IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1407/1/12/21
1411/1/12/21
1412/1/12/21
1413/1/12/21
1414/1/12/21

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Wednesday 8 December 2021

Before:
The Honourable Mr Justice Marcus Smith
Mr Simon Holmes
Professor Robin Mason
(Sitting as a Tribunal in England and Wales)

BETWEEN:
Allergan plc
Advanz Pharma Corp & Others
Cinven (Luxco 1) S.a.r.l (formerly Cinven (Luxco 1) S.A.) & Others
Auden Mckenzie (Pharma) Limited & Another
Intas Pharmaceuticals Limited & Others

Appellants

v

Competition and Markets Authority **Respondent**

A P P E A R AN C E S

Daniel Jowell QC, Tim Johnston (On behalf of Allergan)
Mark Brealey QC (On behalf of Advanz)
Robert O'Donoghue QC, Emma Mockford (On behalf of Cinven)
Sarah Ford QC, Charlotte Thomas (On behalf of Auden Mckenzie)
Robert Palmer QC, Laura Elizabeth John, Jack Williams (On behalf of Intas Pharmaceuticals)
Josh Holmes QC, David Bailey (On behalf of CMA)

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Wednesday, 8 December 2021

(11.00 am)

MR JUSTICE MARCUS SMITH: Well, good morning, everybody. A few housekeeping matters before we begin. First of all, this hearing is being live-streamed and although it's taking place in person, I must warn anyone watching that the proceedings, you're welcome to watch them but please don't retransmit, photograph or record what is going on.

Secondly, thank you all very much for your very helpful written submissions, which we have all read. We have, I think, skimmed through the Notices of Appeal and probably not even done that in terms of the Defence of the CMA most recently served, but I think we have a sufficient grasp of the complexity of these appeals to warrant making a few preliminary observations about where we are going from here.

The parties have, quite rightly, identified that there's going to be a huge need of co-operation between the Appellants in particular, but all parties in order to make this process work. We want to debate with the parties whether this is, as it were, one conjoined appeal with one decision or one conjoined appeal of two decisions.

I appreciate that the consensus before us is that there should be two separate appeal routes, perhaps with a single Tribunal, but nevertheless two separate appeal routes. That consensus might fracture in light of a few suggestions I'm going to be making shortly, but that obviously is a point that we are going to have to consider.

What I think is troubling us is how far the traditional process of running everything up to a single set piece eight-week trial is actually going to work in this case.

It's, I think, a truism of regulatory appeals generally that they don't fit very neatly into the traditional process, because you don't really have the pleadings in the way one normally understands them, and you don't have disclosure. It's a different process.

But even viewing the two decisions as separate and not related, this is clearly going to be a very complex process. We're concerned that bundling all of the issues arising out of even one decision into a single hearing is not actually going to work. So, for example, there are clearly going to be some issues that are contingent one on the other, and it might be a good idea to get the underlying factual debate on which certain arguments are contingent out of the way early. Now, that would imply deciding them earlier on in the process, so that the argument can be structured in relation to what may be the real areas of debate. Equally, it may be possible to identify early areas of agreement or to narrow issues.

So, what we are thinking about is a process that moves from a set piece trial to something like four week-long hearings that will be scheduled to deal with particular issues, and altering the process of articulation of issues to make that work.

At the same time, we are very conscious that set piece trials have their own efficiencies and that the suggestion of a staged process might simply not work because there are too many moving parts, issues may get dropped and lost sight of, and that is something obviously we need to avoid.

However, we have two advantages. First of all, cases are docketed to a particular Tribunal early on in this court and the composition of that Tribunal doesn't change, so if we went down this particular route, I would certainly ensure that this Tribunal continued in control, including myself as chair. I appreciate I have said I've got a very busy year next year, but time will be found.

Secondly, the CAT has a very good infrastructure and the parties in this case are very sophisticated and well-resourced. So, in a sense, if we're going to try something different, this is the case in which to deal with it.

So what do I have in mind in terms of redoing the process? Let me start with a few sort of general principles, if we're going to do this in stages. First of all, it seems to me that the end process from the date of the appeals to handing down of final judgment -- so end of trial plus three months -- shouldn't be any longer under this process than it would be under a single hearing process. I want to make very clear that we don't see this as a delaying of these appeals.

That I think implies, if we're going to have decisions being made in the course of the process, that there can't be any appeals of those in the course of it. Our thinking would be that any appeals would be after the whole decision has been made and no one would be prejudiced by the fact that a point might have been decided, or provisionally decided, relatively early on in the stage, but if we have staged hearings at which certain decisions are made, appeals in the course of that process will simply derail the process and we'll never get to the end.

I also want to make clear that we are not going to impose any process like this -- and I'm going to come to the specifics in a moment -- on the parties. This is, obviously, coming out of a blue sky. What we want the parties to do is to do some very serious thinking between now and I think the end of the year as to how our aspirations can be met.

Equally clearly, diaries are likely to be an issue. It's going to be harder to arrange four week-long hearings than one eight-week hearing at the end of the process. And let me say this: how many hearings we would have and how long they would run for is entirely up for grabs. But I would hope that, particularly the number of Appellants we have and their alignment

on certain issues, might make diaries less complex for the Appellants at least, though I anticipate it might be more an issue for the CMA because you are one against five.

It's also an open question how narrowing of any points in dispute during the course of this process would be recorded, if there were narrowings at all. What I have half in mind is inviting the parties to assist on certain points and then providing a published segment of what would become, in due course, the whole judgment, so that the parties know where they stand as time goes on. But it's an open question to whom that travelling draft would be published and there could be no question of the outcome recorded in any such travelling draft being final.

It would also, I think, be open to the Tribunal to change its mind in the light of later material, but clearly it would be important to manage expectations. If one has got something where the Tribunal's reached a provisional view, if the Tribunal is going to change its mind about that view, that would need to be flagged up quite carefully because it will affect the conduct of future arguments.

But the aim would be to build the case up from the detail to the more general; in other words, the aim would be to close out or identify where there is a dispute in relation to specific factual controversies relevant to broader issues, and then leave the broader issues for later argument.

Now, quite how one identifies these specific early-to-be-resolved controversies is a matter I'm going to return to, because that I think is the critical and very difficult way of resolving this. We've all dealt with lists of issues and in my experience, they never work, so we'll have to have something rather more sophisticated.

So, moving on to practicalities, how actually would this work? I want to start with a point that has been touched on by all of the parties, which is confidentiality and document management. It seems to be envisaged -- I may be wrong about this -- that everyone is going to have their own document management system and the CMA's concern is that access to each of those systems needs to be carefully controlled so that confidentiality is respected.

Frankly, that seems a waste and what we would like to do is require the parties collectively to establish and pay for a cloud document management system for all documents being deployed in these proceedings going forward. That platform would be under the ultimate direction of the Tribunal and would have built within it a series of entitlements to documents, such that those who have rights to see only documents outside the ring can only see those, whereas those in the higher rings have broader access. But it seems to us that a single system would be both more efficient and more protective of confidentiality, and we consider that we'd be quite surprised if that was not achievable.

It would have a further advantage that it would be possible to have access to relevant documents for the Tribunal going forward. Now, if one had a system where all documents being deployed had a unique document ID, so that no matter how sorted, a relevant page could be found in the entire body of materials, then the Tribunal could be referred to a unique document ID in skeleton arguments and everything else, which would themselves be added into the system, so that we could have an efficient process going forward, instead of having a magnum opus or case lines brought into play three or four weeks before the set piece hearing.

What one would have is an ability for the parties to say when they put a document into the trial process, it goes onto the system, everybody has access to it according to their confidentiality entitlements and we all work from that.

So that, as it seems to me, is the starting point.

Moving on, all of the parties would like to have Replies and the date that they have identified is the end of February 2022. We don't have a particular problem with that. However, we do want to put down a series of pretty clear markers as to what we would expect those Replies to achieve, because I don't think we are likely to be assisted by, you know, five documents which fill a lever arch file and which are not, in a way, coordinated in terms of how they articulate the genuine issues of controversy that we want to identify and resolve early on.

So what we would like to do is we would like to start as early as possible to get a sense of actually what the elements of a judgment would have to decide, so that we can get a feeling for the shape of what would need to be decided in a case of a final judgment in order to dispose of these various appeals; in other words, we'd like a roadmap of issues.

Now, I've already been quite disparaging of lists of issues and what I emphatically don't want is a list of issues which each party produces and which pay no particular regard to whatever everybody else produced, and what you end up with is the further five lever arch files of documents which actually don't take matters any further.

So, what we would be minded to suggest, going on as part of the work leading to the Replies at the end of February is something like this. For the parties to produce, I think without reference to each other, a running order of points that will need to be addressed in the judgment. Bullet points are perfectly acceptable. Indeed, the more staccato, the better; and each party to address only those points it is interested in, so the Appellants' lists will

obviously be shorter than the CMA's. And that we would like done in very short order, something like the end of next week.

What the Tribunal will then do is produce its own synthesis of a structure; in other words, we will have well in mind how we would be minded to approach the very difficult issues that arise and we would want to produce something which would set out, in the order that we might deal with it, the points that arise. Now, this would not to be set in stone, it may be further evolved, and more particularly, expanded.

Now, the expansion will be in the form of identifying early on the points on which we're going to need evidence; the points on which we have agreement; and the points on which we're going to have argument, ideally once the facts are found.

So, for example, it might well be possible to agree a series of chronologies on discrete points, which can serve to focus on the points of controversy that really matter. I know that there are highly contentious questions about what was said or agreed in certain documentary exchanges -- I don't know if they were oral -- but at the very least we can get out in the open the documents that matter, so that we can at least consider them, set them out in a short section and then hear argument on - not 'we're going to take you to these documents for the first time' but 'this document here, the CMA says it means this, we say they're wrong, it means something completely different'.

That is where we want to end up when we have an oral hearing. We want to cut straight to the chase and we want to save the parties, and frankly the Tribunal, the burden of having to go through the material that is, as it were, uncontroversial in the hinterland.

Equally, to the extent that data needs to be compiled, it can be -- and again, one of the themes that I'm regularly stressing is that I would like data to be agreed early on. What it means, what

it signifies is likely to be a matter for debate, but I want all the experts to be singing from the same hymn sheet in terms of at least the metrics that they're using. They may very well -- I'm sure they will -- have differences of view in terms of what the data means, but we don't want to have -- we can't have -- argument about the data set itself at the trial.

Similarly, there'll be, well, quite a myriad of points, where potentially important points can be defined, or agreed, or identified as controversial. I mean, I've got an example. It's from Allergan's Notice of Appeal, paragraph 63. If we look at that, what we see there is that there's reliance by the Appellant on hydrocortistab as a sufficiently comparable product.

It's quite clear that there's disagreement about the extent to which this particular drug is relevant, but what I would like to know is whether that debate extends to the assertion in paragraph 64 as to whether it is or is not a sufficiently comparable product, or whether the only area of dispute is in fact the point articulated in paragraph 63, namely that Auden Mckenzie and Actavis didn't price by reference to this product.

Now, that's one tiny example, but it would be, I think, unhelpful for all if one had coming out of the woodwork at a hearing the argument 'oh no, these aren't comparable products at all, they're completely different'. That sort of difference of view needs to be articulated early on so that we know where we stand, and my concern is that the Replies will not move to that level of granularity.

Anyway, the aim would then be to have an expanded list of areas of controversy and areas of agreement which could then inform the future conduct of the matter in -- with preliminary thinking, a staged way. We could then frame a series of hearings at which grouped together points would be heard, and we provisionally think, provisionally determined together.

Now, I want to be absolutely clear this is not intended to be a filter for bad points. Our approach will be that any point a party wishes to make goes into this list. We don't want to have a sense of quality control. I'm sure the parties will only be taking good points, but I'm equally sure that that is a subjective view, rather than an objective view. But that's not the point of this process. What we're aiming for is an early direction of the parties' efforts aimed at producing material that will enable the Tribunal to produce a rapid final judgment.

The way processes presently tend to work is that I fear there is an inbuilt approach towards accentuating disagreement, rather than identifying common ground. What I want to do is I want to invert that process, so that we can identify the common ground, which the parties may very well take as read, but which we don't know is common ground. That's what we want to have, so that we can set out the foothills of a judgment with the uncontroversial stuff and really focus on what matters. So, we might end up with, let's say, a hearing of a week dealing with market definition, its operation, comparator products, the role of NHS procurement; secondly, collusion and other abuses; and thirdly, penalty and individual responsibility.

Now, that is an extraordinarily broad carve-out for three, say, one-week sessions. I'm quite sure that there would be other ways of doing it and I suspect that we are the least well informed in the room as to how to do it. What we want to do is start a conversation in terms of where we go from here and do it right at the outset, so that parties can understand our concerns. And we think that this process can be helpfully integrated in the work that the parties are already committed to doing in terms of the Replies; it's just the Replies may be rather different in shape than they ordinarily would be.

Now, I do apologise for high-jacking this hearing in this way, but it does seem to us that these are points that we need to raise at the outset before we hear from the parties on the limited points in controversy.

What I'm going to do is I'm going to indicate what we are minded to decide and what we are not minded to decide, and then we'll rise for however long the parties think might assist, so that you can take stock and push back, or not push back, as hard as you like in terms of these proposals.

And let me be clear, we've thrown this out at you with no prior warning. We will certainly listen to an argument that this is just not a practical way of going, but equally we are more than happy to make directions that the parties are going to be, broadly speaking, happy with, and leave the further finessing of this process to subsequent debate in the coming days.

So the take home is we would not be minded to make any view whatsoever about the conjoining of the two appeals and the decisions out of them. I think if we are doing a traditional process, they absolutely need to be separate. If we're doing a more radical process of the sort that I've just described, then there's some benefit in having everything in one pot because, for instance, the operation of the pharmaceutical market, these are common issues which we're going to have to understand for each particular appeal. But that's something which I don't want us to commit to. The only thing I would want to say is I wouldn't want us to preclude that course should it be desirable.

Secondly, Replies we've discussed. We will hear from the other parties, but we are happy with the end of February for those, subject to the directions we've given by way of guidance. And confidentiality, well, we'll hear the parties on the limited areas of dispute. I think internal counsel remains on the agenda, unless I've missed a --

MR J HOLMES: I think a glorious agreement has broken out in line with the collaborative approach that was commended, sir. I think we are more or less agreed. There may be a point of principle that Mr O'Donoghue wishes to present to the Tribunal, but otherwise we have a solution based on the supplemental skeleton argument which I hope found its way to you yesterday.

MR JUSTICE MARCUS SMITH: I've certainly seen the supplemental skeleton argument. I hadn't appreciated that agreement had broken out in relation to it.

MR O'DONOGHUE: I will need no more than three or four minutes.

MR JUSTICE MARCUS SMITH: Of course, that's very helpful. What we'll do, I think it would be helpful if the parties had an opportunity to at least think for, well, should we say an hour; does that work for you?

MR J HOLMES: Sir, certainly for our part we would find it useful to take instructions. I'm not sure that we would need as long as an hour and I'm conscious that we're --

MR JUSTICE MARCUS SMITH: Look, let's rise until midday and if you need more time, that's fine. I just want to make absolutely clear, we are not minded today to say that anything is going to be set in stone, but if there is vehement objection, then we probably ought to deal with it because it won't be helpful to have that articulated in the course of correspondence. If, on the other hand, the parties take the view that this is worth exploring further, then we would be minded to do that in the course of the next few days, rather than hear submissions on the hoof on what are really very tricky things.

MR J HOLMES: Yes, sir. May I make only one suggestion at this stage in case it informs the discussions of the other parties? For our part, we understand that what the parties have brought forward to the Tribunal is really a roadmap, leading to a fairly traditional single

block trial, whereas the Tribunal has suggested -- and we see the appeal of that -- breaking it down into more manageable pieces, recognising the scale of the appeals and the range of issues. We hope and think that the Defence, to some extent, already achieves a degree of synthesis and the identification of blocks of material that could helpfully be considered, and that may be of use to the other parties when considering.

On the specific proposal of lists of issues by the end of next week, there is one pressing practical concern that the Tribunal may already have apprehended, which is that the counsel team for the CMA is overlapping with the liothyronine case, and we're in the process of finalising our Defence in liothyronine. So we would therefore suggest -- and we would be interested to hear what others thought about this -- that this might be a two-stage or iterative process whereby the Appellants propose their list of issues first and the CMA then comes forward with its proposals, perhaps a little later.

MR JUSTICE MARCUS SMITH: Well, in a sense, that makes good sense. Aside from the resourcing lines, one could expect the Appellants to be pushing in one direction and it makes sense for the CMA to respond. And if one puts it the other way round, the CMA going first and Appellants responding, but I understand why that doesn't fit, so for my part, that's fine. Again, no need to respond at this stage on that suggestion.

MR O'DONOGHUE: One of the practical points, Hg's counsel in liothyronine are not here today. I know you asked them to be here, but in fact they are not. But that should be made clear for the record.

MR JUSTICE MARCUS SMITH: No, I think there's someone in court --

MR O'DONOGHUE: I think there's somebody from Linklaters, yes.

MR JUSTICE MARCUS SMITH: Well, again, what I'm aiming at that stage is to keep the options open, rather than to close them down, so we would obviously need to hear formally from the parties in liothyronine before we made any direction by way of firm order of the sort that we're doing.

So the only directions I would be minded to make today are ones in these appeals, which don't preclude further more radical options going forward. So that's the thinking. And certainly, if we were to order a massive conjoined appeal instead of two separate sets of appeals in relation to two separate decisions, we would need to hear from both parties.

MR O'DONOGHUE: Sir, do I understand from that, that by two decisions, at least today, you mean the abuse part of hydrocortisone and the agreement part, as opposed to hydrocortisone plus liothyronine?

MR JUSTICE MARCUS SMITH: Sorry, no, what I mean is -- there seems to be -- and it's very sensible -- that the appeals that are before us today formally, I don't think anyone is suggesting that they not be heard together. What is also the consensus is that they only be heard together and not with the liothyronine second decision coming up. That is the point I'm minding to keep open at this stage because whilst I entirely accept that if one had a single set piece trial dealing with both, it's just not going to work.

On the other hand, if one has got a parsing of issues going down the line, I can see certain real efficiencies in having the same Tribunal handle the cases all in one go because we will be much more agile in terms of jumping between decisions, but I equally recognise an awful lot of moving parts in that process, which may mean that it simply isn't workable. So all I'm saying is I don't want us today to be doing anything that precludes the single massive

process that I've articulated but I'm not saying we're committed to do it. So it's options open rather than options closed. I hope that's clear.

Well, thank you very much. We'll resume at midday. If you need a little longer, just let us know and we'll obviously accommodate you. But thank you very much for listening so patiently.

(11.35 am)

(A short break)

(12.05 pm)

MR J HOLMES: I don't mean to take the first word away from the Appellants, sir, but if I could just update you on some provisional discussions that we had during the helpful short adjournment. I should say that there is a range of views among the parties, as perhaps one would expect, but there is some consensus on the immediate steps that we might take from here.

We all find it very helpful and understand clearly the Tribunal's current direction of travel, and what we would propose, subject to the Tribunal's views, is this.

There would be only limited directions made today. That might encompass some directions for beginning the list of issues. That would of course, sir, be a living document and would be open to change as the case progressed, not least with the final round of pleadings at the reply stage.

I think there is general agreement to the CMA's suggestion that the Appellants might go first and then the CMA might follow at a time fixed to reflect the timing of the liothyronine Defence.

For subsequent stages, what we would suggest is -- we've all heard what the Tribunal says, we understand very clearly the roadmap -- we would take that away and we'll see what we would usefully agree to present to the Tribunal.

Now, it may be that, as we work through it, we find that there are some fundamental reservations on the part of certain parties, which they would wish to ventilate before the Tribunal. For the CMA's part, at least as regards the hydrocortisone appeals -- we reserve our position in relation to liothyronine -- we are attracted by the suggestion, but it would be a matter that we could discuss. And we would then perhaps fix a CMC, subject to the Tribunal's availability, in January, when we could refine the proposals, in the light of the Tribunal's reactions to them, and also resolve any more profound disagreements about the direction of travel.

The only point -- and I'm not sure this was fully canvassed -- but it does strike us that it might be sensible to preserve availability to at least give an indication of the window during which these discrete trials or trial, if that's where we end up, could be heard.

There is a table of counsels' availability, which I hope has found its way to the Tribunal. There are copies here, if needed.

MR JUSTICE MARCUS SMITH: Thank you.

MR J HOLMES: You'll see, sir, that there is a sweet spot when everyone is available during the period from September to December 2022. I say "everyone", everyone on the counsels' side, but of course the Tribunal's availability is paramount, so that also needs to be factored in.

This was also prepared of course in a fairly broad-brush way, taking account of the parties' understanding that there would be a long and consecutive block of time. So it may be -- and I can't speak for anyone other than myself here -- that there are little patches here or there that could be slotted in even in the unavailable block. But our proposal would be that the

Tribunal give a provisional indication that the appeals be heard in the window from September to December, if that worked for you.

MR JUSTICE MARCUS SMITH: Well, I think that's sensible because diaries only get more cluttered rather than less. What we will do is we'll take our diaries away. I think, from my point of view -- and I haven't, I confess, spoken to my colleagues -- it would be November/December, rather than September/October. I mean, I indicated in, I think, early correspondence that the reason I'm presiding here today is because the judge who was ear-marked for this became unavailable and would essentially -- there's been a lot of musical chairs going on in the Chancery Division. So I'm minded to hang on to this because I think you are entitled to a degree of consistency in terms of the panel.

But that does mean that I've got three big trials next year. Two are immaterial in the sense that they are March, June and July, but then October I think, and it's the October trial that, obviously, is the problem.

So, we will certainly take away this helpful sheet, but in principle we agree that we need to get some time booked in. My concern is that, if you're looking for eight weeks, that might be tricky.

MR J HOLMES: That's very helpful.

MR JUSTICE MARCUS SMITH: Well, we would be looking at November or December, but we will look at what we can do and I think you're right, getting something in the diary is quite important. So yes, we'll do that.

MR J HOLMES: Thank you, sir. And could the Tribunal have availability for a January CMC at which these points could be --

MR JUSTICE MARCUS SMITH: I have no doubt we can find capacity for that.

MR J HOLMES: I'm grateful, sir. I have points on confidentiality, but they might conveniently be left so that other counsel can react to the broader case management question.

MR JUSTICE MARCUS SMITH: Thank you very much, Mr Holmes, I'm very much obliged. Ms Ford.

MS FORD: Sir, Auden Actavis UK are not addressees of the liothyronine decision. We haven't seen the notices of appeal against the decision, so in some respects we're in difficulty in commenting on the question of the extent to which it would be appropriate to combine the two appeals.

We understand from paragraph 14 of the Advanz skeleton that Advanz's appeal in liothyronine raises issues as to the countervailing buyer power of the NHS. So, on that basis, it seems to us there may be some relatively limited overlap as between the two matters.

But leaving that aside, certainly our understanding is that these are decisions which concern different products and different markets with different characteristics, and so it is not immediately obvious to us that it would necessarily work to hear those two matters together.

We are the Appellant party that is facing the most broad findings of infringement. Our appeal concerns both the unfair pricing allegations and the agreements and questions of penalty and --

MR JUSTICE MARCUS SMITH: You're not producing evidence; you're just --

MS FORD: Sir, that's quite right. We haven't got any factual evidence and we haven't got any expert evidence; our appeal is, essentially, focused on legal questions and questions of appropriate assessment.

We do have a degree of concern about the suggestion that the appeal could then be split off into separate chunks and dealt with separately. The reason we say that is because it seems to us that there are quite a few issues which are going to be common across the whole swathe of the appeal, and so relevant to the allegations of abuse, relevant to the agreements and relevant to questions of penalty.

Just to give the Tribunal one example of that, the issue of the factual assessment of independent generic entry comes up at each stage of our appeal, and we can see that just by looking at the summary of our grounds of appeal that's in our Notice of Appeal, if the Tribunal could it turn it up. It's bundle 2C, tab 7, starting at page 307. Paragraph 6 is essentially a bullet point summary of the grounds of appeal.

MR JUSTICE MARCUS SMITH: Sorry, which paragraph?

MS FORD: Sorry, paragraph 6 starting at page 306.

MR JUSTICE MARCUS SMITH: Thank you. Yes.

MS FORD: Ground 2B in paragraph 6.1.2(ii) is our ground that the CMA should have found that any dominance ended following independent generic entry. So this arises in the context of the alleged unfair pricing abuses. Our ground 4, which is at 6.1.4 over on page 308, is that the CMA erred in its assessment of duration by failing to have regard to the eminent prospect of independent generic entry. That's paragraph 6.1.4. So both of those arise under the alleged unfair pricing abuses.

Then, moving on to the assessment of the agreements, our ground 5A, which is at 6.2.1, is that the CMA was wrong to find a by-object infringement, and that is on the basis of an assumption that single generic entry would lead to a precipitous decrease in prices. So again, in the context of the agreements, there's an assessment of the impact of independent generic entry.

And then our ground 7, which is paragraph 6.2.3 on page 309, concerns duration of the 10 milligram agreement. We say the CMA erred in its assessment of duration by finding the 10 milligram agreement lasted until 24 June 2016 instead of various points at which there was then independent entry either contemplated or actually taking place.

We also then under penalty, under ground 8, make various points as to why, in our submission, it's not correct to look separately at the various alleged infringements, and that actually you should be treating them, essentially, as one composite course of conduct.

And we do, for example, under "Penalty", if the Tribunal turns on to page 379, the Tribunal will see at paragraph 191 the submission that the CMA's decision to treat the 10 milligram and 20 milligram infringement as separate is wrong. And under 191.2 we cross-refer back to ground 2B on dominance and ground 1 on market definition, both of which then concern issues of independent entry. And then paragraph 213.2 on page 391, in the context of financial benefit, we refer back to our ground 5A and the point that generic entry doesn't necessarily cause a precipitous fall in price.

So, in general, our concern is that is one example on the face of our appeals of a situation where the factual appreciation and assessment of a particular issue may well have implications across the entire scope of the appeal. So, we do, at least provisionally, have a degree of concern about the idea that these things would be dealt with separately, although we will of course go away and consider it further.

MR JUSTICE MARCUS SMITH: Well, I mean, you can take it as read that we are very conscious that this is going to require really very careful handling by the Tribunal to get it right, because the risks of things going wrong are significantly higher when one over-engineers. But in an odd sort of way, speaking entirely for myself as to how I see things, I usually like

to get my idea of the market clear before one goes to questions of dominance and abuse. I can see a real benefit in getting a firm provisional view of, say, market definition and operation before one moves on to something like whether a party is dominant in that market, still further whether that dominance has been abused.

So, I can obviously see your concern that facts that are relevant to later stages may inform the outcome of earlier stages, and that, I think, is the biggest problem with the approach that we are articulating in that things can't be set in stone. I don't think we could do a process where we absolutely nailed market definition without any ability to revisit that later on.

And to be clear, that isn't our present thinking. I mean, our thinking is that our approach on the staged basis would not have findings set in stone, but set in -- how can I say -- cold butter. That would be our view. So it would be something you couldn't wish away or reargue, but which, if later developments made a material difference, we would obviously have to revisit.

Now, one will obviously hope to avoid that, but I think we would be foolish not to recognise the issue.

So, I mean, your concerns are absolutely noted. And the point you make about the decisions really, as far as your clients in particular are concerned, being separate rather than together heard is again something which, if this was a conventional set piece, I don't think there would be any doubt of anybody in this room that these would be two separate appeals dealt with pretty much entirely separately. And to be clear, that is where we may end up anyway.

But simply in terms of how the market generally operates, I mean, my experience of the pharmaceutical market is not as extensive as others in the room, but it is, in some respects, quite counterintuitive, and in all respects very complicated and that is something which is

a common feature of both. I mean, I appreciate that the nature of the abuses and the role of the players in that market, as well as the products in question, are different. But in a sense, the fons et origo of everything is the same regulated market, which we are going to have to understand as the first stage in the process, I think. So that, I suppose, is where I see the potential benefits for this matter.

One could, for instance, have then stages which your client didn't participate in because nothing of relevance to your client was being dealt with. That would be a matter for careful case management of the question.

The question is: can we do it or is it just more straightforward to say two appeals, we'll hear them as separate appeals as we go? And I don't want to repeat myself, but I think it is worth stressing we haven't reached a conclusion, I don't think we can reach a conclusion. What we want to do is we want to be able to reject a staged process on rational grounds, rather than simply saying: it's all too difficult and we've done this before.

So, that's really the ambit of the debate. So please don't think that your views aren't being taken onboard, they absolutely are. But what we're going to try and do is I think, without unduly inconveniencing the parties, keeping our options as open as we possibly can.

MS FORD: Sir, that's fully understood, and we can certainly take it away and give it further consideration.

MR JUSTICE MARCUS SMITH: Mr O'Donoghue.

MR O'DONOGHUE: Sir, there's three very short points, if I may. First, to pick up on what Ms Ford adverted to. We will, obviously, go away and consider the Tribunal's proposal in good faith and seriousness. But just to tease out some of the issues which may well surface.

One issue I foresee is that on both factual and expert evidence issues, there is likely be a requirement to hear from the same witness more than once.

At least two issues arise in that context. First of all, there may well not be an efficiency in disaggregating. It will either be neutral or perhaps there's an inefficiency, we'll have to see.

The second problem is maybe more fundamental, which is if in mini trial 1 the credibility of a witness is impugned and that witness then appears in trials, 2, 3 and 4, how is that to be dealt with? So, this sort of disaggregated approach if the witness is to be heard more than once, and if there is to be a ruling of some definitiveness on an interim basis, there is a sort of mechanical issue which I think arises in that context. But we will take all that away and give it consideration, but it does need to be mapped out on a pretty granular level, with a lot of interlocking and overlapping points.

MR JUSTICE MARCUS SMITH: Do you see that as being an issue confined to experts or do you anticipate there might be factual witnesses coming --

MR O'DONOGHUE: Sir, it's factual. Mr Beighton and Mr Sully, who are giving, on the face of it, factual evidence, if one looks at their questions of fact, it covers questions of conclusion and market definition, and to some extent, the question of pharmaceutical markets. So, I don't think it's possible to hermetically seal their evidence into simply trial 1 on the question of collusion. So, we'll take that away and map this out on a more granular basis, conscious of the interlinkages of the potential stages.

The second point to pick up on Ms Ford's first point, you'll have seen, sir, from paragraph 25 of our skeleton for today, we're an Appellant in liothyronine, and from our perspective there is no overlap at all between our appeal in liothyronine and our appeal in the present case.

You've also had the letter from Hg a couple of days ago, where they effectively make the same point. So although it's not for today, one has to see the extent of overlap in context. I mean, it's really Mr Brealey's two points. I mean, that's not for today, but we do wish to lay down a marker that the context, from our perspective, is one of minimal overlap.

Finally, sir, a selfish point. On the list of issues, if we could, if possible, get until 22 December to complete our part, because Ms Mockford and I are, essentially, in court for the next week or so. That will, obviously, have knock-on implications for the CMA which need to be accommodated, but we would make that plea, sir.

MR JUSTICE MARCUS SMITH: Thank you.

MR BREALEY: Obviously, we've got to take it offline, it's a bit of a curve ball. We're not so against the proposal. We do see that there are overlaps on the pricing abuses between the two appeals. We don't see there's any overlap in the witnesses of fact, particularly our witnesses, and we can see the sense, for example, of a mini hearing on collusion in the hydrocortisone appeal because if there's no collusion, that's the end of it; if there is collusion, then you go on to determine whether it's an object distortion of competition, et cetera.

So, I think we've got to take it offline and liaise with the other parties, but we do see that there can be some room for some mini hearings. I think for the CMC, the next CMC in January, maybe that can be with the liothyronine CMC, so that everybody will be together and so Hg can't duck out of it.

So, yes, CMC in January, for both appeals. I do believe that we need to book out November and December just as plan B, if this roadmap doesn't materialise. But before that, we can see that the pricing abuses in both appeals -- I mean, it could be before that because I can

see there's availability -- it could be determined prior to other issues in hydrocortisone or the hydrocortisone collusion could be heard first. It may not be by the same Tribunal, but, you know, I don't think we're going to -- given your availability, sir, I'm not sure that's going to happen unless you've got availability prior to November and December.

MR JUSTICE MARCUS SMITH: Well, we're clearly all going to have to look at our diaries quite carefully. That's a given. Yes.

MR BREALEY: But I do think that the next CMC in this case, where we determine the roadmap, should be a joint CMC with liothyronine.

MR JUSTICE MARCUS SMITH: Well, that, if I might say so, seems a very sensible suggestion. In particular, if we have, in travelling draft, a sense of how the issues are structured, even if they're just the issues in these appeals, we'll at least get a sense of what is common to both. And it may be, as Mr O'Donoghue says, it's vanishingly little. But even, for instance, the law regarding how one establishes abusive pricing, I mean, this is, as everyone said, a very difficult area and I think the parties are entitled to believe in consistency in terms of outcome and that is best achieved by, you know, it being dealt with in common.

MR BREALEY: And that, you'll have seen from our skeleton, we raised that and we see that because there is a common issue of how generics are regulated by way of pricing, and is it cost plus, is it something else. So, that is a factual background which feeds into how the law should be applied.

MR JUSTICE MARCUS SMITH: I'm grateful, thank you, Mr Brealey.

MR JOHNSTON: Sir, I don't have an enormous amount to add to what's already been said. If I could summarise my client's position, it is that it's sympathetic in principle to the desire

for efficiency, but cautious as to what's being suggested today. Obviously, we'll take our position away and come back much more fully in January.

Much like Ms Ford, we have no idea what's in the liothyronine decision, so we simply can't comment on that. That's, obviously, something that's going to have to be remedied before any joint CMC, so that there can be an informed discussion as to overlap or otherwise.

Two other very brief points. Sir, if we are to have a series of mini trials, as it were, in November and December, the only practical question that raised from our perspective was whether it would be possible for the Tribunal to produce a rolling judgment, as it were, in that comparatively short window. So, that's purely a practical point, sir, but it struck us as something to at least mull upon.

And the final I think is to reiterate what Ms Ford said, which is that our concern, I suppose, is that there are cross-cutting themes that run all the way through all of the different aspects of the infringements, and of course crucially are relevant to fine. When we come to questions about proportionality and so on and so forth in relation to fine, it's very difficult to disaggregate that from the submissions earlier as to the facts, and so that therein lies at least part of my client's caution.

I suppose one other point maybe to add, sir, is that -- and this is an impressionistic point and others may disagree or even correct me -- to the extent that the Tribunal's ambition is to decide disputed questions of fact and then move on to submissions as to the law, certainly my impression is that there's not very much between the parties as to the facts, but this matter is largely about, but of course not exclusively, is the proper characterisation of those facts, the proper weight to be lent to different facts; how to treat them as a whole.

And the question then arises whether disaggregating in this way makes it easier or more difficult for the parties and for the Tribunal to engage in that process.

So, sir, as I say, very much sympathetic to efficiency, some caution, we will come back with a fuller, more rounded submission in January, but those at least are our initial reflections, sir, rather than anything more concrete or --

MR JUSTICE MARCUS SMITH: No, thank you, that's very helpful. I mean, to be clear, if we go down the staged process, what we will be doing is we will be looking, I think, at a broader range of hearing dates than simply the November/December period.

MR JOHNSTON: Understood.

MR JUSTICE MARCUS SMITH: The reason I think Mr Holmes quite rightly raised the November December point, is that if we go down the single trial route, he doesn't want -- no one wants that ability to hear the matter to be lost simply because we can't make up our mind as to how we're going to go about things. So, in the spirit of wanting to keep all options open, we'll be looking at the diary with a view to ensuring that a set piece single trial for this appeal alone can take place. Whether we move away from that is an entirely different matter.

So you're absolutely right, the gap between staged hearings would have to be much tighter --

MR JOHNSTON: Indeed.

MR JUSTICE MARCUS SMITH: -- in terms of an ability to hand down a judgment or provisional ruling, if that was appropriate.

You said rather intriguingly that there were no disputes of fact and then --

MR JOHNSTON: Not to put the point too high, pre-eminently -- and as I say, I'm very welcome to correction from others, I'm probably more familiar with our Notice of Appeal than

others, obviously -- that whilst there are disputed questions of fact, the primary dispute between the parties, at least perhaps for my client's part only, is as to the proper characterisation and/or treatment and/or weight to place on those different facts.

So, that's not necessarily a compelling reason why matters couldn't be dealt with in a structured way, but at least to the extent that the Tribunal's starting point was that the efficiency was to deal with factual matters in dispute and to move on to submissions, as it were, at least for my client's part -- and it may be that it doesn't apply to others -- there's significant extent to which, actually, the raw disputed questions of fact are not particularly extensive. It's not a "he said, she said" matter, but rather it's how properly to understand and/or contextualise and/or lend weight to those different facts.

Now, sir, that's not necessarily a compelling argument for or against any particular structure, but it's at least an observation that struck us as we were discussing your suggestion this morning.

MR JUSTICE MARCUS SMITH: No, indeed, it's very helpful to bring these points out. I mean, in a sense, what you're saying, I think, is that context is everything.

MR JOHNSTON: Indeed, sir.

MR JUSTICE MARCUS SMITH: And I think I'm in violent agreement with that. I think context is everything. But what troubles me about dealing with this all in one hearing is that that is precisely what the Tribunal doesn't get. What we get is evidence, which no matter how you try and control it in a single hearing, isn't ordered in the rational way you want. So it seems to me that if one is talking about, let us say, illegitimate agreement, that is absolutely going to be coloured by the market in which everyone is operating.

MR JOHNSTON: Yes.

MR JUSTICE MARCUS SMITH: And one would want to understand the market before one looked at the significance of the agreements that were allegedly made and how they were performed. And that's what I mean by staging it. Now, it may be that you can't say it's all facts, law, penalty, you've got different stages of fact. But for my part, I would very much like to be able to understand the way in which the market operates, generally speaking, and it may be that that can be something that is actually in essence agreed between the parties. I mean, that's one of the things that I'm also keen to encourage, that there are areas of low hanging fruit where the party can say: look, it works in this way, you can take that and you don't need to worry about evidence there, we're agreed.

Now, I strongly suspect that trying to reach agreement on the operation of the market is just so vaultingly ambitious that it's going to fail, but there will be more minor points which will take up valuable court time at trial, which can be knocked on the head or banked in advance. And it's that which I am keen to exploit, but it's subject to all the provisos that we've articulated, which is there's a reason we do things all in trials in this jurisdiction. It has worked for many years and I am certainly not insensible to the fact that one shouldn't, you know, fix something that isn't broken. But I do think these are horses of somewhat different colours -- if I can mix my metaphors -- and it's for that reason we're having that discussion now, but your points are entirely well taken.

MR JOHNSTON: Sir, I'm very grateful. One final point, sir, just to follow in behind Mr O'Donoghue, I'm in a five-day trial next week, so the end of next week might be rather pressing for a list of issues, but perhaps the best thing to do is to canvas that between the parties in terms of timetable. In essence, sir, I anticipate that your concern is to have a document significantly in advance of whenever the January CMC is taken into account,

that you can digest it and take it into account, rather than something that arrives with you 24 hours before.

MR JUSTICE MARCUS SMITH: We are keen to roll up our own sleeves and get stuck into how these things might be parsed, so we're minded to do a bit of work ourselves in working out how we would approach these things.

I mean, it's fair to say that partially because of the evolving service of the pleadings, we're not, I think, as well up on the detail as we perhaps ought to be, and that is something which we would like to take every opportunity between now and January to change.

So, one of the things we're going to be suggesting is that actually each party put in their proposals as quickly as they can. We will look at those that come in and we will do our work as we can do it, and later submissions will be taken into account actually quite profitably, because we will have given it some thought and we'll be able to work out whether there are merits in a later proposal.

So, we're not particularly minded to make, you know, clear timetable directions on what is intended to be a working document that is going to require a considerable amount of work from us, as well as from the parties.

MR JOHNSTON: Sir, that's extremely helpful. I have one additional point to address you on in relation to pleadings, but it's really separate to the matter we're discussing now. I'm happy to address you now or deal with it later once we've finished address --

MR JUSTICE MARCUS SMITH: Why don't we deal it with now?

MR JOHNSTON: It's a very simple point. You may have seen in the correspondence between the parties that my client --

MR JUSTICE MARCUS SMITH: Oh, the adoption of --

MR JOHNSTON: Indeed, sir, the simple background facts being that everybody applied for an extension of time. My client had the misfortune of not being granted an extension of time and wasn't able to coordinate, in particular, with its former subsidiary. And so, sir, the original proposed order for today anticipated an application to amend by February. Given the discussion today, I anticipate that that should come considerably forward in order to bring clarity.

So it would be very helpful to the parties if you were able to provide a preliminary indication on one point only, and that's that there's been some discussion between the CMA and my client concerning whether or not my client needs to plead each of those matters in extenso; in summary, do we need to cut and paste very large sections of other Appellants' grounds into ours or can we do it by cross reference?

Now, sir, if you were able to give a preliminary indication on that point, that might save some trees and might save some time. We're of the view that a cross-reference in the circumstances would be sufficient. That's not to pre-determine obviously the merits of an application, sir, that's for another day, but that would be helpful if you were able to give us at least a preliminary steer on that point alone.

MR J HOLMES: Sir, I would wish to address you on that before you gave any such indication.

MR JUSTICE MARCUS SMITH: Fair enough. In this case, I've got the point, we will deal with it today.

MR JOHNSTON: I'm grateful.

MR JUSTICE MARCUS SMITH: But not now. Yes.

MR PALMER: Sir, there are five brief points that I would want to raise at this stage on behalf of the Intas Appellants.

The first is we are entirely sympathetic to the Tribunal's desire, whatever the ultimate structure of the hearings, for very tight case management -- a tightly managed case on the way to that point, including that the issues be identified at an early stage by reference to particular factual disputes, where the evidence relevant to those factual disputes is, particular expert evidence and so forth, so that the Tribunal will have a very clear idea from an early stage of the scope and compass of each issue and what is relevant to each issue.

We would tentatively suggest, although on a preliminary basis and subject to a discussion with the other parties, that quite a full statement of common ground, if it's possible to agree such a statement of common ground might assist, both for example in understanding the market and how it operates, as well as any other issues to which that statement of common ground might assist. And that would put those issues within a defined context, rather than perhaps a less helpful free-floating general list of issues which, sir, you indicated you found less helpful in the past.

My own experience has been, when accompanied with the statement of common ground, you see not just what's in dispute, but what is agreed and how it all fits together, it becomes a rather more helpful document to all parties and to the Tribunal.

That sort of process might be combined with either a structure of hearings and so might form a basis for a middle way, as it were, between the purely traditional approach and the purely novel approach which has been suggested. So, that is a matter which all parties will want to reflect upon, including ourselves, and perhaps we can address you further in January about that, having thought that through further.

The second point is that we do have some concern at this stage about timetabling issues. One of the merits of a single hearing is that there is some flexibility on the timetable as between

issues, so that if one issue suddenly falls away for whatever reason, or another issue takes longer than is anticipated and becomes more involved than actually there are sort of repercussions on it further down the line, one single hearing has the flexibility to accommodate that.

By breaking it up in advance and having separate hearings operated by a period of time, our concern would be that that would require a very precise time estimate in advance of exactly how long each matter was going to take, and you would lose that flexibility and thus lose some efficiency.

It's also a concern that the novel approach that has been suggested today might, for that reason and others, end up increasing cost for all parties. And we would ask the Tribunal to bear that dimension in mind as well as part of the overriding duty and the need to manage all issues in a proportionate fashion. The more one spreads these issues out over a longer period of time, beyond just the November/December window, the more counsel have to reserve themselves to work on this case, the parties book out time in their diaries and so forth, and it will have a significant impact on the cost of the proceedings.

The third point is related to Mr O'Donoghue's point, which is that witnesses don't fit neatly into one particular issue rather than the other. This is a rather unusual case, there is certainly -- although we're calling three witnesses, we don't anticipate much factual dispute. There may be some, but the compass which that factual evidence covers is relatively narrow. We have Ms Kar, a partner at Linklaters, who essentially provides a procedural chronology about the investigation and various positions that the CMA has adopted at various times. We don't anticipate that will be factually contested, more a question of, you know, its relevance to penalty in particular at a later stage.

We have another witness whose focus is entirely on the compliance measures, which the Intas Appellants suggest is relevant only to penalty; and another witness which covers a range of matters which can't be neatly put into one area rather than the other. So, again the issue in that case would be, would that witness be called multiple times, both on how the market works, as well as at the penalty stage and everything in between? Again, that may lead to inefficiency rather than efficiency.

The fourth point I would wish to raise is about the list of issues. We respectfully agree with what Mr Holmes said about how this would need to be a living document. Some issues may not be apparent until any application to amend Notices of Appeal has been made and until Replies have been filed.

We don't anticipate great amendments at this stage, although now we have the other parties' Notices of Appeal, we'll want to consider whether there are any grounds of appeal which any other parties raise, with which we would want to formally associate ourselves, whether that's by cross-reference or by other means. We don't have a fixed position on that yet. We are still reviewing the grounds of appeal.

The second matter is that to the extent that we are provided with the confidential versions of documents, of which we only have the non-confidential version at the moment, and once we're in that confidentiality ring, we'll see if that new evidence to us requires any amendment as well.

Thirdly, when Replies are filed, that may reduce the scope of issues, it may enlarge the scope of issues to some extent, or at least add colour to what the issues are. But we're certainly happy to start the ball rolling on that now, as the Tribunal has suggested.

A fifth point is in relation to the liothyronine matter, if that is to be a joint CMC. At the moment all we have are the published summaries on the CAT website. There would need to be disclosure of their Notices of Appeal for us to consider exactly how those issues arise, and therefore what the relationship between those issues and our issues is, if any.

Again, we would respectfully suggest this is going to add to the cost of the proceedings, particularly if those common issues are heard together, we would have to be across the lio issues, as I call it for short, as much as our own issues. This is going to expand the amount of work and therefore the amount of cost the parties are going to have to incur, and we would ask the Tribunal to be conscious of that factor, too.

Those are the main issues as they stand, all by way of agreeing with the general position outlined by Mr Holmes at the outset that we should all take this away and work out a developed position to put before the Tribunal in January, but those are the matters at front of our mind at the moment.

I do have at sixth point which is relevant only to the document platform matter. It might be that's conveniently dealt with at a later stage.

MR JUSTICE MARCUS SMITH: No, go ahead.

MR PALMER: The position on that is the confidentiality issue that related to document platforms has been removed. The CMA maintains it's no longer necessary for the servers to be in the UK. Our servers are in Germany, but that's no longer a live issue. These platforms have been up and running for some time and the documents which are on it will not be identical, we hope, with the documents that end up before the Tribunal. Only some of these documents might become what one might call "appeal documents".

So we are, in principle, sympathetic to the idea of having one common appeal platform. We want the confidentiality orders to allow us to have those confidential documents on our existing platforms, and then we can consider what needs to be taken across on to a common appeal platform, to which the Tribunal would have access and all parties would have access.

We would like to think further about the timing of that. Again, there's a cost. You pay a monthly subscription for these things, and we wouldn't want it to have running for more months than is necessarily required. Provisionally, we might suggest that may be set up and consider what documents need to be on it, following the close of pleadings rather than at an earlier stage. Again, that's our preliminary thoughts on that matter.

MR JUSTICE MARCUS SMITH: Yes. Well, thank you very much, Mr Palmer, that's very helpful.

MR O'DONOGHUE: Sir, that point is common to my client as well.

MR JUSTICE MARCUS SMITH: Okay.

So we've got a few points that I'm going to require further assistance from the parties on, but let me just extrapolate what I think is a clear common direction of travel. A CMC in January in both sets of appeals seems to me to be entirely sensible, and there will have to be corresponding disclosure so that the parties who are not party to the lio appeals can be fully and properly informed of what's going on, otherwise the point of a joint CMC is lost. We will work, but not at this hearing, to find a date that most -- I'm sure, it won't be everyone -- but the most people can make.

The notion of the use of statements of common ground, well, yes, I think that actually is really quite intrinsic to the process that I was envisaging earlier. It's a good way of putting things.

It's simply that the more one understands about where the fault lines of dispute lie, the easier this case is going to be to try. So we entirely agree with that.

Witnesses of fact and repeated appearance, I think there is something in that and we will take that away to consider it. I don't feel that it's a problem with experts because it's pleasing to note that experts, whilst they disagree, tend to do so with integrity rather than not. That may not be true with factual witness statements where issues of credibility actually can matter. I've no sense of how far it will in this case, but the point is one that we accept as something we need to bear in mind.

Replies, we are going to order, as we have indicated, for the end of February, and what we would only ask is that the parties bear in mind that the Replies in this case may, because of what we've been discussing, look very different to what Replies normally look like. I don't want to say anything more than that because I don't want to fetter the parties in how they wanted to put their cases, but it's in a sense implicit in the whole debate we've had this morning.

That leaves the points of, not contention, but where we are going to require further submission. First of all, Mr Holmes, you will need to address me on the question of amendments by reference or amendments by cut and paste, which I think are the two options. So, we'll do that in a moment.

I just want to make one point clear about database. I mean, I quite understand that the parties have got their own systems, but my own sense is the sooner those systems are consigned to history the better. I mean, it is not this Tribunal's role to tell the parties how to incur costs or run their cases, but if this is going to be as proactively managed as it is going to be -- and I say that irrespective of the route we go down, it's going to be case managed in a very intense way -- I think we need as a working tool a database that is used by the parties and

the Tribunal sooner rather than later. And for my part, I think we want this up and running before, not after Christmas, because the fact is it will make everyone's life a great deal easier if you use whatever common platform is selected to prepare for the future hearings instead of having documents sort of all over the place and put up on a fairly sort of ad hoc basis. We all know where we're looking at, we all have one common frame of reference and we can therefore actually do long-term preparation from the same documents.

I mean, just as the case in point, when Ms Ford was taking me to her appeal, I have it in a different file. The paragraph numbers work, the page numbers don't. It's important that we set this particular piece of infrastructure in place sooner rather than later.

I don't know if there is a volunteer amongst the parties to take the lead on this in conjunction with the registry here at the CAT in terms of working out how things should matter. It's probably best to have a single interlocutor rather than six, but that may be something which I don't need to direct -- I will if necessary -- but I'll leave the parties a day or two to work out how they want to go about things. But I'm afraid the one area where you've got serious pushback is: leave it to later, because we've got our own systems. I think this has to happen now, otherwise the whole agility of the process that I've been envisaging fails.

So, with that indication, Mr Holmes, I'll hand back to you on the number of trees that need to be cut down for the points to be articulated.

MR J HOLMES: There is of course confidentiality more generally. I don't know if it would help for us to just briefly outline the general area of agreement on that. It would only take --

MR JUSTICE MARCUS SMITH: Do you want to deal with the confidentiality first and amendment second?

MR J HOLMES: Certainly, if I may, yes. So on confidentiality, I hope that the supplemental skeleton reached you.

MR JUSTICE MARCUS SMITH: Yes, it did.

MR J HOLMES: As we explained in that, the reason why the CMA is particularly cautious about confidentiality in this case is that there is a core of about 56 documents, which having been through a process of consideration and liaison with the parties, do appear to contain genuinely quite commercially sensitive material. They contain, for example, plans for particular products and the future management of particular products, the consequences of the penalties for businesses, including, for example, retrenchment of activities going forward. They include very recent market data. The kind of material which is sensitive and that does need to be carefully protected.

And of course the concern is greatest in relation to people seeing that material from within businesses, that's to say in-house lawyers who may also be involved in ongoing commercial activities, giving rise, not to a risk of deliberate misuse, that's not at all our concern, but rather of inadvertent disclosure.

And the solution that we have proposed and which I think is broadly agreed is that those 56 documents should be withheld and confined to an inner ring at the present stage, consisting only of external counsel and advisers more generally, including experts. But the wider pool of documents in relation to confidentiality is disputed, that's to say documents that the CMA does not accept are confidential, but which the parties here present and other third parties have identified as confidential, could be disclosed more broadly to in-house counsel and to external lawyers.

Now, that of course would be kept under review. We see this as an interim arrangement, only in the sense that the parties can revisit the designation of documents and can revisit also who is in the inner ring and who is in the outer ring. And that can be done in a way which will ensure that there is no prejudice, there's no inability to proceed fairly and to obtain instructions and so forth.

I should say that many of the 56 documents actually are not relevant to the substantive issues in the case, which of course occurred at a long distance in time. A lot of them relate in fact to the calculation of the penalty, and so for that reason we think that this is likely to be a durable and a workable solution.

But in any event that commends itself, I think, to all of the parties. Mr O'Donoghue does raise a point, and I don't want to put words in his mouth, but as we understand it, the point is that in-house counsel should, in principle, be included. We couldn't see the principle as being quite that. We do see that, by the time of trial, important documents should be available in a way that allows parties to deal with them effectively. But it's well established that you can have external eyes only rings, particularly in the earlier stages of a process like this. And equally, it's a very contextual enquiry and one really needs to look at the importance of the documents in deciding what needs to be shared, where there is a risk arising in relation to the disclosure of business secrets.

So that's the position on the key question of in-house counsel.

As Mr Palmer has adverted to, the other two issues which arose in relation to document platforms and in relation to the staff, you know, administrative staff and support staff, they've been resolved by the agreement to include an additional couple of undertakings in part B of the

order. So on that basis, we hope that that meets with the Tribunal's approval, but subject to anything Mr O'Donoghue says, that's what we would commend to you.

MR JUSTICE MARCUS SMITH: Thank you. And before Mr O'Donoghue rises, the 56 documents, are they all documents whose confidential nature vests in the Appellants, or are they third party confidential documents?

MR J HOLMES: No, sir, I'm glad you've raised that. Some of them indeed are confidential to third parties, and you'll have seen what we've proposed, painful though the process may be, is that a hearing should be provisionally listed in February or March for a couple of days, at which any issues in relation to the confidentiality ring could be dealt with, should any arise.

I hope that this can be dealt with sensibly and collaboratively by agreement, but you never know. But also where the disputed issues can be swept out of the way in order to ensure that the substantive hearing can proceed as smoothly as possible, and we're mindful, sir, of your recent ruling in BGL.

MR JUSTICE MARCUS SMITH: Yes. Thank you. So it's not something that can be waived by the Appellants, that was really the force of my question.

MR J HOLMES: No, sir, there are third parties.

MR JUSTICE MARCUS SMITH: Mr O'Donoghue, yes.

MR O'DONOGHUE: This won't take long, it's to put my cards on the table going forward. A couple of points of principle, if I may. I don't know if the Tribunal has received a recent Court of Appeal authority, which should have been handed up. It's the OnePlus case from late last year. In my submission, this does move the dial a little bit in terms of what are the salient principles.

So you may be familiar, it was a FRAND case where there was a dispute about external eyes only confidentiality rings, and the issue was access to comparable patent licensing information.

MR JUSTICE MARCUS SMITH: Yes.

MR O'DONOGHUE: And if I can cut to the quick and pick this up, first of all, at paragraph 39.

MR JUSTICE MARCUS SMITH: Yes.

MR O'DONOGHUE: Sir, under 39(2), an arrangement under which the officer employed by the receiving party has no access to documents of importance at trial will be exceptionally rare, if indeed it can happen at all. So that's the point about the trial.

And then over the page, point 4, the court must be alert to the fact that the restrictions should only be to external eyes only at any stage is exceptional. And 5, an important point about burden. If external eyes only tiers be created, the court should remember that the onus remains on the disclosing party throughout to justify the designation of the document so designated, and so on.

I've been asked to read 9 -- (audio cuts out) -- party.

So, at the moment, the issue isn't really about confidentiality as such, the issue is should my in-house counsel, who is my only client contact, be in the inner ring or the outer ring. And in my submission, the starting point must be that the onus is on the CMA or the disclosing party to explain why my client in particular cannot, under the confidential protections of the inner ring, which are substantial, form part of that ring. It is not enough, in my submission, to wave a confidentiality flag.

Now, two supplemental appoints in that context. Our general counsel is a solicitor of 25 years' experience, 16 years in private practice, qualified in England and Wales, New York and Germany, and I ask rhetorically: how is it possible that a paralegal in a law firm joining the

case last week can be in the inner ring and somebody of that level of qualification and experience is in, principle, excluded. It doesn't seem to make a lot of sense.

But the critical point we make in this context, which goes to the point of onus. My client, sir, as you may have picked up from the papers, sold the relevant business in 2015, which was Mr Brealey's subsidiary. So, at least as of today, we do not understand on what basis vis a vis Cinven it is said that the confidential issue arises. As we understand it, the relationships in question are, at best, vertical.

Two final points, sir, if I may. First, since this does concern the confidentiality settled by third parties, sir, your ruling in BGL is fundamental, both in the respect Mr Holmes accepts, but also in another respect, which is it is not sufficient if the CMA has, itself, given confidentiality guarantees to these third parties to cajole them into assisting it in the context of the administrative phase. At this appellate stage, it is fundamental that the CMA, with the assistance of the third parties, puts forward a concrete reason why the third parties alleged confidentiality continues to need to be respected in the manner envisaged in the inner confidentiality ring. That is a specific enquiry that they need to engage with.

Finally, sir, the point which straddles all of this. Sir, I don't need to tell you, but these trials whereby one has a jack-in-the-box scenario and musical chairs of people leaving periodically during the trial is completely unmanageable, and what it engenders is satellite disputes that take up bandwidth for no good reason.

And ultimately, the term this year has to be the conduct of one or more trials. In my submission, that tends towards minimalism in terms of confidentiality and not complication. Sir, these may well be for February or March, but I wanted to put my points of principle and practicality on the table, so no one is in any doubt as to where we are gravitating towards.

MR JUSTICE MARCUS SMITH: Thank you. But you're not inviting the Tribunal to allocate your in-house solicitor into the inner ring today; you're happy to --

MR O'DONOGHUE: Sir, not today. The two markers I'm really putting down is, if an Appellant, in the context of Cinven, wishes to assert confidentiality, they need to factor in this business was sold in 2015.

MR JUSTICE MARCUS SMITH: Yes.

MR O'DONOGHUE: And in relation to third parties, in the light of BGL, there needs to be a concrete articulation of why the particular confidentiality asserted by that third party continues to be justified. The fact that the CMA gave them some protection to assist them during the administrative phase is necessary, but it's not sufficient.

MR JUSTICE MARCUS SMITH: No, I understand. Mr Holmes, I don't think you need reply to that, but, to be clear, the use of broad designations is a helpful starting point in terms of allocating people to rings. But when one comes to persons who have a wider function in the client organisation, one has got to become much more fact specific in terms of the damage that might be done, not through advertent breach but through inadvertent breach in knowing something which then feeds into other decision-making areas. So when this has come before me on other occasions, I've been quite inquisitive about precisely the role of the in-house counsel involved and why it is important that they be joined and they are both important questions and, yes, we have that well in mind. Equally, the extent to which the protection accorded by a confidentiality ring moves, it ought to move to a greater relaxation rather than a greater intensity as time goes on.

So if I can give my two broad indications as to how I see those things, we can hopefully reach agreement about these things rather than disagreement.

Mr Holmes, I see the time. I don't want to impose on anyone unduly. How long are we going to take on the --

MR J HOLMES: I think two minutes.

MR JUSTICE MARCUS SMITH: Two minutes. Would it make sense to try and hear that.

MR J HOLMES: Yes, of course. Yes. So the point is simply this, sir. Allergan, Mr Johnston's client, wrote to the CMA, I believe the day before yesterday, indicating that there were broad swathes of other appeals that it wished to adopt and it also referred to adopting evidence. Now, we didn't find the requests terribly clear but we do have concerns that this is not something that we could simply ourselves give permission to. It's a matter for application if a party wishes to amend their Notice of Appeal to insert additional grounds or additional arguments and that is to be reasoned by reference to rule 12 which specifies particular circumstances in it. It is not the CMA's position, to be clear, that it will be necessary invariably simply to replicate by reproduction the paragraphs that a party wishes to adopt in all cases, but we do, sir, say that a reasoned application is needed to the Tribunal on sufficient notice to enable the CMA, as the respondent, to consider and address the application being made.

The parties had, we thought, until Mr Johnston rose to his feet, arrived at a sensible agreement that any applications to amend the Notice of Appeal would be made by the time of the Replies and could be dealt with thereafter, and in my submission that's an appropriate course. If Mr Johnston's concerned that there is some urgency which requires it to be dealt with sooner, there is always the January CMC, but we say it's not really business for today.

MR JUSTICE MARCUS SMITH: I think Mr Johnston was really looking for an indication as to what we would expect by way of a draft.

MR JOHNSTON: Sir, I've heard from my learned friend as to that in. My only concern as to bringing the process forward -- sorry, I'll remove my mask -- was the Tribunal's concern to map out the issues, vis-a-vis the parties. But Mr Holmes is absolutely right that the agreement had been that it would be dealt with in February. It may be, given the Tribunal's indications today, that bringing that process slightly forward would be helpful but absolutely in agreement with Mr Holmes that it's going to require an application and we're very grateful for his indication that it's not necessary to duplicate in the way he suggested.

MR JUSTICE MARCUS SMITH: No.

MR JOHNSTON: So I'll pause there, sir. I don't think there's anything to go further in respect of this matter.

MR JUSTICE MARCUS SMITH: That's very helpful. I mean, for our part, the testing is always when you have a draft amendment.

MR JOHNSTON: Indeed.

MR JUSTICE MARCUS SMITH: But it does seem to me it would actually require some justification to do a cut and paste rather than simply saying we adopt or move the following points or following evidence. So, without it being in any way a binding indication, it's a non-binding indication that less is probably in this case more.

MR JOHNSTON: Indeed. We're very grateful for that, sir. We're conscious of the need not to replicate and duplicate.

MR JUSTICE MARCUS SMITH: Indeed.

Well, thank you all very much. Is there anything that we've overlooked that needs to be dealt with or do the parties all have a reasonably clear sense of where we are going?

MR J HOLMES: I think we do, sir, but can I just briefly check? The confidentiality order is agreed, I think, and we'll present that to the Tribunal with the amendments that have been agreed so that it can be adopted to all intents purposes now if that's convenient.

The broader directions will be put on hold for a January CMC at a date to be determined but there will be, if I understand correctly, sir, some immediate directions in relation to the preparation of lists of issues. You've heard from the Appellants the suggestion of the date of 22 December. For our part we'd be content with that and we propose 14 January for the CMA to come back with its list, if that's convenient.

One final point, if the list could be prepared by reference to the notices of appeal with specific reference, that might be convenient.

MR JUSTICE MARCUS SMITH: Well, thank you. I'm going to order those dates but as by no later than dates. If anyone can get something to us more quickly, given that these are not intended to be, as it were, documents to be deployed in anger, they're intended to assist us to work out what needs to be considered. The more we get earlier the better. But those dates seem to us to be sensible as long stop dates.

MR J HOLMES: Sir, I'm sorry to keep bobbing up.

MR JUSTICE MARCUS SMITH: Not at all.

MR J HOLMES: I know I'm keeping us all on borrowed time now, but one final point. You mentioned, sir, that the Tribunal was planning to roll its sleeves up to do some further preparatory work on possible blocks of --

MR JUSTICE MARCUS SMITH: Yes.

MR J HOLMES: It does -- to ensure smooth running at the next CMC, if it were possible to give us a couple of days' notice in writing of the Tribunal's proposals, I think that would be extremely helpful.

MR JUSTICE MARCUS SMITH: We would certainly be minded to do what we could to avoid pulling rabbits out of hats, as we have done this morning.

MR J HOLMES: I'm grateful.

MR JUSTICE MARCUS SMITH: So, yes, we would, I think, want to ensure that the parties had an ability to take a clear view as to how we saw things. So we will bear that in mind.

Well, thank you all very much. I'm sorry we've overrun but we're very grateful to you all for your assistance. Thank you.

(1.20 pm)

(Hearing concluded)