

This Transcript has not been proof read or corrected. It is a working tool for the Tribunal for use in preparing its judgment. It will be placed on the Tribunal Website for readers to see how matters were conducted at the public hearing of these proceedings and is not to be relied on or cited in the context of any other proceedings. The Tribunal's judgment in this matter will be the final and definitive record.

IN THE COMPETITION

Case No. 1060/5/7/06

APPEAL TRIBUNAL

Victoria House
Bloomsbury Place
London WC1A.2EB

15 November 2006

Before:
MARION SIMMONS QC
(Chairman)

PROFESSOR ANDREW BAIN OBE
GRAHAM MATHER

Sitting as a Tribunal in England and Wales

BETWEEN:

HEALTHCARE AT HOME LIMITED

Claimant

and

GENZYME LIMITED

Defendant

Mr. Mark Brealey (instructed by Ashursts) appeared for the Applicant.

Mr. Christopher Vajda QC and Mr. Tim Ward (instructed by Manches LLP) appeared for the Respondent.

Transcribed from 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

CASE MANAGEMENT CONFERENCE

1 THE CHAIRMAN: Good morning. On 4th September this year we dismissed the defendant's
2 application for a split trial. Today we are handing down in writing our reasons for that
3 decision. We are also handing down our decision on the claimant's application for an interim
4 payment. For the reasons set out in our written Judgment, which we are now handing down,
5 we make an interim payment of £2 million.

6 There may be matters today arising from our interim payment Judgment which we can deal
7 with. We understand that in relation to the matters arising from our previous order on the
8 CMC there is a measure of agreement between the parties, particularly on the confidentiality
9 ring?

10 MR. VAJDA: I think the answer is "yes". I think there is a non-contentious confidentiality issue
11 that has arisen subsequent to the last CMC.

12 THE CHAIRMAN: Well we are here to deal with whatever needs to be dealt with today.

13 MR. VAJDA: Yes. I am happy to start – does the Tribunal have a bundle of correspondence? I do
14 not think this is going to take my friend by surprise, it is a very technical point.

15 THE CHAIRMAN: This is what was faxed to us yesterday?

16 MR. VAJDA: Possibly, yes. If I could ask the Tribunal to look at p.34 and then we can see if we are
17 in the same bundle. That should be letter of 12th October.

18 THE CHAIRMAN: Yes, it is, that is what I was referring to.

19 MR. VAJDA: Excellent. It is a somewhat technical point. The position is that in the old
20 proceedings there are a number of documents subject to a confidentiality ring, which
21 essentially was the external adviser, Genzyme.

22 THE CHAIRMAN: Yes.

23 MR. VAJDA: The external adviser, Genzyme, has changed – it came right at the end of the last
24 hearing – and what we are asking the Tribunal to do is to vary the orders that were made – and
25 there are a number of them set out -----

26 THE CHAIRMAN: Well it would be making a new order, would it not?

27 MR. VAJDA: It would be making a new order.

28 THE CHAIRMAN: Because these are different proceedings.

29 MR. VAJDA: Exactly, save for myself who is common to both. The position is that if one just
30 looks at (i) to (vi) -----

31 THE CHAIRMAN: There is nobody from Ashursts.

32 MR. VAJDA: Perhaps I could just very briefly explain. The first two documents, they are
33 statements of course from Charles Walsh who is, of course, Healthcare at home.

34 THE CHAIRMAN: Yes.

35 MR. VAJDA: And they were provided on a confidential basis to ----

1 THE CHAIRMAN: Oh, I see what you mean, yes – it is only one way.

2 MR. VAJDA: Exactly. They have now actually been disclosed by us to the other side as part of our
3 disclosure, but effectively we feel that we are still under the original order and therefore would
4 like that varied.

5 THE CHAIRMAN: Yes.

6 MR. VAJDA: The next two items, and these are items that the Tribunal will be familiar with, is that
7 the OFT produced a report on the margin squeeze which again had confidential bits in it.
8 Those were given to the outside ring, and that produced (iv) a supplementary report and
9 exactly the same procedure was made. Then Healthcare at Home produced its response to
10 those reports and again the confidential version of that was limited to the external advisers.

11 THE CHAIRMAN: Yes.

12 MR. VAJDA: Then (iv), there was an order made in relation to this document, and we cannot
13 actually locate that document itself, what we have disclosed is something which may be
14 referred to in that email, which is document 925, but what we therefore ask is that the Tribunal
15 vary the original order as we see on page ----

16 THE CHAIRMAN: Well make an order equivalent to the original order but varied in this way.

17 MR. VAJDA: Exactly, and then we set out effectively the new definition of external advisers on
18 p.34 and if I could add one extra person who has been omitted from that list, which is Chris
19 Shelley, who is a Partner at Manches. Mr. Brealey will correct me if I am wrong, but I do not
20 anticipate that there is an objection from the other side, this was debated because it was said
21 this was irrelevant and unnecessary, but it is simply for the sake of good order that we make
22 this application.

23 THE CHAIRMAN: Is the only difference the Chris Shelley addition?

24 MR. VAJDA: Yes.

25 THE CHAIRMAN: I thought you said that there was a problem that had arisen this morning.

26 MR. VAJDA: This is an issue which arose since the last CMC.

27 THE CHAIRMAN: Oh, I am sorry.

28 MR. VAJDA: So I do not know if Mr. Brealey has anything to say?

29 MR. BREALEY: There is no problem with the revised confidentiality ring. Just for the sake of
30 good order there is a letter from Ashursts at p.59/60 of 25th October, it is actually on p.60
31 under the heading “ Letter of 12th October 2006”, the only marker we would like to put down is
32 the extent to which all this material is going to be disclosed once again and gone through
33 again. But, as far as the people subject to the confidentiality ring is concerned we have no
34 problem whatsoever.

35 THE CHAIRMAN: That goes to the binding point.

1 MR. BREALEY: It does, yes. We are just concerned that we are going to go through the whole
2 thing again but that is probably for another day, not today. But so far as the personnel are
3 concerned we have no problem whatsoever.

4 (The Tribunal confer)

5 THE CHAIRMAN: So that deals with the confidentiality ring, and we will make an order which
6 reflects the terms of the order last time with those documents and the names that are at p.34.

7 MR. VAJDA: Plus Mr. Shelley?

8 THE CHAIRMAN: Plus Mr. Shelley.

9 MR. VAJDA: Yes, I am grateful. If one goes to the order that was made last time, and perhaps I
10 can go through where we are. If one can pick it up really at para.9, there is agreement between
11 the parties that trial bundles should be produced by 14th February and subject to any
12 observation of the Tribunal that can be effectively slotted into the timetable.

13 THE CHAIRMAN: Yes. There is agreement that there is only one expert per party and it is an
14 accountancy expert.

15 MR. VAJDA: Yes, that is right.

16 THE CHAIRMAN: Last time it was the claimant to serve the report of its accountancy expert – we
17 probably do not need to vary that?

18 MR. VAJDA: No, because there are no further experts.

19 THE CHAIRMAN: The names of the experts have no consequence.

20 MR. VAJDA: There has also been some discussion about skeleton arguments.

21 THE CHAIRMAN: Yes.

22 MR. VAJDA: There is a small difference of view, not surprisingly the claimants suggest mutual
23 exchange on 1st March, the normal variant if you have to go first, and not surprisingly the
24 defendants suggest, and I submit, the appropriate course would be sequential, as is normal in
25 this Tribunal, as I understand it, and that is a matter I suspect the Tribunal will have to resolve.
26 So far as the dates are concerned, Ashursts suggest 1st March for mutual exchange, and we
27 have suggested 22nd February for the claimant's skeleton and 1st March for the defendant's
28 skeleton. We would submit sequential exchange is not only consistent with the practice of this
29 Tribunal in contested substantial issues, but also, in my respectful submission, it would greatly
30 assist the Tribunal where you have a document that seeks to respond to another rather than
31 ships passing in the night.

32 THE CHAIRMAN: Well insofar as there is any practice in this Tribunal the idea of sequential
33 exchange does achieve the objective - but we will see what is said.

34 MR. BREALEY: We have no problem with that.

35 THE CHAIRMAN: You are happy with sequential?

1 MR. BREALEY: We are happy with sequential, and it may be that if there is anything in the
2 defendant's skeleton then ----

3 THE CHAIRMAN: You would put in a reply?

4 MR. BREALEY: Yes.

5 THE CHAIRMAN: And you are happy with 22nd February and 1st March?

6 MR. BREALEY: Yes, we are.

7 THE CHAIRMAN: If you are going to put in a response shall we make an order about that?

8 MR. BREALEY: Yes, please.

9 THE CHAIRMAN: That would be 8th March then, on that basis.

10 MR. BREALEY: Yes.

11 THE CHAIRMAN: 8th March claimant's response skeleton, if any. There is the question about the
12 witnesses and the cross-examination schedule, and may be that can be left over until we have
13 seen the witness statements?

14 MR. BREALEY: Precisely, that is what we would suggest.

15 THE CHAIRMAN: That probably is everything, is it?

16 MR. VAJDA: I think that is everything. Both sides may want to put down a marker on disclosure.
17 As the Tribunal is aware the lists were changed last week and we have just received the other
18 side's disclosure and they have just received ours.

19 THE CHAIRMAN: Have you disclosed the documents in relation to the restitutionary claim?

20 MR. VAJDA: Yes, because you gave the Ruling last time.

21 THE CHAIRMAN: Absolutely, so I am just wondering if that had been done.

22 MR. VAJDA: There is a small amount of LPP for which we have given a list and which we are
23 going to get by the end of the week. Obviously, there may be matters arising out of that but
24 certainly it is not something I want to pursue this morning.

25 THE CHAIRMAN: Would that need to be pursued before the next CMC that we have fixed?

26 MR. VAJDA: I would have thought, in the interest of economy, that we do not fix another CMC. I
27 would have thought the appropriate thing – if there issue, and there have been one or two
28 issues debated in correspondence – if, as it were, the debate in correspondence does not lead to
29 a resolution and it is thought necessary to come to the Tribunal before 15th January ----

30 THE CHAIRMAN: Then we will have to see.

31 MR. VAJDA: We will have to see and indeed, as I understand it, you, madam, Chairman, could sit
32 and deal with that on your own, could you?

33 THE CHAIRMAN: I could, yes.

34 MR. VAJDA: One hopes that that would not be necessary at all. I do not know if Mr. Brealey
35 agrees with that?

1 MR. BREALEY: I do. There is just one last matter, on the interim payment the Tribunal will
2 probably remember that there were five skeleton arguments, I think; three were discrete to the
3 interim payment issue, and two were discrete to the CMC, the directions', and we would ask
4 for our costs incurred on the application for interim payment, on the basis they are distinctly
5 incurred, and if the Tribunal were minded to award the claimant its costs of that application
6 they may be subject to detailed assessment by the Tribunal if not agreed. It was not just a
7 question of the CMC, as I say there were two separate skeletons for the CMC and three for the
8 application for interim payment. There was some correspondence: "Please pay us some
9 money", and there was a "No, we will not", and so we did come to the Tribunal seeking an
10 interim payment.

11 MR. VAJDA: On the question of costs the position was this, that there were effectively three issues
12 before the Tribunal last time, leaving aside if you like case management issues. There was
13 what I call the "duration point", which the claimant was successful on. There was what I call
14 the "s.47(a) point" which is the claimant was unsuccessful on, this was effectively that the
15 remedies' Judgment was binding, and there was the interim payments' point which the
16 claimant was successful on. I have looked this morning at Mr. Brealeys' skeleton and quite a
17 lot of time was spent on the 47(a) point. What I submit is – I fully accept that the claimants are
18 entitled to the majority of their costs, but I would respectfully submit that an order that we pay
19 75 per cent. of their costs would meet the justice of what happened on that day.

20 THE CHAIRMAN: Of the interim payment application.

21 MR. VAJDA: Of the interim payment application. The Tribunal may wish to reserve costs until the
22 end, I am entirely neutral on that. If the Tribunal wants to make an order today on costs but
23 my submission would be if it does make it today the claimant should be entitled to 75 per cent..
24 On the interim payment, obviously we received the Judgment late last night and there is no
25 order yet drawn up. What I am hoping to do – in fact my client has just arrived – is to take
26 instructions in relation to time to pay.

27 THE CHAIRMAN: Well we could adjourn for a moment, because it would be nice to wrap the
28 whole thing up today.

29 MR. VAJDA: Absolutely, and so if the Tribunal could permit me five minutes at some convenient
30 point?

31 THE CHAIRMAN: We will do that.

32 MR. VAJDA: Thank you.

33 THE CHAIRMAN: Mr. Brealey, on the costs it seems to be accepted - 75 per cent., do you have a
34 submission to make that that is unfair?

1 MR. BREALEY: Only in that in the correspondence we did ask them to make a sensible interim
2 payment and they said “no”, so we sought the application and if one comes up with three
3 arguments and you have succeeded on two I do not think it is an appropriate that this is issue-
4 based – there are three reasons why we should win and we won on two of them and lost on
5 another. This is not an issue based Judgment. You could also say there was a fourth issue
6 relating to causation which we won and which now makes it 80 per cent. I would say it is
7 unfair and the Tribunal should not adopt an issue based approached to the question of costs in
8 this application.

9 (The Tribunal confer)

10 THE CHAIRMAN: We are going to adjourn; that gives you your opportunity – do you want to let
11 us know when you are ready?

12 MR. VAJDA: Yes, I would certainly anticipate we would be back by 11 o'clock. I am very grateful,
13 thank you.

14 (The hearing adjourned at 10.50 a.m. and resumed at 11.05 a.m)

15 THE CHAIRMAN: In relation to the costs we make the order that the defendant pay the claimant's
16 costs of the interim payment application to be assessed by the Tribunal if not agreed.

17 MR. VAJDA: In relation to payment I have taken instructions and my client is willing to pay within
18 14 days of today – if the order is actually drawn up today that will be 14 days from the date of
19 the order, but in any event from today.

20 THE CHAIRMAN: You have nothing to say about that?

21 MR. BREALEY: No, I do not, thank you.

22 THE CHAIRMAN: Is there anything else?

23 MR. VAJDA: No.

24 THE CHAIRMAN: Well thank you very much.

25 (The hearing adjourned at 11.06 a.m)