with the experts, and

all of a sudden some time has to be found out of a relatively short timetable to address an issue of confidentiality. Why not do it now?

That's my primary submission. If the Tribunal isn't with me on that and says just wait and see if there's anything confidential, then our secondary submission is this: we're very happy that the CMA will proceed on the basis that it's said with a redacted decision, if you will, by 13 October.

The directions then go on at 10C to suggest -- or in their skeleton .... yes. So 10A:

"The CMA is reassessing a request by the parties ... confidential treatment that were made during the investigation."

And 10C:

"The CMA intends to file copies of all the documents cited in the decision which are relied upon by any parties in their pleadings or evidence. The CMA expects that they will be redacted for irrelevant, confidential information only."

That would include the key documents, and this goes back to our point at 11(iii) about some of which may be relevant, some of which may be confidential, we don't know at the moment, and some of which obviously should be therefore protected.

The secondary argument is that one goes ahead with 13 October in terms of the completion of the redaction of the decision, but then absent a confidentiality ring solution, the secondary solution would be for the CMA to undertake to share with the appellants -- and I include Keltbray in this, but they don't need to be if they don't want to be -- and their legal teams, the CMA undertakes to share with them the proposed key documents on a confidential basis so they can be reviewed prior to being put in the public domain, to ensure that, so far as we're concerned, nothing inadvertently slips out absent the protection of a confidentiality ring. We don't want to delay matters, but we are very concerned.

I'm also very aware of the fact that a lot of the material is quite old. That's obvious. I

have discussed with the Keltbray team certain data that's in their documents which relate to, for example, profit margins and I thought: gosh, that might be confidential. Well, they're quite relaxed about that because it's quite old. So I take the point; I'm not trying to press this point simply for the point's sake. We're just genuinely concerned that something may came out.

And indeed -- and this is the point Mr Bailey finished on in terms of our position -- our experts are concerned that insofar as there has to be or there will be directed a joint experts report in terms of what's agreed and what's disagreed, insofar as there is underlying confidential data -- and we simply don't know yet, we simply don't know -- albeit that data may be old, but it may not be insofar as relevant market definition is concerned and insofar as region by region issues are concerned, which are relevant to us -- not necessarily to Keltbray, these are our specific issues -- then yes, we very much prefer, strongly prefer, the situation where that information was protected.

Those are my submissions. Primary case: let's get something in place now. It's relatively straightforward as Mr Bailey has agreed. But if we can't do that, then at least please give us the opportunity to review not the decision, not fussed about that, it's the key documents that we simply don't know about because they're presently out of our ken.

THE CHAIR: What I'd quite like to get an understanding of is what the nature of this confidential information is likely to be. So is it envisaged -- it seems to me that the primary driver normally behind a confidentiality order is that certain categories of person in one party or the other ought not to be able to see the documents.

So is there an issue as between you and your client and Keltbray, for example, in relation to information?

MR RANDOLPH: There may well be in terms of turnover by region, in terms of -- well, market definition to a lesser extent, but certainly turnover by region. Now insofar as historic turnover by region, I'm sure Mr Ridyard would say, "Come on, Mr Randolf, that's all very old and therefore you don't need to protect it".

But insofar as the economists are going be looking at a situation -- not a snapshot, but in order to determine -- I don't want to get into relevant market definition submissions now, but one's not looking at a particular day, they're looking at the market as it was then and as it is now, we would submit, insofar as that may educate the Tribunal as to what the relevant market was or wasn't. And this is an important part of our case, relevant market definition.

The CMA have helpfully set out their defence and they don't agree with our position. But we think it's pretty critical and there may be issues there which are -- where in terms of the experts we have to set out our turnover issues. Now we are competitors to the extent that we are in the same broad business. You will have read our submissions and our grounds of review and we say: actually, we're not in Central London, we don't do basement boxes, we don't do this, we're not in the big boys' club. Nonetheless, we are competitors as witnessed. We tendered for the same jobs, two of them. So yes, we are -- I think had it just been us, it wouldn't have been an issue. But Keltbray are with us and Keltbray have asked that everything -- and we have not resiled from this suggestion and I think this is eminently sensible -- be case managed and heard together, so we will hear the two appeals together.

If the Tribunal orders the experts to do what is suggested, which I think is a good idea personally, there will be three experts: ours, Keltbray's and the CMA's, all sitting together trying to get a report together. And that is the concern: if we had a bilateral with the CMA, that wouldn't be a problem. But we have a trilateral, a trilateral situation whereby three sets of experts are discussing three sets of material, and two of them

are experts for competing parties, and I think that is of concern. This is not a case where you have an appellant, an intervener, and then the defendant. We have appellant, appellants, defendant and that is the basis for our concern.

THE CHAIR: As I understand it, currently there are no redactions in your note of appeal –

MR RANDOLPH: Not in ours, not in ours.

THE CHAIR: So in theory, this is a little bit of a hypothetical issue that may arise further down the track.

MR RANDOLPH: And this is why I put forward my secondary argument. I would understand but all I'm saying, having been in these cases before, it's all lovely at the start, everybody has time to discuss matters at our ease, time then becomes constrained.

I'm just wondering in terms of case management, if we can get rid of an issue, every party, all parties to this appeal, agree that insofar as there is confidential material, it should be protected by a confidentiality ring. In other words, we don't need -- we're not asking to go into private, which was the BGL point.

So we're all agreed on that. The question is: oh, well, there's not anything evidently confidential at the moment. Well, we have the key documents point and the many points, which is (1). (2), experts' real issues potentially insofar as, amongst other things, turnover of a region. And also there's obviously the fine calculation, but that is slightly less in terms of -- that's more legal, if you will, rather than expert economic analysis, but nonetheless there may be issues there as well.

So the question I suppose for the Tribunal is will it impact on open justice? No, because it's going to be a tightly drawn confidentiality ring. And will it detract from the good progress of the case? Far from it, I would submit, with respect. What is the downside? It may never be used. But is it not better, I posit, to put something in place where everybody agrees that it might be useful if there is confidential material that comes up, rather than scrabble around at the last minute. But that is a matter for the Tribunal.

As I say, my secondary position is if the Tribunal is not with me on that, then at least please give us the opportunity to review those key documents, and indeed it would almost be at every stage when -- because what would happen, I put this: so the expert economists meet together, we're not there, lawyers aren't there, they all meet together. And in the meeting, some confidential material is put across from one appellant to the other, or one appellant to the CMA, which is then seen by the other appellant's expert. What happens then? Do they say, "Woo-hoo, that looks confidential, bit worried about you seeing that", then everything has to stop. They ring up the lawyers, "Oh my goodness me, what are we going to do?" "Oh well, we'll get a draft order". We definitely don't want that to happen because on the present timetable, the economists are due to meet at a relatively later stage of the proceedings, because it definitely has to be after the reply, which is 1 December, so it will be in January. Then we are not a million miles away from the start of the trial, assuming we can all start pretty soon after 1 March.

So as I say, all I'm trying to do is to make sure the engine is well-oiled, rather than getting it to a situation where it may be spluttering and one has to indulge in fairly radical surgery at a stage when one doesn't need to do that. Anyway, I'm repeating myself, so ...

THE CHAIR: I may have a concern that we're conflating the nature of the confidential information and the management of reviewing the information as between the parties on the one hand, and trial management on the other.

MR RANDOLPH: Yes.

THE CHAIR: If your clients find they're in a position where they have to hand over information they say, "On reflection, actually we'd really rather Squibb wouldn't see that", then would be for your client to raise this with the other side and say, "We've noticed that there is an issue here, how are we going to deal with it sensibly?"
It's not for the other parties to identify that for your client, is it? It would be for you.

MR RANDOLPH: No, this would be say -- the experts saying in preparation and maybe at the meeting. Supposing at the meeting they put in before a preliminary report saying what we agree, what we don't agree, and then Keltbray's expert or the CMA's expert will say, "What about this?" And then our expert will go away and then produce some information, or maybe Keltbray's expert have produced information which included confidential material about Squibb, but that would be less obvious.
It would normally be a situation whereby in order to make good an expert's point, either the CMA's, Keltbray's or Squibb's, they would wish to rely on confidential material. They could not do that absent a confidentiality ring because obviously to do that, if they deployed it, then the confidentiality would obviously be removed.
And that's the problem because we all know -- and certainly Mr Ridyard knows -- in terms of economists getting together, it's not a static thing, it's a process. There are telephone calls, there are meetings, there are exchanges of information to get to hopefully what is very useful for the Tribunal, which is this agreed and non-agreed

report. And what one doesn't want is for that to be stopped in the middle.

Supposing something is suggested by the CMA or Keltbray, probably the CMA, saying, "The answer to this is that and we can't possibly agree with you", and then Squibb's experts say, "Well, actually, we need to refer to this", and the "this" is confidential. Everything would then have to stop -- it's a bit like the House of Congress, it would have to stop for a while until that issue was resolved. It could only be resolved, I would suggest, if that confidential information was going to be deployed by the setting up of a confidentiality ring.

That's my concern. With respect, I don't think there's any conflation there. It may well be our material -- at the moment, in our grounds of review, there is nothing confidential. That is clear and we haven't marked it as such, unlike Keltbray, and they're going to produce something.

But two things. Insofar as the key documents are concerned, we are still very concerned about that. We don't know what's going be said in there and it may impact on us. We don't know. And insofar –

THE CHAIR: Can I just ask you about that? What do you envisage maybe in these key documents?

MR RANDOLPH: I don't know because we haven't seen them.

MR BAILEY: If I can assist my learned friend. In relation to these documents, these are the documents cited in the decision and then relied on by the parties. Since we wrote to the Tribunal on 15 September, the CMA can now confirm that none of those documents contain confidential information as between any of the parties.

The other thing I wanted to draw to the Tribunal's attention, as I'm sure you're aware,

the guide expects the parties put forward reasonable requests in the form of a schedule and neither party has done that. So we really do see this at the moment as just a purely theoretical concern and the Tribunal's practice when confidentiality does become an issue can be readily addressed by a standard form draft order establishing a ring.

So as far as the CMA is concerned, at the moment this is something that does not arise.

MR RANDOLPH: I'm grateful. But does that mean the letter of 15 September is no longer correct insofar as it's stated in terms, "Many of these key documents are not presently relied on by any party to the proceedings". So that position has changed.

MR BAILEY: The position has just moved on. The CMA continued with its review. It wrote to my learned friend's clients on 27 September and set out the position as far as the CMA is aware, where there is no confidential information at the moment arising in these proceedings, other than those relating to third parties, which will be redacted, and no party's relying on that information. So we don't see there's any need for a ring.

MR RANDOLPH: Well, it's helpful to know that that is the position. I'm not going to make any forensic points about being told in terms that that was the position and 15 September was no longer the position. We are where we are, that's fine. It still doesn't address the issue about the experts, which is going to be a real concern insofar as -- so the key documents points now disappears because of Mr Bailey's intervention, so I'll take that, that's fine. So no key documents are going to be disclosed a week after the new decision is produced, which will be -- in any way, shape or form be confidential.

THE CHAIR: I think Mr Bailey's point is some of them may be confidential, but they will also be irrelevant and they may be redacted.

MR RANDOLPH: That's precisely right, yes. But insofar -- well, okay. Again, they're going to be deemed to be irrelevant on a decision of the CMA, obviously we won't see them. Were we to be a confidentiality ring, we could of course see those key documents.

Then the Tribunal has to say: well, insofar as the Tribunal is -- and it is properly concerned with open justice -- we have a situation here where the CMA is the defendant. Its decision is being impugned both as to the infringement and fine with us and fine with regard to Keltbray. They are now going to produce a new decision -- sorry, a differently contained decision which will avoid the issue of confidentiality, and they will redact on the basis of their assessment -- essentially all the key documents because they are not relied upon insofar as they're confidential, apparently there are none that are relied upon. So that is the change from 15 September.

We don't know -- I mean, we may indirectly rely on, we may not, because we haven't seen the key documents. Anyway, this is something I hadn't expected and I'm very happy to deal with now. I'm not complaining, we are where we are and we need to crack on. I have been on my feet for far too long in any event.

I would ask that insofar as stated positions by the CMA in letters to the Tribunal, insofar as that position changes, I think it's incumbent on the CMA as a matter of professional courtesy at the very least to inform the addressee of that communication, i.e. the registrar, that the position has changed, copied to all the parties. We are where we are, but that position, that change of position, does not impact on the potential problem

we've seen with the experts.

It's all very well for Mr Bailey to say those things can be agreed relatively easily. In my experience, there can be difficulties with regard to who's in the ring, who's outside the ring? Is it a doughnut-type or is it a straight ring? I agree, it should be relatively straightforward. But as at the time when this is going to be taking place, which will be January time in terms of the experts, for my part there seems to be very little downside for putting in place a standard confidentiality ring.

Or even if that is too much for the CMA, then maybe they could undertake a draft confidentiality ring in the terms set out -- so we can set it out, we can discuss it now -- would be put in place were there to be issues of confidentiality, which is essentially what Keltbray have said in their skeleton argument at paragraph 8, where they said in terms that if there is an issue in relation to confidentiality, then that could be resolved by way of a ring.

What I don't want to have is an argument in January about, "Is that confidential or is that not?", and, "Let's get this sorted out and we're very busy at the moment", and then ten days goes on. Madam, you know what litigation is like, it gets busy. I don't see any downside, especially given the fact that Mr Bailey has stated in terms before you today that yes, if there's a confidentiality issue, we can get confidentiality ring in place pretty quickly.

Why not agree one that we would all agree to put in place if there is a need for it, because that would avoid precisely the problem I am concerned about, which is the log jam when everybody is doing other things and we then have to put something else on the agenda, which is what are the terms of the confidentiality. Either that or we agree here and now that the standard order would be put in place.

MR BAILEY: May I assist the Tribunal. My instructions are that Squibb had access

to the file of all documents. At that time, it was subject to the confines of a confidentiality ring set up during administrative procedure. So when it brought its appeal, it could chose whichever documents it so wished to rely upon, and it's done so. It hasn't claimed confidentiality in respect of any of those documents, so we don't see at the moment see why, even on a contingent basis, one should be preparing confidentiality rings. It seems to us to be unnecessary.

As the point in relation to the experts: at the moment, again so far as the CMA is aware, none of the data or documents being relied upon by any the experts or the CMA witnesses is confidential. We would find it highly unusual and unorthodox for an expert to come to a without prejudice meeting with new data that is said to be confidential. We would have thought that would have to be flagged in good time beforehand. So we just say this is really a premature issue.

THE CHAIR: Mr Gregory, do you have anything to add on this subject?

MR GREGORY: No, ma'am.

MR RANDOLPH: Sorry, madam, just one very small point. I've just taken instructions, Mr Bailey said we were shown everything.

I'm told that actually we sought confidentiality for certain material. That was refused and because of -- during the administrative procedure and it was not challenged. We don't need to go into why that wasn't challenged, but it's wrong to say that we were completely okay with everything. We sought confidential treatment for certain data. That was refused us and we then agreed to proceed on the basis that it was not. But we did make an application, we said we think this is confidential, and that was pushed back. Those are my instructions.

THE CHAIR: Thank you. We may rise for five minutes to decide on what to do with this issue.

MR RANDOLPH: Thank you.

(11.18 am)

(Short break)

(11.20 am)

THE CHAIR: Thank you, thank you for your submissions.

We are not attracted by the idea of making a form of prophylactic order. The rules of the tribunal do require a degree of specificity when requests for confidential treatment are made. No specific wording of an order has even been proposed in this case and it does seem to us that it is a hypothetical issue which may arise. If it does, we fully anticipate that the parties will co-operate and deal with the matter sensibly. If any difficulties do arise, then the tribunal can deal with these issues very swiftly and directly with the chair.

Insofar as there may be issues which then arise for trial management in relation to dealing with certain information and whether people have to be court or excluded from court, or for some reason everyone should be in court but there's an assertion that the public should not hear it, then those applications can be heard at a PTR which we will no doubt come to.

That our decision: no prophylactic confidentiality order.

MR BAILEY: I am grateful, madam. The next item is the future conduct of the appeals, that's at item 4. Here, the parties liaise and have agreed, subject to the Tribunal's view, each appellant shall if so advised file and serve a reply and any supporting

evidence no later than 1 December. That's paragraph 9 of the draft order.

THE CHAIR: Yes.

MR BAILEY: Then item 5 is about the manner in which the appeals will be dealt with and case managed from hereon. At the moment, the parties' collective suggestion is that the appeals be heard together but not formally consolidated, which is paragraph 5 of the draft order, which is in keeping with the Tribunal's more flexible approach to managing these issues.

The CMA doesn't have any objection, and I believe the appellants would so wish, to cross-serve their notice of appeals and the annexes on one another, and that's provided for in paragraph 6.

Then paragraph 7 is just simply looking forwards insofar as, for example, the reply and then any evidence, that would also be cross-served. That's where we would propose they be managed together. That then takes one on to the question of evidence.

MR RANDOLPH: I do apologise. The issue of hard copy bundles –

MR BAILEY: I was going to address –

MR RANDOLPH: I see, sorry. I thought that was under future conduct of the appeals. But anyway, if you're going to address it, that's absolutely fine.

MR BAILEY: I was going to come on that question when one gets to the steps towards the main hearing.

In terms of the question of evidence, you'll see in paragraph 4 of the draft order that

there is a list there of each of the witness statements and expert reports which have been filed and served respectively by the CMA and by Keltbray. What is missing from the draft order but we would happily update it to include the first witness statement of Mr Clements and Mr Squibb, and the expert report of Dr Horn and Middleton on behalf of Squibb. There is no objection from the CMA or Keltbray to the admissibility of that evidence.

So that deals with the factual evidence. My understanding is that the moment, each party is proposing to call each of those witnesses, although we are not yet at the stage where we can say we will intend to cross-examine them and for how long.

That then leads on to the question item 7 about how to handle expert evidence. As the Tribunal will have seen in our skeleton, we explained why, and we hope it is satisfactory for the Tribunal, while we filed in the form of witness statements statement on behalf of Dr Walker, who is the chief economic advisor at the CMA, and Dr Haydock, who is the deputy chief economic adviser.

Because they are employed by the CMA, and Dr Walker in particular was involved in the investigation, I didn't think it appropriate they could act as independent experts. But we do propose and believe the appellants agree with us about this, it would be beneficial for each of the economists to meet and discuss and see to what extent they can agree their opinions on the issues in dispute; and where they disagree, to give reasons for that. That is set out in paragraphs 11 and 12.

If one were self-critical of the draft, I might respectfully suggest to the Tribunal that paragraphs 11 and 12 perhaps should not use the words "experts of like discipline" in circumstances where the CMA is not actually calling an expert so called. Perhaps it should rather say "economists addressing the same issues shall meet", or some wording along those lines to recognise the fact that Dr Haydock and Dr Walker are not being called as part 35 experts.

THE CHAIR: Yes, I think that would be sensible.

MR BAILEY: I was proposing to come to the dates by which these steps were to be completed by at the end once the Tribunal has indicated when it wishes to hear the main hearing, and then work backwards as to when that might be appropriate.

THE CHAIR: Yes.

MR BAILEY: That deals with the question of expert evidence. Then one comes on to the main hearing. For the purposes of that hearing, what the CMA has proposed by way of bundles is that at paragraph 10, there should be an agreed bundle of documents relied on by any party that will be filed with the Tribunal. So that will be a compendious set of documents in the decision which are relevant to the appeals, pleadings, and also anything exhibited to witness statements in chronological order. My learned friend raised an issue relating to hard copies. The CMA has no particular preference one way or the other. Environmentally we would prefer to do it electronically in PDF form, but we're really in the Tribunal's hands. Whatever you would find helpful, we will do.

THE CHAIR: Okay. I may be able to add something here. I'm advised that the Tribunal needs one hard copy set for the Registry. I don't think any of us require a hard copy of the full set. I'm a little bit of a dinosaur. When it comes a core bundle, I quite like that in hard copy, and when getting down into minutiae, A5 double-sided because then I can take it to bed and read it there!

MR BAILEY: I hope it can send you to sleep.

THE CHAIR: But I don't know, we might just advise nearer the time whether people want a hard copy of the core bundle and, if so, in what format. But there will be the need for at least one for me. But the full bundle, no. Authorities bundles can be electronic as well.

MR BAILEY: I am grateful. We will amend the draft to reflect those directions. That then brings us on to the main hearing and you can see that's provided for –

THE CHAIR: Can I just stop you on bundles. I'm taking it that you don't need any directions for agreeing indices or anything, you're perfectly happy you're going to co-operate on that?

MR BAILEY: Experience shows so far the parties have been able to co-operate successfully.

So then turning to the main thing for the appeals being heard together, at the moment the proposal is -- again, this is agreed -- that we should ask the Tribunal to list the hearing for the first available date after 1 March next year to suit of course the convenience of the members of the Tribunal. Our time estimate is for seven days, but that is to include one non-sitting day which would encompass opening and closing submissions and cross-examination, or possibly concurrent evidence of the experts, which is obviously a matter we would raise with the Tribunal closer to the time.

That is the proposal, but obviously we're in the Tribunal's hands when it would suit you to list the hearing.

THE CHAIR: We have had a discussion between us here on the panel and with the Tribunal, and we can accommodate seven days from 22 to 30 April.

MR BAILEY: For the CMA, we would able to accommodate those dates. I'm grateful.

MR GREGORY: Our expert has said that's a date to avoid.

THE CHAIR: That entire period?

MR GREGORY: That week, the week commencing 22 April.

THE CHAIR: Right. Mr Randolph?

MR RANDOLPH: I have no instructions insofar as our experts are concerned, so that's good. Insofar -- as my availability is lower down the pecking order, but I was advised yesterday that I may be in court in April but I'm not entirely sure when. But it's much better this case comes first. We're here now. Obviously, madam, you have to deal with the issue of Keltbray's expert but insofar as we're concerned, I won't put any markers down saying no. That week therefore is fine for us.

THE CHAIR: Can I just ask Mr Gregory, is there availability the following week, the week --

MR GREGORY: Yes. Week commencing 29 April, there is.

THE CHAIR: Does that work for the CMA as well?

MR BAILEY: So far as counsel is concerned, it actually wouldn't be myself because at the moment I have another trial next year. But yes, 29 April would work for counsel. We're just trying to check it would work for the CMA witnesses at the moment.

THE CHAIR: What I am thinking about is we may not start on a Monday. We may start halfway through that first week and drift a little further into the second week. We'd probably have to speak to Registry about that and I'll have to check with my fellow members here. I am being handed a note. **(Pause)**.
It may have to await confirmation from the Tribunal, waiting for a little bit. But shall we try and work dates around starting on 24 April or 25th and then running for the whole of the following week. Does that work? If we started on the 25th, we could run through to the Friday. Does that work, or does that leave you short of two Fridays? We might have to sit on a Friday, God forbid!

MR BAILEY: That works from the CMA's perspective, I'm grateful.

MR RANDOLPH: It works from Squibb's perspective.

THE CHAIR: Does that work for you, Mr Gregory?

MR GREGORY: Yes.

THE CHAIR: You think so. Well, let's all say -- it's slightly hypothetical, something may come out of the woodwork and certainly one panel member has to confirm that. But if we take that as the hypothetical date, then maybe we work through the order with that in mind. It is fine. Right, 25th it is.

MR BAILEY: I think what then follows from that is to work backwards as to when various other dates need to be completed by. In the draft order, if one takes those in turn, there's a date -- to which I think my client is indifferent -- at paragraph 6 as to when the appellants serve their notice of appeal on one another. So that's really a matter for my learned friends.

THE CHAIR: I wonder if when they're doing that, we could perhaps clean up the Keltbray notice of appeal.

MR GREGORY: We can certainly do that within a week. It's only minor changes to adopt.

THE CHAIR: Thank you. For that, shall we say 13 October, which is the same as the CMA is serving their new decision.

MR RANDOLPH: The only thing is insofar as our annexes comprise the decision, we need to get their decision first so then we can put that decision in our new annexes.

MR BAILEY: If would assist, then maybe one just (Overspeaking).

THE CHAIR: Yes.

MR BAILEY: Thank you.

The next direction at paragraph 10 relates to the now single hard copy to be filed with the Registry. It may be sensible that that is filed perhaps one month before the main

hearing so that is in sufficient time.

THE CHAIR: Yes.

MR BAILEY: Yes, that could be 21 March, as my learned friend suggests.

THE CHAIR: If it's four weeks, it's 28 March, and Easter start falling around then, doesn't it? So we'll say 28 March for the one hard copy bundle and an electronic copy.

MR BAILEY: There is the question of when the economists should meet with one another. We had in our skeleton argument sought to suggest that it might be useful for that to happen roughly two months or eight weeks before the main hearing. It may be that one could put that in, for example, towards the end of January with the agree/disagree statements to come, say, two to three weeks after that. We don't have particular preference of dates as such but it might be, for example, they could meet by 26 January next year.

THE CHAIR: Yes. In one sense, it's for the convenience of the experts and the parties really --

MR BAILEY: Yes, it is. That's a long stop date so they could obviously meet earlier than that that would suit -- at their convenience.

THE CHAIR: Yes. So if you wanted to say -- I think the eight weeks before the hearing is a good long stop date to have, that would be they must meet by 29 February. If they can do it earlier, great.

MR BAILEY: Then I think we've said the joint statement should be six weeks, so two weeks after that.

THE CHAIR: That would be 14 March.

MR BAILEY: In terms of the dates for the core bundle, the bundle of authorities and the appellants' skeleton, we respectfully suggest that could all be filed and served, say, 21 days before the main hearing. So I think that would bring us to the beginning of April.

THE CHAIR: Yes, that sounds sensible.

MR BAILEY: Perhaps 5 April.

THE CHAIR: Yes, that would be fine.

MR BAILEY: We suggested the CMA's should really come just a week later than that, which I think would be 12 April.

THE CHAIR: Yes.

MR BAILEY: As far as the CMA is concerned, we were anticipating that this is a suitable proceedings for where the practice direction should apply, and therefore the page limits and the formatting should also apply. There's no reason for longer skeletons.

THE CHAIR: I think that's probably right. If there is an issue, you can raise it in the normal way.

MR BAILEY: I'm grateful. That just leaves the question of the pre-hearing review which all parties think is prudent.

THE CHAIR: Did we do bundle of authorities?

MR BAILEY: The date I suggested was the same date as the appellants' skeleton, so 5 April. But if actually one wants to make it slightly later to give them a little bit more time, one could have it at the beginning of the following week.

THE CHAIR: Would it be sensible -- you're doing sequential exchange of skeletons, aren't you, so would it be sensible to do the authorities after the CMA skeleton has been filed so we just have the one?

MR BAILEY: Yes, ma'am, in which case one can delete paragraph 14 of the draft order.

THE CHAIR: Yes, and just put in a date. I don't know how long you need to compile those authorities, but probably –

MR BAILEY: Perhaps 17 April?

THE CHAIR: Yes, that would be good.

MR BAILEY: We will amend paragraph 15 to make provision for the single hard copy of the A5 double-sided core bundle that you requested in paragraph 15.

THE CHAIR: I'm just thinking the best way to do that. Is the best thing to say you'll file such hard copies of the core bundle as the Tribunal notify you of and you just chase us up with a letter and say what do we want in good time and we'll get that done.

MR BAILEY: Yes. That then leaves –

MR RANDOLPH: Sorry, in terms of the date for the core bundle?

THE CHAIR: The core bundle –

MR RANDOLPH: That would have to be the CMA's skeleton and probably after the bundle of authorities, I don't know. Maybe 17 April?

THE CHAIR: The hard copy bundle will be the one I will be scribbling frantically on. I'm happy for it not to include skeleton arguments and for it to come in earlier than that, so ...

MR RANDOLPH: So it won't include skeleton arguments?

THE CHAIR: No, we'll just have those as separate documents. It's often quite handy do that. A date for reading hard copy documents, what about the date the first skeleton comes in, so that would be 5 April? It won't include the skeleton, but then we'll at least

have a core bundle of all the documents referred to in it. Sorry, when I say that, I just mean pleadings, witness statements and expert reports.

MR RANDOLPH: Without exhibits.

THE CHAIR: Yes, exactly right. So that would be 5 April.

MR RANDOLPH: Sorry, just to be absolutely clear: an expert report without exhibits?

THE CHAIR: Yes.

MR RANDOLPH: Thank you.

MR BAILEY: That then leaves the pre-trial hearing, which I think all parties agree would be prudent, if only because there may be issues which arise coming out of the replies, and also the timetabling for the hearing itself.

Our current estimate is half a day. We don't have a particular preference, we're really in the Tribunal's hands as to when it would suit the Tribunal to hold such a hearing. It may well be that it is prudent to put it after, for example, the joint statement of the experts, which would then bring it towards the second half of March, for example.

THE CHAIR: Yes. I don't know I will be a position to give you a specific date for that, but if we could put something in the order.

MR BAILEY: To be notified –

THE CHAIR: Yes, "On a date notified". At the PTR, I would quite like to have on the agenda the management of confidential information at trial, if that is an issue at that stage; a review of the trial time estimate to check it's still right; a trial timetable; and if the parties could consider what they propose by way of expert evidence and if anyone has any strong views about hot-tubbing and the like.

MR BAILEY: I'm very happy to address each of those items.

In relation to the trial timetable, the Tribunal's preference in the recent Prochlorperazine proceedings was to timetable it down to every five minutes. If this Tribunal panel would like to do the same, we can obviously do that; if on the other hand you just wish to have a broad indication of the hours that are allocated to submissions and evidence, then we can liaise beforehand to do that as well.

THE CHAIR: I think a broad indication would suffice on this occasion.

MR BAILEY: We're very grateful. There's nothing further from the CMA.

THE CHAIR: Thank you.

MR RANDOLPH: I've nothing further, thank you.

THE CHAIR: Thank you very much and thank you for having agreed so much before today. It's made it very straightforward.

MR BAILEY: Would the Tribunal find it helpful if we liaised and prepared a revised agreed draft order for your consideration, or would the Tribunal Registry wish to draft –

THE CHAIR: If you could prepare the draft, that would be great.

MR BAILEY: I'm grateful.

THE CHAIR: Thank you very much.

(11.44 am)

(The hearing concluded)