

REGISTERED AT THE COMPETITION APPEAL TRIBUNAL UNDER NUMBER	997
DATE:	23-09-03

IN THE COMPETITION APPEAL TRIBUNAL

Case Number: 1016/1/1/03

BETWEEN:

RECEIVED BY COMPETITION APPEAL TRIBUNAL REGISTRY	
DATE RECEIVED	23 SEP 2003
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GENZYME LIMITED

Applicant

and

THE OFFICE OF FAIR TRADING

Respondent

**SUPPLEMENTAL SKELETON ARGUMENT ON BEHALF OF GENZYME IN REPLY
TO THE OFT'S SKELETON – THE OFT'S DECISION IN *DU PONT***

1. Genzyme served its skeleton argument in reply yesterday in accordance with the deadline of 22nd September 2003 set under paragraph 5 of the Tribunal's Order of 31 July 2003. In that Skeleton, Genzyme explained the relevance of the **Bronner** case as requested by the Tribunal at yesterday's interim hearing.
2. Just as that reply skeleton was being served, the OFT published on its website its decision of 9th September 2003 in *Refusal to supply unprocessed holographic photopolymer film: E.I. du Pont de Nemours & Company and Op. Graphics (Holography) Limited* (annexed hereto). Had that decision been published earlier, Genzyme would have been able to include these submissions in its skeleton in reply. As it was not, Genzyme wishes to inform the Tribunal that it will be making submissions at the hearing on the *DuPont* decision, as outlined below.
3. In that decision, the OFT rejected a complaint of refusal to supply. DuPont had developed and manufactured a film for making holograms. DuPont was found to be dominant on this upstream market. DuPont used its film to manufacture a number of holographic anti-counterfeiting products. OPG, which manufactured holographic products for graphic arts applications, had been supplied with the film by DuPont between 1998 and 2001 under a supply agreement. DuPont

terminated that supply agreement in 2001 in accordance with its terms. OPG complained to the OFT. The OFT based its decision to reject OPG's complaint on an application of the principles in **Bronner**.

4. As the OFT's case against Genzyme is in reality an allegation of the abuse of refusal to supply, it is relevant to see how the OFT applied **Bronner** in its *DuPont* decision.
5. The OFT cited Advocate General Jacobs' Opinion in **Bronner** at [28] and accepted that:

"it is only in exceptional circumstances that competition law should deprive an undertaking of the freedom to determine its trading partners".

C.f. Genzyme's NoA 483(i):

"Any incursion on Genzyme's right to choose its trading partners and freely to dispose of one's property would require careful justification: none is forthcoming here."

6. The OFT rejected OPG's contention that the holographic film manufactured by DuPont was an essential facility to which it was entitled to have access. The OFT observed at [29] that the holographic film:

"is the product of research and development by DuPont. The effect of treating every new product which, at the time of its discovery, had unique properties as an essential facility (if this product was a necessary input into a downstream market), would be to permit an excessive degree of interference with the freedom of undertakings to choose their own trading partners. As stated above, competition law should have this effect only in exceptional circumstances."

C.f. Genzyme's NoA 483(ii):

"Cerezyme is the fruit of very substantial investment by Genzyme, and so particular care is required."

7. DuPont's justification [34] for refusing to supply holographic film to OPG was that, as it was used in anti-counterfeiting products, DuPont needed to "guarantee complete supply chain security" and that ruled out supplying to customers for use in graphic arts applications.

C.f. the evidence of Genzyme's CEO, Henri Termeer [File 37 CB1/13/79-80]:

"[22] ... it is of great importance to Genzyme to maintain control of its production and distribution processes. While it was possible to outsource production for Cerezyme, this represented an unacceptable risk, both to Genzyme and to the patients receiving the treatment. Given the reliance that Gaucher patients were placing on Genzyme to provide Cerezyme on a timely and uninterrupted basis, we could not risk the chance that we would jeopardize the health of these patients due to a problem with a third party supplier. Similarly, we felt it was our obligation to the patients to ensure the highest level of quality in not only the production phase, but the subsequent handling through packaging and distribution as well. Where our own resources are too limited to provide complete control over this quality chain, then we seek third party partners who care as much as we do about the patient.

[25] The desire to bring the homecare service in-house was based on economics and patient care. We knew that we would be able to provide the service in a more cost-effective manner than was being done by either Caremark or Healthcare at Home. These savings would benefit not only Genzyme, but the health care system generally. More importantly, we thought we could provide the patients with a higher and more consistent quality of care."

8. No objection was taken by the OFT to DuPont's justification. It is implicit that the OFT accepted that DuPont's distribution policy was not one "which no rational and fair person could justify. The same must be the case for Genzyme: c.f. Genzyme's NoA 579.

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23 September 2003