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**IN THE COMPETITION APPEAL TRIBUNAL**

Case No.: 1419, 1421-22/1/12/21

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

22 July 2022

Before:
Andrew Lenon QC
Tim Frazer
Professor Michael Waterson
(Sitting as a Tribunal in England and Wales)

BETWEEN:

**ADVANZ LIMITED AND OTHERS**

**Appellants**

v

**COMPETITION AND MARKETS AUTHRORITY**

**Respondent**

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# A P P E A R AN C E S

Mark Brealey QC (On behalf of Advanz Appellants)
Robert O'Donoghue QC and Ben Rayment (On behalf of the Cinven Appellants)
Brian Kennelly QC (On behalf of Hg Capital)
Josh Holmes QC and David Bailey (On behalf of CMA)

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Friday, 22 July 2022

(10.30 am)

Proceedings

THE CHAIR: Good morning, everyone. Some of you are joining via the live stream on our website. I must start, therefore with the customary warning.An official recording is being made, an authorised transcript will be produced, but it is strictly prohibited for anyone else to make an unauthorised recording, whether audio or visual, of the proceedings. Breach of that provision is punishable as a contempt of court. Thank you.

MR BREALEY: I don't know whether we should just follow the agenda or whether the Tribunal has its own ideas. Sometimes we walk in, and we are told what is going to happen, sometimes we walk in, and it is a blank sheet. Shall I just go through the agenda?

THE CHAIR: Yes. I will tell you what we have in mind. I was going to give a few words about the Ambulatory Draft. I was then going to follow the agenda. Provisionally, we are planning to hear all the parties on case management directions and the application to adduce new evidence. We will then withdraw and consider our decision on those matters and then come back to deal with timetabling.

MR BREALEY: Of course, okay.

So, you are going to start with Ambulatory Draft?

THE CHAIR: Shall I start then?

The Tribunal is grateful to the parties for the work they have done on this document. We note that the parties are in agreement that, given the imminence of the trial, it would not be practicable for any more sections to be produced. We agree with that assessment.

The Tribunal, with the assistance of the referendaires, may do some more work on

the draft in terms of tidying up the comments, but we don't propose to make any further directions to the parties in relation to Ambulatory Draft today.

MR BREALEY: I am obliged, sir. On the agenda, that is that.

On the case management directions, there is only a few points of dispute, I think. Maybe we can just take it by sub-issue.

THE CHAIR: Yes.

MR BREALEY: So, the first, I think, issue is whether the skeletons should be exchanged, or they should be sequential.

We have set out in our skeleton why, in this case, we believe they should be exchanged. It is not least because we say that in this case the CMA is clearly responding to what the appellants say, but the appellants are also responding to what the CMA says. You will have picked up that this case is not just about the prices that the appellants were charging, but also the approach adopted by the CMA and the cost plus and whether that forecloses the market, et cetera.

A lot of the submissions are made in detail in the Notice of Appeal and the consolidated Defence. I anticipate that the CMA's data will be admitted. We have, in principle, submitted it should be admitted. But that raises a host of issues in itself as to the procedural safeguards relating to the CMA's application to admit the new data, which we can discuss when we come on to the new evidence.

But in a nutshell, they are seeking to adduce the new data. We don't know, for example, how they are going to deploy it. They say it is going to be used for their trajectory -- their downward trajectory -- but I don't know what the point is going to be, what price it is going to be, and how the pharmacy data -- and this is pharmacy data -- is going to be used to plot their graph.

As you will have picked up, in the decision they asked the three manufacturers themselves what the ASPs were, and that way they plotted their graph. Here they

are not using the same data.

So, the application to admit this new evidence impacts on procedural safeguards for the appellants which then impacts on whether there should be an exchange of skeletons -- sequential -- so that is tied in with that. I understand that Cinven submit there should be exchange as well. Mr O'Donoghue can speak, I think, but I think he says that. Mr Kennelly says there should be an exchange. So really the ball is in the CMA's court as to whether there should be an exchange or sequential. On the last point on that, I am pleased at least to see that the CMA has moved. If it is sequential, they accept, if we go first, it would not be the end of August, it would be 5 September, which at least gives us a little bit more time.

But that is the nutshell on whether there should be simultaneous or an exchange. This case is not the ordinary case when we come to it.

MR KENNELLY: If I may just very briefly add to that two short points. First of all, we say the main reason why it should be exchange, not sequential, is that there are very full pleadings in the case. There were Replies and so the CMA knows exactly what our case is and therefore the ordinary reasons for having sequential skeletons don't arise here. Exchange will cause no prejudice to the CMA.

My second point is that although my learned friend Mr Brealey notes the CMA now suggests 5 September for the appellants if the skeletons are done sequentially, that still in substance significantly interferes with August. A deadline of the 5th means that the junior teams will have to give up their vacation to work in August, which will happen to an extent anyway. So, for that reason, we ask for 9 September for the appellants to do their skeletons.

I appreciate this is not the most important matter in the CMC agenda, but that small difference in time could make a huge difference to the junior teams who are producing these skeleton arguments and it is critical for their mental health, if nothing

else, that they have some holiday in the year and that's why we ask for these few short days in addition to what the CMA is offering.

MR O'DONOGHUE: Sir, we wholeheartedly endorse sequential exchange. On timing, at the risk of turning this into a Turkish bazaar, we had indicated in our skeleton 13 September. My solicitors and my good self, we are finishing a 12-week trial as we speak. At least speaking for myself, I would not mind getting some actual sleep in the coming days and weeks to recharge the batteries.

We do think in all seriousness that two weeks before the hearing is more than ample. As Mr Kennelly says, there are very full pleadings, there is common ground that the AD process has been extremely useful in terms of drawing the battle lines with even greater clarity. So, this is an unusual case. I think it is the second one ever where the Ambulatory Draft process has been used. That is, in our submission, a further powerful reason why some greater proximity to the trial in this case may be acceptable. So, we do say, if it is to be sequential, 13 September.

I don't know if I am jumping the gun, but we have a point on skeleton length. We say 30 pages is in the circumstances the modest minimum. A suggestion of 20 pages or 25 pages is unrealistic, in my submission.

MR HOLMES: Sir, on sequential versus simultaneous, our concern is really to find the arrangement that is likely to be most useful to the Tribunal in laying out the issues ahead of the trial. We say that experience has shown that even in straightforward cases, skeleton arguments are not predictable in their coverage and emphasis. Here there are three separate appeals raising a variety of overlapping and discrete points. Since the appeals were lodged, the parties' experts have met, they have produced joint expert memoranda. The result of this is that the parties' skeleton arguments will inevitably have moved on since the Notices of Appeal. So the point which is made by the appellants in their skeleton arguments in favour of

simultaneous exchange, namely that the issues are already very clear, and that will enable the parties to understand very clearly and to present their cases very clearly in a responsive way in the skeleton arguments, is not something that can be taken for granted in this case at all.

Indeed, the reason for skeleton arguments as well as the Notices of Appeal is because matters do move on, and it is important to see the emphasis of the parties' cases and the final positions adopted in advance of the trial in a crisp and concise way.

So sequential exchange, we say, avoids the risk of a mismatch of coverage between the appellants' presentation of the criticisms of the decision and the CMA's responsive submissions in defence of the decision. As I say, that is likely to be helpful to the Tribunal.

It is the approach which the Tribunal has favoured in every appeal against an infringement decision since at least 2014. That's in cases large and small, whether there is only one appellant or there are multiple appellants, and regardless of the scope of the issues.

I didn't go back before 2014, simply for pressures of time, but it is a pretty much universal practice.

It is notable that two of the three appellant groups in this case are also involved in the Hydrocortisone proceedings which are currently pending in the Tribunal. And in that case, they have agreed to sequential exchange. We don't really understand why there is such opposition to sequential exchange in this case.

A point to be made about the data, obviously we will see where we get to in the application, but the CMA's proposal is that the parties' experts should set out their position by way of amendment to the joint agree/disagree memorandum, which will enable everyone, before skeleton arguments, to see what the experts make of the

data. And they are the most appropriate people, really, to be seeing how their views are affected by the admission of the data.

So, we don't see that that presents any significant reason to change the usual practice of the Tribunal.

There is no difficulty accommodating sequential exchange in the run-up to the trial. All of the parties have offered fallback suggestions to accommodate such exchange and we would commend it to the Tribunal as the better approach.

As regards timing, we have proposed the 5th and 19th September. We left a two-week gap simply because we wanted to allow sufficient time to address in a meaningful way three separate skeleton arguments on the appellants' side. We certainly would not have any objection to the 9th of September, which I think was the date proposed by Mr Kennelly. That seems to us a reasonable proposal for the first round. And we could then follow on seven or ten days later, ahead of the trial.

So, again, this confirms that things can be accommodated.

On the length of the skeleton arguments, the Tribunal will have seen from the Practice Direction that the default is 20 pages with 25 for the CMA's response if there is more than one appellant. In this case the Tribunal has agreed to an extension for the CMA to 40 pages. I think it would be churlish for us to oppose some extension for the appellants.

We are concerned, obviously, to keep the materials within manageable bounds so that the Tribunal is not deluged in paper. For what it is worth, the proposal of Advanz of a 25-page cap for the appellant seems a reasonable and a proportionate one, but really that is a matter for the Tribunal, and we are very happy to go with your assessment of what would be an appropriate length.

MR BREALEY: A few points in reply.

First on the Hydrocortisone case. That is a completely different case. There is

a reason why the appellants are wanting to set their stall out first. One of the reasons is we say that the Decision does not include a lot of the evidence that it should do, and it is incumbent on the appellants to put the evidence forward so the CMA can respond to it.

So, the Hydrocortisone is a different case. We are being pragmatic here.

The second point I just want to raise is it is not good enough to say the experts can jointly agree, or jointly meet and discuss this new evidence. In the normal course of events, the CMA sets out its stall, the appellant's expert can then have a look at it, and then jointly discuss it with the CMA's expert. A joint experts' meeting is not really a good reason for saying, well, the CMA should not set out first how it is going to deploy this data.

I don't want to get into this debate because in principle -- as you have seen from the skeleton -- we say it can be admitted. But our real point is how is this new evidence going to be deployed. The fact it can all be discussed in a joint experts' meeting, well, that is not the way things normally pan out in litigation. Even against the CMA.

We would need to know how it is being deployed and if they are going to have a graph, at what point, and at what price they are talking about.

THE CHAIR: That doesn't really go to sequential versus exchange, does it? That point applies, however, the skeletons are --

MR BREALEY: It does. But it almost goes to that the CMA should go first, so we actually know what their case is on the new data, and downward trajectory. So, in many respects, the exchange is a bit of a compromise here.

THE CHAIR: Okay.

MR HOLMES: Sir, if it assists, it might be sensible for you to hear -- if you are in any doubt about how the data can be accommodated, it may make sense to hear the application.

In my submission, it is very straightforward how the CMA proposes to rely on the data. It can be explained in two minutes today, but we would be happy to explain it in correspondence well in advance of the skeleton arguments and within a week of today's hearing if that would be helpful.

THE CHAIR: Okay.

MR O'DONOGHUE: So, at the risk of jumping the gun, we will get to the application. I think I can take some of the heat out of this. One thing we say, obviously the joint experts need to contend with these figures if they are admitted, and that will have to feature in the joint expert report in the ordinary way. But in principle, if the evidence is admitted, the other parties have the option of interrogating the data, potentially looking at responsive data, and in the ordinary course would be permitted to put in a responsive report.

I just want to lay down a marker that the joint expert process is not fungible or a substitute for that basic question of fairness that there may need to be responsive evidence that the experts then jointly need to discuss and agree or disagree in the ordinary way. I just want to make sure that the question of fairness to the defendants is not left out of the equation.

THE CHAIR: Very good. We can move on, then, to the format of expert evidence.

MR BREALEY: Clearly the expert evidence is relevant to Advanz's case. It is quite important that we have adduced evidence in the form of two regulatory experts. I think it is all agreed that they would be cross-examined in the normal way. So, the issue of whether the economists should be hot-tubbed, I can leave for other parties.

I do repeat that we will want to at least put some questions to some of the economists, because what they say is directly relevant to our grounds of appeal, an essential ground of appeal. But I will leave it to the others, because we have not adduced an expert economist, so it is really for the other parties.

THE CHAIR: On that point, my understanding from the proposed order from the CMA is that if there is hot-tubbing it is not going to be in complete substitution for cross-examination. There will be cross-examination as well as hot-tubbing.

MR BREALEY: Absolutely. That is often a matter for the Tribunal, the extent to which the Tribunal allows counsel to ask the questions at the end, but, yes, the CMA does provide for time for the appellants to cross-examine various witnesses, yes.

THE CHAIR: Thank you.

MR O'DONOGHUE: Sir, on hot-tubbing, a handful of points if I may. First, as a matter of context, the CMA's skeleton rather gives the impression that hot-tubbing is the only game in town. Hot-tubbing in the context of the Tribunal is very much the exception, and for the last 20 plus years this Tribunal has overwhelmingly proceeded on the basis of traditional cross-examination. I accept in a handful of recent cases there has been some hot-tubbing but that begs a contextual point. It is important to bear that in mind.

We set out in our skeleton a series of fundamental reasons why. This is our appeal against an enormous penalty with quasi-criminal implications across the board. We make the basic point that the control or the testing of evidence in relation to that appeal given its gravity and the stigma attached to the appeal should in principle be within our control and not be subcontracted to somebody else.

That is a reason of principle.

We were rather surprised, if one looks at page 6 of the CMA's skeleton, 17 (c), one of the criticisms they make of cross-examination is that the expert will be asked a series of questions seeking to highlight weaknesses in their opinions.

Now, the last time I checked, that was the whole point of the process. I'm rather amazed this has been put forward as a reason in favour of hot-tubbing and against cross-examination.

Finally, a couple of practical points. It is common ground that what I would call the cost plus grounds will not be hot-tubbed in any event, so there are questions of efficiency in terms of the overall savings.

Then in terms of the candidate of issues that may be hot-tubbed, we are talking potentially of three or four experts. There are, I would suggest, diseconomies of scale with hot-tubbing that many experts simultaneously. It tends to work best when there are a couple of experts all on the same page, the larger the cohort, the greater scope, we say, for diseconomies of scale.

It may be a question of balance and degree. Up to four days have been suggested for expert evidence. I would suggest that if there were up to two days of cross-examination and up to two days of questioning by the Tribunal, in my respectful submission in that order, that may be a fair compromise in this case.

THE CHAIR: Yes.

MR KENNELLY: Sir, on this matter Hg's position is very close or the same as the CMA's position so I suggest the CMA go first and I will follow them.

MR HOLMES: Sir, we see this as primarily a matter for the Tribunal as to how it would find it most useful to hear evidence.

For our part, and in case it assists, we do think that this would be a suitable case for concurrent evidence in relation to the core economic issues of principle to be given by Professor Valletti, Dr Bennett, and Ms Jackson, but leaving the evidence of Mr Harman and Mr Chowdhury -- Dr Chowdhury, I beg his pardon -- her pardon -- for cross-examination, because those issues of cost plus are much more detailed and fine grained and arguably of less central significance.

Hot-tubbing, concurrent evidence, is frequently used by the Tribunal. We say that it has worked well in a number of multi-party, multi-expert appeals before this Tribunal.

On our proposal, having three experts in the hot-tub at once would be eminently

manageable.

The advantage as we see it is that the evidence is developed more clearly and coherently with the experts addressing the substance of the matter on a topic-by-topic basis in one go. This is easier to follow, and it gives the Tribunal a very clear picture of the differences of opinion and the basis for them, in a way that allows the Tribunal to pose follow-up questions straightforwardly and at the same time to all three of the experts.

Because the Tribunal leads questioning, it can hone in on the issues that are of most importance to it. It is not constrained by the order chosen by counsel, and it is not held up by questioning on points on which it is reasonably satisfied, based on the written materials. So, with hot-tubbing the Tribunal can go directly to the heart of the matter as it perceives it based on its pre-reading.

Cross-examination by counsel on the other hand creates a risk of wasting time on preliminary sparring rather than focusing on the substance, with the experts being diverted from developing their core evidence by having to fight fires. In this case the burden on the Tribunal seems to us well manageable. The propositions in the agree/disagree memorandum should enable, we hope and think, the Tribunal to guide the discussion relatively easily on the core issues of principle. The use of hot-tubbing also would have advantages in terms of time management and would help to keep the case on track. It would allow topics to be explored efficiently and means that any supplemental cross-examination that is needed can be kept focused and concise.

As regards the other parties' positions, Advanz has no economic expert, and is neutral on how the evidence is heard. Mr Brealey is correct that we would propose to deal by way of cross-examination with the two regulatory witnesses that Advanz has fielded. Hg agrees that there should be concurrent evidence but proposes that it

should be broader in scope encompassing Mr Harman and Dr Chowdhury as well as the economic principle.

But, as I've said, we think the topics dealt with by those two experts are less amenable to hot-tubbing. They descend into points of detail about the valuation of the product rights attributable to the manufacture and supply of Liothyronine tablets, which is an asset in Advanz's capital base, cost of capital and matters of that nature.

In previous cases the Tribunal has been content to leave those matters for cross-examination. For example, Mr Harman, who gave evidence in the Phenytoin case, was not hot-tubbed and was the subject of cross-examination by Flynn and Pfizer.

MR BREALEY: Sorry, but there was no hot-tub in Phenytoin, that's misleading.

MR HOLMES: Mr Harman was the subject of cross-examination -- anyway, it doesn't matter. We therefore think that Hg is being overly-optimistic about the utility and ease of hot-tubbing evidence on cost plus. We think it would be cleaner and more straightforward for the Tribunal to deal with those two witnesses by cross-examination.

Cinven takes more fundamental objections to hot-tubbing. It states that it must be permitted to cross-examine because the fine was substantial. It suffered reputational harm and it needs to be able to put its case in the appeal.

There is, however, no reason to think that a hot-tub will prevent Cinven from challenging the CMA's case as set out in the decision or putting particular points to Professor Valletti. As you observed, sir, our proposal is not to dispense altogether with cross-examination but to have targeted supplemental cross-examination so that parties can deal with points that have not been dealt with to their satisfaction in the hot-tub.

Hot-tubbing has been used in other infringement cases which involve substantial

fines and involve a risk of reputational harm. There is obviously no immutable right to cross-examine, nor does a hot-tub preclude targeted cross-examination. Cinven contends that hot-tubbing would be challenging and burdensome, but on the CMA's proposal there would only be three witnesses. The number of experts presents no particular difficulties and there is a joined agree/disagree memorandum to organise the issues.

Even the wider hot-tub proposed by Hg would, in my submission, be manageable given that not all experts give evidence relevant to all of the topics. So, we say that Cinven's objections are misplaced, but ultimately of course it is for the Tribunal to decide what would be most useful to it.

MR KENNELLY: Sirs, Mr Holmes indicated Hg goes further than the CMA. All of the arguments that the CMA sets out, certainly in its skeleton argument, in favour of hot-tubbing apply equally to the cost-plus issues.

Concurrent evidence in a case like this will certainly be more efficient and as you will hear from me later in relation to the timetable, there is real concern on Hg's part that we will not have enough time to make our case and so we do urge the Tribunal to find efficiencies where appropriate.

Of course, concurrent evidence here does not exclude the ability of counsel for the appellants to follow up with questions that are cross-examination, as the Chairman indicated. When one looks at the evidence here, it is clear there is very substantial overlap between the evidence of Cinven's expert and Hg's expert. Inevitably counsel for the CMA will be asking very similar questions of both experts on the same issues.

In fact, if I could ask you to take up the CMA's skeleton argument, they set it out very clearly. It is in the CMC bundle, behind tab 2, page 6. We adopt these points. You see at paragraph 15 they say is:

"It eminently suitable for hot-tubbing because of the volume of economic evidence

and issue and their technical character and that applies equally to the cost-plus issues. The experts instructed are all experienced in the field and more than capable of presenting themselves effectively in the hot-tubbing process."

We agree:

"Obviously the Tribunal is well suited to overseeing this kind of exercise and it has worked well in the other cases [among those listed by the CMA]."

At paragraph 17, they set out the advantages that hot-tubbing has over cross-examination, which we say are a fortiori here. Firstly, the time available -- I'm just going to the headings, not reading out the skeleton -- the effective use of the time available, but then this narrows it, and this is an important practical distinction. Under cross-examination, the experts are asked a series of questions highlighting weaknesses in their opinions. The experts are then dealing with a series of issues raised by counsel rather than explaining their opinions, as the CMA says, in a clear and coherent manner.

Because of the duplication between the experts on the appellants' side, it means that a question will be asked of one expert on a topic, and then days may pass before the same question is asked on the same topic of the other appellant's expert. It is far better to have both experts together being asked questions by the Tribunal and then by counsel at the same time on the same topic.

It also is obviously efficient because where the experts agree -- as they do on the vast majority of these issues -- they can say so. That will obviously save time. The big advantage in this case, the reason why hot-tubbing is unusually suitable here, is because of the joint statement.

In this case, the experts have produced a joint statement which sets out side by side their views on each of the topics. As the CMA says in their skeleton, on cost-plus there are 43 topics.

The Tribunal now has each expert's view on each of the topics. That is a very useful tool for hot-tubbing. In the same way as this very useful tool can assist the Tribunal in a hot-tub in concurrent evidence, the experts will do the same thing, they will give their views on the same topic at the same time and that will be easier for the Tribunal and easier for the parties.

So, although we hear what the CMA says about the more technical issues on cost plus, but for the reasons that I have been developing, those are actually points in favour of concurrent evidence. That's clear when we looked at the joint statement itself because the level of duplication is such that hot-tubbing would work well here.

Again, I won't dwell on this for long, members of the Tribunal, but could you turn to that, please, in the same bundle behind tab 9.

On page 51, you have the contents and the useful indication as to the division between what the CMA calls the issues of principal and the cost-plus issues.

On issues of principle, A to G, it is certainly our position -- and appears to be the CMA's position -- that these are suitable for concurrent evidence. So, I will focus on the cost-plus issues which are not given letters but are only numbers 1 to 4. One sees that in the contents page.

I don't propose to go through all of those 43 issues. The Tribunal can take it from me that there are only three -- and three minor -- differences between the evidence given by Dr Bennett and Ms Jackson for Cinven and for Hg in those 43 issues. For your note, that is item 3.10 where Ms Jackson for Hg expresses a view, but Dr Bennett does not, because it is a point relating just to the Hg period.

At item 4.2, Dr Bennett gives a disagree and Ms Jackson a qualified disagree, but the difference is really a tiny nuance.

At item 4.8, they take a slightly different position on hurdle rates, which is ultimately of limited materiality.

So, we see a very substantial overlap between the evidence given by these experts on the detailed cost-plus issues. So contrary, if I may say so, with the CMA's position, we say this indicates, for the reason given by the CMA in their skeleton, why concurrent evidence is also suitable and efficient for the cost-plus issues. They are issues of detail, but the experts do deal with them and because of the overlap it is plainly suitable for hot-tubbing.

On the Cinven argument, we respectfully agree with what the CMA said. There is no absolute right to cross-examination. Cinven says it is a serious case. It is for Hg also. They suffered a significant penalty. We also have had to pay a significant penalty. Not as big as the Cinven penalty but the reputational harm is just as serious from our perspective.

Ultimately it is for the Tribunal, and the Tribunal is able to balance the right to defence with the need for the efficient resolution of these issues. In our submission, that can be done and should be done with concurrent evidence for all the issues in the joint statement.

MR O'DONOGHUE: If I can pick up on a couple of reply points.

First, it was suggested by Mr Holmes that Dr Chowdhury, the expert for the Cinven entities, would be separately cross-examined and would not be in the hot-tub. We don't understand how that is supposed to work. If one goes, for example, to the joint statement for example at page 52, so tab 9, page 52, you will see on the core issues in the appeal post entry prices, all the benchmarks and so on.

Dr Chowdhury in each and every instance -- consistent with her report -- has expressed an opinion in the context of the joint statement. Now, there are two possibilities. One is that she is, as Mr Holmes proposed, cross-examined separately. Then one is bound to ask, well, what is the efficiency of the hot-tub when one of the quartet opining on all these issues is not in it.

Second, relatedly, if there is to be a hot-tub covering some or all of these issues, Dr Chowdhury, consistent with her report, has to be in there. It is simply unworkable otherwise and will give rise to significant inefficiencies and duplication on the same matters.

The only other points I wanted to add -- and I hope I made this clear at the outset -- we would submit that in the event if something is hot-tubbed, versus stand-alone cross-examination, there has to be a right for the appellants to ask cross-examination questions. Now, there may be a question as to whether that comes before or after, or somewhere in the middle. But we do think it is important that we have a right to test the evidence even if there is a hot-tub.

THE CHAIR: Mr Holmes, why do you say Dr Chowdhury --

MR HOLMES: Sir, we have just been debating this. We think that on reflection the point made by Mr O'Donoghue is a powerful one, and that it would be appropriate for her to be in the hot-tub, so on that, I think we would amend our position and agree that on the points that she covers she should be heard in the hot-tub.

THE CHAIR: Thank you.

Before we move away from expert evidence, Professor Waterson has asked me to draw to the parties' attention that Dr Bennett was his PhD -- did his PhD under Professor Waterson's supervision. I am not sure anything turns on that, but just so parties are aware of that.

MR BREALEY: We see no difficulty with that, sir.

MR O'DONOGHUE: Even Cinven was not aware of that.

THE CHAIR: The next point is whether a pre-trial review is necessary. Probably not much to say about that at the moment?

MR BREALEY: I think all the parties have said it is not necessary but given what is being debated at the moment.

THE CHAIR: Yes, we will keep that open.

MR BREALEY: We will keep that open. Pre-trial review.

THE CHAIR: There is no more to be said about that at the moment.

MR BREALEY: I do not think so, no.

THE CHAIR: There was one other case management direction that the Tribunal has in mind. That is to ask the parties to produce a list of issues in relation to the factual evidence. Essentially so that the Tribunal is clear as to where we are going when we get to the examination of the factual witnesses. We will come back to that perhaps. But it seems to the Tribunal that would be helpful. I do not whether the parties have any views about that.

MR HOLMES: We think it would be sensible and helpful, sir. I don't know if you have a date in mind for that in terms of your preparation.

THE CHAIR: We have not discussed that, but I would have thought a week before the hearing.

MR HOLMES: I am grateful.

MR BREALEY: I think it's a good idea because I have some sympathy with what Mr Kennelly has said, which is that actually there may be less dispute on the facts than one might otherwise expect. So, a list of factual issues may actually flesh that out.

THE CHAIR: As I say, we will come back to that. The Tribunal is at the moment rather bemused at the amount of time which has been set aside for the examination of the factual witnesses. But, as I say, we will come on to that.

That then leaves us with the CMA's application.

MR O'DONOGHUE: Sir, it is not my application, but we could be here for an awful long time in the application. I can, I think, in about three or four minutes take really a lot of the controversy out of this. Because, in my submission, we don't need to

expend a lot of time today on every twist and turn in this application. There is, we say, a very pragmatic way forward that accommodates the interests of everyone. If I can just develop that for a couple of minutes, it may actually lead to the application not requiring a lot of attention today, but I am obviously, sir, in your hands as to what you wish.

THE CHAIR: By all means, Mr O'Donoghue, if that is going to save time.

Before you do, I should say that we are not attracted by the idea of putting this off until the main hearing. We feel it really needs to be dealt with today.

MR O'DONOGHUE: Sir, that's the point I want to address. It may be that too much has been read into semantics.

We say the CMA had either misunderstood or mischaracterised what actually is our position. We are not saying today that we want the evidence declared inadmissible. What we are saying is that it is admitted pro tem or de bene esse, and its final status and in particular its weight, if any, ultimately gets decided at the main hearing because only then can the full context of the evidence and how it fits with the grounds of appeal be fully appreciated.

Now, just to quickly give you a couple of authorities for why that is actually an orthodox approach, if we can start with the Napp case in authorities 1. Sir, we can start at paragraph 85.

This was an interlocutory discussion of new evidence submitted by the CMA's predecessor. If we can go to paragraph 85 -- I think it is page 31, sir. It starts "Balancing ...". They say:

"We do not think we should exclude Mr Hartley's evidence at this stage. Further argument as to the relevance or weight of Mr Hartley's evidence ...(Reading to the words)... or indeed whether the Tribunal should pay any attention to it at all are best reserved for the final hearing."

At 88:

"If Napp wishes to contend otherwise and to persuade us that for whatever reason we were wrong to take this evidence into account in our final decision ... (reading to the words) ... the time to do so is at the final hearing."

Then at 89 you see at the end:

"Mr Connolly's evidence is borderline. Our decision out of caution is not to exclude it at this stage, but to keep the issue under review."

Then, at 91, Mr Brownlee's evidence:

"This evidence updates the Tribunal on that issue, and we do not think it would be right to exclude the evidence at this stage. Again, we reserve for a later decision how far we are in fact prepared to take this evidence into account."

One final authority, we say this is essentially what we have proposed, that the evidence is not declared inadmissible today, it goes in pro tem. And ultimately, at the main hearing there is a final decision in context with the grounds of appeal and the other evidence as to what, if anything, the Tribunal wishes to make of that evidence.

THE CHAIR: So, it is admitted but everything else in terms of weight and whether it should be taken into account, that's left over.

MR O'DONOGHUE: Well, it is not declared inadmissible, its final stages and its weight is for the main hearing.

MR HOLMES: Sir, if it assists, we have no difficulty with the notion that it will be for the Tribunal to determine the weight and relevance of the evidence in the round at trial. We have never taken issue with that. That's true of any item of evidence which is before the Tribunal. What we do say is that it is appropriate to determine the admission of the evidence today.

If Mr O'Donoghue is suggesting simply that relevance and weight are matters for the

Tribunal in due course, but the material can be admitted, that is fine. If he objects to admission then, in my submission, we should proceed with the application to determine that now so that the parties can go forward understanding what evidence is in play, the experts can express their views about it, and time is not wasted on an application to exclude evidence during the course of the trial. That accords, in my submission, with the Tribunal's indication that on the question of admissibility it would wish to hear the application today.

MR KENNELLY: If I may, from Hg's perspective, endorse what Mr Holmes just said. What Mr O'Donoghue is suggesting appears to us to leave open the possibility of a lengthy debate at the trial about the admissibility of the evidence, which is different from its weight and relevance. For that reason, we agree with Mr Holmes.

MR HOLMES: But if Mr O'Donoghue is prepared to accept that matters of relevance and weight are for trial but that the question of admissibility doesn't arise, that the material can be admitted, then I fully agree that there is no need for us to proceed with the application today.

MR O'DONOGHUE: Sir, it may be semantics but what I am saying is it is provisionally admitted and that in the context of the main hearing we decide its final status and its weight. Just to give you a second authority, this is entirely orthodox, if one looks at Aberdeen Journals in the second authorities tab, page 88.

THE CHAIR: Just before we do that, looking at the Napp case you just took the Tribunal to, there the position appears to be that the evidence is admitted.

MR O'DONOGHUE: Provisionally, yes.

THE CHAIR: So, it is admissible evidence. But the extent to which it is taken into account is left over to the final hearing.

MR O'DONOGHUE: Yes.

THE CHAIR: As I understand it, that would be satisfactory to the other parties.

MR O'DONOGHUE: Yes. The reason I say it may be semantics is that obviously if the weight is zero and whether it is admitted or not is a bit of a sideshow.

Just to complete the authorities, in Aberdeen Journals, tab 2, page 88, you see in 162, the CMA's predecessor, they relied on documents --

THE CHAIR: Let me find that.

MR O'DONOGHUE: Sir, forgive me. Page 90.

THE CHAIR: I am sorry, where is it, Mr O'Donoghue?

MR O'DONOGHUE: Aberdeen Journals, second tab of the authorities, paragraph 162.

Sir, do you have that?

THE CHAIR: Yes, thank you.

MR O'DONOGHUE: You will see that:

"The CMA's predecessor relied on documents ... (Reading to the words) ... not mentioned in the decision."

At 178, that material was ultimately excluded. So, this is an example of where it was held over for the main trial and having considered the entirety of the material at trial, at that stage -- and at that stage only -- was a final decision made.

Sir, just to complete the references, so we looked at Napp. If one looks at the main judgment in Napp -- it is in the next tab -- at paragraph 114, it starts:

"While indicating ..."

Do you have that, sir?

THE CHAIR: What page?

MR O'DONOGHUE: 131. The second sentence. They say at the end:

"We therefore declined to exclude at that stage [which was the stage we have just seen at tab 1] the evidence of five of the directors' witnesses, although we excluded one statement and a further statement was withdrawn by the director."

Then they go on to issue their final ruling on what weight, if any. So, to answer Mr Holmes' question and the Tribunal's question, we do accept that for the purposes of today that it is declared admissible, but it is open to me at the main trial to say, well, in fact, its weight is zero or in principle for reasons of legal argument the evidence is simply not relevant, it doesn't otherwise go anywhere. So, I hope to that extent there is not actually dispute between the CMA and me today. It may save a lot of time --

MR HOLMES: Sir, if I might have another go. I think Mr O'Donoghue has just accepted, if I understood and heard him correctly, that any objection that he might make would go to relevance or weight at the hearing. On that basis, I think there is no dispute as to the admission of the material.

THE CHAIR: Yes.

MR HOLMES: As a matter of principle, of course, it is always open to a party in due course to make an application to exclude evidence. It would be a fairly extraordinary course in this case, when so soon before the trial there is a hearing to determine an application for its admission, but I think we have come to a position where it is clear that there is no real opposition to the material being admitted and questions of relevance and weight as always are matters for the Tribunal. We certainly don't suggest that there will be any difficulty with Mr O'Donoghue making whatever submissions he likes as to the relevance and weight that should be attached to the pricing data, and to the evidence relating to the granting of additional marketing authorisations at trial. I think we may have come to the happy position where we can move swiftly on to timetable for the trial.

THE CHAIR: I am inclined to agree. I take Mr O'Donoghue's point that it is a bit of a barren argument as to whether --

MR HOLMES: Yes.

THE CHAIR: -- not taking any account of evidence is the same or different from not admitting it. But.

MR O'DONOGHUE: The semantics point.

THE CHAIR: I think what we are keen to avoid is an argument at the beginning of the hearing as to whether this evidence should be admitted or taken into account. But if it really goes to weight, essentially then that would seem a sensible way forward.

MR O'DONOGHUE: Sir, one final point on trial timetable. As I said earlier, ordinarily when new evidence is adduced the other parties have the right to consider the evidence and to take account of it and if so advised put forward a responsive position.

Now, just to these data, if we can go to the CMA's letter of 12 May introducing the data -- it is in the application bundle.

MR HOLMES: Sir, I really hesitate to interrupt. This was obviously our application. I think the application has now been granted. Could I perhaps address the consequential matters that arise first?

MR O'DONOGHUE: I am replying in response to the evidence, which I'm entitled to do.

MR HOLMES: In order to assist, it may save time --

MR O'DONOGHUE: The CMA opposes --

MR HOLMES: If I might speak --

THE CHAIR: Mr O'Donoghue, I want to hear it from Mr Holmes.

MR HOLMES: We don't object --

THE CHAIR: The view of the Tribunal before the hearing was that it seems unsatisfactory for there to be a constant addition of new evidence right up to the date of the hearing, essentially as that would not give the appellants any opportunity to

address it. So, what occurred to us was that there should be a cut-off date, say as of now, and that the evidence should be the pricing data as up to today's date. That evidence could be admitted. It would have to be served within a short time. As you have indicated, perhaps it should be accompanied with some sort of explanation as to what use is going to be made of it.

MR HOLMES: Yes. That seems if I may say so, sir, eminently sensible. We are very happy with that outcome. We will not update the evidence with the latest round of figures immediately in advance of the hearing. We do see the difficulties with that. Instead, we are content to provide the evidence that has already been collected and has been with the appellants and their experts for over two months now. It was provided in May. And then the parties can address that in advance of the hearing.

We understand Mr O'Donoghue's point. We see two ways forward in relation to that. The first is Mr O'Donoghue's concern that his experts should be able to set out their position.

Our proposal was that that be done by way of amendment to the joint agree/disagree statement. That just seems an efficient way of dealing with things. We still propose that as a sensible way of ensuring that the expert position is set out clearly in advance of the hearing and can be considered by the Tribunal and the parties.

I think we don't object as such if in addition Mr O'Donoghue's client considers that it would be helpful to put in a very short supplemental report of a few pages which set out the position. But we are not really sure why that can't be done by way of the joint agree/disagree statement instead. We have seen, also, that Mr Brealey's client has requested permission to serve joint responsive evidence by 5 September.

Mr Brealey does not have an economic expert in play, so presumably there will not be any economic expert evidence on this point. Again, we don't object if there is material that Mr Brealey considers would be helpful. He could, for example, bring

forward evidence as to Advanz's average selling prices. There is only one party in the market but we could see what that looks like.

The only point I would make is obviously that is going in very soon before trial, and as I observed earlier, there is always the option for a party to apply to exclude evidence if it can't fairly be dealt with. So, we would reserve our right, if there were anything in that evidence that could not be addressed at trial, to approach the Tribunal about it. But subject to that reservation, we don't have any particular difficulty with him putting forward material. So, on that basis, if that commends itself to the Tribunal, it may be that Mr O'Donoghue's concerns can be laid to one side and the only real question is timings for the amendment of the joint agree/disagree statement which the parties could seek to resolve by agreement and update the Tribunal. If there were any issue, we could then perhaps put forward any differences on the papers.

THE CHAIR: Yes, Mr O'Donoghue?

MR O'DONOGHUE: Sir, a couple of points. First of all, the circumstances of this application are pretty extraordinary. Pleadings have closed. I am not aware of any case in the 20-year history of this Tribunal where after the close of pleadings the public authority rocks up not long before the trial with a cumulative total of two years of new data. That is the starting point.

On the question of delay, it will not have escaped the Tribunal's attention that the bulk of these data relate to the period 2021. We have asked the CMA on more than one occasion why is it the case that these data primarily from 2021 were disclosed to us for the first time on 12 May. We have never had an answer. Mr Holmes has not sought to clarify that either this morning.

Now, in the ordinary way, it is, with respect, not for the CMA or Mr Holmes to tell my client what responsive position they would wish to take in relation to this new

evidence. It may be we end up in the happy position that the joint expert forum is an adequate way to deal with that, but we will have to look at these data and interrogate them. These data are quite problematic. As the CMA candidly acknowledged, they were not manufacturer-level average sale prices, they are wholesale prices to pharmacies only in the case of the Wavedata data. And there may be other commercial data that we wish to complement this with. There may be gaps in this data that we wish to highlight. There may be issues of product mix or discounting that we wish to bring to the Tribunal's attention.

With respect to Mr Holmes at this stage, requiring me -- when this has just been admitted -- to nail my colours to the mast in terms of shoving this into the joint expert statement is out of the question. We have to look at these data, interrogate them, see if there are gaps, maybe look at other commercial data providers and if we reach the position that out of fairness to us as a responsive position we need to put in a short supplemental report, in my submission it would be extraordinary if there were any objection taken to that --

THE CHAIR: I didn't detect there was an objection.

MR O'DONOGHUE: Well, Mr Holmes has a very strong preference, to put it mildly, that this should be funnelled into the joint expert statement and I am not in a position today to give that commitment. It would be fundamentally unjust.

THE CHAIR: No, I understand.

Anything else?

MR BREALEY: I have been silent on this so far. I think everyone is agreed it should be admitted. The issue is going to be of weight and relevance.

I do adopt what Mr Holmes has said, which I think is important, that once the evidence is admitted -- which I think it is going to be -- at the same time, or in two weeks' time, they do explain to the appellants how they are going to use it. It is one

thing just to data dump and that's it, but to what extent are they going to deploy this?

THE CHAIR: Yes.

MR BREALEY: I think that is almost the key question, because we are challenging a decision and we are not just challenging a whole host of data. So, it is quite important for us to know, for example -- for example, they say 75 prices that the pharmacies have been charged. What is the price you say is going to be relevant to your trajectory? How have you arrived at that? You say there are limitations in the Wavedata data, how have you accounted for that?

So, it is not just a question of us taking this raw data and then having to work it out. It is quite important for the CMA -- and if Mr Holmes says it is very easy, you can do it within two minutes in a letter, so be it -- but I think in the Tribunal's order there should be provision for the CMA to set out its stall as to the relevance -- we know in broad terms the relevance, it is relevant to their downward trajectory, but we need a little bit more than that and then there can easily be a provision for any very short responsive statement, and then the joint experts can get on the telephone and try to work it out between them.

It should be quite straightforward. But I think that is the order. The evidence is admitted, the CMA actually gives us more detail as to how they are going to deploy it, there can be provision for very short statements in response, and then the joint experts can meet before the lodging/filing of the skeletons.

THE CHAIR: Yes. Mr O'Donoghue, what do you say about the timetabling in terms of responsive evidence and adjustments to the joint memorandum --

MR O'DONOGHUE: Well, as Mr Brealey says, it is sequential. I mean, the CMA first has to set out their stall in the way Mr Holmes has said they will do. That is the first deadline. We will then need time both to digest that and to interrogate the gaps in this evidence and potentially other commercial data sources.

So, we were on board with Mr Brealey's suggestion that we would put in a responsive report not later than 5 September, but it will depend to some extent on when the CMA can get its act together in terms of how it proposes to rely on this data.

MR HOLMES: Sir, so to concentrate on brass tacks, we obviously do not accept there is anything extraordinary and the application has not been opposed by any of the appellants here today.

The description of the reliance we place on the data can be provided within two weeks, as I think Mr Brealey suggested. That's not a difficulty. In very, very crisp terms, these are pricing data which show, in our submission, that the claim made in these appeals that prices have stabilised since the decision is incorrect. And that prices have continued on a downward trajectory. These are indications -- the data are indications of the price trends. So, we can explain that.

It is a very small data set, I should say. It is only a handful of data points that are relied upon. We can set all of that out within two weeks if that commends itself to the Tribunal. We are content with 5 September for responsive evidence. If they can proceed faster, obviously that is great. Then the expert agree/disagree statement could be updated on the same track at the same time.

THE CHAIR: What about the other evidence, the evidence as to the market authorisations?

MR HOLMES: All that that says is that Sigma Pharm and Accord UK have now obtained marketing authorisations. And that is relevant, first of all, to price trends because, as the CMA stated in the decision, further entry is likely to produce the potential for further price competition in the market. It is also relevant to quite a detailed and fine-grained point on the modelling and specifically on a sensitivity analysis which the CMA undertook when evaluating product rights where it makes

a difference to the price of the product rights, we say in the CMA's favour, but again that's a point that we can explain --

THE CHAIR: Yes, I think that does need explanation. Or it would be useful to have explanation.

MR HOLMES: Of course. Again, that could be addressed in the statement and by way of short responsive evidence if so advised by the appellant.

THE CHAIR: Okay.

MR BREALEY: I think that leaves the timetable --

THE CHAIR: I said at the outset that we would withdraw, but there's nothing much for us to decide now.

MR BREALEY: We're all good friends.

MR O'DONOGHUE: There is one small point. We are where we are on admissibility, that is both a question of case management and a question of legal principle. Sir, could I request the Tribunal extends any deadline for appealing admissibility to after the main hearing, because what I don't want to have to consider is an interlocutory appeal in the context of that question of principle. So, if that deadline for appealing could be extended to the usual period following the main judgment, then I would be very grateful.

MR HOLMES: Sir, the application to admit is unopposed. I don't see how any party here present today could appeal against that decision. But perhaps I have misunderstood something.

MR O'DONOGHUE: Sir, we have made the conditions clear on which we have not opposed today. We are entitled, as a matter of legal principle, to exercise appeal rights in relation to the admission of that for reasons of case management. All I am asking for is the deadline to be extended to a later date.

MR HOLMES: Sir, I am afraid I am not understanding on what basis an appeal

could be brought against a decision in relation to an unopposed application to admit evidence.

MR O'DONOGHUE: Sir, we say there are reasons of principle why ultimately at the main hearing this evidence should not be admitted and/or given any weight. I want to preserve the possibility to do so in due course and not be deterred with interlocutory appeals.

MR HOLMES: Sir, Mr O'Donoghue can make an application in due course and he can, if he wishes, seek permission to appeal against the outcome of that application if he were to take the extraordinary course of arguing for the exclusion of evidence which he has agreed to the admission of today, but that's not really a matter for today and there is no deadline for appeal to be extended today because the decision on such an application has not yet been taken.

THE CHAIR: Mr O'Donoghue, it seems to me that insofar as your client disagreed with the way that the evidence was dealt with ultimately, that's a matter for an appeal against our ultimate decision. It is not something that really --

MR O'DONOGHUE: Sir, that's really the point I am making. What I am wanting to avoi is having to adhere to the appeal deadlines today and have some sort of interlocutory diversion, but that could be wrapped up with any main appeal. That's simply the point I am making.

THE CHAIR: I agree with Mr Holmes. It is difficult to see what could be the subject of an appeal as of now.

MR O'DONOGHUE: Well, sir, the evidence has been admitted to date.

THE CHAIR: Yes.

MR O'DONOGHUE: Its final weight and its legal relevance in the context of my grounds of appeal.

Sir, just to give you one example. We say, for example, as part of our first ground of

appeal that there are reasons of legal certainty in principle why evidence as to post-decision pricing should not be relied upon.

That will be determined at the main appeal.

THE CHAIR: Yes.

MR O'DONOGHUE: The evidence which has been admitted is wrapped up in that point of principle. I just want to make sure we don't fall between two stools and that there is not a point taken later and I am somehow shut out.

THE CHAIR: Certainly, our order can make clear that the admission is without prejudice to that argument, which as I understand it, the CMA took that position themselves.

MR O'DONOGHUE: Yes, sir, therefore I am content.

THE CHAIR: Okay.

Yes?

MR BREALEY: Sir, I don't know if you have a preferred timetable? I have my timetable in front of me. I have the CMA's timetable. I don't know whether, sir, you have taken a provisional view that you prefer one over the other.

You did mention that time for factual witnesses may be too much.

THE CHAIR: Your timetable suggests two and a half days. The CMA's timetable suggests two days. But reading their statements I really could not see why that was necessary.

MR BREALEY: No, that is right. It does say factual witnesses -- expert witnesses. So that is four days. Certainly, the CMA wants four days for the experts.

THE CHAIR: This case is essentially about expert evidence, isn't it? It is not factual evidence.

MR BREALEY: I am content if the CMA only wants one day for cross-examination of the factual witnesses. There are essentially two: one in the morning, one in the

afternoon.

THE CHAIR: What do you say, Mr Holmes? I would have thought one and a half days absolute tops.

MR HOLMES: Sir, we are content with that. There is always a degree to which one feels the need to be cautious in relation to cross-examination because one does not know how lengthy the witness will be and also, you know, in final preparation points occur. But we would be happy to compress factual witnesses to one and a half days, on the proviso that perhaps the Tribunal might, if we find ourselves with limited time consider sitting for perhaps an extra half an hour if needed.

MR BREALEY: Sir, the question that arises is whether -- if one looks at the Advanz timetable, obviously Monday 26th is on non-sitting day.

THE CHAIR: Yes.

MR BREALEY: Then Advanz has one day for opening statements which is very short, so this is just essentially a teaser as to the issues.

Then, on the Wednesday, we would go straight into factual witnesses; finish on Thursday at midday if necessary, and then go into the experts. I'm conscious, if one looks at the CMA timetable, there is two days for opening and other parties may want longer.

We did see the sense. I think from our perspective, it is important for us and for the Tribunal that we have longer for closing than for opening, because opening we will know the joint statements, we have all of the Notices of Appeal and the Ambulatory Draft. For us, really, we were proposing short opening statements to set out the issues that the parties say will arise, and then we can go straight into the evidence.

But it would be then important for the parties to have longer in closing. I think there are some fairly fundamental issues that have to be explained. So, I will leave it to the other parties as to whether they want longer for opening, because that impacts

on when the factual evidence will start.

THE CHAIR: Yes.

Our provisional view was that we sympathise with the view that there should be plenty of time for closing submissions. The four days seemed to us to be appropriate.

But equally, the Tribunal would not want to curtail the parties if they wanted more time for their opening.

MR BREALEY: Clearly everyone wants time to open the case.

THE CHAIR: Yes.

MR BREALEY: What we were trying to do is ensure a balance between CMA wanting two days to cross-examine the factual evidence, people wanting time for the experts, and certain non-sitting days for the preparation of written closings.

THE CHAIR: If we reduce the factual witnesses to one day, that would give time for a day each for opening statements.

MR HOLMES: Sir, I am concerned that a day for four factual witnesses, at least one of which will require some fairly extensive cross-examination, might be too tight. My concern is that I don't want to see slippage down the line and a day and a half, in my submission, would be safer.

MR BREALEY: Sorry to interrupt, but if one looks at the Advanz proposed timetable, Monday 26th is a non-sitting day, as we know. If we have two days for opening statements, and not one, then you have one and a half days for factual witnesses and the experts can start on Friday. I am sure there can be one expert that can be dealt with in an afternoon. It may well be that we just have to, on Thursday 6 October, allow for part of that day to be devoted to experts if it slips over.

THE CHAIR: Yes.

MR BREALEY: Because we still have Friday and then we have the weekend. So

maybe that's the way to do it: you have two days of opening, and then you have one and a half days of factual. You also allow, on Thursday, 6 October, for some slippage in the expert evidence.

MR HOLMES: Sir, may I just say that we agree with that, respectfully. If we can get the factual cross-examination done in a day, well and good.

THE CHAIR: Yes.

MR HOLMES: But safer to warn the factual witnesses for a second day. As soon as we end that, we could move into the concurrent evidence session if the Tribunal were minded to proceed in that way.

THE CHAIR: Yes.

Then what about week three?

MR BREALEY: Sir, week three, I think, remains as Advanz -- so there would be a non-sitting day. So, people have been working, for example, on Friday, Saturday, Sunday; it gets lodged at 10.00 am or whatever on Monday, 10 October. That gives a full day to review. Then oral submissions for four days. Then we just have to divvy it up between the three appellants and the CMA.

THE CHAIR: That really deals with the trial timetable, does it?

MR BREALEY: I imagine Mr Kennelly wants to --

THE CHAIR: I'm sorry.

MR KENNELLY: Sir, I don't know if Mr O'Donoghue is going to oppose any of that. You have seen from our submissions that it is absolutely critical for Hg's appeal to have the four days for the closings, because that is the emphasis of our appeal, it is not on the evidence.

THE CHAIR: Yes.

MR KENNELLY: So, we strongly endorse the timetable that Mr Brealey advanced and the idea of having potential slippage. Hopefully that won't be necessary. And

having reviewed the factual evidence, we respectfully agree with the Tribunal that the factual evidence certainly should be addressed in a day, but I understand Mr Holmes' concern to make sure it is done properly.

MR O'DONOGHUE: No issue on my side. We have effectively gained a day, so everybody has what they want as a result.

THE CHAIR: Very good.

MR HOLMES: Sir, just one point if I may in relation to the timing of the expert evidence. If you are working from Mr Brealey's timetable, he's allowed three days for experts in week two. We think it would be prudent to have the experts available for a fourth day -- Thursday 6 October -- in case it were needed.

MR BREALEY: What I anticipated was on Friday, 30 September, there is a half day for expert; on Thursday 6 October, there would be half a day for the expert.

THE CHAIR: Yes, half a day to a day. Yes.

MR BREALEY: Yes.

MR HOLMES: We are very happy with that, sir.

THE CHAIR: Okay.

MR BREALEY: Subject to the Tribunal's direction, I think we are agreed on that.

THE CHAIR: Good.

Unless there is anything else you need to address us on, we are going to withdraw to consider the points on the skeleton arguments and the experts.

MR BREALEY: Thank you.

(11.54 am)

(A short break)

(12.26 pm)

THE CHAIR: Having considered the parties' submissions, the Tribunal's ruling on the various outstanding case management issues is as follows.

First, the order of skeleton arguments. The Tribunal directs that there should be sequential service of skeletons, essentially for the reasons advanced by the CMA. This will ensure a joinder of issues and will be more helpful for the Tribunal.

Secondly, the dates for service. The appellants must serve their skeleton arguments by 9 September and the CMA by 19 September.

Thirdly, as regards the length of the skeletons, given the exceptional complexity of this appeal, the Tribunal is content that the appellants should have up to 30 pages each.

Fourthly, as regards the format of the expert evidence, the Tribunal is satisfied that this is an appropriate case for concurrent or hot-tub evidence from the economic experts, Dr Bennett, Ms Jackson, Professor Valletti and Dr Chowdhury.

The hot-tub evidence will be concerned with issues of economic principle and the appropriateness of the cost plus test. The Tribunal will issue a protocol with questions by 9 September. The hot-tub will be followed by cross-examination and we leave it to the parties to agree on precise timings for that.

Fifthly, as regards the list of issues, we direct that the parties should provide a list of issues arising out of the factual evidence and that should be provided to the Tribunal by 20 September.

Sixthly, as regards the CMA's application for the admission of new evidence, it is accepted by all parties that the evidence should be admitted, though that is without prejudice to Cinven's argument that it would be wrong to place any weight on that evidence in view of its contention with regard to legal certainty and any other issues that it wishes to raise.

The new evidence consists of pricing data up to May 2022, and evidence as to

recent market authorisations. The CMA must provide a statement within 14 days explaining the relevance of the new evidence and how they propose to deploy it at the hearing.

The appellants may, if they wish, serve responsive evidence by 5 September. The joint memorandum of experts must be updated by 9 September.

I am going to ask the parties to agree an order and also to agree or to draw up a new timetable, the contents of that timetable are agreed as I understand it, and it will be helpful for the Tribunal to have a new document setting that out.

I see from the original agenda that there are possible issues as to confidentiality and costs but those have not been raised, so I presume we do not need to trouble ourselves with those.

Is there anything else?

MR HOLMES: Sir, that is extremely helpful. We are grateful to the Tribunal. One question in relation to the scope of the hot-tub.

If issues relating to the principle of cost plus are to be included, we would respectfully request that the CMA's witness, Mr Harman, should also be included within the hot-tub so that he can address those points.

I understand that he's the witness on the CMA's side that deals with those matters. We just wanted to clarify that that's what you intended, sir, if cost plus issues are to be dealt with by way of the hot-tub.

THE CHAIR: Yes, I think questions of principle rather than questions of detail, that's the important distinction.

MR HOLMES: I understand. That is very helpful. On that basis, then, I think we don't need him in the hot-tub. I am grateful.

THE CHAIR: All right.

MR BREALEY: Costs in the case, obviously. And I think that's it.

THE CHAIR: Thank you very much then.

MR BREALEY: Have a very nice summer.

(12.33 pm)

(The hearing concluded)