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IN THE COMPETITION
APPEAL TRIBUNAL

Case No. 1016/1/1/03

Victoria House,
Bloomsbury Place,
London WC1A 2EB

29 September 2005

Before:
SIR CHRISTOPHER BELLAMY
(The President)
PROFESSOR PETER GRINYER
MR. GRAHAM MATHER

Sitting as a Tribunal in England and Wales

BETWEEN:

GENZYME LIMITED

Appellant

and

THE OFFICE OF FAIR TRADING

Respondent

Supported by

HEALTHCARE AT HOME

Intervener

Mr. Aidan Robertson (instructed by Taylor Vinters) appeared for the Appellant.

Mr. Rhodri Thompson QC and Mr. Jon Turner (instructed by the Treasury Solicitor) appeared for the Respondents.

Mr. Euan Burrows (of Ashurst) appeared for the Intervener.

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**PROCEEDINGS AFTER
JUDGMENT HANDED DOWN**

1 THE PRESIDENT: For the reasons given in the Judgment which the Tribunal is handing down
2 today we propose to make a Direction to the effect that:

3 “Genzyme shall supply Cerezyme (and so far as relevant Ceredase) to any bona fide
4 provider of Homecare Services at a drug-only price exclusive of any charge in respect
5 of any element of Homecare Services, at a discount from the prevailing NHS List
6 Price for such drugs from time to time of not less than 20 pence per unit.”

7 That being the Tribunal’s Judgment there are various matters that we still need to deal with.
8 Perhaps I could say first of all that, as is normal in these cases, there are two versions of the
9 Judgment, one is the confidential version which remains confidential on the normal terms; the
10 other is a non-confidential version that will be published on the website. In the non-
11 confidential version we have, I hope, dealt with all the points made about confidentiality that
12 the parties have raised.

13 You will also see on the website on this occasion a short version of the non-
14 confidential Judgment. The short version is identical to the longer version but omits sections
15 3 – 8 inclusive, which are the long background sections, with a view to creating a more user
16 friendly and shorter version of the Judgment that can be used more conveniently in the hope
17 that that will improve matters from the user’s point of view – the shorter version of the
18 Judgment is, as I say, identical, and it is just as authoritative as the long version, but the long
19 version contains the background.

20 That, subject to any points that arise, leaves us – as far as we are concerned – with the
21 following four issues: First, the actual wording of the Direction. Secondly, there is the
22 question of costs. On the question of costs the position is that we had submissions some time
23 ago on 25th March and 5th April 2004 as regards the OFT’s and Genzyme’s costs in the main
24 proceedings, and at the Case Management Conference on 27th May 2004 we left those issues
25 over until this part of the case had been decided. Clearly, a certain amount of water has gone
26 under the bridge since then, and we also have the intervention of Healthcare at Home. So, as
27 far as we are aware that is the situation on costs.

28 Thirdly, there is Genzyme’s outstanding application for permission to appeal in
29 relation to which we had some written submissions on 13th April 2004 and 29th April 2004.
30 Fourthly, there is in the back of our minds the issue of the new company, Careology, and
31 whether there are any remaining issues in this case in which we ought to hear Careology on
32 any particular point. It is not completely obvious to me that there are such issues but I think it
33 is appropriate to raise that question. So those being the outstanding issues, from the Tribunal’s
34 point of view I am not completely sure that we can necessarily resolve everything today. It
35 may well be that we shall need one more occasion in which we try and deal with everything

1 that is outstanding. But let me just see now from the parties how you see these “mopping up”
2 operations – if I can call them that. Mr. Robertson and Mr. Thompson?

3 MR. ROBERTSON: Perhaps if I could just deal briefly with each of those issues so that the
4 Tribunal knows our position.

5 THE PRESIDENT: Yes, thank you.

6 MR. ROBERTSON: As regards the wording of the actual Direction we are content with it save as to
7 one point, and it is really just a clarification and concerns the reference to “Ceredase”. We do
8 not think it is necessary to include a reference to Ceredase. As we said in the Notice of Appeal
9 – and I have checked this morning and the position remains the same – there is only one
10 patient being treated with Ceredase who receives infusions at the Royal Free Hospital.

11 THE PRESIDENT: So there is no issue about him?

12 MR. ROBERTSON: I do not know whether it is a “him” or a “her”. So I think you can cross out
13 Ceredase.

14 The position in relation to costs: we submit that the appropriate course is for the
15 Tribunal to invite written submissions as to costs as it did following the previous Judgment in
16 this case. In that case I think the OFT were given 14 days and we were given a further 14 to
17 respond. I suggest that would be a sensible course to adopt today.

18 Thirdly, as regards our outstanding application for permission to appeal, obviously we
19 have a month in which to apply for permission to appeal if so advised. No decision has been
20 taken in relation to that, it is obviously a matter that Genzyme Ltd. will need to discuss with its
21 US parent, and obviously it has not been able to do so far. But we would inform the Tribunal
22 of our position in relation to the existing application for permission to appeal and any further
23 application for permission to appeal as soon as a decision has been taken.

24 Fourthly, as regards Careology, we do not see that any further issue does arise
25 relevant to this Appeal as to the position of Careology which is now an independently owned
26 and operated care services provider.

27 THE PRESIDENT: Yes. The only point I just mention on the direction, Mr. Robertson, is that the
28 OFT has raised one query as to the question of the “modification” of the Direction within three
29 years as distinct from its “revocation”, and we were proposing just to insert in para.3.2 before
30 the word “revoked” in line two the words “modified or”, to make it clear that either a
31 modification or a revocation formally needs the permission of the Tribunal for three years.

32 MR. ROBERTSON: I will just check with my instructing solicitor.

33 THE PRESIDENT: It is a pure formality, but it is protection I think for both parties.

34 MR. ROBERTSON: Yes, we are perfectly happy with that.

35 THE PRESIDENT: Yes, thank you very much.

1 MR. THOMPSON: On the issue of the Direction the indication from the Tribunal is a helpful one
2 and, I think, gives some significant reassurance to the OFT. The question of in what precise
3 circumstances a modification or a revocation might merge into one another was obviously one
4 that we were thinking about in terms of a radical change to 2 or 4, and the indication at
5 para.246 of the Judgment about possible changes in funding, but I think that amendment
6 addresses that possible area of concern.

7 THE PRESIDENT: Yes.

8 MR. THOMPSON: In terms of costs, the Tribunal obviously has our submissions in relation to the
9 earlier stages and we see no reason to change or modify them. We are obviously concerned in
10 general terms that this matter should now finally come to an end and so – were the Tribunal
11 minded to address that issue today – we would be very happy to push forward and encourage
12 the Tribunal to do so, but if it is necessary to delay that for the purposes of a Ruling then so be
13 it.

14 THE PRESIDENT: Well, we have your submissions as regards the situation up until 25th March
15 2004, and we are now, for whatever reason, on 29th September 2005 and there have been some
16 costs in the meantime.

17 MR. THOMPSON: Indeed. We have fairly robust views about the costs since then, and we take
18 some comfort in those views from some of the remarks made in the Tribunal's Judgment of
19 today, in particular I think para.8 and paras. 212 – 215. The OFT's general view is that there
20 have been endless changes of position, in fact, going back before March 2004 – you will recall
21 going right back to 1999 – and that the speed of change has only accelerated since March
22 2004, and has caused a great deal of delay and confusion. Therefore, the OFT's position will
23 be that it should be entitled to its litigation costs since the date of the Judgment in March 2004,
24 but not for the costs of the various reports that in particular Mrs. Pope and her assistants and
25 colleagues have had to undertake in the exercise of the OFT's role as competition regulator.

26 THE PRESIDENT: You are not seeking those costs?

27 MR. THOMPSON: We are not seeking those costs, but we will be seeking the litigation costs, so for
28 example the costs of counsel and the legal team at the OFT and the Treasury Solicitor, in
29 relation to the litigation. If the Tribunal were minded to deal with it in a summary manner
30 today we consider that the facts are rather extraordinary and extreme and could be dealt with
31 straight away, but obviously if the Tribunal wishes to follow what I think is its usual practice
32 of inviting written submissions on either side then we will obviously put in written
33 submissions and would be happy to operate on a relatively short time scale, because I think we
34 have given an indication of what we will be saying.

1 THE PRESIDENT: I think there are three possible ways of doing this, subject to what my
2 colleagues think. One is that you simply put in written submissions and there are written
3 submissions in reply in the normal way. The second is that you make oral submissions today
4 and we allow Genzyme to reply in writing if they persuade us they are not in a position to reply
5 today. The third situation is that we simply hear both sides' oral submissions. We will not
6 rule today because we have to go back and refresh our memory on what happened before.
7 Having said that, of course, a complication is – and I think Mr. Burrows is just beginning to get
8 to his feet – that we have Healthcare at Home as well and we need to consider what their
9 position is, and we would probably wish to deal with costs altogether rather than bit by bit.
10 Having said that, it is probably going to be easier to do it in writing. Do you have a position,
11 Mr. Burrows?

12 MR. BURROWS: We are ready to deal with them today, but I can see the sense in putting them
13 back. I think the reason for that is that we take a slightly different view as to whether or not the
14 costs incurred in connection with the reports were part of these proceedings and you have
15 jurisdiction to make an order.

16 THE PRESIDENT: Well there is an issue there, I think.

17 MR. BURROWS: Exactly and that might be an issue that would be best dealt with in writing, so I
18 think that is our position.

19 THE PRESIDENT: Just let me have a quick word with my colleagues.

20 (The Tribunal confer)

21 THE PRESIDENT: Mr. Thompson, we do think we ought to deal with this in writing, if we may.

22 MR. THOMPSON: I suspected that might be the position and I think, given the issue on permission
23 to appeal where for whatever reason there is a month window under the rules, it may be that
24 there is no particular loss in terms of expedition because of that feature of this jurisdiction.

25 In terms of permission to appeal, again you have our submissions in relation to the
26 main body of the Appeal. As we understand it Genzyme is entitled to bring an Appeal in
27 relation to the remedy. We would expect that to be limited to the remedy and not to be any
28 opportunity to reopen or amend any earlier Notice of Appeal in relation to permission to
29 appeal, although obviously the size of the remedy and the event since March 2004 on both
30 sides will no doubt be taken into account by the Tribunal and possibly the Court of Appeal as
31 to whether or not this Appeal has much juice left in it from a practical point of view. No doubt
32 Genzyme will say it has a great deal of juice but the OFT may well say that it has not. So I
33 think that is just by way of indication on permission to appeal.

34 In relation to confidentiality I understand that has been sorted out. I think the only
35 other issue is the fine, and the question of interest which you may recall we made submissions

1 about in the same submissions as in relation to costs. Our understanding is that the fine has not
2 been paid and that interest has been accumulating. We have not pressed that issue at the
3 moment, but our understanding under the Act and under the Appeal Rules is that there is no
4 reason for the payment of the fine to be stayed pending any Appeal, and so I think the issue of
5 the quantum of the interest and the payment of the fine is something which is still live and the
6 OFT sees no reason why the fine should not be paid. The general position under the White
7 Book in relation to an Appeal to the Court of Appeal is that that is a matter within your
8 jurisdiction as the lower court, but there is no automatic stay. So it seems to me that that is a
9 matter that should be at least considered by the Tribunal and no doubt Genzyme will have
10 views about what should be done. But from the OFT's point of view this is a matter that has
11 dragged on for a long time, and we see no reason why the fine should not be paid.

12 THE PRESIDENT: Yes, thank you. Yes, Mr. Burrows, do you have any further observations apart
13 from costs? You would like to deal with costs in writing – is there any other point that you
14 wanted to make?

15 MR. BURROWS: In respect of the four points that you noted at the outset, no, Sir.

16 THE PRESIDENT: Thank you. If we go through those one by one, I would have thought that if
17 there are applications for costs or further development of existing applications, probably 14
18 days to the OFT and Healthcare at Home, and 14 days for Genzyme to reply. When we are
19 dealing with costs we will want to deal with the interim measures case as well as the present
20 Appeal. It is rather unlikely that we shall need a specific hearing on costs I think, so as at
21 present advised we will deal with costs in writing.

22 As far as the Direction is concerned, I take it that, subject to the points that we have
23 discussed already this morning concerning the Direction, there are no further points arising on
24 the Direction, and the Direction can therefore be incorporated in an Order of the Tribunal as
25 soon as convenient.

26 As far as any application for permission to appeal is concerned, or the pursuit of the
27 existing application for permission to Appeal, my personal initial reaction, Mr. Robertson, to
28 Mr. Thompson's submissions is that he is probably right, but on the substance you may very
29 well be pinned to your existing framework, although you are probably entitled to time to
30 appeal on the remedy if that is what you seek, and both sides are probably entitled to draw to
31 our attention matters that have happened since the existing application which may affect our
32 discretion on whether to grant permission. That is how one would analyse it at first sight. So
33 you have your 28 days to consider the position – or one month, I think it is.

34 Careology – nobody seems to think that there is any need for us to involve Careology
35 at the moment. We have, I think, written to the registered office of the company to inform

1 them of the proceedings and so it is very much up to Careology if they wish to play any part in
2 these proceedings.

3 As regards interest and payment of the fine, two points arise. One – I shall need to be
4 reminded, if I may, is there any outstanding dispute between the parties as to the rate of interest
5 that is payable, because I think the Tribunal has more or less evolved a standard rate of
6 interest. I have just been handed Genzyme’s submissions of 5th April 2003, para.34 of which
7 says:

8 “Genzyme does not dispute the OFT’s contention at paragraph 4 of its costs and
9 interest submission that interest should be payable on the penalty as from 27th June
10 2003, the date on which the penalty would have been payable under the OFT
11 Decision. Genzyme has already been in contact with the Treasury Solicitor to make
12 arrangements for payment of the penalty”

13 which would suggest to me that there is no dispute about the actual rate of interest which
14 would fall to be payable at first sight from 27th June, and as far as actual payment of the fine is
15 concerned, I do not think it falls to the Tribunal to make any particular order, it is for the OFT
16 to collect the money, is it not – Mr. Robertson?

17 MR. ROBERTSON: I think that is correct. On the actual rate of interest, you will see from
18 para.33 ----

19 THE PRESIDENT: Yes.

20 MR. ROBERTSON: I do not think that is in dispute.

21 THE PRESIDENT: The Bank Rate plus 1 per cent.?

22 MR. ROBERTSON: Yes. As to arrangements for payment of the penalty, I think it is a matter to be
23 resolved between Genzyme and the OFT. I think within Genzyme there may be a decision to
24 be taken as to the attitude it takes to that, dependent upon whether it makes an application for
25 permission to appeal this Judgment or whether it withdraws its existing application for
26 permission to appeal, but that is something that we can resolve – well with my learned friend it
27 has to be resolved in a month and it should be resolved a good deal earlier than that.

28 THE PRESIDENT: I am just checking, while we are on it, what is the effect of the Appeal on the
29 obligation to pay?

30 MR. THOMPSON: I do not know if we can assist on this, we did look at it briefly this morning?

31 THE PRESIDENT: Yes, thank you, Mr. Thompson.

32 MR. THOMPSON: There is a provision in the Competition Act itself which says that bringing an
33 Appeal to this Tribunal ----

34 THE PRESIDENT: That is what I am searching for.

35 MR. THOMPSON: It is s.46(4). It is drafted rather back to front. It says:

1 “Except in the case of an Appeal against the imposition, or the amount, of penalty,
2 the making of an Appeal under this section does not suspend the effect of a Decision
3 to which the Appeal relates.”

4 As far as I can see that simply implies that if it is an Appeal against a fine it does operate as a
5 stay, but the equivalent provision in relation to Appeals to the Court of Appeal is at 49.

6 THE PRESIDENT: Yes.

7 MR. THOMPSON: The appropriate court, as I understand it, is the Court of Appeal.

8 THE PRESIDENT: Yes.

9 MR. THOMPSON: And there is no equivalent provision there. Then if one looks at the White
10 Book, which I do not know if you have available?

11 THE PRESIDENT: Yes, we do.

12 MR. THOMPSON: As I understand it, the general rule on appeals is p.1470 of the 2005 White
13 Book.

14 “52.7 Unless —

15 (a) The Appeal Court or the lower court orders otherwise
16 an Appeal shall not operate as a stay of any order or decision of the lower
17 court.”

18 That is what we understand to be the governing provision unless we have missed a some more
19 specific rule, but that appears to be the general position, so that formally it is correct that the
20 fine remains payable and accruing of interest. As I understand it, there is the slightly curious
21 position that Mr. Robertson is not deciding yet whether or not to apply for a stay, which I
22 suppose means that the OFT could enforce tomorrow, but that may or may not be practical if
23 they are liable to seek leave to appeal and then seek a stay. I am not quite sure what Mr.
24 Robertson is saying on that. I think there has been a sort of *de facto* truce pending today’s
25 hearing, but it might be better to clear the position at least pending the decision on permission
26 to appeal. It may be enough if the OFT indicates that the truce can continue for another month
27 until the decision is taken by Genzyme what it wants to do about the Appeal.

28 MR. ROBERTSON: Yes, Genzyme would certainly like to take up that offer of another month’s
29 truce; we think we can resolve it that way.

30 THE PRESIDENT: Yes, that is probably sensible. I would have thought, strictly speaking, Mr.
31 Thompson, if I go back to s.46(4), one might think at first sight that the suspensive effect of the
32 Appeal against penalty formally speaking came to an end when we gave our Judgment on 11th
33 March 2004, it is no longer an Appeal against penalty after that date, we are simply concerned
34 with the remedy. However, there was (and still is) outstanding an application for permission to
35 appeal against penalty and I am not sure that anyone has formally addressed their minds to the

1 question as to whether the payment of the penalty should, in formal terms, be stayed until the
2 application for permission to appeal has been dealt with, which would be the first stage. The
3 next stage would be whether there would be a stay pending the hearing of that Appeal from the
4 Tribunal or from the Court of Appeal, so it has been left vague, but I would have thought if we
5 simply record your indication that the OFT does not take any steps to enforce the payment of
6 the penalty until one month from today's date, that will – in an informal way – simply clarify
7 where everybody is.

8 MR. THOMPSON: I think that is the most practical thing.

9 THE PRESIDENT: Interest is still running so you are protected.

10 MR. THOMPSON: Indeed, rather than take up time today worrying about the precise position on a
11 stay, I think that is likely to be the most practical solution and probably the national funds will
12 survive another month.

13 THE PRESIDENT: The Exchequer might stagger on another month without this! So we will leave
14 it like that and it will then be up to you to enforce it or up to them to seek a stay if they want to.

15 MR. THOMPSON: I think that is likely to be the most convenient course, yes, Sir.

16 THE PRESIDENT: Very well. We will deal with costs in writing and that just leaves outstanding
17 the question of whether there is going to be an active application for permission to appeal or
18 not.

19 Unless there is anything else I think that does deal with matters today. Thank you all
20 very much for your help in this long running case.

21 (The hearing concluded at 11 a.m.)