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IN THE COMPETITION  
APPEAL TRIBUNAL

Case No. 1029/5/7/04

Victoria House,  
Bloomsbury Place,  
London WC1A 2EB

14 January 2005

Before:

MARION SIMMONS QC  
(Chairman)

Sitting as a Tribunal in England and Wales

BETWEEN:

DEANS FOODS LIMITED

Claimant

and

ROCHE PRODUCTS LIMITED & OTHERS

Defendants

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Transcript of the Shorthand notes of  
Beverley F. Nunnery & Co.  
Official Shorthand Writers and Tape Transcribers  
Quality House, Quality Court, Chancery Lane, London WC2A 1HP  
Tel: 020 7831 5627 Fax: 020 7831 7737

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Mr. Fergus Randolph (instructed by Taylor Vinters) appeared for the Claimant.

Mr. Mark Hoskins (instructed by Freshfields Bruckhaus Deringer) appeared for the Second Defendant.

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**CASE MANAGEMENT CONFERENCE**

1 MR. RANDOLPH: Madam, good afternoon. May I say, first of all, how grateful we certainly are, and  
2 I am sure my learned friend is as well, that the Tribunal was able to sit so promptly and indeed  
3 during the course of the week at this late hour. We are very grateful for that.

4 THE CHAIRMAN: I am sorry we have had to do it at this late hour but, as you know, I have had other  
5 judicial commitments.

6 MR. RANDOLPH: Indeed, madam. We are very grateful. I hope, madam, that you have received my  
7 suggested reading list. Obviously I hope you have received the application.

8 THE CHAIRMAN: Of reading material?

9 MR. RANDOLPH: Yes, and my learned friend's skeleton argument.

10 THE CHAIRMAN: Yes. In the time available I have done my best to read what you put before us  
11 during the week and this evening. I may not be as au fait as I might otherwise have been, but  
12 I have looked at everything.

13 MR. RANDOLPH: I am grateful. I can then plunge in.

14 THE CHAIRMAN: Before you plunge in, the usual practice. Maybe I can tell you where my thoughts  
15 are at the moment. It seems that the history of this application lies in an application that was made  
16 by the claimants at the last case management conference on 17 December, which was that  
17 excisions from documents disclosed by the defendants had not properly been made by the  
18 defendants. In the event, it was not necessary for me to rule on that application as, following  
19 initial submissions from counsel for the claimants and the defendants, the claimants' solicitors  
20 decided to take up an offer from the defendants' solicitors to inspect documents which had been  
21 disclosed but from which there was excised material that was to be irrelevant.

22 I understand that inspection of the documents took place before Christmas and since then  
23 I have read considerable correspondence between the parties' solicitors as to what has been agreed  
24 between them, what the purpose of the inspection was intended to be and whether either or both of  
25 the parties have acted properly. It is also the case, as I currently understand the position, that  
26 regrettably it was found that some of the excisions made from the documents disclosed to the  
27 claimants had not properly been made by Freshfields, and Freshfields have now provided the  
28 claimants' solicitors with further disclosure of relevant material, in particular as regards material  
29 that had originally been excised in relation to Yellow Carophyll, and I can quite understand why  
30 those excisions had originally been made. Of course that information ought not to have continued

1 to be excised once the defendants had agreed to the claimants' amendment to cover Yellow  
2 Carophyll.

3           However, as I understand the position from the witness statements which have been  
4 lodged with the Tribunal for this hearing and from the correspondence there remains a dispute  
5 between the parties as to whether certain information regarding vitamins that are not relevant  
6 vitamins and were not covered by the Commission's decision ought to be disclosed, and in  
7 particular the claimants are seeking information relating to vitamins B12 and K which fall into that  
8 latter category.

9           The way in which Taylor Vinters conducted themselves following the inspection may  
10 have been inappropriate and it may be that an application for specific disclosure of the categories  
11 should have been made earlier. I say no more about that.

12           A large part of the witness statements in advance of the hearing deal with those issues.  
13 As we all appreciate, this hearing is being held at short notice and at a late hour. In those  
14 circumstances, I do not consider that it is good use of any our time, but least of all the Tribunal's  
15 time, to hear counsel as to who agreed what and with whom at the last hearing or what the scope  
16 of the previous disclosure order was, or matters of that sort. They are matters in the past. I may  
17 get submissions that they may relate to costs. If so, that can be explored at a later time, but it is  
18 not for this evening.

19           Subject to further submissions it seems to me at the moment that the information relating  
20 to vitamins B and K was not covered by the Tribunal's previous disclosure order made in July  
21 2004. I do not know if there an issue about that, probably not. However, the issue to be decided  
22 this evening is whether I should now order disclosure of that material to the claimants. So what  
23 I am interested in this evening is whether those documents which the claimants seek are relevant  
24 to an issue in this case.

25           It seems to me that Freshfields make a point in their skeleton argument that the claimant  
26 could not have considered those documents or that information relevant because they did not seek  
27 to disclose comparable documents themselves and, subject to any submissions that I hear in a  
28 moment, on the face of it it seems to me that that submission of Freshfields has some force.  
29 Again, subject to hearing submissions, it also seems to me that it is material that on 7 January  
30 2005 the defendants lodged with the Tribunal an expert report prepared by Dr. Biro. That report is

1 highly critical of the methodology adopted by the claimants' expert, Mr. Morrell, in quantifying  
2 the claimants' damage for the purposes of this action. In para.35 he says:

3 "In order to confirm whether the pre and post-cartel prices used as the start and end-  
4 points are in fact representative of normal competitive conditions, it would be desirable  
5 for these prices to be compared to the history of prices within the market more  
6 generally."

7 In para.36 he says:

8 "... I would expect Mr. Morrell to have explored the market conditions that led to the  
9 large observed price reductions and considered whether these support the assumption of a  
10 steady fall in prices 'but for' the operation of the cartels – as opposed, for example, to the  
11 alternative of a step-change in prices. I would also expect Mr. Morrell to have examined  
12 whether there were any other relevant changes in market conditions that would have  
13 materially affected the prices 'but for' the operation of the cartels."

14 So it seems on a first reading of Dr. Biro's report that the information relating to the price  
15 movements for vitamins B12 and K possibly, which did not form part of the cartel, may be useful  
16 for background comparative purposes in assessing whether the straight line methodology applied  
17 by Mr. Morrell is reasonable and indeed whether the criticisms of Dr. Biro are reasonable.

18 However, the only evidence which the claimants have provided in support of tonight's  
19 application appears to be paras.9.2 and 9.3 of Mr. Perrott's witness statement of 11 January, and  
20 that seems to me to be rather skeletal and the defendants in their skeleton argument have indicated  
21 that their view is that it is rather skeletal.

22 I understand, but have not yet seen, that the claimants have notified the Tribunal today of  
23 their intention to amend their claim to plead restitutionary damages. It seems to me, but subject to  
24 submissions, that such an application, if allowed, would or might have a knock-on effect on  
25 disclosure generally. I am concerned that perhaps, having regard to the indication that we have  
26 received today and also to the rather skeletal information provided as to the necessity for the  
27 disclosure which is being applied for this evening, the application for specific discovery being  
28 made this evening might, as events have turned out, have been made rather prematurely.

29 Those are my comments up to now.

30 MR. RANDOLPH: Thank you very much indeed, madam, that is very helpful as ever. It was going to  
31 be our case in any event in my submissions that the only question for this Tribunal on this

1 application was the question of relevance. All the other matters were entirely irrelevant. I am  
2 grateful, madam, for your indication about the fact that you do not want to go into who said what  
3 to whom and why and what that meant.

4 THE CHAIRMAN: I do not want to hear those words again!

5 MR. RANDOLPH: Probably not, and that goes off to another occasion for costs.

6 THE CHAIRMAN: If necessary.

7 MR. RANDOLPH: If necessary. However, and I am very well aware of what the Tribunal has just said,  
8 I have had clear instructions to make the following points because they were raised in the skeleton  
9 argument. This is going to the assertion, the allegation, about abusive conduct or recklessness.

10 THE CHAIRMAN: I really do not want to hear that. All that is going to do is to have a lot of  
11 submissions on both sides, which is not going to get to what we need to do.

12 MR. RANDOLPH: No, it will not, but the Tribunal should not be under any illusion but that those  
13 assertions are taken very, very seriously.

14 THE CHAIRMAN: I was very careful to say “may”.

15 MR. RANDOLPH: Absolutely, but those assertions are taken very seriously and are very, very strongly  
16 contested, and are certainly not accepted one jot.

17 THE CHAIRMAN: I appreciate that.

18 MR. RANDOLPH: Fine, I just wanted to make that point and I can then pass on to the meat of this  
19 application, which is effectively very short. Is pricing data relevant relating to non-cartel vitamins  
20 – and it is not all non-cartel vitamins, we are not asking for the whole range, we are asking for the  
21 disclosure and the de-redaction, if there is such a word, or the unredaction, of disclosed  
22 documents, it is all there, I am eliding this with timetabling and delay and everything else –  
23 existing documents relating to two vitamins, B12 and K? We say that they are relevant, and we  
24 say they are relevant for two particular reasons. Madam, you picked on one, which is arising out  
25 of Dr. Biro’s expert evidence and the paras.35 and 36. I was actually going to go to paras.35 and  
26 36, but I do not need to because, madam, you have them firmly in mind. We say that they show  
27 quite clearly, as is totally normal – this is common sense, you do not have to be an economist or  
28 an econometrician to understand the relevance of this data. The relevant paragraphs dealing with  
29 this in Dr. Biro’s report are under the title “The Counter-Factual Situation”.

30 What is a counter-factual situation? A counter-factual situation is a “but for”. The “but  
31 for” situation can be in two ways. It can be temporal or relating to products – i.e. you can have a

1 situation before and after the relevant incident in question, and indeed you can have a counter-  
2 factual relating to products that were not covered by the relevant unlawful activity. That is hugely  
3 important because our expert evidence from Mr. Morrell is that “but for” – literally – “but for” the  
4 illegal activity by, inter alia, the defendants the prices would not have gone up as much as they  
5 did. At the moment, or prior to, unless disclosure is ordered, Mr. Morrell had to guess what that  
6 “but for” price was, because he did not have it. He did not have any data on it at all. One of  
7 Dr. Biro’s complaints is, “Well, that is rather unfortunate, guesses are not very good and  
8 Mr. Morrell should have availed himself of more evidence and should have taken into account  
9 other theories and various other things, but he should have looked at the position in the market at  
10 the time”.

11 What better evidence is there than selective documentation relating to vitamins not  
12 covered by the cartel which were produced and sold by the very same defendants and which were  
13 bought by the very same claimants? That is the perfect counter-factual, and it is very rare, in my  
14 experience, to have this situation. Normally one has a cartel and the companies involved cartelise  
15 their whole production of widgets, or whatever it is. Here we have a situation where, for whatever  
16 reason, they decided not to cartelise all vitamins, but only certain ones. Fine, that is their decision,  
17 they were caught and they were fined and now we are seeking damages from them. By the fact  
18 that they failed to cartelise all their production that, in effect, has given the Tribunal the  
19 opportunity of seeing truly what is the “but for”, the counter-factual. We say on its face and as  
20 clearly expressed, very fairly by Dr. Biro, this is what is relevant.

21 The issue of relevance was not dealt with by Freshfields in their witness statements.  
22 They just dealt with matters that we do not need to deal with this afternoon. The first inkling  
23 of ----

24 THE CHAIRMAN: They say it is for you to deal with relevance and you have not.

25 MR. RANDOLPH: We dealt with relevance. We pointed out in Mr. Perrott’s witness statement at the  
26 relevant paragraph, 9.2, because 9.3 is on Yellow Carophyll – also, madam, in a letter that  
27 unfortunately did not get into the bundle, but was attached to my list of documents ----

28 THE CHAIRMAN: Your reading list?

29 MR. RANDOLPH: Yes, my reading list, and it is at the back of that, 11 January, and that sets out in  
30 rather more detail possibly what the position is with regard to relevance. Madam, do you want to  
31 just take a moment to read that to yourself? It is attached to the ----

1 THE CHAIRMAN: The letter of 11 January?  
2 MR. RANDOLPH: Yes.  
3 THE CHAIRMAN: I have got that. (After a pause) Is it just the two paragraphs?  
4 MR. RANDOLPH: It is really the two bottom paragraphs.  
5 THE CHAIRMAN: It does not say more than 9.2 and 9.3.  
6 MR. RANDOLPH: We raised the point in the witness statements in support, we are saying why it is  
7 relevant. They say – this is really their only point, it seems to us, on relevance, apart from the  
8 scope of disclosure, and I do not think we need to go down that particular path ----  
9 THE CHAIRMAN: I am not sure we do not.  
10 MR. RANDOLPH: I am not pressing the point on paras.3 and 8 of the order.  
11 THE CHAIRMAN: Which is?  
12 MR. RANDOLPH: It was suggested at an earlier stage that category 3 of the disclosure order and/or  
13 category 8 of the disclosure order might cover ----  
14 THE CHAIRMAN: They do not.  
15 MR. RANDOLPH: I am not pressing that point.  
16 THE CHAIRMAN: But the way you are putting it is that it is common sense that these documents are  
17 relevant. If it is common sense that these documents are relevant then why was the application not  
18 made at an earlier stage?  
19 MR. RANDOLPH: Because Dr. Biro came in.  
20 THE CHAIRMAN: The documents were produced before Dr. Biro came in.  
21 MR. RANDOLPH: Indeed. We base our relevance on two points, the upstream point, which we will  
22 come to in a moment, which came in at the beginning of November from Mr. Drake. From  
23 November onwards – you will recall, madam, that I went through a rather tedious exercise of  
24 going through all the relevant correspondence, and we were engaged in correspondence about  
25 redactions. We come to December and then on the 17<sup>th</sup> there was the further CMC, and then we  
26 say, “Look, we are making an application”, and as you said, and as my learned friend quite fairly  
27 put it, our application was for all documents that had been redacted to be unredacted in so far as  
28 they were relevant and/or not confidential.  
29 THE CHAIRMAN: They would only be relevant in so far as there are specific discovery orders. They  
30 would be entitled to excise any information in it to do with vitamins B12 and K.

1 MR. RANDOLPH: Effectively the disclosure order of 26 July was based on consent between the  
2 parties. It was made quite clear, and I can take you, madam, to the transcript – this is exactly what  
3 I feared when this was agreed. In fact, it may be a good idea to go right now to the relevant part of  
4 the transcript which is attached to Mr. Perrott’s witness statement, and it can be found at p.32 of  
5 the witness statement, EFVP1, near the end of his first exhibit. This is Mr. Hoskins speaking at  
6 the top:

7 “I asked Mr. Randolph before this particular hearing what was meant by that, and again  
8 he will correct me if I am wrong, but my understanding is that it is nothing to do with  
9 disclosure in relation to how the cartel operated or met, or agreed prices, it is rather  
10 information recording evidence in the manner in which the defendants set their prices to  
11 their customers, taking the existence of the cartel as read. That is what Mr. Randolph has  
12 indicated is intended by that, and probably we need to tighten up the wording a bit but I  
13 think we are *ad idem* on what we mean by it.”

14 Then we go on, and at line 17 Mr. Hoskins says:

15 “If I can just say a quick word on that issue – I have already dealt, to a certain extent, of  
16 ‘why by category’ rather than generally. The purpose of it was to carry out disclosure in  
17 a focused way, and certainly we had envisaged that if after the disclosure of process is  
18 complete, and done on this category basis, if any party thinks there are any gaps then  
19 obviously they can come back and seek specific disclosure.”

20 It was on that basis, just turning over the page to line 4, that I then said:

21 “So on the basis that Roche and indeed Aventis is happy to disclose that material we  
22 would be happy to receive that material by way of disclosure, so there does not seem to  
23 be any dispute any more on that. I think the dispute (if there is a dispute) is between  
24 whether there should be general disclosure, or whether it should be by category, and I am  
25 very grateful to hear what my learned friend has said. What I do not want to have is to be  
26 cabined, cribbed and confined by way of their draft list whereby we could not raise any  
27 issue thereafter and they point to us and say ‘Tough, you agreed to this and you are stuck  
28 with it’. He has now made that clear that that is not going to be the position and, on that  
29 basis, I am perfectly happy to act on the basis of the list as amended.”

30 THE CHAIRMAN: Yes, you could ask for specific disclosure of other categories.

31 MR. RANDOLPH: We could ask for specific disclosure of anything that was relevant.



1 THE CHAIRMAN: Yes.

2 MR. RANDOLPH: Yes, and that is picked up by para.4.

3 THE CHAIRMAN: That does not mean that they have to produce those documents unredacted.

4 MR. RANDOLPH: If the documentation is relevant then it must be disclosed.

5 THE CHAIRMAN: Only if it is part of a disclosure order. The disclosure was done by specific  
6 disclosure of categories. If you wanted some other category you needed to make an application  
7 about it. They did not have to disclose everything and therefore they did not have to disclose the  
8 material within documents that were relevant for specific disclosure categories.

9 MR. RANDOLPH: Yes, madam, but we are now in a specific disclosure application.

10 THE CHAIRMAN: The reason that we are there is because you noticed it in those documents, not that  
11 you made an application before.

12 MR. RANDOLPH: Madam, you said that you did not want to get into the whys and the wherefores, and  
13 that does go to that. The only question for you, with respect, we would submit, is whether these  
14 are relevant. We are making a specific application pursuant to, amongst other things, para.4 of the  
15 order. It does not matter how we came to think of this.

16 Let us pose another counter-factual. Supposing we had not taken up the inspection offer  
17 from Freshfields. Supposing we had gone away and supposing there had been no application, and  
18 we had got Dr. Biro's report, or indeed we had got Mr. Drake's witness statement and Dr. Biro's  
19 report and scratched our chins and thought, "Gosh, this is an issue here, let us make a specific  
20 application". On that basis the only question, as now, is relevance, and that is all that has to be  
21 decided. We submit that it does not really matter how the idea was formulated as to whether there  
22 should be disclosure of this or not. The critical matter is, is it relevant?

23 THE CHAIRMAN: The reason that I made the comment is that you were putting your case on the basis  
24 that it is common sense these documents are relevant. If it is common sense that these documents  
25 are relevant then one would have thought that you would be jumping up and down at an earlier  
26 stage asking for them. The only time that you are jumping up and down is because you went and  
27 examined some documents. I do not want to get into why that happened, but the fact is that  
28 because you are saying that it is common sense it makes one think, "Well, if it is common sense  
29 why were they not asked for earlier, and therefore is it really common sense?"

30 MR. RANDOLPH: Madam, in reply to that, it is common sense now because it is quite clear that our  
31 initial impression has been clarified by Dr. Biro's evidence, which specifically says – and this is

1 the first time this has been dealt with – they made it clear, and I do not deny this, at an earlier stage  
2 in December at the CMC what the areas of the proceedings were that the experts were going to  
3 look at, and we had this great big debate as to whether it was essential to have Dr. Biro and the  
4 other expert, and we were told, yes, there was going to be a serious defence with regard to the  
5 appropriateness of Mr. Morrell’s “but for” test. We then get that.

6 That obviously came in November. My learned friend’s argument is, “This is all  
7 outrageous, you should have known the position way back on 21 September when we did  
8 disclosure”. We say, “We do not think that is terribly fair, we did not know what your case is, you  
9 had not served any witness statements”, and to say we should have made an application is, we say,  
10 without foundation.

11 Mr. Drake comes in at the beginning of November saying, amongst other things,  
12 on behalf of Provimi, who was in between us and Roche, you could not really say what the  
13 position was, it may well have absorbed the over-charge. That is with regard to cartel vitamins. It  
14 is very interesting, we would submit, to see how the position was with regard to non-cartel  
15 vitamins. Again, it is a counter-factual, they are saying one thing, we are saying another. It is not  
16 as if we have been rooting around like truffle hounds in wastepaper baskets or anything else. This  
17 is documentation that was produced to us and on the disclosure list.

18 THE CHAIRMAN: Even if it had not been produced to you you would say it is relevant. Maybe the  
19 way you are looking at it is this: you presented Mr. Morrell’s report and on the basis of that report  
20 you had confined yourself to a particular way of presentation and to a limited look at pricing –  
21 i.e. pricing of the relevant vitamins only. Dr. Biro cannot have his cake and eat it. He cannot say  
22 other things are relevant and at the same time not look at the other things.

23 MR. RANDOLPH: Exactly.

24 THE CHAIRMAN: When he said other things are relevant, then they are not accepting the confined  
25 way of looking at the case, and if they are not accepting it and they are going to challenge it then it  
26 brings in all these other things.

27 MR. RANDOLPH: Yes.

28 THE CHAIRMAN: It may be that the other things were not relevant and do not show anything.

29 MR. RANDOLPH: It may be that they do not assist us, but on the other hand it will be the true counter-  
30 factual and we are being brave, if you like, on this one. I have not seen it. I have been handed

1 documentation that I specifically have not looked at yet, and I am not going to look at it unless  
2 I am invited to, because I think, madam, you asked for ----

3 THE CHAIRMAN: We thought it ought it to be there.

4 MR. RANDOLPH: Fine. I am happy not to look at it until I am invited to do so.

5 THE CHAIRMAN: We thought it ought to be in court.

6 MR. RANDOLPH: Just so no one is under any illusion, I have not seen it at all, apart from a very brief  
7 glance after my learned friend showed it to me, and it was upside down and I did not see any  
8 figures.

9 THE CHAIRMAN: So you do not know whether or not it is ----

10 MR. RANDOLPH: I do not know. All I am saying is that it would seem likely that one way or other it  
11 will shed light on the situation and therefore be of assistance. Madam, you are absolutely right,  
12 we would submit with respect, because if their approach is Mr. Morrell's methodology is wrong  
13 because he did not take into account all the relevant circumstances including what was actually  
14 happening, what he says at para.36, "discussion of the evolution of market conditions over the  
15 periods of the cartels". That is exactly it. Fine, if they want that then they must allow us to test  
16 that. Otherwise they can, of course, withdraw that part of the expert evidence and we are left with  
17 a situation where there is no full frontal attack on Mr. Morrell's "but for" approach. Madam, you  
18 have correctly put it, we would submit, they cannot have their cake and eat it.

19 Once one has dealt with that issue then the only point, it seems to me, is one of, is this  
20 appropriate in the circumstances? That goes to the issues raised by my learned friend in his  
21 skeleton argument about delay and, more particularly, impact on the timetable. In terms of delay,  
22 I have made my case. The first point arose we say not when disclosure took place but when  
23 Mr. Drake made his witness statement in November, and then we were in pretty much constant  
24 communication via letters ----

25 THE CHAIRMAN: In relation to this sort of disclosure?

26 MR. RANDOLPH: Well, in relation to upstream absorption. Things have been redacted, we did not  
27 know what was in it.

28 THE CHAIRMAN: It is nothing to do with it being redacted, it is to do whether a specific disclosure  
29 application ----

30 MR. RANDOLPH: It is fair we did not make specific disclosure, but we did make a specific disclosure  
31 application in December.

1 THE CHAIRMAN: For?

2 MR. RANDOLPH: For all documents, and my learned friend ----

3 THE CHAIRMAN: Not the documents in relation to other vitamins.

4 MR. RANDOLPH: We say there has been no disclosure, but even if there has been it can be cured. The  
5 critical point is how is this going to impact, if at all, on the timing? Neither party, it seems to me,  
6 wants to lose the trial date. This is not an option, we will not lose the trial date. We say that there  
7 is absolutely zero danger of that trial date being lost for the following reasons: one, the data is in  
8 Freshfields' hands, it is here.

9 THE CHAIRMAN: They say there is more data.

10 MR. RANDOLPH: I do not know, but all we are looking for is the stuff we tapped because that is all  
11 we were shown.

12 THE CHAIRMAN: What you are looking for is data relevant, or information in documents relevant to  
13 the pricing of other vitamins.

14 MR. RANDOLPH: Yes, but we have confined that to B12 and K.

15 THE CHAIRMAN: What they have shown you at the moment happens to be documents relating to the  
16 relevant vitamins which happened to have references to these vitamins. There may be documents  
17 which relate to these new vitamins which did not have anything to do with the relevant vitamins  
18 and therefore have not been shown to you yet.

19 MR. RANDOLPH: That may be the case.

20 THE CHAIRMAN: Do you want those?

21 MR. RANDOLPH: At the moment we are very content to have what we asked for. Unless my learned  
22 friend is going to say these are not representative – I am not going to make a thesis of the pricing  
23 of B12 and K vitamins. All we want to do is to have some form of data to show, “Oh, well, yes,  
24 that fits roughly within Mr. Morrell’s thought process”, or, “That clearly does not”. As I say, it is  
25 potentially a double-edged sword because I, for one, have not seen this documentation, it is purely  
26 objective. I am instructed that they are ----

27 THE CHAIRMAN: They are price lists.

28 MR. RANDOLPH: They are price lists, and the mere repetition of price lists simply will not make it  
29 better, it will just make it more voluminous. That is number one point.  
30 Number two point is that is said against us, “Well, we will have to produce the  
31 documentation”. Fine, no worries. The relevant documentation with regard to us purchasing, our

1 purchase data of B12 and K vitamins, fine. We have already asked the client to search for that  
2 documentation and that can be dealt with very quickly indeed.

3 The third point made against us is, "Oh, well, this is terrible, we will have to put in  
4 further evidence, both factual and expert. No, with respect, this is purely expert evidence which  
5 will go in as rebuttal evidence to Dr. Biro's report by our economist, and we have an economist  
6 working on the case, Dr. Cento Veljanovski, and he has made it clear, because he was specifically  
7 asked this point, that this sort of data would be extremely relevant, this counter-factual data would  
8 be extremely relevant.

9 THE CHAIRMAN: Do you know if Mr. Forbes has ----

10 MR. RANDOLPH: I have no idea because I have not seen his report, although it is due today.

11 I probably left Chambers before it had been served. It is due at close of play today.

12 THE CHAIRMAN: Let us just assume for the moment that Mr. Forbes also refers to it. If Mr. Forbes  
13 refers to it then ----

14 MR. RANDOLPH: Refers to the "but for". I did not think he was going to. My learned friend probably  
15 knows because no doubt he has seen the report. I did not think Mr. Forbes was going to go to "but  
16 for". I thought he was going to deal with more the accountancy aspect.

17 MR. HOSKINS: He does not deal with that.

18 MR. RANDOLPH: I am sure we will receive the report at some stage.

19 THE CHAIRMAN: I think you have probably.

20 MR. RANDOLPH: Good, I look forward to reading it over the week-end. That is another reason we  
21 say why there is ----

22 THE CHAIRMAN: You say if it does not go to Mr. Forbes it does not go to Mr. Morrell?

23 MR. RANDOLPH: It is rebuttal evidence that will be put in Dr. Veljanovski, and that will be dealt with  
24 in the normal way. There is a timetable provision for Dr. Veljanovski's report, and then there is  
25 timetabling for the experts to have a discussion, and then the usual course will take place where  
26 the experts are examined. So there is no reason why anything should impact adversely on the  
27 timing of the trial. It would be something totally different if we had said we want to see every  
28 single price list for ever single vitamin that Roche ever produced during the relevant period. No,  
29 we do not, we just want to see stuff that is there, that has already been through the mill, if you will,  
30 in Freshfields, and nothing more and nothing less.

1                   We say that the argument put forward by my learned friend on behalf of Roche on  
2                   timetabling simply is not borne out by reality.

3   THE CHAIRMAN: Your application is for price lists?

4   MR. RANDOLPH: It is very difficult for me to know because I have not actually seen what the  
5                   documents are, but I am instructed that ----

6   THE CHAIRMAN: Your instructing solicitor knows.

7   MR. RANDOLPH: My instructing solicitor has, but there is a sensitivity about this. I specifically  
8                   received this documentation on the understanding that I would not see it, read it or otherwise know  
9                   about it until I was invited to look at it.

10   THE CHAIRMAN: Just think about it for a moment. Forget about what is in the files. There is a big  
11                   difference between an application for specific discovery in relation to all documents relating to  
12                   pricing of other vitamins and the application for specific discovery in relation merely to the price  
13                   lists which refer both to the price lists already discovered but redacted in relation to these  
14                   vitamins.

15   MR. RANDOLPH: That is all we are after.

16   THE CHAIRMAN: I think it is only fair to the defendants that they know what your application is.

17   MR. RANDOLPH: Absolutely, and as far as I am aware it is set out in the application notice. We are  
18                   seeking disclosure of documents already disclosed by them with redactions in respect of vitamins  
19                   B12 and K removed.

20   THE CHAIRMAN: It is just those documents?

21   MR. RANDOLPH: It is just those documents, yes.

22   THE CHAIRMAN: That is not a lead to something else?

23   MR. RANDOLPH: No, it is not. We are the people who have lost money. We want this trial to go  
24                   ahead as soon as possible. We do not want to put any spokes in any wheels, but on the other hand  
25                   we want to have a fair crack of the whip.

26   THE CHAIRMAN: We know that the documents which have been disclosed with redactions are all  
27                   price lists – is that right?

28   MR. RANDOLPH: I am instructed that they are very largely price lists.

29   THE CHAIRMAN: What I am concerned about, and I think we need to deal with this, is if they are not  
30                   just price lists, but they are other memoranda or something which happens to refer to something,  
31                   and that leads to something else because there is a document referred to, and so on.

1 MR. RANDOLPH: I can understand that, which leads to a search.

2 THE CHAIRMAN: And then you are opening up the whole thing.

3 MR. RANDOLPH: Yes, I can understand that. I am instructed that we certainly do not want to go  
4 beyond that but the vast bulk of them do relate to prices, and that is what we are ----

5 THE CHAIRMAN: I think there is a difference between price lists and other documents. One, I can  
6 see, could confine oneself to price lists and say that that is all that is being shown; but if there are  
7 other documents in there it may well be that the other side will then say, "If you put those in you  
8 need to put some other stuff in, and so on, and we need to see from you whatever". There may be  
9 a difference between just the official price lists and something else.

10 MR. RANDOLPH: Indeed. May I take instructions on that. (After a pause) I am instructed there are  
11 effectively two types of documents. First of all, there is an official general price list from Roche;  
12 and then there are other documents which are apparently documents to intermediaries saying,  
13 "This is the price we are going to sell vitamin B12 or vitamin K to you at".

14 THE CHAIRMAN: That will not lead to other documents becoming relevant?

15 MR. RANDOLPH: No. The only reason we say this is relevant is for the reasons we have set out, and  
16 it is to test the points being put forward against us on absorption and the "but for" test. As I say, it  
17 is not in our interests to find all sorts of other satellite matters that may or may not be of some  
18 peripheral interest. A main part of Roche's defence is, "You have not suffered any loss and in any  
19 event if you did you have not been able to quantify it".

20 We can show that they have been found guilty of an offence, but we have obviously got  
21 to prove causation. We do not want this to go by the board, and as you pointed out, madam, one  
22 cannot have one's cake and eat it. It is just a testing mechanism, it is no more. It is difficult to  
23 give an undertaking but as far as I am concerned, this is it, because there will not be any time  
24 thereafter and any application made would, I imagine, fall on deeply unsympathetic ears. This is  
25 it, this is our one chance and we are taking it. That is it, that is why we do not want to go wider  
26 than that. It is a very targeted application focused on this particular issue, and that is all.

27 Can I just show this to my learned friend, because I have been handed two examples of  
28 something. (Same shown) (After a short discussion) May I hand that up?

29 THE CHAIRMAN: They are redacted versions, are they?

30 MR. RANDOLPH: They are redacted versions. (Same handed)

1 THE CHAIRMAN: I think I saw something like that last time when it was being explained what this  
2 was all about. This is the other sort of document?

3 MR. RANDOLPH: The one to Newtech, which apparently shows what price Roche were going to sell  
4 at to Newtech.

5 THE CHAIRMAN: So if they adjusted the prices between price lists they would write a letter. Is that  
6 what it is?

7 MR. RANDOLPH: I do not know. I would imagine – this is pure guesswork but my learned friend can  
8 tell me if I am wrong – they probably publish general lists, and then their evidence is ----

9 THE CHAIRMAN: Let me read it out. It says:

10 “Due to the recent changes in currency we have decided once again to revise our prices  
11 for the remainder of this year. The following prices are also for quarter 1 1997 and come  
12 into immediate effect.”

13 It is headed “Quarter 4 1996, revised prices and Quarter 1 1997”, and so all it is is a document  
14 which sets out a revised ----

15 MR. RANDOLPH: Indeed Provimi, for example, received discounts, and they would have done on a  
16 volume basis or whatever, and so certain intermediaries would have certain different prices from  
17 Mr. Joe Bloggs. So that is that.

18 Madam, I do know whether I can help you any further.

19 THE CHAIRMAN: I will hear what Mr. Hoskins says. I am sure you were going to address me at  
20 length about other matters which we do not want to hear about.

21 MR. HOSKINS: I am delighted at this stage of the evening to be as short as I can. Beginning with the  
22 question of relevance, it is noticeable that, despite various invitations, not just from me but from  
23 the Tribunal as well, all we have had is, “It is all common sense”. Let me show you why that is  
24 not the case. There are two ways in which this is said to be relevant without any development of  
25 why and how this information will be relevant. The first is in relation to upstream passing on.  
26 Mr. Randolph has said that upstream passing on is an issue in the case. Yes. Mr. Randolph has  
27 not given any explanation of how you take prices that were charged by my client to intermediaries  
28 and used that to come up with an analysis that helps in relation to upstream passing on.

29 Let me explain why that is important. You cannot simply take the information they were  
30 seeking and say “abracadabra”. There are more layers to it. Mr. Drake’s witness statement is the  
31 perfect place to make that point. I hope you have the Deans bundles from the last hearing.



1 Mr. Drake is in Deans bundle 8, tab 16, p.616. Mr. Drake is, as he says, the chairman of Provimi,  
2 so he is the chairman of one of their intermediary companies who purchased from my client, and  
3 he explains in the early part of the statement that what they did was they bought the vitamins and  
4 they manufactured pre-mixes which contained vitamins and other carriers, and it was those pre-  
5 mixes that were sold to people like the claimants. Then he deals with passing on, and perhaps the  
6 best thing, madam, is if I can ask you to read from para.7 through to para.10, because then you  
7 will see the nature of the issue.

8 THE CHAIRMAN: (After a pause) He says that each one gets priced individually effectively, so you  
9 cannot just go from the price of the vitamins to ----

10 MR. HOSKINS: Precisely. That is one point. There is another point, which is para.9, which is that if  
11 you are going to conduct a passing on analysis it is not enough just to know at what price the  
12 intermediary bought. That is common sense. You need a whole set of other data to do the  
13 analysis of what happened once it went in.

14 THE CHAIRMAN: That is what I am saying, it is going to lead to other information.

15 MR. HOSKINS: There is the problem that you cannot just compare one vitamin to another, one; and  
16 two, the intermediaries themselves say that they are not in a position to conduct any analysis about  
17 pass off. In the light of those points B12 and K are going to be useless, because you cannot just do  
18 a read across, and just getting the pricing information on B12 and K is not going to get you  
19 anywhere near doing an analysis on pass through. When Mr. Randolph referred to Mr. Drake's  
20 witness statement, he drew it to the Tribunal's attention, we have been inviting them to tell us  
21 what possible methodology they are going to adopt using the B12 and K information to show pass  
22 through – silence, nothing. It is a wild goose chase.

23 THE CHAIRMAN: So would you say that what Dr. Biro said in the paragraphs that we have alluded to  
24 is not actually going to help either.

25 MR. HOSKINS: I am, madam, but can I deal with that separately. I certainly will deal with that and  
26 that is what I am going to say.

27 THE CHAIRMAN: You are not supporting your expert. You will explain that.

28 MR. HOSKINS: I think there has been a misunderstanding. It is actually Mr. Biro, not Dr. Biro. There  
29 is actually a misunderstanding about what he says, but I will deal with that in a minute.

30 What I want to look at is this question of the counter-factual and, again, look at the way  
31 the claimant has tried to explain relevance. That is the letter of 11 January which Mr. Randolph

1 took you to which was attached to his reading list. The relevant paragraph is at the bottom of the  
2 first page.

3 “The second reason is that in Dr. Biro’s expert report it is said that Mr. Morrell’s ‘but for’  
4 approach is flawed because it fails to take into account all relevant factors which could  
5 impact on the prices of the vitamins in question had they been subject to unlawful cartel  
6 pricing. It is obvious that data relating to non-cartel vitamins will be important in  
7 determining whether Mr. Morrell’s approach was correct.”

8 So again, no attempt to actually explain what is going to be done, just the glib comment, “It is  
9 obvious, it is common sense”.

10 Let me look at what Mr. Biro has actually done in his report. There are two elements.

11 The first element ----

12 THE CHAIRMAN: Do I need his report in front of me?

13 MR. HOSKINS: It is probably helpful, madam, yes.

14 THE CHAIRMAN: Are we on paras.35 and 36?

15 MR. HOSKINS: Yes. Paragraph 35 deals with this issue. What has happened is that for each of the  
16 relevant vitamins – so let us take vitamin A – what Mr. Morrell has done is he has taken the price  
17 immediately at the start of the cartel and a price right at the end of the cartel. That is what he has  
18 used for his straight line approach. The criticism that Mr. Biro makes is that what Mr. Morrell  
19 should have done – and we will stay with vitamin A – is looked at a spread of prices before the  
20 cartel started and a spread of prices for vitamin A – this is all specific to vitamin A – after the  
21 cartel started. He says that only by doing that can you get anything that might be reasonable as a  
22 starting point for the straight line method and an end point for the straight line method. The point  
23 is that what he is complaining about is nothing to do with looking at other vitamins, but not  
24 looking at enough information in relation to vitamin A. That is what is said in para.35.

25 THE CHAIRMAN: Let me just look at it again. As you know, the reading I had when I looked at this  
26 was effectively what Mr. Randolph says. So let me look at it again now that you have explained.

27 MR. HOSKINS: Madam, I understand that. As I shall show you in a minute when we come to para.36,  
28 when he talks about market ----

29 THE CHAIRMAN: Let me just read this.

30 MR. HOSKINS: (After a pause) Madam, can I help in another way, because Freshfields put the point  
31 to Frontier Economics this morning ----

1 THE CHAIRMAN: I was just going to ask if that had been done.

2 MR. HOSKINS: They confirmed the interpretation I have just given. That is what the expert's report  
3 says.

4 THE CHAIRMAN: It does not actually say what you are saying.

5 MR. HOSKINS: Madam, that is the purpose for which it will be relied upon. It will not be relied upon  
6 to say, "You should have looked at other vitamins pre-cartel and post-cartel".

7 THE CHAIRMAN: It says:  
8 "In order to confirm whether the pre and post-cartel prices used as the start to end points  
9 are in fact representative of normal competitive conditions it would be desirable for these  
10 prices and the pre and post-cartel prices to be compared to the history of prices within the  
11 market more generally."

12 MR. HOSKINS: "These prices" are supposed to be a reference to the start and end points that have been  
13 taken and compared to the history of prices for that particular vitamin. Madam, that is what the  
14 experts say that paragraph means. I am sorry if it is unfortunately drafted, but that is the case.

15 THE CHAIRMAN: These things happen. We all know that we draft things and they do not say quite  
16 what we want to say.

17 MR. HOSKINS: Precisely, but there is no doubt that is what the report says. The criticism of  
18 Mr. Morrell is not, "By taking a particular start point and a particular end point you have failed  
19 because you should have looked at the particular start point and end point of other vitamins", it is,  
20 "For vitamin A you should have looked at a greater spread of prices pre and post-cartel", that is  
21 the point.

22 Paragraph 36 is then developed in relation to each of the vitamins. What para.36 is about  
23 is that what Mr. Morrell has been criticised for is adopting a straight line approach without looking  
24 at events in the particular market for each vitamin that might have affected the pricing over time in  
25 that market.

26 THE CHAIRMAN: You say that both paras.35 and 36 relate only to the relevant issues?

27 MR. HOSKINS: Yes. Madam, the sorts of point that arise, if one looks through he then takes each  
28 vitamin separately. For example, vitamin E begins at para.56. He looks at exchange rates which  
29 actually apply to each vitamin for obvious reasons. Then at para.59 he deals with something  
30 which is specific to vitamin E, which is the fact that there was demand growth during the period  
31 and that there was entry of Chinese production during the period.

1 THE CHAIRMAN: I suppose para.53 supports what you are saying:  
2                    “The previous sections outlined the main factors that standard economic theory predicts  
3                    would have influenced but for prices during cartel periods. I have reviewed publicly  
4                    available information in relation to these factors.”

5 MR. HOSKINS: That is right and in relation to each particular vitamin. The analysis he then does ----

6 THE CHAIRMAN: There must be publicly available information in relation to price as well.

7 MR. HOSKINS: You can see in his own report the sort of things he has looked at. He has looked at  
8                    industry reports, et cetera.

9 THE CHAIRMAN: He could have done that in relation to other vitamins?

10 MR. HOSKINS: Precisely, yes.

11 THE CHAIRMAN: And he did not?

12 MR. HOSKINS: No.

13 THE CHAIRMAN: That supports what you are saying?

14 MR. HOSKINS: Yes, there is nothing in here which says, “I criticise Mr. Morrell for not looking at  
15                    other vitamins”. The criticism is that for each particular vitamin, A, E, B3, Mr. Morrell has not  
16                    looked at particular factors relating to those vitamins – for example, an increase in demand over  
17                    the period, the fact there was a fire in the factory which produced one of those vitamins, the fact  
18                    that Chinese producers entered the market. That is the criticism.

19 THE CHAIRMAN: Yes.

20 MR. HOSKINS: That is the way Mr. Biro puts it. He does not criticise Mr. Morrell for not looking at  
21                    other vitamins. Again, the problem is this: if what the claimants wish to do is to introduce B12  
22                    and K, et cetera, you cannot just simply take the prices of B12 and K, and say, “There you are, let  
23                    us compare them to A, E and B3”, you would then have to look at particular market factors in  
24                    relation to B12 and K. That is the whole point of Mr. Biro’s report.

25 THE CHAIRMAN: Then it opens the whole thing?

26 MR. HOSKINS: Exactly, (a) it is not relevant, and (b) it opens up the whole thing. Those are the  
27                    problems, there are two aspects to this.

28 THE CHAIRMAN: You say that Mr. Drake says that you cannot do it that way?

29 MR. HOSKINS: Mr. Drake only says that in relation to pass through. This is the counter-factual. The  
30                    counter-factual, as we put it, is not quite as simplistic as Mr. Randolph has suggested. What we

1 say is that the information they get will be of little use unless you open a whole can of worms, is  
2 probably the best way of putting it. It is not a straightforward, "Let us get some prices".

3 We say that the claimant has failed to show a proper case for relevance. We have invited  
4 them on several occasions to explain methodology. They have had Mr. Drake's witness statement,  
5 there has been no attempt to actually respond to that.

6 THE CHAIRMAN: Can you just help me, there are two points being taken, there is common sense and  
7 Mr. Biro. I understand your Mr. Biro point. The common sense point, how do you deal with that?

8 MR. HOSKINS: It is not common sense for the reason I have shown. All that Mr. Randolph has done  
9 is to say, "It is common sense that if you look at other vitamins it will help".

10 THE CHAIRMAN: It may not be common sense just to look at the pricing documents because you  
11 need all this other material. If one was starting afresh would it be common sense to look at all the  
12 vitamins?

13 MR. HOSKINS: That might have been one way to approach it.

14 THE CHAIRMAN: But that was not the way it was approached.

15 MR. HOSKINS: Precisely, madam, and if this had been done at the start it would have been a far bigger  
16 exercise. That is one of the reasons why we thought it was sensible in all the parties' interests to  
17 say at the start disclosure by category. That is why we have not run a case saying, "You should  
18 have looked at other vitamins", because we could not do that having suggested disclosure by those  
19 categories and having carried out the exercise on that basis. Madam, what the claimants are now  
20 about to do is to lift the lid on what was agreed way back at the start which is it is proportionate to  
21 have disclosure by category.

22 THE CHAIRMAN: If that is common sense and if that is the way they wanted to run the case from the  
23 beginning then they should have done it from the beginning.

24 MR. HOSKINS: Precisely.

25 THE CHAIRMAN: You are not bringing it in now or making a criticism of them so my reference to  
26 having your cake and eating it does not apply.

27 MR. HOSKINS: Exactly, madam, we are not having any cake.

28 THE CHAIRMAN: Yes, because you are not going to make that criticism.

29 MR. HOSKINS: That is right.

30 THE CHAIRMAN: This is a confined case.

1 MR. HOSKINS: All our criticisms relate to a failure to properly investigate the relevant vitamins. That  
2 is the relevance point.

3           There are two separate points. There is the delay point and there is then how do we fit  
4 this in with the trial approaching. It may be, I do not know, that this is an idea that has only  
5 recently occurred to the claimants for whatever reason.

6 THE CHAIRMAN: It does happen, these sorts of things happen.

7 MR. HOSKINS: Precisely, but the point is that they can and should have raised this point a very long  
8 time ago. Upstream passing on is specifically dealt with in the Morrell report. It is not something  
9 that only came into the case when we served Mr. Drake. It is something that Mr. Morrell, himself,  
10 dealt with. So they were aware that it was an issue from the start. Mr. Morrell's report was  
11 30 July 2004. At the CMC on 26 July 2004 – you may not remember, but let me try and remind  
12 you – we produced with our skeleton argument a Linklaters letter which we relied on relating to,  
13 yes, upstream pass on. So again, the idea that the upstream pass on is only something that has  
14 come into this case latterly is simply not correct. It has been there from the start and it has been an  
15 issue, and I mean an issue, for half a year.

16 THE CHAIRMAN: Just assume that they had just thought of it, they had not realised and they now  
17 want to do it on this larger basis. They are saying they want to confine it to the price lists, and you  
18 are saying, “Just look at Mr. Biro's report, Mr. Biro saying you cannot confine it just to the price  
19 list, you have got to look at all this other material about how prices are affected, therefore if you  
20 are going to take all these vitamins in you are going to have to take all this other material in and  
21 what they have submitted just now is that they do not want to do that”.

22 MR. HOSKINS: Precisely, and Mr. Drake shows exactly the same point in relation to upstream pass on,  
23 “You need to look at all this other information and each vitamin is not the same”. What my  
24 submission is directed to saying is that the application they are making, “Just give this particular  
25 information”, does not work. It is not going to get anyone anywhere. If the other option is, “No,  
26 let us open the whole thing up”, then they are too late.

27 THE CHAIRMAN: People are never too late now to put in new evidence, are they, as long as they pay  
28 the costs. I think the Court of Appeal have now said that. I know that before the Human Rights  
29 Act came in the CPR was of the idea that proportionality, et cetera, if somebody runs their case in  
30 one way they cannot open it up and put in new evidence, and the courts were throwing out these

1 sorts of applications at the last minute. There have been cases since the Human Rights Act which  
2 do not support that line.

3 MR. HOSKINS: Yes, but I think even in those cases it is still a matter of discretion in the  
4 circumstances. There is no absolute right under Article 6 of the Convention to turn up on the  
5 morning of the trial and say, "Here are a hundred new points".

6 THE CHAIRMAN: We are not on the morning on the trial.

7 MR. HOSKINS: No, precisely, but my only point in saying that is that it all depends on the  
8 circumstances of the case but there is still a discretion to say it is too late to raise this point.

9 The other point is the timetabling issue. Again, madam, as you rightly said, it is not as  
10 simple as is painted by the claimants. What is actually sought is just a haphazard selection of  
11 information relating to B12 and K. If the claimants want to open this argument then there will  
12 have to be proper disclosure in B12 and K because of the reasons I have shown.

13 THE CHAIRMAN: Why do you just choose B12 and K?

14 MR. HOSKINS: Precisely, that is something that is lurking in the back of our minds. I do not know  
15 why they have picked B12 and K. You do not know whether they are representative or not within  
16 the sample.

17 THE CHAIRMAN: We will hear why they have chosen B12 and K.

18 MR. HOSKINS: It may well be that they are germane to their business, but that does not necessarily  
19 mean that they are the best counter-factuals for the purpose even. That is the problem.

20 That is why we say that if this is going to be an issue there has to be proper disclosure on  
21 our part and on the claimants' part. You do need factual evidence. You need factual evidence  
22 because you need to deal with the particular aspects of each market. Mr. Fitt on our side puts in  
23 evidence dealing with the particular circumstances of certain markets. He dealt with a fire in one  
24 particular production factory, for example. He also, I think, dealt with Chinese production –  
25 I need to check that. He deals with specifics. That is the sort of thing we are thinking of. They  
26 may well say, "Well, B12 was not a typical market because the Russians came in half way through  
27 the period", for example – a hypothetical example.

28 So there has to be a degree of factual evidence. Obviously there has to be expert  
29 evidence because that is what the claimants want. If they are to put in expert evidence then we  
30 have to have a chance to reply to it. We have not had a chance to do that yet. It is not good

1 enough to say they put in an expert report, there is a meeting. We will want to respond. The  
2 hearing is on 21 February.

3 Our submission is that the short cut which is being suggested is ill-conceived because it  
4 does not understand the true nature of the position and it is too late. It is a question of fairness. It  
5 is difficult to see how it is going to be fitted in sensibly given the current timetable.

6 THE CHAIRMAN: They say they do not want to lose the date?

7 MR. HOSKINS: Exactly, and we were working to that date as well, there is no doubt about that. It is  
8 not fair, in a sense, on either party to suddenly say, "Here is a large exercise, go and do it". There  
9 is a lot of work to be done before this trial takes place and this is going to help anyone.

10 Madam, there are some issues but I have dealt with them in my skeleton argument. I do  
11 not think I need to labour the point. Madam, unless I can help you further those are our  
12 submissions.

13 THE CHAIRMAN: Thank you, let us see what Mr. Randolph says.

14 MR. RANDOLPH: Just to answer the point about B12 and K, madam, those are the vitamins that are  
15 used in chicken feed.

16 THE CHAIRMAN: The fact is that when you are looking at pricing you are looking at all vitamins.

17 MR. RANDOLPH: Yes, but that is a sensible ----

18 THE CHAIRMAN: That is why you have done it.

19 MR. RANDOLPH: It is an objectively justified reason.

20 The bulk of Mr. Hoskins' submissions to you, madam, were effectively based on a  
21 review of Mr. Biro, because on the wording it looked pretty clearly ----

22 THE CHAIRMAN: We now have an undertaking that they are not going to expand into the way that  
23 you and I thought was possible.

24 MR. RANDOLPH: We have an undertaking that that is the basis of the report.

25 THE CHAIRMAN: And that they are not going to take that point.

26 MR. RANDOLPH: And that it is not going to be taken. It is slight unfortunate that we were not told  
27 about that earlier, but nonetheless, there we are. The problem with that is that there is still an  
28 attack on Mr. Morrell's "but for" approach.

29 THE CHAIRMAN: That is why Mr. Biro was instructed.

30 MR. RANDOLPH: That is why he was instructed, in part. Let us not forget that he did something on  
31 passing on as well, but in part at least we know why Mr. Biro was instructed.



1 THE CHAIRMAN: I know you were hoping that Mr. Biro would come along and say Mr. Morrell  
2 was ----

3 MR. RANDOLPH: Indeed, perfectly right. Well, he did not, surprise, surprise. His assault is on the  
4 “but for”. We have looked at some of the paragraphs, including later paragraphs, but if you turn  
5 back to a page – unfortunately my paragraph numbers do not seem to have come out.

6 THE CHAIRMAN: This is in?

7 MR. RANDOLPH: This is in Mr. Biro’s report, section 3. It is the page before paras.35 and 36.

8 THE CHAIRMAN: It is para.33 that you are going to show me.

9 MR. RANDOLPH: I really cannot tell because my paragraph numbers have not come out.

10 THE CHAIRMAN: Looking at your document it looks different to my document.

11 MR. RANDOLPH: That is rather worrying. This is something that was faxed to me.

12 THE CHAIRMAN: Mine is not a faxed version, I think that is probably why.

13 MR. RANDOLPH: I hope I have been working off the right report. It says it is from Freshfields on 7  
14 January at 3.50 in the morning.

15 THE CHAIRMAN: I have got a final version.

16 MR. RANDOLPH: I did not have that privilege, but there we are.

17 THE CHAIRMAN: At the bottom of the page have you got a footnote?

18 MR. RANDOLPH: Yes, I have, it is that page. I have got another version with the paragraph numbers,  
19 it is para.33:

20 “On this approach the prices prevailing immediately and after the operation of the cartels  
21 are used as predictors of the prices that would have prevailed absent the cartel.”

22 This is the point, this is the general point: was Mr. Morrell right in his approach about what would  
23 have happened but for the cartels? Of course Mr. Morrell was concentrating only on the vitamins  
24 that were covered by the cartel because those were the vitamins that caused the loss to the  
25 claimants, and that is what he was instructed to look at. If one is testing the general point as to  
26 whether Mr. Morrell was correct or not in his approach on the “but for” test, what better way of  
27 doing that than by looking at vitamins produced by the same defendants but not subject to the  
28 cartel.

29 THE CHAIRMAN: Mr. Randolph, what is being said, and what Mr. Biro is saying, as explained to us  
30 now, is that you cannot just look at the beginning price and end price, you have got to look at the  
31 price of any vitamin all the way through, and you have to look at the circumstances and features of

1 the market in relation to that vitamin all the way through to see how that reflects on the price, and  
2 that he has done that for these particular vitamins.

3 MR. RANDOLPH: He being?

4 THE CHAIRMAN: He being Mr. Biro, we were shown para.50 something.

5 MR. RANDOLPH: I do not think he has. He certainly has not picked out all and sundry, he has just  
6 picked out ----

7 THE CHAIRMAN: He has done some.

8 MR. RANDOLPH: Nothing is perfect, he has picked out a few examples of some factors that might  
9 have an impact.

10 THE CHAIRMAN: Right, and what is being said is, firstly, Mr. Biro is not criticising in relation to the  
11 limited vitamins, he is not saying that there needs to be a comparison with all vitamins or with  
12 B12 and K; secondly, he is saying that if you do compare B12 and K you cannot just look at the  
13 price list, because look at Mr. Biro, he says there were other factors. Therefore, it is going to bring  
14 in all the disclosure and it cannot be limited to just the price lists.

15 MR. RANDOLPH: That is in a perfect world, madam. You have got to look at everything and you  
16 have got to know what would have happened to ever little jot and dot of ever product in every kind  
17 of market. Unfortunately we do not live in that kind of world. We do not have that material.  
18 What we do have, courtesy of Freshfields and available in their files, is a perfect counter-factual  
19 on one point, pricing. Admittedly, there is nothing to do with exchange rate or other fluctuations  
20 or whatever, and of course my learned friend Mr. Hoskins can make his submissions on that basis  
21 saying, "Look, this does not go anywhere where you are going".

22 Let us just suppose for a moment – and I have no idea what this data shows – that we  
23 have got the graph of price for the cartel vitamins that goes steeply up like that, and supposing at  
24 the same time we have got a graph just gently going up like that, or even possibly going down,  
25 who knows, so we have got this wide divergence. We will say, "Well, is that not interesting, and  
26 in fact that coincides pretty much with what Mr. Morrell was suggesting in his "but for" approach.  
27 We will say that and they might say, "That says one thing but it does not produce the whole  
28 picture because you have not got exchange rates in, you have not got this, you have not got that".  
29 Fine. Then it is for the Tribunal to weigh the evidence.

30 THE CHAIRMAN: We will not have that evidence.

31 MR. RANDOLPH: I know, but you have not got the evidence on the other matters.

1 THE CHAIRMAN: They have brought some of it.

2 MR. RANDOLPH: Some, but not all. It is not a perfect picture.

3 THE CHAIRMAN: But we have got some of it.

4 MR. RANDOLPH: Some is better than nothing, we would submit, and this is some.

5 THE CHAIRMAN: You are not asking for that evidence in relation to B12 and K?

6 MR. RANDOLPH: No. We are willing to go forward on that limited basis and obviously open to the  
7 submission from my learned friend that that will not really assist overall. We are willing to take  
8 that point because we want to show the one key point that Mr. Morrell is making in his report on  
9 this issue, which is that the prices will have gone from A to B. We think that actual data relating  
10 to actual vitamins that were not actually covered by the cartel will be quite useful for the Tribunal  
11 in determining whether or not Mr. Morrell's approach was appropriate. It is not, of course, a total  
12 answer, it will simply assist. In terms of relevance and disclosure, obviously, madam, one does  
13 not have to have the answer to the issue, it is something that is relevant to an issue – i.e. it goes to  
14 it or it does not go it.

15 THE CHAIRMAN: In relation to the relevant vitamins has any material been disclosed other than the  
16 price lists in relation to the effects of prices?

17 MR. RANDOLPH: From Roche?

18 THE CHAIRMAN: Or from you?

19 MR. RANDOLPH: From us we just have ordinary data. Not as far as I am aware. In terms of  
20 exchange rate data, this has been worked up by the experts and the experts say, "That has got to be  
21 taken into account, the Swiss franc against the UK pound or the Deutschmark".

22 THE CHAIRMAN: What about the China market?

23 MR. RANDOLPH: The China market has been mentioned in passing, but there is no evidence sitting  
24 there. The bottom line is that it is a question as usual that unfortunately for the Tribunal we  
25 cannot produce, and I think my learned friends cannot produce, a perfect set of evidence data  
26 which shows absolutely in black and white, "Yes, that is the answer, no, that is not the answer".

27 THE CHAIRMAN: Hold on, Mr. Randolph, what is being said against you is that this is going to open  
28 up disclosure. If, in relation to the relevant vitamins, there is disclosure of other features which  
29 may or may not have a relevance to pricing, then if you were to get this material the defendants  
30 should be entitled to produce similar documentation in relation to the new vitamins.

31 MR. RANDOLPH: The non-cartel vitamins.

1 THE CHAIRMAN: They should also be entitled to, if they want to, open it up generally. Although you  
2 have identified two vitamins, which happen to be the ones that are used in chickens, it may be that  
3 there are other vitamins that are relevant to this analysis or that would be of assistance to this  
4 analysis, and they might say that the whole thing ought to be opened up. When you are looking  
5 and saying, “Well, all we want is these documents”, if the fact is that other documents have been  
6 disclosed in relation to the relevant vitamins then clearly it is misleading only to have those  
7 documents. One would need the other documents in relation to the particulars. Then the question  
8 is, are the defendants happy to restrict it to two other vitamins or would they say, “If you are doing  
9 this exercise you have to do it across the board with all the vitamins”?

10 MR. RANDOLPH: Again, that is a matter for them and their submissions. They can turn round and  
11 say, “This is lacking in any kind of overall representation across the board, you have picked up  
12 two” ----

13 THE CHAIRMAN: They do not know that until they do the analysis and you have chosen to put your  
14 case on the narrow basis.

15 MR. RANDOLPH: Madam, you asked about whether any other evidence had been put in, the answer is  
16 that save in so far as Yellow Carophyll is concerned – Yellow Carophyll is the specific ----

17 THE CHAIRMAN: The dubious one, yes.

18 MR. RANDOLPH: I do not whether I would accept that, madam.

19 THE CHAIRMAN: It was not in the original, that is why I say it is dubious. I did not mean “dubious”  
20 as in ----

21 MR. RANDOLPH: Good.

22 THE CHAIRMAN: Dubious in the fact that it was not part of the decision and the question of whether  
23 it is.

24 MR. RANDOLPH: I understand. Apart from that, no, because Mr. Morrell’s evidence goes – and this  
25 is one of the complaints from Mr. Biro, he has only looked at exchange rates. He said, “There  
26 may be other issues but I do not know about them, so I am putting them to one side, I am basing  
27 my case on a straight line projection amended or affected by exchange rates in so far as I know  
28 them”. He has done that, and that is all he has done.

29 THE CHAIRMAN: If we did the exercise that you suggest, and if you are right that the limited material  
30 that you are saying now has to be disclosed is the equivalent of the material that has been

1 disclosed in relation to the other relevant vitamins, then what you are saying is that Mr. Biro  
2 would have to supplement his report in relation to these other vitamins, B12 and K.

3 MR. RANDOLPH: What would happen would be that this evidence would be incorporated into the  
4 evidence produced by Dr. Cento Veljanovski.

5 THE CHAIRMAN: Why should Mr. Biro ----

6 MR. RANDOLPH: If I may come to that, madam. Mr. Biro would then read Dr. Veljanovski's  
7 evidence – I have not taken instructions on it, I do not see any particular reason why, if need be, he  
8 should not be able to supplement his present report ----

9 THE CHAIRMAN: We would need some time for Mr. Biro to supplement his report?

10 MR. RANDOLPH: It is already timetabled that he meets with Dr. Veljanovski.

11 THE CHAIRMAN: You would want to know before then, or your expert would want to know before  
12 then, what Mr. Biro says about this because he may bring other factors and other documentation  
13 may show all sorts of things about this, or may not.

14 MR. RANDOLPH: Indeed. We know what the arguments are going to be: one, this does not take into  
15 account everything, it is hardly a drawing let alone a painting; second, at the end of the day it is  
16 only two vitamins, and other vitamins may show something completely different and when you  
17 average it all out it shows that Mr. Morrell was wrong and Mr. Biro was right. Fine, that is not  
18 beyond the bounds of reason. I cannot remember what the timetable was, but there is some time.  
19 Dr. Veljanovski has to put in his report on 21 January.

20 THE CHAIRMAN: Can we just see what the timetable is?

21 MR. RANDOLPH: Yes, I was just trying to remember where the order is.

22 THE CHAIRMAN: I have got it here. This was 17 December. It was drawn on 20<sup>th</sup>.

23 MR. RANDOLPH: Yes, and it has yet to go on the internet. Mr. Biro has got to file by the 7<sup>th</sup>, which  
24 he did, then Mr. Forbes by the 14<sup>th</sup>, which apparently he has done. Then we file two expert  
25 reports, one further one from Mr. Morrell and one from Dr. Cento Veljanovski by the 21<sup>st</sup>. Then  
26 counsel have got to do various things ----

27 THE CHAIRMAN: Which is next Friday?

28 MR. RANDOLPH: That is Dr. Cento Veljanovski's response. Then a week on we have got to do  
29 various things. Then on or before the end of that week, so in two weeks time, Mr. Biro ----

30 THE CHAIRMAN: Where is your two weeks time?

1 MR. RANDOLPH: The 27<sup>th</sup>, para.9, madam, we are now the 14<sup>th</sup>. I am not quite sure why Thursday  
2 was picked.

3 THE CHAIRMAN: Because the timetable was so short.

4 MR. RANDOLPH: So para.9, Mr. Biro and the claimants' expert to consider what can be agreed  
5 between them, what is not agreed, and the extent of the agreement.

6 THE CHAIRMAN: There are two meetings, one on the 27<sup>th</sup> and one on the 28<sup>th</sup>, that was the reason.

7 MR. RANDOLPH: Then the trial does not start until the 21<sup>st</sup>, so one has got a month.

8 THE CHAIRMAN: We have got the statement of the experts by 2 February, and the meeting is the 28<sup>th</sup>,  
9 so there is very little time for Mr. Biro to ----

10 MR. RANDOLPH: Well, Mr. Biro will have from 21 January until 2 February. The position is that  
11 Freshfields have the documentation, it is not as if they are going to be taken by surprise and we are  
12 going to wait until the 21<sup>st</sup>, i.e. next Friday. If disclosure of this documentation is ordered  
13 Freshfields have it. They can give it to Mr. Biro immediately. They can give it to him tonight, it  
14 is in the file, it is there. Mr. Biro can look at it and say, "This is what it shows, and this is the  
15 weakness of that evidence". So he will have from today, effectively, or, let us be fair to him,  
16 Monday, the 17<sup>th</sup>, all the way up to 2<sup>nd</sup> February.

17 THE CHAIRMAN: That is not being fair to him because he has got to go a meeting on 27 January.

18 MR. HOSKINS: Madam, we have, in the context of trying to arrange the meeting, also made it clear  
19 that Mr. Biro has very limited availability, certainly in that week which includes the 27<sup>th</sup> and 28<sup>th</sup>.  
20 We would have to check prior to that. There is no guarantee that he is going to be available ----

21 THE CHAIRMAN: What, for the 27<sup>th</sup> and 28<sup>th</sup>.

22 MR. HOSKINS: No, he has some dates that week. It is simply in terms of this exercise. They know his  
23 limited availability, certainly that week, and we think that is probably the case in other weeks as  
24 well. It is just slightly optimistic, if I can use that expression.

25 MR. RANDOLPH: It is all very well, but experts are instructed and they know what the position is,  
26 they have been shown the timetable, it is tight, and they have to work to it. Our experts are  
27 equally busy and they will have to deal with it as well.

28 The bottom line is that it is doable because all that is being looked at is the price data, and  
29 it is not going to open up a huge amount of other data for this very reason: we do not want it to.  
30 That gives my learned friends an enormous opportunity to attack the evidence. We are not asking  
31 for the moon here, we are just asking for a little step on the way. We can guess what they are

1 going to say which is, "This does not get them very far", but it gets us as far as we want to go. We  
2 say that is where we should be allowed to go, because it deals with the true counter-factual, and it  
3 is no more and no less than that.

4 Madam, time is marching on, and unless you want to hear me on particular points relating  
5 to ----

6 THE CHAIRMAN: No, I think I have got the points.

7 MR. RANDOLPH: I think you have got the points. I do not think I need to go back over other matters  
8 unless there is anything I can help you on.

9 THE CHAIRMAN: No. The only question that I think I raised at the beginning was the indication  
10 today about the restitutionary damages and whether this is all part of ----

11 MR. RANDOLPH: Restitutionary/exemplary damages, madam. You will have noticed there was ----

12 THE CHAIRMAN: I have not seen it, I was told about it.

13 MR. RANDOLPH: Very briefly, you will obviously recall that the Tribunal, I think on every occasion  
14 when we met, were keen to ensure that we searched our minds, and we did, and in the light of the  
15 most recent evidence we have re-searched our minds and have come to the view that, yes, we will  
16 be seeking to apply to amend the relief sought either in the form of a restitutionary remedy in the  
17 form of an account of profits, or, which is the flip side, by way of exemplary damages under the  
18 second head in *Rookes v. Barnard*. Effectively it is a disgorgement remedy one way or the other.  
19 There may be issues as to whether it is a better idea to take exemplary damages because the law is  
20 fixed rather than a restitutionary remedy where the law is less than fixed. Neither, we would  
21 submit, will impact on this because neither will require any factual evidence. We will not be  
22 seeking in terms of the restitutionary relief actual damages, we would simply be seeking at this  
23 stage a declaration.

24 In so far as exemplary damages are concerned, it is not an accounting exercise, it is a  
25 punitive sanction, and therefore the Tribunal can, to a certain extent, put its finger up in the air and  
26 say ----

27 THE CHAIRMAN: You would need some evidence, would you not, you cannot quite do it that way.

28 MR. RANDOLPH: You need some evidence with regard to the over-charge probably and the amount of  
29 the super ----

30 THE CHAIRMAN: The way you are putting it at the moment, and I will not hold you to it, is that all  
31 you are going to do for the time being is to ask us to consider and to declare appropriate methods

1 of damages, whether it is the way it is pleaded at the moment, whether it is restitutionary or  
2 whether it is exemplary, and if it is the way it is pleaded at the moment to assess them.

3 MR. RANDOLPH: Exactly.

4 THE CHAIRMAN: If it is the other methods ----

5 MR. RANDOLPH: Then to grant or not the declaration. If the declaration is granted then it goes off to  
6 separate assessment, if you will. That is just a purely legal point. It is for the very reason that we  
7 do not want to derail the trial, but we do want to obviously ensure that our rights are properly  
8 protected. That will not have any impact on this.

9 THE CHAIRMAN: On disclosure immediately. It is not going to be followed with a disclosure  
10 application?

11 MR. RANDOLPH: It is certainly is not. That is speaking for myself. I am sure Mr. Robertson, who is  
12 not here, for BCL will agree with what I have just said, well at least I hope he will because he is  
13 another claimant. The note that we produced was jointly produced.

14 Madam, unless I can help you any further, those are my submissions.

15 THE CHAIRMAN: No, thank you very much. Mr. Hoskins, do you want to add anything?

16 MR. HOSKINS: I will not get drawn into a debate about potential amendments.

17 THE CHAIRMAN: I was just worried that we were going off next on another disclosure application.

18 MR. HOSKINS: We are working towards 21 February. You have heard submissions, and you can put  
19 aside this specific disclosure on what you have heard.

20 THE CHAIRMAN: I will rise for a moment and think about what I am going to do.

21 (Short break)

22 THE CHAIRMAN: I am going to give my decision and the reasons. This is an extempore decision and  
23 the reasons will be subject to revision when I see the transcript.

24 This is an application by the claimants for specific disclosure of excised material relating  
25 to vitamins B12 and K in documents already disclosed by the defendants. There are two bases on  
26 which the claimants rely for the relevance of these documents. The first is, they submit, common  
27 sense. The second is the report of the claimants' expert, Mr. Biro, particularly paras.35 and 36.

28 I take the second submission first, regarding Mr. Biro's report. The defendants have told  
29 me this evening that Mr. Biro is not suggesting that evidence in relation to "non-Relevant  
30 Vitamins" is germane. When I say "non-Relevant Vitamins", I mean those vitamins, including  
31 vitamins B12 and K, not falling within the terms of the earlier disclosure order made by the



1 Tribunal. It has been explained by the defendants – and this explanation is given by them having  
2 consulted Mr. Biro – that Mr. Biro’s criticism is confined to the Relevant Vitamins and is a  
3 criticism only of the fact that Mr. Morrell does not consider the actual price of those Relevant  
4 Vitamins for an appropriate period and the features which may have affected the price of those  
5 Relevant Vitamins during that appropriate period which were extrinsic to the cartel. Having  
6 regard to this explanation, Mr. Biro’s report cannot be relied upon by the claimants as a ground for  
7 this application.

8 I now turn to what has been referred to as the “common sense” ground. If it is a matter of  
9 common sense then it seems to me that it should have been obvious from the outset. The  
10 claimants have, up to now, confined the material on which to base their claim to the Relevant  
11 Vitamins. They now wish to expand outside those categories, but they only wish to expand in  
12 relation to B12 and K. The defendants submit that if B12 and K are to be taken into account then  
13 other non-Relevant Vitamins ought also to be taken into account. The defendants also submit that  
14 if any other vitamins, including B12 and K, are to be taken into account then it would be necessary  
15 to give consideration to all features which affected the price of those vitamins during the  
16 appropriate period, whatever that period may be.

17 The claimants do not accept these submissions of the defendants and urge me to confine  
18 further disclosure only to excised material from the documents which have presently been  
19 disclosed. They do so because they accept that wider disclosure could disturb the timetable for  
20 trial and both parties have told me that they do not want to lose the trial date.

21 Having heard the submissions, I am satisfied that to allow the application would be to  
22 change the foundation on which this claim has been based up to now. That foundation was limited  
23 to looking only at the price of Relevant Vitamins. If the foundation was to be changed then each  
24 party would be entitled to revisit disclosure and revisit the evidence which they each wish to  
25 produce to the Tribunal. I cannot see how such an exercise could be undertaken within the current  
26 timetable. Therefore, even if these documents have relevance, I accept the defendants’ submission  
27 that disclosure would mean that the fixture would have to be broken.

28 However, I am not satisfied on what I have heard this evening that these documents are  
29 relevant. Apart from two paragraphs in Mr. Perrott’s witness statement in which Mr. Perrott  
30 asserts their relevance as being obvious, there is no evidence before me to demonstrate that the  
31 documents are indeed relevant. The claimants have not advanced a convincing argument that the

1 pricing of B12 and K is an important consideration in this claim, and the fact that this approach  
2 has only just surfaced is an indication to me that this information is unlikely to be of assistance to  
3 the Tribunal or have a direct bearing on the issues to be decided for the reasons given by the  
4 defendants.

5 Although the claimants are presently confining the request to a small number of  
6 documents, it has the clear potential to open up new issues as to examination of the pricing of  
7 other vitamins currently outside this claim which will require further disclosure and expert  
8 evidence and possibly factual evidence. At this very late stage, when the hearing is set down for  
9 21 February 2005 and when all parties are wanting to keep to that date, it would be  
10 disproportionate and impracticable in the time available to embark properly upon that exercise  
11 which, in any event, may prove to be an unnecessary luxury and of limited or of no real assistance.  
12 To embark upon this exercise in the arbitrary way that is submitted by the claimants would be  
13 unfair to the defendants. I therefore dismiss the application.

14 MR. HOSKINS: Madam, at the risk of making myself very unpopular can I say a very few words on  
15 costs, and I promise they will be a very few minutes – literally, if you will allow me two minutes,  
16 and then you can say whether you want to deal with it tonight or not.

17 THE CHAIRMAN: All right.

18 MR. HOSKINS: You will remember that on the last occasion, which was 17 December, when we were  
19 before you, there was the issue of redaction and I applied for costs on that occasion on the basis  
20 that we had made an offer for inspection of the documents, to allow Taylor Vinters to inspect the  
21 documents, when we gave disclosure on 21 September 2004. They had pursued redaction and at  
22 the last hearing, as you have seen from the evidence, they then said, “Is the offer still open?” and  
23 that is where we got to. So all the correspondence that took place about redaction was wasted,  
24 because what happened on 17 December was that the original offer that we had made was  
25 accepted. We should have our costs in relation to that period. Inspection then took place.

26 Madam, you left over the question of costs. On 17 December you said to me, “Let us  
27 wait and see what happens, let us see what the result of this is”. We know the result now, we have  
28 won. The reasons why we have won have been set out in ----

29 THE CHAIRMAN: You have not quite won in relation to the redaction issue because there were  
30 documents.

31 MR. HOSKINS: Madam, there were some clerical errors.

1 THE CHAIRMAN: Whatever it was, there were documents.

2 MR. HOSKINS: Madam, all the time this evening has been taken up with ----

3 THE CHAIRMAN: That is a different matter.

4 MR. HOSKINS: Precisely. All the time this evening has been taken up with issue of B12 and K.

5 Madam, on that basis we say that we should have the costs, even of the redaction issue, because

6 although there were certain errors we made the offer originally. So what I am asking for are the

7 costs incurred between the 21 September letter saying, "Come and inspect", and 17 December,

8 when they said, "Okay, we will come and inspect". They are our costs.

9 THE CHAIRMAN: The practice so far has been not to have costs orders on these interlocutory matters.

10 To do it in one case ----

11 MR. HOSKINS: Madam, this case is different because this is the first damages case.

12 THE CHAIRMAN: Even in this case we have not been doing it.

13 MR. HOSKINS: Madam, there has not been an indication that they will not be dealt with on any

14 occasion, simply most times we have run out of time. The point I have made before ----

15 THE CHAIRMAN: We are out of time, it is now eight o'clock.

16 MR. HOSKINS: Madam, this is a short application. If this is to be run – I use this word advisedly – on

17 a sensible basis then one would expect it to ape what happens in the courts when dealing with

18 damages claims. The reason why there costs consequences visited on parties is to make sure that

19 proceedings are run efficiently, and that is precisely why parties have to pay costs when they make

20 an application. That is now the basis of the CPR.

21 THE CHAIRMAN: Are you asking for costs to be paid forthwith?

22 MR. HOSKINS: No, they can be paid at the end.

23 THE CHAIRMAN: You are not asking for the order that the courts make, which is that interlocutory

24 applications have to be made as soon as possible.

25 MR. HOSKINS: The order that I would ask for would be that we should have the costs in any event and

26 the amount ----

27 THE CHAIRMAN: On the old basis where it all gets in at the end, because at least the costs order has

28 been made as we go along.

29 MR. HOSKINS: Precisely. The trouble is if we leave it to the end ----

30 THE CHAIRMAN: It is just gets wiped up.

1 MR. HOSKINS: ---- this is never going to be dealt with. That is the problem with this approach. I fully  
2 appreciate that the Tribunal does not want to waste time on it.

3 THE CHAIRMAN: Let us see what Mr. Randolph says about this.

4 MR. RANDOLPH: We would oppose that, madam, not least by virtue of the fact that many of the  
5 reasons that you came to which led to your finding against us were based on Mr. Biro and  
6 Mr. Biro's new evidence put in this evening. We based ourselves quite clearly – and you,  
7 yourself, madam, based yourself quite clearly – on the words that were in the report. It is totally  
8 fair to go ahead with that and it is fair to speculate that had the evidence not been put in with  
9 regard to Mr. Biro the result might well have been different. So it would be wholly wrong in these  
10 circumstances to make an award for costs.

11 THE CHAIRMAN: In fact, I think it is right that this Tribunal indicated about Mr. Biro earlier this  
12 week.

13 MR. RANDOLPH: Yes, indeed, in your letter, and then the point was dealt with specifically by my  
14 learned friend in his skeleton argument where he said, “Oh, well, actually it is not quite that, you  
15 are looking at something else, you are looking at pre and post”, but they did not deal with this  
16 point about particular vitamins. That only came out in reply to my submissions. I made the point  
17 in submissions ----

18 THE CHAIRMAN: Some of the costs would have been saved, or may have.

19 MR. RANDOLPH: We may have won.

20 THE CHAIRMAN: Assuming they had told us at an earlier stage you would still have gone on the  
21 common sense point.

22 MR. RANDOLPH: We might have done, we might not have done, but had they told us earlier on we  
23 might have reviewed the position and certainly the costs of this evening may well have been  
24 saved. In those circumstances and given there are other issues – we take your point, madam, about  
25 the redaction exercise having been flawed – in those circumstances and based on the fact that it  
26 was closely argued, and particularly with regard to new evidence coming in at the last minute, it  
27 would be wrong for there to be a costs award and the ordinary approach should be taken which is  
28 that costs should be determined at the end. Let us face it, there is no reason why we should be  
29 penalised for having taken a good point.

1                   There are also other issues. Madam, you raised at the beginning that you did not want to  
2 deal with the issues about abuse. A lot of time was taken up with that. All of the evidence from  
3 the other side related to the abuse point.

4 THE CHAIRMAN: One could deal with that in a costs order because one could say that it is the costs  
5 thrown away by today's application, the application for the B12 and K documents, and the costs  
6 thrown away by you not taking up the offer originally.

7 MR. RANDOLPH: We certainly do not agree to that either. This has been dealt with before. On  
8 17 December costs were specifically asked for.

9 THE CHAIRMAN: And we said let us wait and see what happens.

10 MR. RANDOLPH: Let us wait and see what happens. Supposing there had been no problem, what  
11 would have happened then? Supposing there had been no B12 and K and there had been just these  
12 little points and that basically there had been agreement with regard to the errors and they had put  
13 them right, then what would have happened? It would have gone off to the end. I do not have the  
14 transcript here, but certainly my understanding was that this was a matter that was not going to be  
15 revisited because you would not have known that we were going to make an application, and it  
16 could well have come on at the end. I think it is unfair to spring that on us. Certainly we were not  
17 intending to deal with that.

18 THE CHAIRMAN: What about today's application, which is completely separate?

19 MR. RANDOLPH: Today's application is completely separate, and we say ----

20 THE CHAIRMAN: The costs thrown away by that application?

21 MR. RANDOLPH: No, madam. The Tribunal's judgment is based in large part on the new position  
22 taken by the defendants with regard to Mr. Biro.

23 THE CHAIRMAN: There is the common sense argument.

24 MR. RANDOLPH: Then there is the common sense argument. We put a large amount of our eggs, if  
25 you will, in the Biro basket, and that is quite clear, and nothing came from the other side until this  
26 evening on that, although they were put on notice by the Tribunal's letter of the 11<sup>th</sup>. We say that  
27 it would be wholly unfortunate and unfair and wrong in those circumstances to penalise us, having  
28 brought a perfectly sensible application which coincided with the Tribunal's understanding of the  
29 evidence before it as well. So in those circumstances it would be correct and proper not to make  
30 any order as to costs at the moment, especially in the light of the fact, as I say, that there is this  
31 difficulty with regard to the fact that all their evidence prior to the skeleton argument we received

1 this morning was predicated on the abuse point. Up until the skeleton argument this morning we  
2 thought that there was not going to be an issue taken on relevance, the only point being taken was  
3 that on ----

4 THE CHAIRMAN: What do you say about Mr. Hoskins' point that this is a damages claim?

5 MR. RANDOLPH: So?

6 THE CHAIRMAN: This Tribunal has taken a view on other matters that come before it that generally,  
7 because it is a new jurisdiction and because one wants to look at costs order generally in the round  
8 and see how it all works, the Tribunal does not normally make individual costs orders. What he is  
9 saying is that this is not a new jurisdiction because this is damages and therefore this Tribunal  
10 should not take the same view as on other of its jurisdictions. Would you say that this is actually  
11 also a new jurisdiction?

12 MR. RANDOLPH: Yes, it is, 47(a) is a new jurisdiction, quite clearly, and the mere fact that it is a  
13 damages action is neither here nor there. There is a specific jurisdiction for this Tribunal to deal  
14 with this type of matter in a particular way. We say, therefore, that the ordinary manner in which  
15 this Tribunal deals with interlocutory matters should be continued into this case. The mere fact  
16 that it deals with damages is neither here nor there. Echoing, I believe, the President in this  
17 particular case, when faced with a cross-application earlier, he made it clear that in the context of a  
18 damages case, the first damages case before this Tribunal, no, the Tribunal was not keen to enter  
19 into this type of debate; *a fortiori*, at five past eight on a Friday evening where it is not so  
20 straightforward, there are interesting issues as to splitting bits off and wasted costs. So at the end  
21 of the day it does not serve anybody, because there will be, one would imagine, serious arguments  
22 as to amounts, although the amounts are not being looked at.

23 THE CHAIRMAN: That is not being looked at.

24 MR. RANDOLPH: It is the division, and really the justice of the situation would demand, we would  
25 say, that there be no order as to costs, or that the costs be dealt with at the end.

26 Madam, unless I can assist you any further those are my submissions on costs.

27 THE CHAIRMAN: Mr. Hoskins, do you have anything else on that?

28 MR. HOSKINS: Very briefly. At the last hearing, madam, you did specifically say:

29 "It seems to me it is premature to deal with costs because we do not know what the result  
30 of inspection is going to be. Although it is unfortunate that it has taken this long to

1 resolve the inspection part of it, I think the matter needs to be left over and let us see  
2 where inspection takes us.”

3 That is why I am making this application.

4 There are two elements to the costs. There is the redaction issue and there is this  
5 application. In relation to redaction it is very simple, we made the offer on 21 September ----

6 THE CHAIRMAN: No, I understand that.

7 MR. HOSKINS: ---- therefore we should have the costs of that. In relation to the hearing, the common  
8 sense approach, that is what my friend put forward, that is what they lost on. In relation to  
9 Mr. Biro, that was not a reason that was put forward by the claimants. It was put forward by the  
10 Tribunal. The first time it was actually adopted by the claimants was today in this hearing.

11 THE CHAIRMAN: No, it is in the 11 January letter.

12 MR. RANDOLPH: No, it is in the 11 January letter which is appended to the list of suggested ----

13 MR. HOSKINS: Madam, I had not seen that letter before. The first time it was adopted by the  
14 claimants was 11 January, because it does not appear in ----

15 THE CHAIRMAN: I am not sure they adopted us.

16 MR. HOSKINS: The first time it was raised by the claimants was 11 January, so we have had two  
17 working days if we were going to deal with it, and we did not enter into any substantial  
18 correspondence because the application was being made. So in relation to the hearing, we should  
19 have our costs, it is quite simple.

20 Then there is the practice. It is very dangerous to say that there is a Tribunal practice,  
21 with respect.

22 THE CHAIRMAN: I am not saying there is a practice.

23 MR. HOSKINS: There is not one, and this is actually a very important issue for a Tribunal about how to  
24 deal with these sorts of cases and we say it is not a typical “public law type competition claim”  
25 that one gets, an appeal in respect of regulator’s decisions, it is like a commercial quantum trial or  
26 a liability trial, it is a commercial issue, and there would have to be very strong reasons why the  
27 Tribunal thought it was not appropriate to have costs consequences which the High Court  
28 obviously deems fit.

29 Madam, I will not take up any more time.

30 THE CHAIRMAN: I am going to rise for a moment.

31 (Short break)

1 THE CHAIRMAN: I am not prepared to consider the costs application tonight at this late hour since it  
2 seems to me inappropriate to consider it on a cursory basis when, because of the time constraints,  
3 I have not heard the submissions of both parties as to the dispute between them as to how the  
4 history of this application arose and how the history of the previous application arose.

5 The outcome of this application should be specifically revisited when the costs  
6 applications are dealt with at the end of the main hearing. I am making a note in relation to this  
7 application specifically.

8 It is for those reasons that I have given that I am not making an order tonight. It should  
9 not be taken that there is any practice or that in other circumstances I would not have made a costs  
10 order in such an interim application.

11 MR. HOSKINS: It just remains to thank you, madam, for sitting and thank you for sitting so late.

12 MR. RANDOLPH: Mr. Hoskins got there before me. I probably should have said that because it was  
13 my application, but thank you very much indeed and our apologies for taking so much time.

14 THE CHAIRMAN: I am sorry we had to do it so late.  
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