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**IN THE COMPETITION**

Case No. 1060/5/7/06

**APPEAL TRIBUNAL**

Victoria House  
Bloomsbury Place  
London WC1A.2EB

20<sup>th</sup> July 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

Applicant

and

GENZYME LIMITED

Respondent

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

Mr. Tim Ward (instructed by Manches) appeared for the Respondent.

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**CASE MANAGEMENT CONFERENCE**

1 THE CHAIRMAN: Good afternoon. Before we start I have a few comments. The purpose today is  
2 to discuss with the parties the course of these proceedings so that the parties have an  
3 opportunity to consider those aspects that we discuss further within the next month. We are  
4 available to have a further CMC at 11 o'clock on 4<sup>th</sup> September which I understand is a date at  
5 which all legal advisers are able to attend. However, there are a number of aspects that we do  
6 wish to raise for consideration between now and then.

7 If I turn to the agenda, first, I think the forum is agreed as England and Wales so that is non-  
8 contentious. As to the amendment to the pleadings we note from Ashursts' letter of 10<sup>th</sup> July  
9 that the claimants wish to amend their claim to take account of expert evidence dealing with  
10 quantum and that that is presently being prepared. Now, we are concerned whether the  
11 evidence dealing with quantum needs to be prepared and further developed at this stage, and  
12 before the issues as to the legal recovery of the seven heads of claim have been resolved. It  
13 seems to us at our preliminary stage of looking at it that consideration needs to be given to  
14 whether there are issues within the seven heads of claim which might usefully be decided at a  
15 first stage which would then provide a foundation and a proper basis for considering what  
16 quantum evidence is needed and how that should proceed. Turning back to the agenda, the  
17 remarks that I have just made go, I think, to issues 2 and 3 as well as to the question of the  
18 appropriateness of the amendment proposed to the claim.

19 The suggestion of hearing this matter in what would then be two stages might involve some  
20 factual evidence for the first stage, both in relation to documents and possibly oral evidence,  
21 and that needs to be explored and is something that might be explored at the next CMC after  
22 everyone has considered it.

23 Today it might be helpful if the claimants were to indicate in a little more detail the nature of  
24 the amendments which they proposed to make and as to whether they relate to what I am now  
25 calling a stage 1 or stage 2 hearing. I am deliberately not saying "preliminary point" because  
26 that has a connotation which might be something that we want to do slightly differently.

27 Another matter on the agenda is confidentiality. We assume that this is not an issue in this  
28 case and if it is going to be an issue I think we would want to raise that now.

29 Finally, we would like to raise one matter which the parties, and particularly the claimant has  
30 not so far raised and there may be reasons why they have not raised it, but that is our power  
31 under Rule 46 for an interim payment. We note that in respect of what is termed legal costs  
32 the defendants admit that head of claim, although not the amount of it. It seems to us, subject  
33 to further submissions, that this might be a head for which an interim payment might be  
34 appropriate. We also wonder whether head 1 would give rise also to an interim payment, and  
35 in that respect it might be helpful if the Tribunal were to decide as an issue right up front what

1 the relevant period is for the head 1 damages' claim, and to decide that as a distinct issue and  
2 possibly at the CMC in September. I say that because our first impression is that that only  
3 involves construing s.47(a) and if that is the case it may be quite a short point. It may also be  
4 that at the CMC on 4<sup>th</sup> September we could also decide the amount of the legal costs, if there is  
5 some issue between the parties as to that, and it has not been agreed before 4<sup>th</sup> September – I  
6 put that up for consideration.

7 Those are the points that we would like to raise and, of course, they are open to submissions by  
8 the parties. I do not know if you want a few moments to consider what we have said before  
9 you continue, or whether you want to go on now. (After a pause) You would like a chat?  
10 Shall we say 20 past 2?

11 MR. BREALEY: Yes, thank you.

12 (The hearing adjourned at 2.10 p.m. and resumed at 2.20 p.m.)

13 MR. BREALEY: Thank you very much for those indications. Can I say where our conversations  
14 have got to and then I have had a very quick word with Mr. Ward, and maybe we can tell you  
15 where we are.

16 THE CHAIRMAN: Yes.

17 MR. BREALEY: We would welcome the case management conference on 4<sup>th</sup> September and,  
18 subject to what I am going to say after the discussion with Mr. Ward, we would welcome at  
19 that case management conference a determination of the period, as you have suggested.

20 THE CHAIRMAN: I know I have thrown this at you, so it may be that you might go away and think  
21 differently, but at the moment are we right in thinking it is just purely a construction of  
22 s.47(a)?

23 MR. BREALEY: I believe it is, yes.

24 THE CHAIRMAN: So it should not actually take very long?

25 MR. BREALEY: No, I would have thought that maybe the CMC would need to be the whole day.

26 THE CHAIRMAN: That is why we thought 11 o'clock.

27 MR. BREALEY: Yes. Subject to what Mr. Ward has indicated to me, yes, we can try and argue that  
28 on the 4<sup>th</sup>. Determination of the interim payment concerning ----

29 THE CHAIRMAN: You would have to make an application?

30 MR. BREALEY: Yes, we would - head 1 and 4 – the legal costs. At the 4<sup>th</sup> September CMC we can  
31 debate the stage 1, stage 2 issues, because at the moment we are slightly unclear as to ----

32 THE CHAIRMAN: Between now and then you could consider how you would deal with that. We  
33 have some ideas about it, but I think it should start from you and not from us really.

34 MR. BREALEY: In many respects this is like the final hearing. This is not split liability where  
35 quantum is put back, this is the quantum hearing.

1 THE CHAIRMAN: Well, we get a confusion do we not in relation to what we mean by “liability”,  
2 because normally your split hearing is liability and then damages. But damages has, in itself,  
3 liability for those damages and the calculation of the damages.

4 MR. BREALEY: And causation maybe, yes.

5 THE CHAIRMAN: So liability is established here, subject to the 47(a) period point.

6 MR. BREALEY: But there are other issues ----

7 THE CHAIRMAN: There are other issues of damages’ liability, so what we were thinking about  
8 was that we split the legal issues in relation to your heads of damage from the quantum,  
9 because we do not need to know whether it is £1, £5 or £1 million to know whether or not  
10 damages should be awarded, and therefore if one does that first one gives the framework and  
11 the guidance for the purposes of then assessing what the loss is, which means that you do not  
12 go and have loss dealt with by the experts on one basis and disclosure on one basis, and it turns  
13 out it should have been on another basis and then everybody is scrambling around and there is  
14 a lot of wasted costs. So that is the thought process behind it which seems to us to be sensible,  
15 but we do not know enough about the case to know whether actually we ought to impose it.

16 MR. BREALEY: Yes, absolutely and I think we do need to go back and actually sit down and  
17 discuss it with the other side.

18 On the amended claim, the purpose of the amendment is twofold. One is to tighten up the  
19 actual numbers and the other ----

20 THE CHAIRMAN: Can I just say, in relation to tightening up the actual numbers, we wonder  
21 whether it is necessary to do that, because until you know what the foundation stones are, i.e.  
22 the law on quantum, what the numbers have to go to, one does not actually know what the  
23 number should be and, for example – you have heads 1 to 7, so assume we have head 8 so that  
24 I do not indicate anything – assume that we said at the end of the day, having heard that head 8  
25 is not a matter which you can recover, then what is the point of spending a lot of time and  
26 money dealing with head 8 on quantum and having, I assume, experts and all sorts of people,  
27 and disclosure? It is very nice for the lawyers and the consultants and everybody else, but not  
28 so nice for the parties.

29 MR. BREALEY: Of course, I take that point, yes. The second amendment which was envisaged  
30 really is under head 5: “Loss and damage to the claimant’s business”. Here we are intending to  
31 plead the fact that we have lost other contracts because we were financially poorer, financially  
32 insecure, we could not compete properly for other contracts and indeed we lost a contract  
33 because of our financial insecurity which we say was directly caused by the margin squeeze,  
34 and that is essentially the substantial amendment to head 5.

1 THE CHAIRMAN: So that probably would have to be amended because one would need to know  
2 that is the loss and to question as to whether or not it is legally recoverable?

3 MR. BREALEY: Absolutely, yes. What we were proposing to do, because that is to a certain extent  
4 bypassing some of the accountancy evidence, we will attempt to do that by the end of next  
5 week.

6 THE CHAIRMAN: Because that is not a very big amendment, is it?

7 MR. BREALEY: No, we broadly know what we need to do. That would then give the defendants  
8 their normal 28 days, which would then allow everything ----

9 THE CHAIRMAN: 4<sup>th</sup> September ----

10 MR. BREALEY: Yes.

11 THE CHAIRMAN: Next week is 28<sup>th</sup> July, is it not, I think?

12 MR. BREALEY: It is, yes.

13 THE CHAIRMAN: But that would be a very small re-amendment of the defence.

14 MR. BREALEY: I think that is absolutely right, yes. This is not a major amendment.

15 THE CHAIRMAN: No.

16 MR. BREALEY: That is how we were looking at it when we went out. I quickly discussed it with  
17 Mr. Ward, and I am sure he is going to indicate what the defendants say, but he is of the view  
18 that while this may be a sensible case management they want to get on with the whole thing  
19 very quickly, and we also have some sympathy with that as well. So there are two approaches,  
20 we could either do this on the 4<sup>th</sup> – go down this road – or we could really go, maybe taking the  
21 actual number crunching out, but having the whole trial decided quite quickly and that is what  
22 Mr. Ward’s preferred view would be.

23 THE CHAIRMAN: What, with the number crunching as well?

24 MR. WARD: Ma'am, our starting point in this is that this litigation has been going on for about five  
25 years now and, of course, we are now at what should be the final stage – the damages  
26 litigation. Of course, it is no secret that damages litigation is often capable of being settled and  
27 it is in the interests of everybody if it is settled at the earliest opportunity, but to settle the case  
28 we have to know the whole case. I confess we are not enthusiastic about any proposal that puts  
29 off the day of reckoning in terms of knowing what the adjusted numbers really are. Of course,  
30 a tool in settlement is also having preliminary rulings from this Tribunal which may, hopefully  
31 from my client’s point of view, knock out whole swathes of the case. The settlement takes  
32 place on the basis of commercial evaluation of the risks in this kind of litigation. So before  
33 getting on to the question of preliminary issues by another name, we do say that we would like  
34 the whole case, please, at the earliest possible moment and then my clients will be in the best

1 position to take a view about how best to conduct this matter to what will hopefully be a final  
2 conclusion.

3 THE CHAIRMAN: Well knowing litigation, it is the damages part of it – the assessment of the  
4 damages part – which makes it very easy for defendants to bog down cases, and I can see, I  
5 think we can all see that if the hearing in relation to the legal points was done very quickly then  
6 that would give a foundation for the damages part and the damages part could then hopefully  
7 be agreed. If it was not agreed we then concentrate on the damages part and do that very  
8 quickly. Whereas, if we allow both to go in tandem, and then have a hearing, that opens up a  
9 whole lot of disclosure for questions, lots of problems, experts' reports and all of that and I can  
10 foresee that the timetable will then get lengthened considerably, and because we have not  
11 decided the main issues there is little prospect of the whole matter being settled. But if we  
12 dealt with the heads of damage first, and said "Yes", "Yes", "Yes", "No", "Yes" in **this** area,  
13 **that** area, then the evidence is focused for the figures. What is needed in expert evidence can  
14 be focused because we know against which background it is, but that can be done within a  
15 short time, and overall if it is properly case managed and does not get out of control the whole  
16 thing ought to be no longer than it would otherwise be, and possibly shorter and more  
17 opportunity possibly not to incur the costs of the second stage because one can take a  
18 commercial view. That is the thinking behind it.

19 MR. WARD: Well I hope I understand that. I want to be clear about separating out ----

20 THE CHAIRMAN: I will read you this note from Professor Bain – can I?

21 PROFESSOR BAIN: Yes.

22 THE CHAIRMAN: "Are you suggesting that we actually decide more on the 4<sup>th</sup> September than we  
23 have suggested?"

24 MR. WARD: No.

25 PROFESSOR BAIN: Pity!

26 THE CHAIRMAN: Now you know where we are going.

27 MR. WARD: I wish I were able to, but I am afraid that is not my submission. I just wanted to  
28 separate out two separate submissions here.

29 THE CHAIRMAN: Can I indicate to you, so you know the context in which we are doing this, that  
30 our idea is that we will hear the issues on liability, damages and liability at the end of the year,  
31 and if you could timetable it so that we could do the whole case as fast as that, then I think  
32 there would be some support on this side.

33 MR. WARD: I am not sure it can be done as fast as that, but I do not think it needs to be done over a  
34 lot more time than that. But if I could just come back to two different things which I am

1 perhaps talking about at the same time; first, there are the amendments to the claimant's case.

2 That we would like as soon as possible because ----

3 THE CHAIRMAN: What, the total amendments?

4 MR. WARD: Yes because it is very good news to hear for the first time what the amendments are  
5 about. It is very good news to hear that we will have some of them next week, but there is in  
6 addition this adjustment to the numbers which of course may, depending on the size of the  
7 adjustment to the numbers, be absolutely crucial to the commercial view that my clients will  
8 take of this case.

9 THE CHAIRMAN: We could have a two-stage process – I do not know how long it is going to take  
10 you to do the adjustment to the numbers.

11 MR. WARD: Mid-August was the latest offer we had.

12 MR. BREALEY: Without instructions, but I would imagine we can do the amendments to the loss  
13 of contracts by the end of next week and we can still, by mid-August, indicate to the other side  
14 what the new numbers are.

15 THE CHAIRMAN: So you would have the numbers, the question of whether we need to go any  
16 further than their pleading of the numbers.

17 MR. WARD: Unless the numbers are pleaded they are not quite so firm are they?

18 THE CHAIRMAN: No, what I am saying is whether we need to go further than the pleading of the  
19 numbers.

20 MR. WARD: No, indeed, that is my first point. So putting that aside, because that is obviously  
21 crucial to negotiation whether or not it is crucial to the litigation, depending on the form that  
22 the litigation takes. Of course, I entirely see the force of the Tribunal's point about the  
23 principle of damage and the quantum of damage. We are a little bit cautious about it in this  
24 case because the distinction is not as cut and dried as it might be. Under some heads what the  
25 defendant is really saying is there is simply nothing recoverable here at all. So there is not  
26 really a clear distinction.

27 THE CHAIRMAN: I thought that there is, what you are saying is as a matter of principle it is not  
28 recoverable so why do we need to get on to quantum.

29 MR. WARD: Indeed, we will get to the same point in any event if it is a one stage or a two stage  
30 trial.

31 THE CHAIRMAN: No, because we will never have to get on to the quantum if we decide that, a  
32 matter of principle it is not there, so why does everybody spend a lot of money on the  
33 quantum?

34 MR. WARD: I see the point.

1 THE CHAIRMAN: The point that you were making is the defendant's point in the sense of bogging  
2 down the case.

3 MR. WARD: More generally in the case though there are not really a great many crisp, legal type  
4 points floating around in the case. There is our point, of course, on exemplary damages, and if  
5 there are to be any form of preliminary issues we would, of course, welcome that and, in any  
6 event, one would anticipate any account, should the claim for exemplary damages succeed,  
7 would take as a second stage. But then beyond that it is a little difficult to see the issues.  
8 There is the s.47(a) construction point ----

9 THE CHAIRMAN: Which we will decide hopefully – are you happy for us to decide, at the  
10 moment, depending ----

11 MR. WARD: Subject only to this, there are actually two limbs to that issue. There is the period  
12 issue, and the rate issue. They are both s.47(a) construction points, and I agree with Mr.  
13 Brealey if they were to be determined at the CMC then a date would be needed because it must  
14 be a half a day issue to hear full argument on those points.

15 THE CHAIRMAN: The amount issue as well? Or just the period issue?

16 MR. WARD: Period and rate, yes.

17 THE CHAIRMAN: Period and rate – you think we could do that in a day?

18 MR. WARD: Well hopefully. They are both aspects of the same problem which is how one  
19 construes s.47(a), but we had not anticipated dealing with it as a preliminary issue because  
20 there is still plenty left in that issue, realistically, whatever the outcome of it.

21 THE CHAIRMAN: But it may give us enough to make an interim payment.

22 MR. WARD: Indeed.

23 THE CHAIRMAN: And since you said that it is very important that this case gets on because it is so  
24 long ----

25 MR. WARD: Absolutely.

26 THE CHAIRMAN: -- and the claimants have been out of their money.

27 MR. WARD: The other point about interim payment, of course there is no difficulty at all with an  
28 interim payment on legal costs. All that is required are properly receipted invoices for the  
29 costs that have been paid.

30 THE CHAIRMAN: Which can be dealt with between now and then?

31 MR. WARD: Yes. There is really no need to be troubling the Tribunal with that, almost certainly  
32 not. The overall gist of our concern really is that with the greatest of respect there is a danger  
33 that, taking what are in effect preliminary issues, in truth prolongs the process rather than  
34 accelerating it and from the point of view of settling, if we get reasonably quickly into the  
35 disclosure and quantum stage and indeed the claimants had said “We ought to be able to have



1 disclosure within four to six weeks of the CMC”, if that be right we will be doing disclosure in  
2 September and into October. The prospects of bringing the whole thing to an end – whether by  
3 settlement or through the CAT – sooner rather than later is that much greater than if, in fact,  
4 we have a trial by December on discrete points of principle; we then obviously need the  
5 decision of the CAT and then we regroup, then we reconsider, then we have a CMC in, say,  
6 May of next year after we have had the decision, after we have considered it and then we are  
7 back here about this time next year talking about setting down trials for quantum.

8 THE CHAIRMAN: I would hope it would be done much quicker than that.

9 MR. WARD: I would hope so too, ma'am, but experience suggests that it may take that long,  
10 realistically. If we have disclosure in October – September/October – disclosure is really the  
11 largest issue in the quantum claim.

12 THE CHAIRMAN: There is going to have to be disclosure both ways. There is going to have to be  
13 disclosure in relation to your documents, in relation to exemplary damages, just as much as  
14 there is going to be disclosure on the other side.

15 MR. WARD: That is fully appreciated.

16 THE CHAIRMAN: You are going to have quite a lot, I assume, of expert or other evidence about  
17 the market and that sort of thing.

18 MR. WARD: Yes, and both sides have long since instructed their experts. Indeed, you will have  
19 seen from the correspondence that both sides came here today to say that they did not really  
20 see this as a case that was suitable for preliminary issues. So I do not dissent from the general  
21 proposition that in principle it could be beneficial, but here where the concern really is to deal  
22 with everything as quickly as possible – whether through litigation or through compromise –  
23 there is great value in both sides putting all their cards on the table at the earliest possible date.  
24 So the hypothetical saving of time that might be had through preliminary issue is in this case, I  
25 do respectfully suggest, perhaps a little bit more doubtful.

26 THE CHAIRMAN: One of the ways that one could do it is to run both at the same time, so one  
27 could have two levels going on.

28 MR. WARD: Yes.

29 THE CHAIRMAN: One could have the fast train dealing with the preliminary issues, if we call  
30 them that, of stage 1 just before or after Christmas, and at the same time in the background the  
31 assessment of damages and all of that can be going on – if you want to spend that money – so  
32 that we could have another hearing in March or April which dealt with those matters on the  
33 basis that there would be a judgment in between.

34 MR. WARD: That to some extent removes the benefit of the preliminary issues, in the sense that if  
35 the parties are preparing for trial on the whole range of quantum issues anyway.

1 THE CHAIRMAN: Well it does not because it would then mean that the hearing on the quantum  
2 would be limited.

3 MR. WARD: That would undoubtedly be the effect of the preliminary issues. It is not being  
4 suggested that there would be no hearing on quantum. I have not reflected fully on it in the  
5 time we have been discussing this this afternoon but I am not sure that this is a case that could  
6 be completely knocked out by preliminary issues.

7 THE CHAIRMAN: Depending on how one decided it there is a possibility that some of the heads,  
8 like exemplary damages ---

9 MR. WARD: Some undoubtedly – exemplary damages could simply go on the basis of a  
10 preliminary issue, if we are right about it. Although of course, as you said yourself, ma'am,  
11 there would have to be some disclosure even in that preliminary issue. It is not the case that all  
12 of these preliminary issues are crisp points of law that could all be dealt with by submission  
13 alone. There may even be cross-examination on that issue for example, and there may be  
14 others.

15 PROFESSOR BAIN: Mr. Ward, it does seem to me that there is a huge difference between the  
16 parties at the moment. A major part of that difference comes from the different constructions  
17 of 47(a) for example, of whether or not particular heads of damages are going to be  
18 recoverable at all. Is it not going to be the case that if one can settle the issues of whether or  
19 not there is a claim, or the extent of the period to be covered by a claim, then the difference  
20 between the parties' positions will be a fairly small fraction of what it is at the moment. If that  
21 is the case, is it not likely that a negotiated settlement over quantum will be much easier to  
22 achieve than it is at the moment?

23 MR. WARD: A qualified “yes” to that, sir, in the sense that of course it has the potential to cut down  
24 the issues and from my client's point of view, because of course there is no counterclaim here,  
25 that could only be a good thing. Obviously my client wishes to pay no more than it has to in  
26 this case. The concern is really that the delay that this would build in in doing it in two stages  
27 would not actually be a net benefit here and of course there is a pleaded case, and of course the  
28 parties have their own commercial view of what the value of those different pleaded elements  
29 is. One of the largest elements in the case is the part 5 claim about consequential business  
30 losses, for example, and one way or another that is going to devolve down to a fairly nitty-  
31 gritty exercise of disclosure. I have not seen how that is going to be disposed of by any kind of  
32 preliminary point.

33 So if the preliminary points were very crisp and could be taken at very high speed, then of  
34 course it would only be of benefit to my client. It is not that my client is trying to put off the  
35 evil day. Paradoxically here we are in the position of a defendant, who has an infringement

1 finding against it saying “What we want is everything at once so it can be dealt with all at once  
2 and therefore dealt with as quickly as possible”.

3 Can I assist further with that, ma'am?

4 THE CHAIRMAN: No, thank you. Do you have some answers to that at the moment?

5 MR. BREALEY: Subject to the Tribunal’s direction, we can sort out the amended claim, the  
6 defence. We have the case management conference hopefully on the 4<sup>th</sup>. We will apply for an  
7 interim payment, and we can determine at the CMC on the 4<sup>th</sup> the period and, if necessary, the  
8 rate relating to head 1. At the CMC on the 4<sup>th</sup> we can ----

9 THE CHAIRMAN: Decide which way to go.

10 MR. BREALEY: -- decide which way to go.

11 THE CHAIRMAN: Have you gone a long way down the quantum part of providing the materials?

12 Are you well on the way to doing that?

13 MR. BREALEY: Yes, we are.

14 THE CHAIRMAN: So it is not actually a lot of additional cost. One of the things I am concerned  
15 about in these cases is that because of the way our Rules are the claimant has to put in a lot of  
16 material. It then turns out, when you are a bit further down the road in looking at what the  
17 liability of damages is, that one would have done that differently.

18 MR. BREALEY: I appreciate that.

19 THE CHAIRMAN: So I have a concern to make sure that claimants are not forced to put their claim  
20 in one particular way and then it turns out because of the law that it should be done slightly  
21 differently or because the approach as we discuss it should be a slightly different approach.  
22 Then one has spent a lot of money on the first stage where it suddenly goes off somewhere else  
23 and the experts have to put in further reports etc., and then it becomes a very expensive,  
24 tedious, time consuming exercise.

25 MR. WARD: Understood, yes.

26 THE CHAIRMAN: So for my part I am very concerned to try and make sure that that does not  
27 happen because that is typical of commercial litigation and if we can avoid it, it would better to  
28 avoid. But you say you have gone down quite a lot of the road?

29 MR. BREALEY: We have instructed Deloitte’s and they have gone quite a long way down.

30 THE CHAIRMAN: Right, and because of the history of this of course a lot of the evidence is there  
31 anyway.

32 MR. BREALEY: Yes.

33 THE CHAIRMAN: Well is the answer that you do the amendment on the lost contract point?

34 MR. BREALEY: On head 5 by 28<sup>th</sup>.

1 THE CHAIRMAN: By 28<sup>th</sup> July and you have 28 days to amend your defence in relation to that,  
2 which should be probably very simple because I can imagine what it is going to say.

3 MR. WARD: If it is as it sounds it will be very simple.

4 THE CHAIRMAN: Meanwhile, you do the number crunching part of it and put in your amendments  
5 to that, which will be available sufficiently in time for 4<sup>th</sup> September so we know where that is  
6 going.

7 MR. BREALEY: Yes.

8 (The Tribunal confer)

9 THE CHAIRMAN: Having heard what Mr. Ward says he has not persuaded us today that it is  
10 appropriate in this case to put everything together. It seems to us that that will mean that there  
11 will be a lot of work done and a lot of cost spent which may or may not be necessary and that it  
12 is a way that the case could easily get bogged down in the numbers and then take a long time  
13 to come to fruition. That needs to be considered.

14 What was going through my mind was that we had two structures, and worked out how one  
15 would do it on both bases, and then see whether we are being cost effective by doing it in two  
16 stages or not as far as one can do that looking at the crystal ball. But from my experience, and  
17 normally I know preliminary points can be more expensive, but in this sort of case – having  
18 regard to the issues and having regard to the newness of this area of the law – it seems to me  
19 that there may well be a benefit in doing it in two stages, but I think that needs to be thought  
20 about properly.

21 In any event, it may well be that there are certain issues, like exemplary damages, which could  
22 be decided first, even if we did it in one stage for everything else. So I think that is something  
23 that perhaps you will consider individually and jointly and you have your month to do that, but  
24 that was one of the reasons that we were anxious to have a case management conference now  
25 so that we could air this matter and that it did not get to September when we had to air it and it  
26 would go off for another six weeks.

27 We need a timetable to lead up to the September hearing because there will have to be  
28 submissions in relation to the 47(a) points, and the 47(a) timing point I think is purely on the  
29 law. The 47(a) amounts point – is that purely on the law?

30 MR. WARD: As we see it the position is this: if the claimant is right, then it is the simple point of  
31 construction because you are just bound by what the CAT found in the earlier remedies'  
32 decision. If we are right and that does not apply then there is a complex question of fact about  
33 what the correct measure of loss would be under this head.

34 THE CHAIRMAN: And so what you were thinking was that we would decide whether we are  
35 bound by the ----

1 MR. WARD: Yes, that is capable of being dealt with on the 4<sup>th</sup>. The consequences are not,  
2 depending upon how you actually decide that point, because if you find in favour of my clients  
3 then it inescapably opens the door to a much more complex question which is, as a matter of  
4 primary fact, what should the rate be?

5 PROFESSOR BAIN: We have thought a little about this issue of rate and of course we have not  
6 reached any conclusions on it. I think I can probably say that the Tribunal is perhaps likely to  
7 be influenced by the facts of what actually happened, or persuaded to follow the facts of what  
8 actually happened more readily than it would be by a hypothetical alternative which was not  
9 actually done, and which has been produced well after the event. So we will need to be  
10 persuaded, fairly strongly, if we are to depart very materially from the actual factual situation  
11 as it emerged.

12 MR. WARD: I have taken a careful note, sir.

13 THE CHAIRMAN: Putting that, I think, in a legal way ----

14 PROFESSOR BAIN: Yes, please do put it in a legal way.

15 THE CHAIRMAN: -- there is the first question as to whether or not there is issue estoppel, which is  
16 I think the point you were making – is that right, Mr. Ward?

17 MR. WARD: Essentially, yes.

18 THE CHAIRMAN: The second point is that even if there was not issue estoppel there are the actual  
19 facts of this case, some of which are set out in that decision and to argue against those facts  
20 and say something else you would need very good quality of evidence to be able to do that.

21 MR. WARD: I see the force of that entirely.

22 PROFESSOR BAIN: Yes, there have been a number of cases before this Tribunal where economists  
23 have produced theoretical models that were beautiful bits of theory and bore no relation to the  
24 real world.

25 MR. WARD: Were not well received by the Tribunal.

26 PROFESSOR BAIN: I am suggesting to you that we will not depart from the view the Tribunal has  
27 taken of such models.

28 MR. WARD: I fully see that, sir. But in terms of the way you put it, ma'am, question 1 is clearly a  
29 question that could be dealt with on 4<sup>th</sup> September, question 2 plainly not.

30 THE CHAIRMAN: That is why when you said that it was both parts I was wondering how we were  
31 going to do the second part.

32 MR. WARD: I am grateful for the opportunity to clarify that, because it is just the point of  
33 construction.

34 THE CHAIRMAN: On the issue estoppel?

35 MR. WARD: Yes.

1 THE CHAIRMAN: That could be dealt with fairly shortly and, of course, without recourse to any  
2 evidence.

3 MR. WARD: Yes.

4 THE CHAIRMAN: And of course your clients were Interveners in the remedies ----

5 MR. WARD: No.

6 THE CHAIRMAN: No, sorry you were the defendants.

7 MR. WARD: We were, alas, the defendants.

8 THE CHAIRMAN: Sorry, you were the defendants, yes, I was thinking about issue estoppel I think  
9 you were both parties. Your clients were the defendants and the claimants were Interveners in  
10 the remedies part of it?

11 MR. WARD: Yes.

12 THE CHAIRMAN: So the issues were effectively dealt with between the two parties. You probably  
13 see where I am coming from?

14 MR. WARD: I do indeed.

15 THE CHAIRMAN: It is not a case where they were completely somewhere else for issue estoppel?

16 MR. WARD: Yes. Well, in my submission this can be dealt with on the 4<sup>th</sup> September but it is not  
17 as short a point as it might have been thought at first sight, but if we stick to the  
18 construction/issue estoppel points then at least we need not fear that evidence or discovery is  
19 needed to deal with the points.

20 THE CHAIRMAN: Right, because I think if we got into evidence on the 4<sup>th</sup> we would not be able to  
21 do it in a day.

22 MR. WARD: That is undoubtedly question 2.

23 THE CHAIRMAN: So probably it will only be half of the second point?

24 MR. WARD: Yes, in effect. Could I just make one more point, ma'am, whilst I am on my feet? It is  
25 about the timetable for the amendments to the defence, all of which we very respectfully  
26 accept. We do just point out, of course, that even the first amendment would require consent  
27 either from the defendant, or from the Tribunal and, of course, the way it is described it sounds  
28 tolerably anodyne, but I must at least formally reserve the position on that.

29 MR. BREALEY: That must be right, yes.

30 THE CHAIRMAN: If it is coming in in seven days you will either consent or not.

31 MR. WARD: Yes.

32 THE CHAIRMAN: If we have a look at it and think we ought to give our consent in any event, then  
33 we can do that in writing, alternatively you could put in a defence *de bene esse*, and that is not  
34 going to cause very much cost ----

35 MR. WARD: No, no, I simply make the point to reserve the position.

1 THE CHAIRMAN: Yes. Is that all right if we do it that way?

2 MR. WARD: Certainly.

3 THE CHAIRMAN: Hopefully it will not be more than has been indicated, although sometimes these  
4 things when you look at them turn out to be very different, but hopefully everybody will be  
5 very sensible about it. It is a very early part of the proceedings so I cannot quite see how one  
6 would object to an amendment, except in relation to costs.

7 MR. WARD: It is always better to see it first though.

8 THE CHAIRMAN: So there are two stages to the amendment of the claim. The first stage is the  
9 head 5 claim, and that is by 28<sup>th</sup> July, with the defence by – what date should that be? They are  
10 going to need to see that in order to do the submissions for the 4<sup>th</sup>. Do you need four weeks to  
11 do that?

12 MR. WARD: It is just impossible to say without seeing it. Four weeks will take us, I think, to  
13 Friday 25<sup>th</sup> August.

14 THE CHAIRMAN: I am just wondering if I gave you to the 18<sup>th</sup>, if it turns out that it is not as easy  
15 as you and I – or at least I – think it is going to be, I mean if it is not just an amendment in a  
16 couple of sentences.

17 MR. WARD: Yes, would you just give me a moment, ma'am? (After a pause) Ma'am, the concern  
18 that is raised behind me is that the intervening period between now and 4<sup>th</sup> September is, of  
19 course, August; leading counsel is away, my solicitor is away.

20 THE CHAIRMAN: Mr. Bowsher is back, is he not?

21 MR. WARD: Mr. Bowsher is back for at least part of that period, yes, and there is some concern of  
22 course about our ultimate instructing clients being available. I am sorry to raise this rather late  
23 in the discussion but it is a factor here – not just bearing on the defence but even on the  
24 proposal to decide these issues on 4<sup>th</sup> September.

25 THE CHAIRMAN: It was said that the 4<sup>th</sup> September was when everybody was available to do this,  
26 you were trying to put this off to the 4<sup>th</sup> September.

27 MR. WARD: Undoubtedly, no.

28 THE CHAIRMAN: And that meant that people had to be available to give instructions for 4<sup>th</sup>  
29 September.

30 MR. WARD: Indeed, but of course there is a difference between what was anticipated, namely a  
31 procedural hearing, and a hearing for which issues of substance may actually be decided.

32 THE CHAIRMAN: Well the s.47(a) point is not difficult, nor is the issue estoppel point, that does  
33 not need instructions from your clients.

34 MR. WARD: No, that may be so.

1 THE CHAIRMAN: It needs counsel to sit down and consider how they are going to present it and  
2 make their submissions and to write some written submissions. It is not too much of an  
3 arduous task.

4 MR. WARD: Ma'am I have advanced the concern that has been expressed.

5 THE CHAIRMAN: I know. If we give you until the 18<sup>th</sup> August to put in the amended defence on  
6 the head 5, we have to remember that Monday 28<sup>th</sup> is a bank holiday, and we are going to need  
7 to see the submissions and if we are going to be able to do it in a day we are going to have to  
8 have some time the week before to do that. Can you exchange submissions on this, or is it  
9 going to have to be sequential.

10 MR. BREALEY: I think given the time we can certainly exchange.

11 THE CHAIRMAN: Exchange.

12 MR. WARD: I think so.

13 THE CHAIRMAN: Can we exchange by the 25<sup>th</sup>?

14 MR. BREALEY: If we could just push that back a few days it would greatly assist me.

15 THE CHAIRMAN: Well, you see if we push it back it is going to have to be Tuesday, 29<sup>th</sup> because  
16 it is bank holiday weekend so I am not sure it makes a difference – it might do if everybody  
17 wants to work at the weekend. We cannot have it later than 29<sup>th</sup> because that only gives us that  
18 week; we have to distribute it here – Professor Bain is in Scotland and so it has to get up to  
19 Scotland.

20 MR. BREALEY: I am not back from holiday until the 24<sup>th</sup>. I will be working on it ----

21 THE CHAIRMAN: You can deal with it before you go because they are two discrete points, are  
22 they not?

23 MR. BREALEY: I may have to.

24 MR. WARD: Ma'am, there is a suggestion from behind me that if the timetable now feels very  
25 compressed, as in truth it does, there may be something to be said for moving the CMC back  
26 later into September.

27 THE CHAIRMAN: Well there is a problem with that because we do not have very many dates in  
28 September that we can do it. I think we will exchange written submissions on the 25<sup>th</sup>.

29 PROFESSOR BAIN: If they 29<sup>th</sup> that is all right.

30 THE CHAIRMAN: Well it will have to be the morning of 29<sup>th</sup> otherwise you are not going to get it.

31 MR. BREALEY: 29<sup>th</sup> you said?

32 THE CHAIRMAN: Well, the difficulty is that by the time we have distributed it administratively  
33 here, it is not going to give us very much time to look at it, and it would be more helpful here if  
34 we had it on the 25<sup>th</sup> because that allows us to distribute it, and people can look at it on the 29<sup>th</sup>  
35 and 30<sup>th</sup>, and for my part I can look at it over that weekend. Exchange on 25<sup>th</sup> – I mean it is a



1 discrete point, it is not as if you need all this time to do it, because you could do it up front. So  
2 exchange skeleton arguments on 25<sup>th</sup> August in relation to 47(a) and the quantum issue.

3 MR. BREALEY: Sorry, can I just be absolutely certain? The skeleton is going to be on head 1,  
4 relating to the construction of s.47(a) and the period?

5 THE CHAIRMAN: Yes, s.47(a) on the period, and s.47(a) which relates to whether or not we are  
6 bound by the previous decision.

7 MR. BREALEY: On the rate?

8 THE CHAIRMAN: Yes.

9 MR. WARD: Whether bound on the issue of rate.

10 MR. BREALEY: Thank you.

11 THE CHAIRMAN: Now, that leaves also for the CMC the other matters in relation to the CMC, and  
12 how we are going to go forward. Now, on that we possibly could leave consideration of that,  
13 not for 25<sup>th</sup> but for the next week, on some written submissions. It may be helpful to have  
14 written submissions because it means that everybody will have directed their minds to what we  
15 are talking about, and what we have been talking about today and we can see where everybody  
16 has got to, which will lead to the next thought process, so that could be the 29<sup>th</sup> August –  
17 hopefully everybody is back and would be able to consider it. I may be generous and say 30<sup>th</sup>  
18 August, because the other part needs much more consideration, this we can do quicker I would  
19 have thought, so Wednesday, 30<sup>th</sup> August.

20 MR. WARD: And that is for a written submission on the question of what – if any – preliminary  
21 issues should be dealt with at stage 1?

22 THE CHAIRMAN: And any other CMC issues – and if you are going to say that it should not be  
23 split in any way, then your reasons for saying it, your justification.

24 MR. WARD: Yes, of course.

25 THE CHAIRMAN: And possibly cost benefit analysis on both ways of doing it.

26 PROFESSOR BAIN: It sounds like three months' work!

27 THE CHAIRMAN: Is there anything else? You have to make an interim application in the  
28 meantime.

29 MR. BREALEY: Yes. I am very grateful, thank you.

30 THE CHAIRMAN: Thank you.

31 (The hearing concluded at 3.10 p.m)