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IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1016/1/1/03

Victoria House
Bloomsbury Square
London WC1 2EB

Thursday, 27th May 2004

Sir Christopher Bellamy (President)
Professor Peter Grinyer
Mr Graham Mather

BETWEEN

GENZYME LIMITED

Applicant

- & -

THE OFFICE OF FAIR TRADING

Respondent

Mr Aidan Robertson (instructed by Messrs Taylor Vinters) appeared for the Applicant

Mr Rhodri Thomson QC (instructed by the Director of Legal Services, Office of Fair Trading) appeared for the Respondent

Mr Euan Burrows (instructed by Messrs Ashurst) appeared for Health Care at Home

H E A R I N G

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1 (At 10 a.m.)

2 THE PRESIDENT: Good morning, ladies and gentlemen. The hearing this
3 morning, I think, is perhaps somewhat more informal than usual because
4 what we essentially want to discover is where this case is going and
5 at what point we, the Tribunal, need to take our own decision on how
6 it is to be disposed of.

7 There are three outstanding matters: one is the OFT's application
8 for costs; the second is Genzyme's application for permission to
9 appeal; and the third is the question of the Direction. We have, I
10 think, as a matter of policy, been leaving the first two issues of
11 costs and permission to appeal on one side in order to get a feel for
12 how the third issue is being resolved so that we can deal with matters
13 as a whole. That is why we have not ruled so far on issues one and
14 two; however, there obviously comes a point where we have to decide
15 issues one and two, and we need at some point this morning -- we do
16 not propose to decide them this morning -- to know from the parties
17 whether they want to make any additional submissions on those two
18 issues or whether they are content for us to deal with them on the
19 basis that we have already got.

20 As far as issue number three is concerned, our impression is
21 that, for whatever reason, this has been taking rather more time than
22 we had anticipated it would. What we would particularly like to hear
23 from the parties is their own impression of where the matter is now
24 and whether it is likely to be resolved by agreement or whether we,
25 the Tribunal, have to take our own decision. Our very initial
26 impression from the papers is that matters did seem to start in a
27 collaborative and positive way, for which we are extremely pleased,
28 but we are at the moment somewhat puzzled by the line taken in
29 Professor Appleyard's report and how that corresponds to quite a
30 substantial amount of historical and other information that we have
31 already had on the issues in this case, including the Dixon Wilson
32 report, Mr Williams's evidence, the evidence we had at the interim
33 measures stage, the original correspondence with the DHS in 1999 and

1 | so forth.

2 | We have, ourselves, some comments to make about the nature of the
3 | exercise and what this exercise is seeking to achieve. But before
4 | going into that, I think it is useful for us to have a general
5 | statement from at least the two principal parties and -- I think we
6 | have HH here this morning, is that right? Yes, good morning -- and
7 | possibly HH as to where they now see things going and, in particular,
8 | whether the timetable now proposed in Taylor Vinters' latest letter of
9 | 26th May is something that is feasible from the parties' point of
10 | view.

11 | I think it is probably for the OFT to kick off first, as they are
12 | the public authority.

13 | MR THOMSON: I am grateful, sir. Do I press the green button?

14 | THE PRESIDENT: You have got a green button. That is right, yes.

15 | MR THOMSON: Can I just briefly say something about the costs and the
16 | appeal position?

17 | THE PRESIDENT: Yes.

18 | MR THOMSON: So far as I am aware, we have nothing further to add, as
19 | it were, in writing, though we would obviously be very happy to attend
20 | any hearing and make such observations as might be appropriate if
21 | there are any points that the Tribunal wants us to raise.

22 | THE PRESIDENT: Yes.

23 | MR THOMSON: But I think we have put out our stall on those two issues.

24 | THE PRESIDENT: Yes.

25 | MR THOMSON: In relation to the Direction, on the point of substance I
26 | think that the position of the Office is as follows: we are agreeable,
27 | in principle, to the approach that Genzyme has taken by seeking to
28 | identify the costs of home care services as the basis for establishing
29 | what I think the Tribunal have called the ex-manufacturer's price. We
30 | have some concerns of the kind that the Tribunal has raised about the
31 | commercial reality of what is being proposed, given the history of
32 | this matter and the market power of Genzyme as a buyer of home care
33 | services over the past decade. It seems to us that the result is a

1 surprising one from that perspective.

2 In terms of principle, there is an issue about whether or not
3 addressing solely avoidable costs is the correct approach, and also
4 there are, no doubt, some specific issues about whether the
5 assumptions and figures that have been adopted are appropriate. It is
6 particularly on the last element, although we would not necessarily
7 exclude input on other elements, that we are particularly interested
8 in Health Care at Home's position, and the timing issue that we have
9 had, apart from the fact that we have only received Genzyme's proposal
10 I think on 20th April which has caused us some degree of delay, there
11 has been negotiations with Health Care at Home -----

12 THE PRESIDENT: It is now 27th May, Mr Thomson.

13 MR THOMSON: Indeed. I think the Tribunal will see that a lot of the
14 time since then has been discussions with Health Care at Home about
15 the terms of confidentiality and how information is to be forthcoming
16 from Health Care at Home. So I think it may be that Mr Burrows will be
17 part of the solution, as it were, in explaining to the Tribunal about
18 what realistic timetable there is for Health Care at Home to produce
19 the information that the OFT needs.

20 My position, as I understand it, on timing is that I do not think
21 that we think the timetable proposed by Genzyme in its latest letter
22 is achievable. We had a meeting with Health Care at Home, I think
23 either yesterday or the day before, at which it was suggested that
24 there might be quite some time before Health Care at Home's input is
25 available and, to some extent, we are constrained by that. So we think
26 that the timetable we have proposed of a six-week period for the OFT
27 to produce its report is realistic and, indeed, we are somewhat
28 concerned that it may be optimistic given what we have been told by
29 Health Care at Home. So I think that is our position.

30 I should also say that there is one other point of substance and
31 one point of procedure. In terms of substance, there is some reference
32 to a separate price depending on whether or not nursing is involved,
33 and we have some difficulty in seeing how that fits in to the

1 | idea of an ex-manufacturer's price and we find that is an unclear
2 | aspect of Genzyme's position. The procedural point is on
3 | confidentiality; that we would favour, if that is agreeable to the
4 | Tribunal, that any undertakings in relation to confidentiality should
5 | be given by Genzyme to the Tribunal rather than to the Office. We
6 | considered that that would be more appropriate, but that is something
7 | that perhaps -----

8 | THE PRESIDENT: In relation to what? In relation to any costs
9 | information from Health Care at Home?

10 | MR THOMSON: For example, to Professor Appleyard and to Professor
11 | Yarrow we would prefer that any undertakings were given to the
12 | Tribunal, but that is a matter that perhaps can be -----

13 | THE PRESIDENT: You have a confidentiality ring within the Tribunal?

14 | MR THOMSON: Yes. Given that we are before the Tribunal, I think the
15 | OFT considers it would be preferable for that to be policed by the
16 | Tribunal but that is, as it were, a point of procedural detail.

17 | THE PRESIDENT: Yes. Thank you.

18 | MR THOMSON: Can I just take instructions as to whether there is
19 | anything else?

20 | THE PRESIDENT: Yes.

21 | (Pause)

22 | MR THOMSON: The other point that is made is I think it is envisaged
23 | that there be a process of agreement of reports which we are not sure
24 | whether that is feasible. I think, looking at the very broad question
25 | that the Tribunal put to us, we think it is likely, looking at it
26 | perhaps rather pragmatically and pessimistically, that it may well be
27 | that there is going to be something at the end of the day for the
28 | Tribunal to rule on, though quite the extent of it we do not know.

29 | THE PRESIDENT: I think one of the things we are trying to get a feel
30 | for at the moment is whether this is a process, essentially, of
31 | gathering information which will enable the Tribunal to rule, or
32 | whether this is a process of negotiation which will arrive at a
33 | commercial settlement between the Office and Genzyme.

1 MR THOMSON: I think my own judgment, and I do not think the Office is
2 saying anything different to me, is that we are not at the moment
3 talking about tweaking, about whether 2.6p or 2.7p is the right
4 figure.

5 THE PRESIDENT: No.

6 MR THOMSON: There are likely to be some points of principle which I
7 would be surprised if they are immediately agreed.

8 THE PRESIDENT: Yes.

9 MR THOMSON: But there is no dissent from behind me. I think that is
10 our position.

11 THE PRESIDENT: Thank you. Yes, Mr Robertson. Are your clients serious
12 about reaching a commercial settlement in this case or are you really
13 inviting us to make a further ruling?

14 MR ROBERTSON: We think that it is likely that we will reach a
15 commercial settlement.

16 THE PRESIDENT: Right.

17 MR ROBERTSON: The negotiations have been going well. We obviously do
18 have some issues of principle which we still have to agree with the
19 OFT, along with DoH and HS officials. It is important to get them
20 right because this case will be seen as a benchmark for other home
21 care service procurement exercises in the NHS. But at the moment we
22 think that this is well capable of a negotiated solution.

23 If that is not possible, then we think we will have gone a long
24 way to narrowing down the relevant issues of principle which we will
25 ask the Tribunal to decide upon as well as the areas of factual
26 dispute.

27 THE PRESIDENT: Yes.

28 MR ROBERTSON: So the timetable that we proposed in the letter that was
29 sent yesterday afternoon is designed to concentrate everyone's minds
30 on trying to reach a settlement relatively speedily.

31 THE PRESIDENT: Yes.

32 MR ROBERTSON: So that if that does not prove possible, then we can be
33 back in front of the Tribunal again relatively quickly for the

1 Tribunal to make what we envisage will be a final ruling and a
2 direction.

3 THE PRESIDENT: Yes.

4 MR ROBERTSON: We do not think -- I mean, effectively the Tribunal, in
5 its judgment, paragraph 662, said there are two options: remission or
6 the Tribunal substituting a direction.

7 THE PRESIDENT: Yes.

8 MR ROBERTSON: Effectively we are in the remission stage at the moment.
9 The OFT is considering this, considering what we say and either we
10 will reach an agreement, in which case we will come back in front of
11 the Tribunal asking it to make a direction on agreed terms.

12 THE PRESIDENT: Yes.

13 MR ROBERTSON: And if we do not reach agreement, then hopefully we will
14 have narrowed it down so that the Tribunal can focus on what are the
15 real issues and make its ruling accordingly.

16 So that is where we see things. We did say in our written
17 submissions at least that there is clearly an evidenced spirit of
18 cooperation between that of Genzyme and the OFT and the relevant DoH
19 officials to bring this matter to a speedy resolution.

20 THE PRESIDENT: Yes.

21 MR ROBERTSON: So that is the overview.

22 THE PRESIDENT: Yes.

23 MR ROBERTSON: Taking Mr Thomson's point on procedure, confidentiality
24 ring supervised by undertakings and the Tribunal, that seems very
25 sensible and we would agree with that.

26 THE PRESIDENT: Yes.

27 MR ROBERTSON: On the points of substance outlined by Mr Thomson, those
28 are the matters that we will endeavour to agree with the OFT in
29 negotiations. Obviously there are some points of principle still
30 outstanding.

31 THE PRESIDENT: Yes.

32 MR ROBERTSON: But we see no reason why they cannot be settled, and
33 then it is a question of really getting the figures right. It is

1 | important for the NHS that the figures are right because, as I say,
2 | this will be seen as a benchmark for other home care procurement
3 | exercises.

4 | THE PRESIDENT: I am not sure whether that will be the right way to
5 | look at it myself. Dealing with this particular case, we are not, as a
6 | Tribunal, settling how home care is provided in the NHS; we are
7 | dealing with a particular case under Chapter 2.

8 | MR ROBERTSON: We appreciate that, but the view has been expressed by
9 | other pharmacists that this would inevitably be seen as a benchmark.

10 | THE PRESIDENT: All I am saying is that may not be a correct view.

11 | MR ROBERTSON: Yes. Sir, that is where we are on the substance. As
12 | regards timing, it does seem that it is taking quite some time for
13 | Health Care at Home to reach agreement with the OFT as to the terms on
14 | which it discloses information to the OFT. We had hoped that in view
15 | of the undertakings we are prepared to make on confidentiality that
16 | those concerns can be quickly addressed and that the OFT will be in a
17 | position to look at Health Care at Home's financial information very
18 | soon indeed so it can proceed with its report.

19 | THE PRESIDENT: Yes.

20 | MR ROBERTSON: Sir, I think that is all I have got to say on issue
21 | three for the time being.

22 | THE PRESIDENT: Yes.

23 | MR ROBERTSON: On issues one and two, I think our position is exactly
24 | the same as Mr Thomson's.

25 | THE PRESIDENT: Yes.

26 | MR ROBERTSON: We do not have anything more to say to what we have put
27 | in writing.

28 | THE PRESIDENT: Both points have been very fully and helpfully argued
29 | by everybody.

30 | MR ROBERTSON: Yes.

31 | THE PRESIDENT: So at the appropriate moment we can deal with those two
32 | issues on the papers?

33 | MR ROBERTSON: Yes.

1 THE PRESIDENT: Yes. Very well. Yes, Mr Thomson, did you want to add
2 anything?

3 MR THOMSON: Can I just add two points. First of all, I am asked by the
4 OFT just to stress that we do not see this as a process of commercial
5 negotiation between the OFT and Genzyme but, rather, between Genzyme
6 and the NHS which we are seeking to approve, if necessary.

7 THE PRESIDENT: Yes.

8 MR THOMSON: And we do think that regardless of whether we agree it or
9 not, procedurally the best process will be for a direction from the
10 Tribunal in the end, which may take the form of a Consent Order or may
11 actually be a ruling on the merits.

12 THE PRESIDENT: I think at this stage of course in the case the
13 Tribunal has to bear in mind that any ruling -- well, two things:
14 first of all, that the Tribunal is, as it were, seized of the matter
15 so that even if, as we hope they will, the parties, without for the
16 moment distinguishing between the NHS and the OFT, but the parties we
17 have in front of us are the OFT and Genzyme -----

18 MR THOMSON: Yes.

19 THE PRESIDENT: ----- reach agreement is up to the Tribunal to say
20 whether that is an acceptable solution or not because there may or may
21 not be implications to the rest of the NHS, certainly our
22 implications, the rest of the case law on abuse of dominance and
23 market squeeze, so we have to keep one eye on the principles to be
24 applied from a legal point of view in cases of this kind.

25 So all I am saying is there is always a reservation from the
26 Tribunal's point of view as to what is the right direction to make,
27 even if it is agreed, as it were. That, I think, is the main thing and
28 although, secondly, you rightly point out that the principal parties
29 involved are the NHS and Genzyme, at the end of the day, in terms of
30 powers, it is the OFT and the Tribunal who have the power to sort it
31 out if it cannot be sorted out.

32 MR THOMSON: Indeed, but I think all I wished to stress was that this
33 is a true hybrid procedure because, in the end, even though

1 | it has been remitted to the OFT -----

2 | THE PRESIDENT: It has not actually been remitted.

3 | MR THOMSON: It may -----

4 | THE PRESIDENT: We have not made any order.

5 | MR THOMSON: In the sense that Mr Robertson put it, it remains a matter
6 | subject to the supervision of the Tribunal and we think it likely
7 | that, one way or the other, it will require a direction in the end.

8 | THE PRESIDENT: Yes.

9 | MR THOMSON: Can I just also say on the point of precedent, and I think
10 | it is a related point.

11 | THE PRESIDENT: Yes.

12 | MR THOMSON: It does seem to us that, in the end, the pricing of home
13 | care services will be a matter for commercial negotiation.

14 | THE PRESIDENT: Yes.

15 | MR THOMSON: One way or another.

16 | THE PRESIDENT: Yes.

17 | MR THOMSON: So it does seem to us the idea that this will create a
18 | precedent for what home care services cost in the market is perhaps a
19 | slightly artificial one.

20 | THE PRESIDENT: Yes.

21 | MR THOMSON: So simply to agree with the Tribunal's view from a
22 | slightly different angle.

23 | THE PRESIDENT: Yes.

24 | MR THOMSON: Those were the only two points I wanted to make.

25 | THE PRESIDENT: Thank you, Mr Thomson. Well now, Mr Burrows, how far
26 | are you and your clients abreast with what has been going on since we
27 | saw you in this case over a year ago now?

28 | MR BURROW: Yes. I think our understanding is patchy. To begin with, we
29 | do not have a copy of the Taylor Vinters letter of 26th May but I
30 | think I can probably offer a few comments by way of assistance.

31 | THE PRESIDENT: Yes. Thank you.

32 | MR BURROWS: Firstly, I think we do rile a little bit at the
33 | suggestions that possibly are being made that we have been part

1 of the problem rather than the solution. We were contacted on 22nd
2 April by the OFT and asked to provide this relevant information. By
3 10th May, we had agreed in principle to provide certainly the majority
4 of what was being sought.

5 THE PRESIDENT: Yes.

6 MR BURROWS: Subject to what we considered to be reasonable concerns as
7 to the imposition of an appropriate confidentiality regime. That
8 really is, I think, where the position is in substance today. For our
9 part we think that probably the most appropriate solution would be if
10 we can impose that via the Tribunal, so some form of undertaking I
11 think is the consensus on that issue.

12 THE PRESIDENT: Yes.

13 MR BURROWS: For our part, and I think this is the final point, we are
14 not entirely convinced that the Tribunal should be optimistic about
15 consensus being reached in respect of points of principle.

16 THE PRESIDENT: Yes.

17 MR BURROWS: I think we would just make one very short point which is,
18 going back to the judgment, we had understood that the negotiation
19 process would involve an invitation to, I am reading from 661 of the
20 judgment: "...Genzyme and the relevant NHS representatives and, as
21 necessary, individual home care service providers to see if a
22 negotiated solution can be reached."

23 THE PRESIDENT: Yes.

24 MR BURROWS: We clearly consider that some form of input from the
25 people who will actually be providing these services is perhaps both
26 essential and preferable. So I think that is probably all that we have
27 to comment at the moment.

28 THE PRESIDENT: Yes. Yes, Mr Robertson.

29 MR ROBERTSON: If I could just assist the Tribunal on one point in
30 relation to that last comment from Mr Burrows. As the Tribunal will
31 see from tab seven of our representations for this hearing -----

32 THE PRESIDENT: Yes, you wrote to everybody.

33 MR ROBERTSON: We wrote to them and we will be involving them in the

1 process once we have established the principle with the purchasers of
2 home care services which, again, of course is the NHS.

3 THE PRESIDENT: Except they are not purchasing them from you; they are
4 purchasing them from them.

5 MR ROBERTSON: Yes.

6 THE PRESIDENT: So it is a triangle I think, is it not?

7 MR ROBERTSON: Yes.

8 THE PRESIDENT: Yes, thank you. Was there another point?

9 MR ROBERTSON: Sir, I am reminded that we had suggested to the OFT that
10 they contact Health Care at Home for their input to involve them in
11 that triangle.

12 THE PRESIDENT: Yes.

13 MR ROBERTSON: So we have not sought to exclude home care service
14 providers from this exercise. We have positively sought to include
15 them.

16 THE PRESIDENT: Any settlement, if it is going to be a viable
17 settlement or direction, really ought to involve everybody who has an
18 interest in it.

19 MR ROBERTSON: Yes, and I endorse Mr Thomson's comment on that of a few
20 moments ago.

21 THE PRESIDENT: Yes, very well. If we just deal, first, with the
22 procedural issue of how any information is to be handled from a
23 confidential point of view, we are not that keen, in principle, on
24 confidentiality rings but I think probably in this case it might be an
25 appropriate solution if all three parties are asking us to do that.

26 The way it would normally work is that we have a list of defined
27 people to whom confidential, commercially confidential or sensitive
28 information is to be given and each of those people give a signed
29 personal undertaking to the Tribunal to maintain the confidentiality
30 of the information and not to pass it on in any unauthorised way.
31 There are models which most people in the room will be familiar with
32 in one way or another.

33 So the first practical issue is how we go about establishing

1 | that because somebody needs to draw an order, we need the names, we
2 | need the undertakings, all that has to happen. I think it is probably
3 | for you to take the lead in doing that, and "you" the OFT I mean, Mr
4 | Thomson.

5 | MR THOMSON: Yes, I do not think that is a problem. The OFT has had
6 | some experience of doing this in the past.

7 | THE PRESIDENT: The Claymore case is one that comes to mind as an
8 | example and Mrs Pope is familiar with that. The sooner that can be
9 | done, the better. Just in terms of the actual mechanics of drawing the
10 | documents and getting the signatures -----

11 | MR THOMSON: Yes. I am sure that can be done, if the principle is
12 | established that that is what is going to happen.

13 | THE PRESIDENT: It appears to be agreed, yes.

14 | MR THOMSON: I think the OFT can produce the list because I suspect
15 | that the issue is, really, who is going to be on the list.

16 | THE PRESIDENT: Yes. So can we just leave that to you to progress?
17 | Perhaps if we say within seven days you will provide us with a draft
18 | order and draft list of people and we can then make an order by
19 | consent setting up the necessary confidentiality ring?

20 | (Mr Thomson took instructions)

21 | MR THOMSON: I think the only problem is because of where we are in the
22 | year with the Bank Holiday etc, I think the question is whether people
23 | will actually be here. So if it could be Monday of the following week
24 | for that.

25 | THE PRESIDENT: Yes, Monday-week.

26 | MR THOMSON: I am grateful.

27 | THE PRESIDENT: Monday-week is what date? Monday-week is 7th June.

28 | MR THOMSON: I take it that is a draft for the approval of the
29 | Tribunal?

30 | THE PRESIDENT: Yes. You will need obviously, in the process of doing
31 | that, to obtain from Genzyme and Health Care at Home the names of the
32 | people that they want on the list.

33 | MR THOMSON: Yes.

1 THE PRESIDENT: And if there is any dispute, then we will settle it and
2 we will rule on it.

3 (Mr Thomson took instructions)

4 MR THOMSON: There is still some concern about the timing but I am
5 reluctant to push my luck.

6 THE PRESIDENT: I think we need to get on with it now because it has
7 got to be done.

8 MR THOMSON: I am grateful.

9 THE PRESIDENT: Sorry, Mr Robertson did you want to come back on that
10 point?

11 MR ROBERTSON: No.

12 THE PRESIDENT: I am assuming, so far as possible, that both Genzyme
13 and Health Care at Home will be able to be cooperative in the physical
14 process of setting up.

15 MR ROBERTSON: Yes.

16 MR BURROWS: Sir, may I just make one short comment?

17 THE PRESIDENT: Yes of course, Mr Burrows.

18 MR BURROWS: Again, we are slightly in the dark but we are concerned
19 that none of the -- proceeding, first, on the presumption that the
20 material and the names on the list will be the experts and the
21 external legal advisers -----

22 THE PRESIDENT: Yes.

23 MR BURROWS: ----- we are slightly concerned that particularly the
24 external experts should not be put in a difficult position where they
25 are continuing to conduct negotiations, essentially, with the
26 purchasers of the services because there seems to be two discrete
27 tasks within the process envisaged by the Tribunal.

28 THE PRESIDENT: Yes, good point.

29 MR BURROWS: The first, the preparation of the reports and the second,
30 the ongoing negotiations.

31 THE PRESIDENT: Yes.

32 MR BURROWS: Clearly HH would have concerns about where those experts
33 essentially knew the company's costs and, at the same time, were

1 carrying out negotiations with the purchasers of our product.

2 THE PRESIDENT: Yes.

3 MR BURROWS: I wonder whether we might give a little thought to that
4 issue.

5 THE PRESIDENT: Yes. We shall certainly give thought to that issue. Who
6 needs to see this information, Mr Robertson?

7 MR ROBERTSON: I think the list of people would be Genzyme's external
8 legal advisers; possibly but we will have to take instructions on
9 this, Miss McMorrow who has previously given confidentiality
10 undertakings to the Tribunal; the two external experts Professor
11 Appleyard and Professor Yarrow, they are not conducting negotiations
12 on behalf of Genzyme.

13 THE PRESIDENT: I have seen Professor Yarrow's name at least in the
14 certain meetings.

15 MR ROBERTSON: Yes. He is acting in the capacity of an expert and if
16 his undertaking means that he cannot act in meetings which are
17 effectively negotiations, then he will not take part in those
18 negotiations.

19 THE PRESIDENT: Yes. It is very much better, I think, in this sort of
20 situation that people who have this information do not thereafter
21 participate in the negotiating process.

22 MR ROBERTSON: If necessary, that should be made explicit in the
23 undertaking.

24 THE PRESIDENT: Yes. It may be that you need to think separately about
25 the position of Professor Appleyard who, as I understand it, has been
26 an expert particularly so-called and Professor Yarrow who has, as it
27 were, had a wider view of the case in general.

28 MR ROBERTSON: It has been confirmed to me that Professor Yarrow will
29 not be taking part in anything that can be described as a commercial
30 negotiation.

31 THE PRESIDENT: Yes. As far as Miss McMorrow is concerned, I am not
32 completely sure at the moment without having thought about it.

33 MR ROBERTSON: I think we need to think about it some more as well.

1 | If we do apply, then we will have to set out reasons and the Tribunal
2 | will have to adjudicate.

3 | THE PRESIDENT: Yes. I think this probably ought to be a very small
4 | circle of the external legal advisers and the professional experts.

5 | MR ROBERTSON: We will consider the point and if we wish to make an
6 | application for Miss McMorrow, then we will write to the Tribunal
7 | explaining why.

8 | THE PRESIDENT: Yes.

9 | (The Tribunal conferred)

10 | THE PRESIDENT: In the light of that, assuming that can be set up, does
11 | it appear at the moment that the working timetable -- which I think Mr
12 | Burrows may not have seen so we have to make allowances for that --
13 | which is set out in Taylor Vinters' letter of 26th May is a feasible
14 | one? What that says is that they would envisage that the OFT disposes
15 | what is called a draft report on Friday, 25th June; that there is a
16 | meeting between the experts by Friday 2nd July to either agree the
17 | report or identify areas of disagreement; that the matter should be
18 | reported back to the Tribunal by Friday, 9th July; that there should
19 | be a further report from Genzyme if there are points of difference by
20 | Friday, 16th July; and there should be a final hearing before the
21 | Tribunal on the first available date after 23rd July, the date for
22 | which we are invited to fix today.

23 | As a timetable, does that now appear to be a feasible framework?

24 | MR THOMSON: I am sorry to say that -----

25 | THE PRESIDENT: You were expressing doubts a bit earlier, Mr Thomson.

26 | MR THOMSON: Yes. There is a particular concern that emerged I think
27 | yesterday which was that Health Care at Home indicated that their
28 | input would not be available for three weeks.

29 | THE PRESIDENT: Yes.

30 | MR THOMSON: Which would really make that a very optimistic timetable
31 | if that cannot be improved on because it would mean we would not get
32 | Health Care at Home's, what could be quite significant information,
33 | until the middle of June or later. From that sort of start date, it

1 | looks like the timetable is a very optimistic one.

2 | I should perhaps say, just to close on the confidentiality
3 | regime, there is an issue about the scope of the information that is
4 | going to be provided.

5 | THE PRESIDENT: Yes.

6 | MR THOMSON: Our understanding is that it is the report itself rather
7 | than all the data provided by Health Care at Home that is the scope
8 | of what is intended to be shared, rather than that all Health Care at
9 | Home's commercial information should be shared.

10 | THE PRESIDENT: Yes.

11 | MR THOMSON: But I think it may be appropriate simply to clarify, since
12 | we are all before the Tribunal.

13 | THE PRESIDENT: That would sound right to me. If there was a dispute as
14 | to the accuracy of the figures, it would probably be unlikely, then we
15 | have to sort of think again, but in the first instance it is not the
16 | underlying workings, it is the result basically.

17 | MR THOMSON: Yes. I mean, there is a point made to some extent on
18 | behalf of Health Care at Home that the timetable, in a sense, is
19 | putting the matter back to Mr Burrows as to what the timetable is.
20 | Even if we had Health Care at Home's information on a shorter
21 | timetable, I think we would still think that is quite a tight regime
22 | and, on the basis of what we have been told so far, we really think it
23 | is an impossible one.

24 | THE PRESIDENT: I think it might be useful at this point for the
25 | Tribunal just to say -- before I come back to you, Mr Burrows -- a
26 | little bit about the nature of the exercise that this all involves. As
27 | we have said in our judgment, I think what we referred to as the
28 | "average costs of home care" is a starting point and it is one element
29 | in the situation. However, if what we are here considering is some
30 | kind of ex-manufacturer price which one can loosely describe as a
31 | "market opening price", what sort of price one would need to offer in
32 | order to make it viable for independent home care providers to operate
33 | in this market.

1 It seems to us at the moment that it is not just a question of
2 cost. The question of what would be an appropriate margin needs to
3 take account also of historical information, of which we already have
4 quite a lot in our papers, about how people have seen the costs at
5 various stages, that includes the 1999 information to The Department
6 of Health, the Dixon Wilson report and Mr Williams's evidence to name
7 but three, as well as other past arrangements which may have changed,
8 there may have been other developments, but those are all part of the
9 factual matrix of understanding how this market works or should work.

10 The other important factor, so it seems to us, of which we are
11 somewhat in the dark about at the moment, is what sort of margin an
12 independent home care service provider customarily works on because if
13 this sector, this market is to be opened, it is no use inviting
14 someone to enter it if you are not going to earn a margin equivalent
15 to or similar to or, in some way related to, the margin he earns in
16 parallel sectors where competitive conditions prevail.

17 So we need to know, I think, a bit more about how margins
18 generally work in this part of the industry in order to say what is an
19 appropriate margin in this particular case.

20 From the Tribunal's point of view at the moment, we would be
21 somewhat reluctant, we would need quite a bit of persuading to go down
22 the road of a detailed look at very complex accounting issues. We
23 would be much more inclined to be looking at the matter from the point
24 of view of commercial reality faced by an undertaking who wishes to
25 enter this particular activity.

26 Now that may have some bearing on how much information you need
27 from Health Care at Home and what sort of information you need. We do
28 not know so far what was asked for, but certainly the sort of margin
29 that is customarily earned in other areas, a number of which Genzyme
30 drew our attention to in the course of the hearings, haemophilia and
31 so forth, is, at least by way of background, of some possible
32 relevance.

33 Now, are you able, perhaps Mr Thomson or perhaps Mr Burrows, to

1 | inform us a little more as to the sort of information you have been
2 | seeking from Health Care at Home without going into anything
3 | confidential?

4 | (Mr Thomson took instructions)

5 | THE PRESIDENT: Yes, Mr Thomson.

6 | MR THOMSON: Yes. I have not been party to any of these discussions and
7 | I have only got limited information.

8 | THE PRESIDENT: Yes.

9 | MR THOMSON: As I understand it, the OFT were not shocked or amazed by
10 | the observations that you have just made and -----

11 | THE PRESIDENT: I am relieved to hear that.

12 | MR THOMSON: ----- and the discussions have been on a broader basis
13 | than purely questions of costs and have looked more also at the
14 | commercial reality of how prices are established and margins are
15 | negotiated in this particular industry.

16 | THE PRESIDENT: Yes.

17 | MR THOMSON: So I think that is part of what is being discussed and I
18 | think they have also been looking at the costs structure.

19 | THE PRESIDENT: Yes, the costs structure is one part.

20 | MR THOMSON: And obviously what feeds in and what a realistic sort of
21 | profit element is built in, given the costs of the associated
22 | industry. I think those issues have all been addressed and the wider
23 | commercial context, as I understand it.

24 | THE PRESIDENT: Yes. I mean, I know one is asking for further help from
25 | Health Care at Home but it still seems to us -- I am not quite sure,
26 | perhaps Mr Burrows, if I could look across to you, what is it that is
27 | going to take a lot of time for your clients to produce, bearing in
28 | mind that it is still very much I hope in their interests to see this
29 | thing through, having got this far?

30 | MR BURROWS: Yes. Sir, I was glad that Mr Thomson's clients were not
31 | shocked or surprised at the points that we have been making in
32 | correspondence to them over the last few weeks in terms of a market
33 | opening price.

1 THE PRESIDENT: Yes.

2 MR BURROWS: I have actually got the letter in front of me which makes
3 the request of the information that we have been asked to provide. One
4 of the reasons as I understand it -- I was not at the meeting
5 yesterday, but the reasons for the time required to produce this is
6 that it is actually quite detailed indeed. I have only got one copy of
7 the letter. I do not know whether it would be helpful to pass it up.

8 THE PRESIDENT: It sounds to me as if it might well be helpful.

9 MR BURROWS: Yes.

10 THE PRESIDENT: This is not something that Genzyme has seen, I suppose,
11 is it?

12 MR ROBERTSON: No.

13 MR BURROWS: I do not believe so. Do you have a spare? I have not seen
14 the submission in the bundles so -----

15 MR THOMSON: What is the date of the letter?

16 MR BURROWS: Twenty-second April.

17 THE PRESIDENT: Do you want us to rise for a few moments while -----

18 MR THOMSON: It is actually in the OFT bundle at pages 70 and 71.

19 THE PRESIDENT: I am sorry. Forgive me, Mr Thomson. At?

20 MR THOMSON: It is a letter starting on page 69 and then it has a
21 schedule on page 71.

22 THE PRESIDENT: Sorry, a schedule at page?

23 MR THOMSON: It is an informal request dated 22nd April on page 71. I
24 think it is particularly the third paragraph which goes to a wider
25 scope, although it is fair to say that the first two are focused on
26 costs as a matter of meeting the requirements of addressing Professor
27 Appleyard's report.

28 (Pause)

29 MR THOMSON: I understand that in addition to this there has been a
30 meeting and, as I think Mr Burrows has indicated, Health Care at Home
31 has raised wider issues already.

32 THE PRESIDENT: Yes.

33 MR THOMSON: I think there is some of that in the correspondence that

1 comes after this in the bundle.

2 THE PRESIDENT: Yes.

3 MR THOMSON: And obviously any further discussions will take account of
4 the indications from the Tribunal.

5 (Pause)

6 THE PRESIDENT: Yes. It is one of those situations in which the public
7 authority, very understandably, wants to have as much information as
8 possible; the provider of the information wants to provide something
9 useful but not to have to go over the top in the detail. One is
10 looking for some intermediate solution that does not involve an
11 unreasonable amount of work while giving everybody what they need to
12 have.

13 (The Tribunal conferred)

14 THE PRESIDENT: Mr Burrows, we have actually got the information, as
15 you have gathered from the discussion, or the request for the
16 information. What is it, as far as you know, that is going to take the
17 time or cause the trouble in all this? Is it the fact you have to go
18 back a long way or that it is difficult to find it or you have not got
19 it? What is it exactly, do you happen to know?

20 MR BURROWS: Yes. I mean, I have not taken instructions specifically on
21 that point. I do not think that it is so much the historical nature of
22 the information.

23 THE PRESIDENT: Yes.

24 MR BURROWS: I think that, as you can see from the request, it not only
25 involves finding and producing this information, but also an exercise
26 in attribution of costs across the business.

27 THE PRESIDENT: Yes.

28 MR BURROWS: It is not simply handing over material, which is why I
29 think a not unreasonable estimate was given to the OFT I understand at
30 the meeting yesterday of some three weeks. I think we had originally
31 said four but we then asked, in the end, for three.

32 Insofar as I understand it, no objection is taken to doing the
33 exercise in principle in respect of the years ending 2000 to 2002.

1 We have had an issue arise in respect of 2003 which I think was
2 touched upon yesterday and I hope satisfactorily. It is more just a
3 question of time.

4 THE PRESIDENT: Yes.

5 MR BURROWS: If it helps the Tribunal, the three weeks from yesterday,
6 by my ready reckoning, expires on 16th June which would then, on the
7 timetable in the Taylor Vinters letter, only give the OFT some nine
8 days until 25th June.

9 THE PRESIDENT: Yes. It is a bit difficult I suppose, Mr Thomson, to
10 say how much time you are going to need once you have got all this
11 stuff.

12 MR THOMSON: I have to say that the indications that I have been given
13 is that if three weeks is really when, as it were, the starting date
14 is for processing the information, then even our suggestion of 9th
15 July is looking optimistic which is, however regrettable, what I am
16 being told.

17 THE PRESIDENT: Let us just see how we go. 16th June would give us four
18 weeks until -- four weeks would take us to 14th July. (Pause) I am
19 very anxious not to lose the momentum on this, Mr Robertson.

20 MR ROBERTSON: If it assists, our view on this is that it is better it
21 is done thoroughly. We would be losing momentum if the parties were
22 going to have to come back to the Tribunal to apply for directions for
23 further disclosure of documents, further information. So if Health
24 Care at Home say they need three weeks, and I can understand in that
25 context and I can understand the OFT will need time properly to
26 analyse it, then so be it. But we would just emphasise that it has got
27 to be done thoroughly so we do not find ourselves derailed again by
28 having to go back and apply for, as I say, underlining documents.
29 That is why the report should be as full as possible as well, so that
30 our experts can understand it.

31 Obviously I appreciate what the Tribunal has said about the
32 confidentiality extending to the report and not to underlying
33 documents. Obviously the report will have to be full so that

1 somebody reading it understands it and does not have to go back to
2 underlying documents to understand how the things have been arrived
3 at.

4 THE PRESIDENT: Yes.

5 (Pause)

6 MR BURROWS: Sir, just one short point.

7 THE PRESIDENT: I am sorry, Mr Burrows.

8 MR BURROWS: Perhaps a point for Mr Thomson, but I am not at the moment
9 clear as to what other steps the OFT are planning to take. At the
10 moment, again the debate seems to be shifting towards merely an
11 analysis of HH's costs and some sort of report produced on that basis.
12 Now, I am not sure if that is the case and perhaps that issue might be
13 usefully clarified because, again, if, as we had understood, there
14 would be utility in them talking to other home care providers to
15 establish, as we say, a market opening price rather than that at which
16 HH might be able to supply, then perhaps a little further time might
17 be useful to that end as well.

18 THE PRESIDENT: We are certainly interested at this point in having as
19 much information as possible from as many quarters as is convenient to
20 get a good feel for this issue. In some ways I think, Mr Burrows, at
21 this stage what would help the Tribunal is not just that HH, as it
22 were, sends information to the OFT but that HH itself gives some
23 thought to some of the issues of principle we have been canvassing
24 this morning in order to arrive at a position of what it says the
25 right approach is to this sort of exercise. By that means, we have
26 perhaps a slightly more balanced view of the problem we have to
27 resolve.

28 MR BURROWS: Yes, sir. I do not have the benefit of the bundle before
29 me. You may have a copy of the letter from us which floats some
30 earlier points of principle in that regard.

31 THE PRESIDENT: Yes.

32 MR BURROWS: Which I think is a letter in early May, 10th May perhaps.

33 THE PRESIDENT: Yes.

1 MR BURROWS: But we shall certainly give some additional thought to
2 that.

3 (The Tribunal conferred)

4 MR THOMSON: I should perhaps add that I am being told that we are not
5 simply waiting for Health Care at Home but we are actually in contact
6 with other home care service providers so that process can go forward
7 as well.

8 THE PRESIDENT: That is something we would be glad to have some
9 information about.

10 MR THOMSON: I am grateful. I do not have any detail on that, I am
11 afraid.

12 (The Tribunal conferred)

13 THE PRESIDENT: On the question of the timetable, the way our minds are
14 working at the moment is to assume that Health Care at Home is able to
15 supply the OFT with the information the OFT needs within three weeks,
16 which I think was 9th June. Was that the 9th or the 16th?

17 MR ROBERTSON: The 16th.

18 THE PRESIDENT: The 16th. If we were to invite the OFT to produce for
19 us a report on the state of its progress by, say, four weeks after
20 that, that is 14th July, we would then propose to put a date in the
21 Tribunal's diary for this case at some point in the last week of July.
22 We would have to work out what the exact date will be when we have had
23 a chance to coordinate our diaries, but I would have thought we could
24 say probably provisionally Thursday, 29th July. That will need to be
25 confirmed.

26 We will use that date for whatever is appropriate at the time,
27 which might be to have a further discussion of where we are with a
28 view to settling a hearing perhaps early in September to resolve any
29 outstanding issues; which might be to sorting out some issues or
30 giving some indications on some remaining points that would help the
31 parties to resolve them, or something. But we would expect to see
32 everybody back in the last week of July in order to have a discussion
33 about where the case has got to by then, and to sort out as much as

1 | we can as to where it would go from there onwards.

2 | How does that strike you, Mr Robertson?

3 | MR ROBERTSON: That is perfectly acceptable.

4 | THE PRESIDENT: Yes.

5 | MR THOMSON: For what it is worth, we were thinking very much along the
6 | same lines on this side of the room.

7 | THE PRESIDENT: Right. That means we are having a slightly less
8 | detailed schemer than the one set out in the recent letter from Taylor
9 | Vinters, but it comes to very much the same thing.

10 | MR ROBERTSON: I think in the light of what Health Care at Home have
11 | said, that obviously does vary from what we have put out in writing
12 | yesterday.

13 | THE PRESIDENT: Yes. How does that strike you insofar as you have got a
14 | first reaction, Mr Burrows?

15 | MR BURROWS: I think, from the point of view of my clients, that seems
16 | very sensible. I am personally in difficulties for that week because I
17 | will be on honeymoon.

18 | THE PRESIDENT: How delightful.

19 | MR BURROWS: So I would not expect it to be moved.

20 | THE PRESIDENT: Many congratulations from all of us.

21 | MR BURROWS: Thank you.

22 | THE PRESIDENT: Very well. Let us work to a timetable along those
23 | lines. Is there anything else we can usefully do today?

24 | MR ROBERTSON: Genzyme has got nothing to suggest.

25 | (The Tribunal conferred)

26 | THE PRESIDENT: Yes, Mr Thomson.

27 | MR THOMSON: Reverting to the issue of costs and appeal, I take it that
28 | will wait until this exercise is over?

29 | THE PRESIDENT: To some extent, we are in the parties' hands on this. I
30 | do not know whether you say there is any particular urgency in
31 | deciding either of those issues, but my sense is that while this
32 | period of negotiation is continuing and as long as it has some
33 | reasonable prospect of success, it is probably better to park those

1 | points until we see where we are. But I am open to submissions.

2 | MR THOMSON: I was not pressing -- it was simply a point of information
3 | in terms of whatever goes into whatever order is to be made at the end
4 | of this hearing but, as I understand it, those issues are, as it
5 | were, parked until this one is resolved.

6 | THE PRESIDENT: In practical terms, I think unless somebody is inviting
7 | us to rule before, our preference at the moment would be to rule on
8 | those issues after we are further ahead with this aspect of the case.

9 | MR ROBERTSON: We are perfectly happy with that approach.

10 | MR THOMSON: We are content. I am grateful.

11 | THE PRESIDENT: Yes. Very well. The Tribunal, I am just reminded
12 | rightly by Mr Mather to say that we are obviously ourselves spending
13 | the time thinking about what the right approach to the solution in
14 | this case is. We are not just sitting back waiting for the parties to,
15 | as it were, serve us up on a plate something which is how they see it.
16 | So far as we need to keep you in touch as to how our thinking is
17 | evolving, we will keep in touch with you. There are obviously a number
18 | of important issues we need to bear in mind.

19 | Very well. I think that is probably it. Yes, thank you very much
20 | indeed.

21 | (Adjourned at 11.05 p.m.)

22 | - - - - -