IN THE COMPETITION APPEAL TRIBUNAL

Case Nos. 1028/5/7/04
1029/5/7/04

Victoria House,
Bloomsbury Place,
London WC1A 2EB

8th December 2004

Before:
SIR CHRISTOPHER BELLAMY
(The President)
MARION SIMMONS QC
PROFESSOR ANDREW BAIN

Sitting as a Tribunal in England and Wales

BETWEEN:

BCL OLD CO LIMITED & OTHERS — Claimants

and

AVENTIS S.A. & OTHERS — Defendants

AND

DEANS FOODS LIMITED — Claimants

and

ROCHE PRODUCTS LIMITED & OTHERS — Defendants

Mr. George Leggatt QC and Aidan Robertson (instructed by Messrs. Taylor Vinters) appeared for the Claimant BCL Old Co.

Mr. Brian Kennelly (instructed by Messrs. Ashurst) appeared for the Defendants Aventis & Rhodia.

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

Mr. Mark Hoskins (instructed by Freshfield Bruckhaus Deringer) appeared for the Defendants Hoffmann –La Roche and Roche Products Limited.

Mr. George Peretz (instructed by DLA) appeared for the purchaser, 2 Sisters Group.

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CASE MANAGEMENT CONFERENCE

THE PRESIDENT: Good morning, ladies and gentlemen. Thank you for accommodating the change of timing and the listing of this case. The case (or cases) bristle with issues of various sorts and we have been giving some thought as to how we should really address those issues so far as today is concerned. Let me begin by outlining how we see the day unfolding and then see whether that is a satisfactory programme as far as you are concerned.

First, we would like to hear argument on the assignment issue with a view to reaching a view on that. In light of the very full arguments that we have received in the written skeletons we had in mind that if perhaps Roche took 15 minutes, Aventis 15 minutes, BCL 15 minutes, 2 Sisters 10 minutes, and then there was a short reply, we could perhaps approach the assignment issue on that basis, which would take us probably until about noon or so.

There is then an issue as regards security for costs which we think we ought to hear argument on today, or at least see where we are. There has been quite a lot of evidence about what has or has not been agreed, and we need to be in a position to address that issue and so we would like to do that next, and that will probably take 30 or 40 minutes dividing the time reasonably between the various parties.

There then may be a short issue as to the costs in relation to the yellow carophyll point that we can perhaps briefly hear argument on before we get to lunch. Over lunch we will probably, we hope, be able to consider the arguments on at least the assignment point and come back after lunch with an indication of how the Tribunal views that point. We rather doubt whether it is going to be useful or appropriate to try to give an extempore judgment on the point today, but we are probably going to be in a position to give an indication of what our decision is going to be, with a written Judgment to follow shortly.

Depending on how the morning goes we then come to various case management issues to which we think we ought to devote the afternoon as far as we can. A number of those issues, it seems to us, depend on a prior question as to what the issues in the case really are because in many ways the issues of disclosure and experts' preliminary points and so forth, do depend on making an effort to define those issues. I will not say any more about that at the moment, but that is something I think we, the Tribunal, will want to address immediately after lunch – the question of how we go about defining the issues in the case and how we rule on matters such as disclosure and experts, and other issues in the light of that prior definition of the issues in the case. That is broadly how we see the afternoon.

Towards the end of the afternoon we will then (with any luck) be able to look at the question of the future conduct of the case and in particular the timetable regarding the existing trial date. In that connection I think I can signal that at the moment the Tribunal is very anxious

to keep the existing trial date. We do not want to see that moved, nor do we wish to see these proceedings placed in jeopardy by avoidable procedural issues, or manoeuvrings. So we are working to the existing trial date and we, the Tribunal, have in place (and we can use) procedures to make sure that any necessary directions' hearings are held at short notice and as quickly as possible so that the trial date can be maintained. So that is where we, the Tribunal, are at the moment.

It is probably desirable before we go on if I just go around the various legal representatives just to see if that, as it were, plan for the day is an acceptable plan for the day or whether there are other points the parties wish to draw to our attention at this stage.

The claimants first, I think, Mr. Leggatt Yes, good morning?

MR. LEGGATT: That is wholly acceptable, Sir.

THE PRESIDENT: Thank you very much. The Defendants – does that sound an appropriate plan, Mr. Hoskins?

MR. HOSKINS: Sir, absolutely. I think there will be an issue on assignment as to what exactly we can and should be doing today, and I know Mr. Peretz has concerns about that, but obviously we can deal with that when we come to that first issue of the day but, absolutely, the scheme seems workable.

THE PRESIDENT: Yes. Mr. Kennelly, what do you say?

MR. KENNELLY: Sir, yes, except in relation to the time estimate. Mr. Hoskins and I discussed how we would divide the time between ourselves.

THE PRESIDENT: I see, yes, quite.

MR. KENNELLY: It may not be exactly 50:50, I am prepared to give some of my time to Mr. Hoskins.

THE PRESIDENT: No, fine. If you have reached an agreement between yourselves which keeps within the overall limit that is, of course, acceptable.

MR. KENNELLY: Indeed, Sir. Also we were told yesterday by the Tribunal that you would not receive any more paper – quite understandably – from us. I have a further bundle containing a witness statement that may be useful for the security for costs application that you may want to consider this side of lunch, and it may be useful to give that to the Tribunal now as a housekeeping matter.

THE PRESIDENT: We will, for everybody's comfort including our own, have some break between the assignment issue and the security for costs issue, so if whatever it is you want to give us is lodged with the Registry we will try and look at it over the break at least to get a first impression of what it is all about.

MR. KENNELLY: I am very grateful.
THE PRESIDENT: Yes, Mr. Peretz?
MR. PERETZ: All I wanted to say is, first of all, I am going to have to apologise because I am trying to speak through a very heavy cold; and secondly, the difficulty with determining the assignment issue today is that with it is wrapped up an issue of estoppel which involve certain questions of fact and our submission will be that the Tribunal simply is not in a position to determine that issue today.
THE PRESIDENT: Well, I think what we would like to do is to at least hear the argument and then see where we are on the submission that you make about that. What I mean when I talk about the "assignment issue" is basically the issue that arises under s.136 of the 1925 Act and whether we are dealing with a legal assignment or an equitable assignment rather than broader points, I think, at this stage. Very well – so far so good. Are we then in a position to address the assignment issue, Mr. Hoskins?
MR. HOSKINS: I am, yes, Sir.
THE PRESIDENT: Very good. Well so long as you are, I am not sure if we are – we will see whether we are as time unfolds!
MR. HOSKINS: I think it might be helpful obviously, as Mr. Peretz has pointed out, first of all to clarify what I think the issues are ----
THE PRESIDENT: Yes, that is very helpful indeed, yes, thank you.
MR. HOSKINS: -- and what is there embedded in that. First, there is the question, on the proper construction of the Agreements, was the right to sue transferred from the claimants to the purchasers? I must admit, I had not intended to address the Tribunal on that today, given the indication we had had from the Tribunal, but you have had written submissions on that.
THE PRESIDENT: Yes.
MR. HOSKINS: The next question logically I think is if, on the proper construction of the agreements there was a transfer of the right to sue, are the purchasers nonetheless estopped from claiming the right to sue?
THE PRESIDENT: Yes.
MR. HOSKINS: The third issue, on its proper construction, does Rule 35 of the Tribunal Rules permit the addition or substitution of a party after expiry of the limitation period set out in Rule 31? The fourth and final issue is has express notice in writing been given to the defendants pursuant to s.136(1) of the Law of Property Act and, if so, there will have been a statutory assignment, and the claimants will no longer have the right to sue and, if not, there will have

been an equitable assignment and both the claimants and the purchasers must be parties to the proceedings.

I should point out that whatever the type of assignment, whether it is statutory or equitable, means that the claimants will have no rights to the fruits of the action. So, if they lose on the construction point, and lose on the estoppel point, they will be chasing nothing, because the fruits automatically will go to the purchasers.

In terms of the issues which can and should be dealt with today – construction – the Tribunal has said – leave on one side.

THE PRESIDENT: Yes.

MR. HOSKINS: Estoppel, for reasons Mr. Peretz indicated in the skeleton, has to be left to one side, so we are left with the limitation issues, and the express notice in writing point.

THE PRESIDENT: Yes.

MR. HOSKINS: The limitation issue first. I think it is sensible that is decided definitively today because if it is decided against us then it means all the purchasers come in and are joined, and that is what should happen if we lose, so I think it is a very short point and it should be decided today. I do not mean to take long on it because the position is very clearly set out in the skeleton arguments. But just to summarise the position taken by the parties. Our position is set out in paras. 18 to 21 of our supplemental "Right to Sue" skeleton. In short, what we say is take the relevant CPR Rules – there is a general rule for addition and substitution of parties, and there is a specific rule for addition or substitution of parties after expiry of the relevant time limit.

Take the Tribunal Rules. There is only one rule, Rule 35, which is couched in general terms, dealing with the addition or substitution of parties. There is also a limitation rule, Rule 31, and what we say is that given the contrast with the CPR, where an express provision was required to deal with addition or substitution after expiry of the limitation period, it cannot be the case that Rule 35 was intended to give the Tribunal an unfettered discretion to add or substitute parties after the expiry of the limitation period in whatever circumstances. We say that the draftsman of the Tribunal Rules must have had the CPR Rules in mind and, if the intention had been to give the Tribunal a power to add or substitute parties after the limitation period it would have been set down in the Tribunal Rules.

It is worth noting that under the CPR Rules an equitable assignee may only be joined after the limitation period has expired, pursuant to CPR 19.5(3)(b). That is where a party is a necessary party to the action. So there is no general rule of practice that permits joinder of equitable assignees. That position is also provided for in the CPR. So, if this were a High Court

case everything to do with addition or substitution would be bound by that CPR Rule, and that is why we say that is a correct comparison.

THE PRESIDENT: Do you say we have no discretion, or we have some discretion and this is not a case where we should exercise it, or what?

MR. HOSKINS: I think the way we are putting the case it has to be there is no discretion.

THE PRESIDENT: No discretion.

MR. HOSKINS: I think the oddity then is that the Tribunal is left with a very extreme position because either it has complete discretion or it has no discretion.

THE PRESIDENT: Well any discretion we had would need to be judicially exercised, and we would have to see on what principles similar discretion was exercised in the High Court context and so forth and so on.

MR. HOSKINS: But that is the way I put the case. On the other side, we have the claimants' position which is set out at paragraphs 26 to 29 of its skeleton argument for the CMC. Again, I hope I do not do undue violence to their position but, in summary, what they say is because Rule 35 of the Tribunal Rules is expressed in general terms it does give the Tribunal an unfettered discretion to add or substitute parties after the end of the limitation period. We say that that is an extreme position and it cannot be right, given the contrast with the CPR. I do not think there is any point in taking the issue further. It has been developed in the writing ----

THE PRESIDENT: No, I think the issue is very clear, Mr. Hoskins, yes, thank you very much.

MR. HOSKINS: Yes, and it is there for the Tribunal to decide.

THE PRESIDENT: Yes.

MR. HOSKINS: On the question of whether there has been a legal or equitable assignment, there are a number of very difficult issues involved in this, and I must admit that my primary submission would probably have been that if right to sue issues are going to be left over, for example, the estoppel issue and the construction issue, then this also should be left over, because, for example – certainly in our original skeleton argument for the right to sue we pointed out certain case law about whether notice can be given before or after proceedings have started. We also pointed out case law which related to whether documents given in the context of disclosure could constitute express notice in writing.

But the way the point has been tee-ed up today by the claimants, they have not gone into any of those issues in their skeleton for today. It is almost like a summary Judgment application, because what they have said is that regardless of any of the other arguments relating to legal assignment, they have invited the Tribunal to find that there has not, on any view, been a legal assignment, because there has not been express notice in writing within the

meaning of s.136(1) of the LPA. So it is like a summary Judgment application, they focused on one issue relating to statutory assignment and they have tried to deal a knock-out blow on that. I am in the Tribunal's hands, having made that point I am perfectly willing and capable of dealing with the specific issue that has been raised on express notice, if that is helpful, or whether it is better to leave all the issues on statutory assignment to be dealt with at the same time, because one of the other issues which is raised is when are the assignment issues going to be dealt with – before or after the substantive hearing? Those are the two remaining things – certainly I need to deal with the latter one today, I am simply in the Tribunal's hands, I can make submissions on the notice point, if you so wish?

(The Tribunal confer)

MISS SIMMONS: Are you suggesting that we do not need to decide the assignment issue if we decide what you call the limitation issue, because if we decide the limitation issue on the basis, for example, that the parties are joined, and the purchasers, or the relevant purchasers are joined, then this case proceeds on that basis and the assignment issue can be left to whenever it is, and you would be content with that?

MR. HOSKINS: That is my understanding of the legal position, yes.

MISS SIMMONS: Is everybody content with that?

MR. HOSKINS: Well I am simply reacting. It was the claimants who suggested that today they wanted to deal with that particular aspect, etc., which is why I have come prepared to deal with it, but it is probably a question for Mr. Leggatt.

MISS SIMMONS: Yes. Mr. Leggatt, would you be happy on that basis?

MR. LEGGATT: I would, yes, in view of what Mr. Hoskins has said, that if he is wrong about the limitation argument that he makes, he accepts that there would then be no bar to joining the purchasers as additional parties to the action, and that the matter could be dealt with then at a later stage. Since he accepts that position then I agree with him that it is not necessary to decide further assignment issues today.

MISS SIMMONS: Yes, that sounds sensible. Does it depend on the purchasers as well?

MR. LEGGATT: It does depend on them as well.

MR. PERETZ: I take the same view. I am happy with that.

MISS SIMMONS: You are happy with that.

MR. KENNELLY: As are we.

THE PRESIDENT: Right, well that sounds like a bit of progress. But we still have to decide the Rule 35 point.

MR. HOSKINS: Absolutely, yes. Sir, if that is where we all are, then the only question remaining on the right to sue issues – well, there are a number of subsidiary points, let me just take them in turn. First, there is the question of the joinder of the purchasers, and we say if we lose on the limitation point, yes, they should all be joined.

We do say that both Deans and Broomco 2524 Limited should also be joined. Those are the companies that have reassigned any right to sue that passed to them back to the Claimants. The reason why we say they should be joined is that it makes it absolutely clear that they are going to be bound at the end of the day by the Judgments. We are not suggesting they have to take any active part in the proceedings, in fact, one can imagine they will not want to. The only issue that might arise is that if third party disclosure issues come up there might be a difference as to whether they were standing outside the action as non-parties, or in the action as parties, but the Tribunal is aware of that situation, it should not make any difference if a disclosure application has to be made that they are in or out in those circumstances – either we meet disclosure or we do not. So subject to that, we just suggest that they are joined, but we do not expect them to play an active role.

MISS SIMMONS: Are they not represented today?

MR. HOSKINS: Well Deans are – in their own action.

MISS SIMMONS: Yes.

MR. HOSKINS: Broomco 2524 have re-assigned the matter back, I do not believe that they are represented.

MISS SIMMONS: Nobody has turned up for Broomco today?

MR. HOSKINS: Nobody has turned up for them, no.

MR. RANDOLPH: Madam, can I just say that in terms of the assignment issue Mr. Leggatt is dealing with that for Deans as well as for BCL, but in terms of all the other matters I shall be representing Deans.

THE PRESIDENT: Thank you, Mr. Randolph.

MISS SIMMONS: Is Mr. Leggatt representing Broomco 2524 for this purpose?

MR. LEGGATT: No, he is not. I think they have written a letter to the Tribunal. I cannot immediately put my hands on it, but I will find it, saying that they have re-assigned any rights that they might have to my clients and that, in view of that, they intend to take no part in the proceedings, and without any disrespect to the Tribunal have therefore not attended today. They know, of course, that there may be an order made joining them today, but they have made it clear that if there is they do not intend to do anything.

THE PRESIDENT: They have had their chance to turn up.

MR. LEGGATT: Yes.

MISS SIMMONS: Thank you.

THE PRESIDENT: Right, yes, Mr. Hoskins?

MR. HOSKINS: Sir, I think in that situation if there is no express indication, they would normally joined as defendants, but they do not have to play an active role. 2 Sisters are represented. Just for completeness, there is also PD Hook who have had correspondence with the Tribunal, but again are not represented today and have not put forward any active position. They say they reserve their position, but again it seems clear that they should be joined as defendants.

THE PRESIDENT: Yes.

MR. HOSKINS: The next issue relates to the subsequent purchasers of certain of the businesses. If I can explain that: the East Wretham Feed Mill and Flixborough Feed Mill businesses were purchased from the claimants ----

THE PRESIDENT: Sorry, may I just catch up. It is your skeleton on right to sue, is it not, where some of this is set out? Yes, East Wretham and Flixborough?

MR. HOSKINS: Sorry, I am catching up with myself now, Sir. That is right, it is paragraph 22 of our skeleton on the right to sue. What happened there was the East Wretham and Flixborough Feed Mill businesses, they were sold by the Claimants to Broomco 2523 Limited and Broomco 2488 Limited. We have now been told that those two Broomco companies have sold on the businesses to two subsequent purchasers, and the question then arises has the right to sue been transferred to them? Of course, we already have the question: Have they been transferred to the Broomco companies? The next question that arises is has the right to sue been transferred by the Broomco companies to the subsequent purchasers?

We have been provided with copies of the agreements by those acting for 2 Sisters and what the Claimants have said is: "We have looked at them and it is clear that there is no transfer of the right to sue, therefore they should not be joined".

THE PRESIDENT: They should not be joined?

MR. HOSKINS: They should not be joined.

THE PRESIDENT: Yes.

MR. HOSKINS: That is what the Claimants say. We say that that is not the appropriate position. We say the defendants are entitled to know that at the end of this trial they are not going to be sued for the same damages by someone else popping out of the woodwork, that is our concern. If it is clear – if it is indeed clear – from the sale agreements between the Broomco companies and the subsequent purchasers, the right to sue was not sold on to the subsequent purchasers,

then the subsequent purchasers, having received notice from the Tribunal will not intervene, if that is the true legal position there would be no point. However, if notice is given to them ----

THE PRESIDENT: The subsequent purchasers – just remind me – they have not received notice ----

MR. HOSKINS: As far as I am aware they have not been notified.

THE PRESIDENT: They have not received notice at the moment.

MR. HOSKINS: By anyone, no. So if it is clear, as the Claimants say, they are not going to want to come in and waste time and money if that is the position. However, if they think that is not the position when they receive notification, then they can apply to be joined and they will fall into the same category with exactly the same sorts of issues as we already have, and what that will mean is at the end of the day we will know we are not going to be sued by two other people. But what we are not happy to do is simply just look at the agreements and say "yes, there is no problem". We want to know ----

THE PRESIDENT: What are you suggesting, Mr. Hoskins, that we follow the same procedure?

MR. HOSKINS: The same procedure.

THE PRESIDENT: Yes.

MR. HOSKINS: Simply that they be notified; if they do not want to come in it should not be a problem, they can be joined and they will not have to take an active part, however, if they do have a claim it will be resolved.

THE PRESIDENT: Yes.

MR. HOSKINS: And it seems to us that that has to be the sensible approach.

The final issue on right to sue relates to when the right to sue issue is going to be determined. This is a very important issue. It is dealt with in paragraph 23 of our supplemental right to sue skeleton, if you want to pick it up there. Basically the position is this: 2 Sisters and the Claimants say that the right to sue issues should be left over until after the substantive trial.

THE PRESIDENT: Can we just pause there so that I can just keep it in my head. When you say "the right to sue" issues, we mean what, exactly?

MR. HOSKINS: It is three of the four issues that I identified at the outset this morning.

THE PRESIDENT: Yes, hang on, I am just turning back.

MR. HOSKINS: The construction of the agreement, the estoppel issue, and statutory or equitable assignment.

THE PRESIDENT: So construction, estoppel – Mr. Peretz is about to tell us that will involve some fact finding.

MR. HOSKINS: That is my understanding. Then the legal arguments ----

THE PRESIDENT: Legal or equitable, yes.

MR. HOSKINS: -- about statutory or equitable assignment. We say that it is important that those issues – who has the right to sue – should be determined as soon as possible, and we say that for a number of reasons. First in an action of this type we should have the ability to protect ourselves in costs by, for example, making a payment in which is seen in the Tribunal Rules, or by making offers by way of Calderbank Letters, etc. The problem we have at the moment is that we have a myriad of people who are potentially entitled to the fruits of the action, so it is not clear to us to whom we should be making offers and if, for example, we made a payment in it is not clear who can accept the offer, because depending on the way the issues go it could be the claimants who have the right to the fruits of the action, or it could be a combination of 2 Sisters and PD Hook, and the Claimants.

THE PRESIDENT: Why can you not just make a payment in on the basis that this is the payment in and that is to be divided between you all as you sort out between yourselves?

MR. HOSKINS: Who could accept the payment in these circumstances?

THE PRESIDENT: We would have to decide that as a separate issue later on, I do not know. You pay it in in settlement of the claim that is being made against you so that people who are making the claim against you can presumably take it out, or accept the offer if it is a Calderbank ----

MR. HOSKINS: If the Claimants are still in the action, because we have not decided whether there has been a statutory assignment, and if the purchasers are still in the action then it is not actually clear at this stage who has the right to that money, so it is actually not right to say that the claimants can turn round and say "We will take the money", because the purchasers may not want to accept that offer.

Another problem which we have had to consider is Rule 43, which is the Tribunal Rule in relation to payments in, is not actually a very effective rule in certain circumstances. I am now trying to dredge up from my memory why not, but there are circumstances where better protection is given by means of making a Calderbank offer rather than using the Tribunal Rules. The problem with the Tribunal Rule is the time period which is allowed to accept an offer of settlement. Rule 43(5) says:

> "A payment to settle may be accepted at any time up to 14 days before the substantive hearing of the claim."

That is the only way in which a payment in can work under the Rules. What that prevents us doing is, for example, making an offer tomorrow and saying "You have 14 days from now to

accept", so there is more flexibility in an ability to make Calderbank offers than there is in the payment in provisions in the Tribunal.

THE PRESIDENT: I have still not quite grasped why you cannot just make a general offer and say "That is the offer, take it or leave it, but it is on the basis that everybody who has (or may have) a claim accepts the offer".

MR. HOSKINS: Can I move this on in this way? One of the things that everyone is envisaging at some stage in this case is some form of ADR procedure. I am going to deal with your point and I am dealing with it through this mechanism. It is very difficult to see how we can reach a settlement if it is not known who has entitlement to any damages that may be awarded, and the reason I say that is if we make a global offer the Claimants, for example, may want to accept it, but one or other of the purchasers may refuse to accept it. If we know who has an entitlement to any damages that may be awarded we can make an offer to that person.

MISS SIMMONS: Mr. Hoskins, you say the purchasers may be entitled to refuse to accept it. Now, the purchasers could only have jurisdiction to do that if they were Claimants, and as I understand it the purchasers here have all said they do not want to be claimants. Therefore, does that not protect you? Does that not mean that what they have said is: "We are happy that the present claimants deal with this, vis à vis you, and at the end of the day if they settle we will be entitled (or possibly entitled) to whatever the proceeds are having regard to that position", and they are not saying "We want to be involved in all of this". That is reinforced by the fact that the way the damages are being put in this case is "It is the damages of these claimants, it is not the damages of somebody else". Therefore it is what these Claimants have lost, and they are the people that know and can deal with that. So the only issue that you have is as to whether, if you paid, these Claimants and there had been a statutory assignment, and these Claimants did not pay the money over to the purchaser on the statutory assignment, that you could be at risk the second time around, and the answer to that is they are joined as Defendants, they are bound by it and therefore you are not at risk. Why is there any other problem?

MR. HOSKINS: I think the practical problem we were worried about was what role the purchasers would play in trying to agree any settlement in any ADR – I saw Mr. Peretz nodding away there. But if the purchasers are saying to us: "We are literally going to do nothing and leave it all to the Claimants", and if they say that to us in court then I can see that this problem does not arise.

MR. PERETZ: Well, perhaps I can make everybody's life easier by saying exactly that.

THE PRESIDENT: Well, that had been our understanding up to now.

MR. HOSKINS: Well I am sorry to be overly cautious, but you will understand why we want to be in a position where if we want to settle it we can do it cleanly, but if that is the indication then obviously ----

THE PRESIDENT: Well we are struggling a bit to see that there is a problem at the moment.

MR. HOSKINS: I think what might be helpful, we will write to PD Hook and send a copy of the transcript and just say "This is the position adopted by 2 Sisters", and get them to confirm in writing that that is the same position, because if that is the position then that problem does go away.

I think then the only issues left to decide are the right to sue issue, the limitation point, the joinder of the purchasers, and the notice to the subsequent purchasers from the two Broomco companies. Sir, unless I can help you further on those issues that is all we would say.

THE PRESIDENT: Thank you. Yes, Mr. Kennelly?

MR. KENNELLY: Sir, as always, I adopt in its entirety everything that Mr. Hoskins said, and I should add a few brief matters. First, in relation to the issue of the Tribunal's discretion. It is our submission as you have seen in my skeleton that the Tribunal does not have the discretion. If provision had been made it would have been under Rule 31, and Rule 31 does not contain any provision allowing the Tribunal the discretion described by Mr. Hoskins.

Secondly, on the question of joinder, an issue has arisen between ourselves and Deans as the Tribunal has seen flagged in my skeleton. We thought that we were out of the Deans' action but there is a dispute as to the terms of the compromise.

THE PRESIDENT: There is a compromise – but a disputed compromise.

MR. KENNELLY: Indeed, perhaps that is better dealt with as a CMC issue at the end. I simply flag that up because we would like today for Deans to state its position in relation to its interest in the BCL action. They have been very equivocal in their correspondence, and we think that they should be joined as well for that reason, but it would be very useful if they did take a position finally, and I will take the Tribunal to the correspondence at the end of the day.

THE PRESIDENT: Yes, I think we ought to look at it, and on that point, as a very provisional view, I, at least, do not see any difficulty – I do not think the Tribunal sees any difficulty – in the Tribunal itself trying to sort this out because it seems to me we need to decide whether we have jurisdiction to hear the case or not, and if the case has been compromised then the case comes to an end, but we probably at first sight ought to try to decide whether it has been compromised if there is still a dispute about that.

MR. KENNELLY: Indeed, and in the bundle which I shall give the Tribunal at the break

Mr. McDougall has made a witness statement in relation to that and we would make an application for permission to amend our defence to plead estoppel ----

THE PRESIDENT: Yes, we can come to how we are going to handle that later on.

MR. KENNELLY: Indeed. Finally, on the issue of the problem with payments to settle, there is a problem in my submission. I think Mr. Hoskins was trying to remember Rule 43(3). If the Tribunal could look at Rule 43(3) of its Rules, you will see that in order for a payment to settle to be properly made notification must be sent to the Registrar, and to the party to whom the payment to settle is made. As Mr. Hoskins said, with the myriad of potential parties ----

THE PRESIDENT: I see the point, yes.

MR. KENNELLY: -- we simply do not know who to send the notification to. In my submission an offer of payment to settle cannot properly be made unless it is sent to that party.

THE PRESIDENT: The problem is that the party bringing these proceedings are the Claimants. Why do you not just send the notification to the Claimants?

MR. KENNELLY: At the moment it appears that the parties who are claiming are the Claimants, but the purchasers are hedging their bets – certainly in terms of Deans. At the moment they may be saying "We do not intend to claim, but we would not be opposed to being joined to them", as matters develop they may change their position.

THE PRESIDENT: But no one is suggesting they want to be a Claimant, are they?

MR. KENNELLY: Not yet, no, but it makes our position much more difficult in offering payment to settle. But I simply wanted to draw the Tribunal's attention to Rule 43(3).

THE PRESIDENT: We know the position of 2 Sisters, because we have just been told the position of 2 Sisters. They do not want to be Claimants as I have understood it, so we are just left with PD Hook, is that right?

MR. KENNELLY: That is correct, yes, and Deans and Broomco. We do not have definitive positions as to their future intentions in this action. Deans have stated the position at the moment, but it will not state what the position will be for the rest of the action in the event that their 15th October 2004 agreement is found to be invalid and they are actually the proper holders of the right to sue. They have not stated what the position will be then in terms of a potential claim against us.

THE PRESIDENT: Yes.

MR. KENNELLY: I have nothing further.

THE PRESIDENT: Yes, Mr. Leggatt?

MR. LEGGATT: May it please you, Sir, we applied at the last hearing, and renew the application today, to join the purchasers as additional parties to the proceedings ----

THE PRESIDENT: Yes.

MR. LEGGATT: -- and to join them, as you know, as Defendants. There is no question so far as we are concerned to be seeking to have them joined as additional Claimants to the action. All the purchasers have now had the opportunity to state their positions and those who have chosen to do so and are represented today by Mr. Peretz have made it clear that none of them is applying to the Tribunal to be added as a Claimant, that they are content to be joined as Defendants – at least none opposes that course – and their position is that if the Claimants succeed in the action then they may wish to argue as between themselves and the Claimants, that they are entitled to the damages that are recovered. So for our part, and addressing what perhaps is the last point but convenient to do it first, there is nothing in the concern expressed by the Defendants that they do not know who to make any offer of settlement to, and they do not know who is claiming against them. They do know who is claiming against them, it is the same Claimants that started the action who are still claiming against them now. Any time they wish to do so they are free to make an offer of settlement to the Claimants. If the Claimants were to accept that offer the claim would be compromised, that would bring the claim to an end, there may still be an issue as between the Claimants and the other purchaser defendants as to who should keep the benefit of the action, but that is not an issue that need concern the Defendants.

THE PRESIDENT: They say they are worried that all that will happen and then Hook, for example, will come along and say "I have a claim too", or "I have not been paid off".

MR. LEGGATT: Hook will be a party to the proceedings, they will be bound by the outcome of the proceedings and they will not be free to make in another action a claim which, if they were going to make it, they would have needed to make as part of this action. Therefore the Defendants are protected by the joinder, which is one of the purposes of joining the purchasers. It is possible, of course, that Hook may come along later in the proceedings and say to the Tribunal "Now we would wish to have permission to make a claim against the Defendants". The Tribunal may not look very sympathetically on that since they have had the opportunity to ----

THE PRESIDENT: It is getting a bit late now, is it not?

MR. LEGGATT: -- make the application.

THE PRESIDENT: Yes.

MR. LEGGATT: But if and when the hypothetical situation were to happen the Tribunal will, of course, need to deal with that application when it is made on its merits, but the theoretical possibility that such an application which no one has intimated, despite being asked whether they wish to, might be made in the future, cannot be a reason, in our submission for adopting a

back to front approach of resolving issues now, which logically should be decided at the end of the proceedings.

As we understand it, none of the Defendants seeks to argue that it would be unjust or inappropriate from a case management point of view to join the purchasers as parties – that is not surprising, because doing so will in fact protect the Defendants, by ensuring that everybody who has any possible interest in the claims is bound by the Judgment of the Tribunal. So it is clearly the just order to make – if the Tribunal has power to make it - and none of the Defendants has sought to argue the contrary. What they do say is, however just and convenient it might be to join the purchasers, the Tribunal cannot do it, and they say that, despite what we say is the clear wording of the Tribunal Rules, Rule 35, which states in quite general terms, and unqualified terms, that:

> "The Tribunal may, after hearing the parties grant permission for one or more parties to be joined in the proceedings in addition or in substitution to the existing parties.

On its face that is an entirely general provision which applies irrespective of any time limit expiring or any other consideration. It leaves the Tribunal to decide as a matter of discretion, in all the circumstances, whether it is right to grant permission for joinder or not. The submission made is that although on its plain terms Rule 35 is unrestricted, nevertheless there is an invisible restriction which is to be read into it when you compare these Rules with the Civil Procedure Rules. It would indeed be a trap for unwary users of the Rules of this Tribunal if what appears to be the plain meaning of its Rules had in fact to be interpreted by comparison with other Rules made for other courts, and that resulted in the conclusion that Rule 35 in this case does not mean what it says. It is our submission that if the Tribunal does look at the Civil Procedure Rules in fact the comparison which the Defendants seek to draw with those Rules simply reinforces the conclusion that Rule 35 does mean what it says. I do not know if the Tribunal has copies of the relevant Civil Procedure Rules, but I have photocopies here.

THE PRESIDENT: If you have them handy that is probably convenient.

MR. LEGGATT: I will hand them up, and there are a few spares if anybody else does not have one. (Documents handed to the Tribunal) The position in the Civil Procedure Rules is that there are two rules instead of one that deal with addition and substitution of parties. The first such rule is Rule 19.2 which is the general rule, and if the Tribunal has 19.2 - (1):

> "This rule applies where a party is to be added or substituted except where the case falls within rule 19.5 (special provisions about changing parties after the end of a relevant limitation period)".

And so there is the general rule which applies in all cases except where rule 19.5 applies and essentially gives the court a discretion to order a new party to be added where it is desirable, it is a general discretion.

Then, if we look at Rule 19.5 there is a special provision over the page of the photocopy about adding or substituting parties after the end of a relevant limitation period, and Rule 19.5 applies to a change of parties after the end of a period of limitation under certain specified Acts. It then goes on to provide that certain conditions must be satisfied in those circumstances before the court may allow a party to be added or substituted. The additional substitution has to be necessary and in turn various requirements have to be satisfied for that.

We say that when one contrasts those rules with the rules of this Tribunal the overwhelming implication is that the authors of the Competition Appeal Tribunal Rules deliberately chose to have a less trammelled jurisdiction and to make a single general rule to cover all circumstances. In contrast to Rules 19.2 and Rule 19.5 of the CPR, Rule 35 of this Tribunal has no exception as 19.2 does for circumstances where a relevant limitation period has expired, and it has no limitation built into it, such as Rule 19.5 does that it only applies in particular circumstances before or after the end of a period of limitation, and we say that the clear implication of that is that it is a general rule which applies in either circumstance, and without exception or limitation.

The reason why there are particular restrictions built into Rule 19.5 of the Civil Procedure Rules is because those restrictions are made necessary by s.35 of the Limitation Act, 1980. On the same photocopy I have handed up to the Tribunal, on the third and fourth pages of it I have copied s.35 of the Limitation Act. If the Tribunal would look at subsection 3 of that section, you will see:

> "(3) Except as provided by section 33 of this Act or by rules of court, neither the High Court nor any county court shall allow a new claim within subsection (1)(b) above, other than an original set-off or counterclaim, to be made in the course of any action after the expiry of any time limit under this Act which would affect a new action to enforce that claim."

It then goes on to say at subsection 4:

> "(4) Rules of the court may provide for allowing a new claim to which subsection (3) above applies to be made as there mentioned, but only if the conditions specified in subsection (5) below are satisfied, and subject to any further restrictions the rules may impose."

Then there are certain conditions set out in subsection 5. The effect of that is that in the High Court or County Court a new claim cannot be made which includes addition or substitution of a new party after the expiry of a limitation period under the Limitation Act, except in certain restricted circumstances set out in subsection 5 with which rules of court for the High Court and County Court must reflect. Hence the reason why in Rule 19.5 of the CPR, there are limits on the jurisdiction of the court to add a party after the end of the limitation period.

THE PRESIDENT: But that is all about making a new claim.

MR. LEGGATT: It is about making a new claim. That is defined for this purpose as including the addition or substitution of a new party, but equally, by its terms, s.35 applies only to the High Court or any County Court, not to the Competition Appeal Tribunal, and it applies only to time limits under the Limitation Act, not for example, to the special time limit that arises under Rule 31 of the Competition Appeal Tribunal Rules, which is the basis of the Defendants' submission here. There is no provision in the Competition Appeal Tribunal Rules, or any legislation relevant to these claims which corresponds to s.35 of the Limitation Act. There was therefore no need for the authors of the rules of this Tribunal to provide that parties may be added or substituted after the expiry of a time limit only if certain special conditions are satisfied. There was no need therefore for any counterpart to rule 19.5 – none was included and instead the authors of the Rules chose to give the Tribunal a broad discretion to allow parties to be added or substituted at any time according to what it considers just. For those reasons, in our submission, the suggestion that the court has now power, no jurisdiction to allow the purchasers to be added is wrong as a matter of law. It is not then suggested that there is any basis on which they ought not to be added and it follows that the Tribunal ought now, in our submission, to give permission to the Claimants to add the purchasers as additional defendants to the proceedings.

It is our position that it is unnecessary to join either Deans or the Broomco Company which have expressly disavowed any claim to be entitled to recover damages which are subject of this action and there are signed agreements that have been made giving effect to that and transferring any right of action if they had acquired one back to the Claimants. So we are not asking to join them, as it were, of our own initiative but, the Defendants say, they have some argument which we confess we find hard to follow, but for some reason it might be relevant to have Deans and Broomco formally bound by the outcome of the Tribunal's Judgment, and so we are content rather than go down any highways and byways of arguments about statutory and equitable assignments to apply to join them too so that they will be bound, but both have

made it clear that they intend to take no part in the proceedings, and that they assert no interest or claim to the damages sought in the proceedings.

So far as the subsequent purchasers of the businesses are concerned, and I am moving on now to Mr. Hoskins' third point.

THE PRESIDENT: Yes.

MR. LEGGATT: He says it is possible that because the 2 Sisters' purchasers sold on two of the businesses ----

THE PRESIDENT: This is East Wretham and Flixborough?

MR. LEGGATT: Yes, in turn, therefore those subsequent purchasers might assert that they had some claim, and so they ought to be joined. The agreements have been made available by the 2 Sisters' purchasers, they have looked at those agreements and said on the plain terms of those agreements they can see no possible basis on which it can be argued that subsequent purchasers acquired any rights of action. We have looked at the agreements and we agree with that, and the reason in short is that because the only assets sold under those agreements are specifically identified assets and there is no category of so-called "residual" assets, all other assets in connection with the business, such as there is in the agreements by which the businesses were sold to 2 Sisters themselves. It is that category of residual assets that gives rise to the argument of interpretation about whether or not it includes, on its proper instruction, the rights to bring these claims. But there simply is not such a category in the subsequent agreements. The only assets sold are assets that are specifically named in those agreements. So we can see no possible basis on which the subsequent purchasers could conceivably assert any right to bring these proceedings, and it seems to us that the suggestion that may be added is entirely unnecessary, and simply an unnecessary complication to proceedings.

Now, if the Defendants, having read those agreements themselves, with their no doubt considerable ingenuity can put forward any possible argument that would give those purchasers a claim, then if they could explain that we could perhaps see the need to join them in the proceedings, but so far we have not attempted to do so and unless they can suggest that there is a real risk, as opposed to a purely fanciful risk of some claim being asserted, then we think it should stop with the purchasers being joined and that it is an unnecessary procedure for the Tribunal to also go through the process of notifying and inviting representations from yet further parties.

The last point is when the assignment issue should be decided, whether now or at the end of the proceedings. It is the Defendants' application to have those issues decided as preliminary issues. At the last hearing they accepted before the Tribunal that if the purchasers

are joined to the proceedings, then their interest in the substantive assignment issues falls away – as Mr. Hoskins put it – and it becomes a matter to be resolved between the Claimants and the purchasers as to who has the rights to any damages. Nevertheless, the Defendants maintained at the last hearing that the issues ought to be decided first – the issues of assignment – and the reason they gave then was that the purchasers, if they are joined in, might want to take a full part in the proceedings, that was the suggestion made – they might want to turn up at the trial and cross-examine witnesses and so forth. That would complicate the proceedings and therefore they suggested the question of assignment, title to sue, should be decided first.

That suggestion has turned out not to be a valid suggestion because all the purchasers have now had the opportunity to say whether they would like to play an active part in the proceedings. Most of them have either said that they positively wish to take no part, or have said nothing at all, and Mr. Peretz, who appears for 2 Sisters, has confirmed in his skeleton argument, but he will no doubt make his position clear in a moment, that his clients intend to take no active part in the substantive proceedings on the merits of the case, but will only wish to argue the assignment issues if and when it becomes necessary to do so – if it ever is necessary to do so. That being so the concern then expressed by the Defendants has proved not to be justified. They have nevertheless come up with a new set of reasons in their skeleton argument for this hearing as to why they say the Tribunal has ----

THE PRESIDENT: Well they seem to be worrying as to who they should make offers to.

MR. LEGGATT: Well so it is said and the answer to that has already been given, we would submit. It is difficult to see this as anything other than an attempt to find some means to delay or interfere with the progress of the timetable by requiring the issues to be decided now, because there is really no reason, either in logic or in efficiency of case management, to do so. In our submission the obviously sensible course is to decide first whether these are good claims and, if so, what the damages are and then, if there remains any issue still unresolved, between the claimants and the purchasers at the end of the day, as to who is entitled to any damages, for it to be resolved at that time. None of the reasons put forward for reversing that process in our submission has any validity to it.

Sir, those are my submissions on that point.

THE PRESIDENT: Thank you very much, Mr. Leggatt. Mr. Peretz, do you have a contribution on this point?

MR. PERETZ: Yes, just a few remarks. On the issue of Rule 35 I have very little to add to what Mr. Leggatt has just said, except perhaps to draw the Tribunal's attention to its own limitation rules which stand as a contrast to s.35 of the Limitation Act. As we read the provisions on

limitation there is a two year time limit on claims running from the final moment of the Decision. That time limit, as we read it, is extendable by the Tribunal under Rule 19 of the Tribunal's Rules which applies to this sort of claim by virtue of Rule 30 and it gives the Tribunal a discretion as you say, Sir, to be exercised judicially to extend that time limit in appropriate circumstances. That contrasts with the much more stringent set of rules in the Limitation Act, which just may explain the difference between Rule 35 of the Tribunal's Rules and Rule 19 of the Civil Procedure Rules, so operating against an entirely different set of limitation rules.

THE PRESIDENT: So you say we could extend that?

MR. PERETZ: Yes. I feel I am trying to fill out the point made by Mr. Leggatt that you have to read the Civil Procedure Rules against the background of s.35 of the Limitation Act. The limitation rules against which you have to read the Tribunal Rule (Rule 35) is the rule in 31(1) that there is a two year time limit, but one asks is that time limit one that can be extended, and we would suggest that the answer is "yes" under Rule 19(2)(I) of the Tribunal's Rules which is a general discretion to extend time limits, and Rule 19 applies to this part of the Tribunal's Rules by virtue of Rule 30. Sir, that we say may explain the difference.

THE PRESIDENT: Yes, the Rule 19(2)(I) power on its face applies where the proceedings are already there, as it were. Whether it applies or might apply when you have not brought any proceedings, but you need to extend the time in order to bring them might be a different point.

MR. PERETZ: There may be an argument but our submission is that that looks to us like the relevant limitation system of the Tribunal and that may explain the difference. Probably the issue does not call to be decided to day, but that may be the explanation.

On the question of timing – when are the various issues to be resolved? Again, I have little to add to what Mr. Leggatt says other than to emphasise that we have no intention of playing any active part in these proceedings. As far as we are concerned, if there are offers to settle – Calderbank offers or payments into court – those offers should be made to the Claimants, probably for the sake of good order we should be informed of them, but as far as we are concerned they should be made to the Claimant.

Two further points arise in relation to timing and that is this. First, if the Claimants lose and get no damages the issue simply does not arise. So in that sense one risks spending a lot of time determining who owns the right to damages, an issue which may well turn out to be entirely abstract if it turns out there are no damages to be obtained at all.

Secondly, there is a practical difficulty in that a certain amount of time would need to be taken to resolve the issue. I can go into this in more or less detail as the Tribunal wishes, but

certainly the estoppel argument does raise matters of witness evidence. Put shortly, the plaintiffs have to establish – an estoppel by convention in this case – have to establish as a matter of fact that various things have happened which give rise in law to an estoppel by convention and there may well need to be witness statements prepared and possibly cross-examination of witnesses in order to determine exactly what happened. That will take time. The Tribunal emphasised this morning that it is keen to keep 21st February date for the main proceedings. We suspect that there simply is not time practically to organise such a hearing between now and that date. I can go into the reasons, the estoppel position, if the Tribunal wishes me to, but it is probably unnecessary.

The final point I wish to make is simply about the subsequent purchasers. Again, we entirely agree with Mr. Leggatt. We thought it right to draw everybody's attention to the subsequent agreement for the sake of good order. The last thing we wanted is for it to turn out at a later stage that in fact we had sold on the businesses and inferences might be drawn against us and so on. But when one actually looks at the agreement ----

THE PRESIDENT: You said just then "sold on the businesses", but I understood Mr. Leggatt to be saying that you have not actually sold the business, you have sold ----

MR. PERETZ: Sold on the assets pertaining to the business. If I take the relevant clause in one of the sale on agreements, what is sold on is the benefit subject to the burden of the contracts as defined, the lease contracts as defined – various contracts related to the businesses, the goodwill and the business intellectual property that is defined but in a commonsense way, then stocks, loose plant, equipment, computer systems – all defined terms, but basically meaning what one would suspect they meant – and that is it. There is no residual assets category such as generates, we say, the assignment in this case, as far as we are concerned. So what we sold on, and whether one calls it the business or not is a matter of one pays one's money and one takes one's choice, but what was sold on is a set of defined assets relating to the business but not crucially, even arguably, any claim for damages such as that at issue here.

I suppose it is possible that the Tribunal might feel that just for the sake of absolute certainty that the subsequent purchasers should be joined, but our response to that would be that one really does want to try and avoid these proceedings becoming unnecessarily baroque, and if the suggestion is made that they should be joined, there should at least be put forward some argument, even a fanciful argument to the effect that the relevant agreements created an assignment, and we have not even heard a fanciful argument to that effect put forward by the defendant. In those circumstances we say it is simply unnecessary to join the subsequent purchasers.

That is all I wish to say.

THE PRESIDENT: Thank you. Mr. Peretz, you said a moment ago that if there was an offer to the Claimants you felt that for the sake of good order your clients should be informed. I think the way that we are seeing it at the moment is that the channel of communication is from the Defendants to the Claimants and it does not seem to us that there is any express or implied obligation on the defendants to inform anybody except the Claimants, if they are making an offer. What the claimants then do with it and how you assert your rights as against them is another matter, but that is not really to do with the Defendants.

MR. PERETZ: We would obviously need to be told about it at some stage, if only because at that point, once the offer had been accepted, we need to assert our interest in the amount at stake. It may be sensible to inform us at the same time. I am not going to put it any higher than that. If they feel for some reason they do not want to do that we entirely accept that the direct channel of communication, as you put it, Sir, is between them and the Claimants.

THE PRESIDENT: Mr. Hoskins, did you want to come back briefly?

MR. HOSKINS: On the limitation point, the first issues, Mr. Leggatt raised an argument on s.35 of the Limitation Act. Unfortunately I do not have a copy, but as far as I understand it, it is said that because in the Limitation Act there is a bar on no new claim being brought after expiry of the time limit, and the definition of new claim includes the addition or substitution of a party. That is why Mr. Leggatt says there is the particular form one sees in the CPR where a specific exception is necessary to allow people to be joined after expiry of the time limit. Mr. Leggatt makes that point in relation to the Limitation Act and says that is why the Competition Tribunal position is different. But with respect he is wrong about that, because one does have the time bar in the Tribunal Rules. It is Rule 31. Rule 31 of the Tribunal Rules is the equivalent of s.35(3) of the Limitation Act. The Limitation Act says: no new claim after expiry of the time limit, and Rule 31 says that a claim for damages must be made from a period of two years beginning with the relevant date. If "new claim" under the Limitation Act is to be taken to mean adding or substituting parties then there is no reason why Rule 31 should not have the same meaning.

THE PRESIDENT: It is difficult to read Rule 31 as applying to an application to add a defendant, is it not?

MR. HOSKINS: Well it is, if you look at the CPR the power that is in there is for people to be joined both as Claimants and Defendants, because they are necessary for a claim to be brought. Now if the purchasers were not joined as Defendants it would not be possible for this claim to continue.

THE PRESIDENT: Do you want to have a look at the section, Mr. Hoskins?

MR. HOSKINS: Yes, I do not have a copy of it, I am afraid. [Document handed to Mr. Hoskins] Is there some particular provision you would like me to look at?

THE PRESIDENT: Well, it is s.35(3), I think the point that is being made is that this is all a rather self-contained system for which a particular rule of court was necessary in order to operate it and for that reason Rule 19.5 of the CPR does not really have any equivalent provision in the Tribunal Rules.

MR. HOSKINS: This is a specific system for the High Court and the County Court which has a limitation bar and then possible exceptions to the limitation to add or substitute parties. My point is that is precisely what one has in the Tribunal Rules. One has a limitation bar, Rule 31, except in the Tribunal Rules one does not have an exception to that bar. So my argument is that Mr. Leggatt's submissions actually count against him because he has overlooked the fact that there is a limitation bar in the CAT Rules – rule 31 – and if rule 31 is to be overridden one would expect it to be done expressly.

The second point was the joinder of Deans and Broomco. I have explained why we would like that. I understand it is not opposed and I will not waste any more time on it.

The third point is the subsequent purchasers point, the people bought the Feed Mill businesses.

THE PRESIDENT: Yes, the Flixborough and East Wretham point.

MR. HOSKINS: It is not particularly comforting for us to find the two parties who would benefit from having nobody else potentially claiming part of the pot telling us not to worry, because that is effectively what is happening. We are not suggesting – I did not suggest – that these parties should be joined. What I suggested ----

THE PRESIDENT: You want us to write to them?

MR. HOSKINS: -- was that they should be given notice, precisely. If their position is "We have no interest in this claim", they will not appear. However, if their position is "We think we have a right to this claim" then they may apply to be joined and so they should. That is as far as this point goes, but it is perfectly clear, we say, that notice should be given because we are entitled to know if we are required to pay any damages at the end of the day that that is the end of the matter. It is a very simple point, and that is the way I put it.

THE PRESIDENT: Before the Tribunal, as a Tribunal, goes around the place giving notice to people about proceedings, we need some proper basis upon which to do so. One of the questions that arises is how far we have to go into all of this in order to decide whether we have a proper basis or not.

MR. HOSKINS: Sir, if you give notice it would be self-solving, because either they will not have a claim and they will not come in, but if they do have a claim it is right that they should have been notified, because otherwise there is a risk they will come after I submit it. I look a this case, this shows why they should be notified. On the one hand we have all looked at the original agreements which transferred the business from the Claimants to the purchasers. We say it is clear they transferred the rights. 2 Sisters say it has clearly transferred the rights. The Claimants are saying "Oh no. Look, if you take estoppel into account, and take the background into account that is what we want to avoid. We are not saying "Get into that debate", but we want to avoid being stung by that debate, and that is why we say the proper course is to notify.

THE PRESIDENT: Yes.

MR. HOSKINS: The fourth point is the timing, which I hope I have dealt with very fairly today. When it was made clear that the purchasers on the 2 Sisters' side did not intend to take any part in the proceedings we immediately said "Fine", we can see the sense of it going off. That is how we dealt with it there, and it is very unfair to suggest that this was a mere attempt to delay in some way or form – I will come on to it – because we have an application for costs in relation to this issue. We have been pressing for right to sue to be resolved for a very, very, long time. To somehow suggest that we are delaying is completely inappropriate. But it is important to note 2 Sisters say we will not play any active part, but then they say "Perhaps we should be informed of an offer", and the Tribunal said that that did not seem appropriate. We agree, that is not appropriate. It is very important that it should be possible to make confidential offers and we should be able and allowed to do that in this case. So Mr. Peretz, certainly as far as we are concerned, has no right and will not be informed of any offers made to the Claimants.

Another aspect to this, whilst he disavowed, almost entirely, their interest, we also want to make it clear, and we would like it to be accepted by Mr. Peretz that his clients will not play any part in the ADR process, because again that is one of the practical points that I raised, if this is to be settled ----

THE PRESIDENT: You need at some point to just sketch out a bit more what you mean by the "ADR process".

MR. HOSKINS: Well one of the things that is on the table is a mediation, which I am envisaging if there was a mediation there will be the Claimants and the Defendants there and it will be mediated. But what we are concerned is there should not be in rooms tucked away at the back the purchasers expected to play a role in this, because that is precisely our concern, we want to be able, if there is to be mediation, to deal with it with the Claimants and no one else.

THE PRESIDENT: That is probably something that sorts itself out in the mediation process, rather than a matter that we can address at the moment in the Tribunal.

MR. HOSKINS: Well Mr. Peretz can say now "We will not turn up at any ADR proceedings. We will not play any role."

THE PRESIDENT: That is quite outside the scope of the present proceedings, I think, Mr. Hoskins.

MR. HOSKINS: Well except, Sir, I said that we are quite happy to let this be decided after the trial as long as there are clear lines of communication for settlement, and one of my points is that if there is to be mediation one can see how it might work between the Claimants and the Defendants, but if it is Claimants, Defendants and a number of other purchasers, and we have to mediate a satisfactory solution for all of them, then that is not something that we would want.

THE PRESIDENT: Well, your interlocutor – if that is the right word, it may not be the right word - are the Claimants basically. You have been sued by the Claimants and it is the Claimants to whom you must address yourself if you wish to compromise the proceedings.

MR. HOSKINS: Sir, I have raised the point as a practical point. We are trying to be constructive, I hope that is how it is coming across.

THE PRESIDENT: Yes, thank you.

MR. HOSKINS: I do not have anything else to add.

THE PRESIDENT: Thank you very much.

MR. KENNELLY: Sir, just on the statutory basis point, because it was raised by Mr. Leggatt and it as considered useful to examine the statutory foundation of the Tribunal's rules. It may be useful in relation to the Tribunal's discretion to look actually at the foundation for your rules, and that is in the Enterprise Act. If the Tribunal turns to Schedule 4 of the Enterprise Act, Part 2. You will see in para.11, Part 2, Schedule 4.

> "11(1) The Tribunal Rules may make provision as to the period in which and the manner in which proceedings are to be brought."
>
> "11(2)(a) provide for time limits for making claims to which section 47A of the 1998 Act applies in proceedings under section 47A or 47B;

And importantly:

> "11(2)(b) provide for the Tribunal to extend the period in which any particular proceedings may be brought."

It is express statutory provision for the Rules to allow for the extension of time. But when the Tribunal's Rules were drafted we would say there was no express provision for a rule permitting the Tribunal to extend time. The statutory basis was there, but the Tribunal's Rules

themselves do not contain that provision. One would imagine, following the statutory framework in Part 2, Schedule 4, there would be in Rule 31, which contains the time bar, express provision for the extension of time as one finds in the CPR, an done would imagine that following the statute upon which the rules are based.

Mr. Peretz seeks to find in the Tribunal's Rules such provision, and he refers to Rule 19(2)(I) which the Tribunal has already seen.

THE PRESIDENT: Yes.

MR. KENNELLY: But as I would submit is obvious those rules are the case management rules for the Tribunal and are modelled, certainly drafted with part 3 of the CPR in mind, and the list of matters in relation to which the Tribunal may give directions is based with Rule 3.1.2 of the CPR in mind. They are not drafted on exactly the same terms, but I think it is going too far to say that the Tribunal's Rules when drafted in Rule 19(2)(I) was intended to be the express power in the Tribunal to extend time, and to extend time under Rule 31, to alter the time by Rule 31. One would not see it in 19(2)(I), that relates to ordinary case management time limits for orders, directions and so forth, and cannot be read to cover Rule 31 of the Tribunal's Rules. I can see what Mr. Peretz is trying to find, but it is impossible in my submission.

THE PRESIDENT: It is not there.

MR. KENNELLY: Yes. I have nothing further.

THE PRESIDENT: Yes, thank you.

MR. LEGGATT: Sir, may I very briefly reply on the Enterprise Act, as it is a new point?

THE PRESIDENT: Yes, it is a new point of law, I suppose.

MR. LEGGATT: May I just say, in our submission, the question that has been raised about extending the time for bringing proceedings is something of a red herring, because there is no application before the Tribunal to extend time for bringing proceedings. The proceedings were brought in time, nobody is asking to extend that time, nobody is asking to make new claim after the time limit has expired. All we are concerned about is adding additional parties to the proceedings. That is dealt with, I see, in a different part of the Part 2 Enterprise Act Schedule at the end, para.24 which is what provides that:

"Tribunal Rules may make provision –

(a) for a person who is not a party to be joined in any proceedings."

We would simply make the point that that is in general and uncircumscribed terms (as is the rule made under it), and we are dealing here with a quite different regime from that which I showed the Tribunal under s.35 of the Limitation Act and the rules of court which are made pursuant to that.

Thank you.

THE PRESIDENT: Thank you very much. The Tribunal will rise now for at least 15 minutes.

(The hearing adjourned at 12.12 p.m. and resumed at 12.35 p.m.)

THE PRESIDENT: The Tribunal has heard argument on a number of procedural issues that arise in this Case Management Conference. We do not propose to take time now in giving our full reasons which we will give at a later date. What we propose to do is simply indicate what our Decision is on the various points that have been argued.

The first question is whether various persons should be added as defendants to these proceedings. The persons in questions are purchasers who have bought the relevant businesses from the claimants. In other words, the claimants have sold on the businesses concerned to subsequent purchasers. In relation to that, it is submitted that the Tribunal has no power under Rule 35 of the Tribunal's Rules to add those purchasers as defendants to the proceedings in circumstances where the limitation period has already expired.

Without going into detail, our judgment on this issue is that Rule 35 is expressed in broad terms and we are not persuaded that we should cut down or limit the Tribunal's jurisdiction to grant permission for one or more parties to be joined in the proceedings of that rule. In our judgment that discretion exists and since it has not been suggested in this case that there is any reason for us not to exercise the discretion (assuming it to exist) our judgment is that we should allow those relevant purchasers to be joined as defendants in the proceedings. I think it follows from that that 2 Sisters, P.D. Hook, Deans and Broomco 2524 will be joined as defendants in the proceedings.

The next issue is what the Tribunal should do about certain sub-purchasers to whom 2 Sisters has apparently sold, namely the East Wretham and Flixborough businesses. In that regard we think the best course, although it is perhaps showing a certain amount of caution, is for the Tribunal to write to the sub-purchasers in question, simply drawing their attention to the existence of the proceedings and probably the transcript of today's hearing, and invite them to state within an appropriately short time limit whether there are any submissions they wish to make to the Tribunal. That will ensure that all relevant parties are at least on notice.

The last matter we need to decide is at what stage of these proceedings outstanding issues as between the claimants and the purchasers (now joined as defendants) need to be decided? There is an issue as to the construction of the relevant sale agreements. There is a possible issue as to estoppel, and there may be an issue as to whether the relevant assignments

were legal or equitable. Those issues are entirely as between the claimants and the purchasers, and they do not arise unless the claimants establish that they do have a claim to damages. Those issues may not arise at all if the defendants succeed in showing that the claimants have no claim. On that basis, our view is that the better course is to decide all those issues at a later stage after we have decided the main proceedings. So that, very briefly, is the basis upon which the Tribunal proposes to proceed at this point.

MR. HOSKINS: Can I raise one point of clarification in relation to the parties who are to be joined?

THE PRESIDENT: Yes, I may not have got it quite right, Mr. Hoskins.

MR. HOSKINS: It is important to be more specific about what 2 Sisters means, because there was an agreement whereby certain business were sold, 2 Sisters' Premier Foods Ltd., so that is one 2 Sisters' company.

THE PRESIDENT: Yes.

MR. HOSKINS: But then the three feed milling businesses were each sold to different companies owned by 2 Sisters.

THE PRESIDENT: Right.

MR. HOSKINS: So long as we all understand that 2 Sisters encompasses four companies, part of the group, then there will not be a problem. I think that is what was intended.

THE PRESIDENT: Does that sound right to you, Mr. Peretz?

MR. PERETZ: Yes, that is correct.

THE PRESIDENT: Yes, now do we have time to start the security for costs point? I think we probably do.

MR. HOSKINS: Sir, we also have a costs' application in relation to the right to sue. If I can just say there are three costs' issues. There is security for costs, there is costs in relation to right to sue, and there is costs in relation to Yellow Carophyll and obviously I am in your hands as to how and when you would like me to deal with that.

THE PRESIDENT: I think on two and three for the time being we will reserve the costs, Mr. Hoskins, and come back to it at some convenient point but not today.

MR. HOSKINS: If I turn to security for costs then.

MR. PERETZ: Sir ----

THE PRESIDENT: Sorry, Mr. Peretz, I probably quite unreasonably rode roughshod over some application you are about to make.

MR. PERETZ: No, the point I wanted to make is simply this. These costs' applications are of no interest to us at all. The only surviving issue, which is of any relevance to us at all, given the

attitude we are taking to these proceedings, is an application for disclosure of material that we have. I have had the opportunity to have a quick discussion off-line with Mr. Hoskins on this and he says he would like to raise the topic of disclosure. I think that is it as far as we are concerned. I do not particularly mind dealing with something now and coming back after lunch, but I think ----

THE PRESIDENT: You want to go.

MR. PERETZ: I never wish to leave this Tribunal, Sir, but I do not think my clients would want to pay me to stay any longer than necessary.

THE PRESIDENT: So if there is anything that concerns you, you would rather we tackled it ---

MR. PERETZ: Dealt with it sooner rather than later, yes.

THE PRESIDENT: Just let me say one thing, Mr. Hoskins. One of the problems we were going to come to this afternoon is how to approach the disclosure issues because it seems to us, as I said at the outset, a number of those issues in turn depend on defining what the issues in the action are, what the ambit of those issues are, so I am not sure we can deal particularly shortly with disclosure. I do not know where that takes us, Mr. Hoskins was about to solve the problem for me.

MR. HOSKINS: I wish I were. I am happy to deal with things in whatever order the Tribunal wishes.

THE PRESIDENT: No, I do not want to deal with disclosure now – I am sorry about that, Mr. Peretz.

MR. HOSKINS: Can I deal with security for costs then?

THE PRESIDENT: Yes.

MR. HOSKINS: We have an application for security for costs against what we call the Premier Claimants – that is in the BCL action – BCL, DFL and PFF. I think Mr. Kennelly has a similar application.

What we are asking for is a parent company guarantee in the amount of £250,000. If I can ask you to turn up the application notice, which is in the first supplementary bundle. I am going to have to work out the bundle numbers here.

THE PRESIDENT: File number 13, I think.

MR. HOSKINS: It should be at p.122 of that bundle.

THE PRESIDENT: Yes, we are there.

MR. HOSKINS: You will see there what we are asking for is security £250,000 by way of parent company guarantee, and we have set out in the annex the draft order which follows through,

p.127. We have obviously tried to follow the wording of the previous parent company guarantee that was given.

THE PRESIDENT: So we are just talking about the sum of money, I take it?

MR. HOSKINS: I think that is right, yes. We have set out in the second Lawrence the basis for the application but I do not need to take you to that. For the note it is in **this** bundle at p.128. Basically the Claimants had originally contended by way of alleged agreement we were not allowed security relating to the period pre- 7th December, but that issue has now gone away, they are not taking that point any longer. They did say that if we were only allowed security from 7th December onwards they were prepared to give £30,000. That is in their skeleton argument.

THE PRESIDENT: Yes.

MR. HOSKINS: So obviously we are just talking about the amount of money, but they offered £30,000 for the period 7th December onwards, but what we are asking for is £250,000 which covers the start of this action to the trial – I want to make that clear. The offer we have on the table is £30,000 for that limited period I have described.

THE PRESIDENT: So the offer you say is from 7th December up to and including the trial.

MR. HOSKINS: Yes, it is expressed as "to trial", which I think is intended to include trial – I am sure Mr. Leggatt will correct me if I am wrong.

THE PRESIDENT: You want to go back to the start of the action?

MR. HOSKINS: £250,000 covers security for the start of the action.

THE PRESIDENT: Forgive me for not being completely on top of this side of it – do we know anything about the amount of costs you say you have incurred so far?

MR. HOSKINS: We do indeed. We have produced a statement of costs only to be told where the copy is in all the bundles. I am sorry for the confusion. There were three bundles handed up this morning – I provided everyone this morning – it is p.748 of those supplementary bundles.

THE PRESIDENT: 748.

MR. HOSKINS: There is confusion, I am sorry. This is called "supplementary bundle" as well, and I have been using the supplementary bundle. There are three lots of bundles – one set for last time, then a new set prior to this action and a new set that was produced this morning.

THE PRESIDENT: I have a document that I am looking at that has a figure of £8,942.50 on the bottom of it.

MR. HOSKINS: That is the right one, Sir. No, sorry, that is for the costs of this application today.

THE PRESIDENT: That is the costs of the application – yes.

MR. HOSKINS: It is the next document behind tab 8.

THE PRESIDENT: It does sound a slightly modest figure.

MR. HOSKINS: I would be sweating myself at that stage! [Laughter]

THE PRESIDENT: There is another figure a bit later on.

MR. HOSKINS: The one I am looking at has £839,255.

THE PRESIDENT: It has a grand total of £839,255, and a figure for what are called "costs to date" of the order of half a million pounds.

MR. HOSKINS: That is correct. Sir, what we are asking for is simply £250,000 and we say in the context of those costs £250,000 is very reasonable.

THE PRESIDENT: I just want to understand what is going on. There is the sum that you say has been incurred up to now, then there is an estimate of future minimum estimated costs which break down into effectively Freshfield's costs and disbursements.

MR. HOSKINS: That is correct, Sir, yes.

THE PRESIDENT: And that adds up to the final figure we have just mentioned.

MR. HOSKINS: That is correct. So the headline figures, if you like, are on p.4. Costs to date are £517,000-odd, then £300,000-odd, giving the total of £800,000-odd.

THE PRESIDENT: Yes.

MR. HOSKINS: What we are seeking is £250,000 which we say is very reasonable in the light of those costs.

THE PRESIDENT: And you are seeking that on what basis exactly? On what legal basis are you seeking it?

MR. HOSKINS: Well there is a power in the rules to provide security for costs, and in this particular case ----

THE PRESIDENT: And we should exercise it because?

MR. HOSKINS: The reasons why are these: the claimants are shell companies which do not have any assets against which a costs' order should be enforced, and secondly the claimants' ultimate parent company, which is the company that would be giving the guarantee, is a FTSE 250 listed company and on the information we have been able to find for the six months to 3rd July 2004 it had a turnover of £425.8 million for those six months, and an operating profit of £31.2 million.

THE PRESIDENT: We have all that in our papers, Mr. Hoskins?

MR. HOSKINS: That is why I referred you to Mr. Lawrence's second witness statement.

THE PRESIDENT: Yes, absolutely.

MR. HOSKINS: Obviously I am happy to take you to it but I gave you the reference.

THE PRESIDENT: Yes, you did.

MR. HOSKINS: What we say in short is that it would be wholly wrong to allow the Claimants to protect themselves from potential costs' liability by hiding behind corporate personality. It is a standard situation in which security can be grated when the Claimant does not have the funds to meet any potential costs' order.

THE PRESIDENT: Yes.

MR. HOSKINS: And no point has been taken, obviously we have put in the evidence in second Lawrence, it has not been suggested to us that they do have funds that we are not aware of, nor has it been suggested that the parent company is not in a position to give a guarantee in the sum we seek, so there does not seem to be any dispute in relation to that.

The only real point I think that has been made against us is to complain about the amount of our costs. They say they are excessive. We, of course, say they are not excessive. We say that figures are wholly reasonable given the detailed nature of the case. It is a complex damages claim, it is brought by indirect purchasers, it relates to the period from 1989 to 1999 and the current time estimate for trial is three weeks. Given the nature of the claim we say our costs are reasonable, but in any event we say the argument that our costs are not reasonable is a red herring because all we are seeking, as I have said, is £250,000 out of the total that we think we will spend, and what we are actually looking for, as I have said, is a parent company guarantee. So there will be no need for the Claimants or for the ultimate parents to actually produce any money ----

THE PRESIDENT: They are not going to actually lodge money anyway?

MR. HOSKINS: Exactly. The only time they will be required to produce money is when and if we have been awarded costs and when those costs have been agreed or assessed, and we say that in the context of our assessed likelihood of costs if we were to win then £250,000 is very reasonable, but there is no jeopardy at this stage. We will only claim under the guarantee what we are entitled to because it has been agreed, or because the Tribunal has assessed them. So that really is a red herring, it does not help anyone to say "These are terribly high". That does not take us anywhere.

The other points that are made, again it is a similar sort of point, it is said that we are throwing money at the litigation. But again, with respect we would say what we have actually endeavoured to do is to be as focused as possible throughout this, that is why it was us who suggested disclosure by category of documents rather than just an all encompassing disclosure exercise. You have also seen that we intend to instruct our experts jointly with the other defendants to save costs, so it is simply this is how much these sorts of actions cost. We have not conducted this action in anything other than a focused and reasonable way.

The other point that is made is that s.47(a) of the Competition Act was introduced to facilitate private enforcement of Article 81 damages. That is correct, but what s.47(a) clearly does not do is to excuse a Claimant from the burden of proving his actual loss. It is not a shortcut, it is a jurisdictional power, but it is not a shortcut. The purpose of s.47(a) is to permit the Tribunal to hear damages claims, but it does not override the fact that a claim such as the present one does raise highly complex issues of, for example, causation and calculation of quantum. So those meet the specific points made against us, but the bottom line is the one I have made. We think we are going to spend over £800,000. We are only asking for £250,000 and we are asking it by way of parent company guarantee.

THE PRESIDENT: The costs to date, it is very helpful to have them, perhaps understandably do not really break things down between the various different things we have had to consider, such as the assignment point, the overall preparation of the case, the joining of further parties, and so on and so forth.

MR. HOSKINS: We did not feel that it would be helpful or cost efficient to have pages and pages. The point is at the moment there are no costs' orders on either side. The only costs' applications that are outstanding are actually our costs' applications. Again, it is security for costs by way of guarantee. We will only get costs that we are entitled to at the end of the day.

THE PRESIDENT: Yes.

MISS SIMMONS: Can you just remind me, under the CPR there are rules about how you do these costs' schedules in relation to determining costs. I know this is a security for costs application and I am not sure that there are not rules about that. Is this done in accordance with that, or is there supposed to be a greater breakdown about costs already incurred at least?

MR. HOSKINS: This is simply prepared for the purpose of the hearing. I don't think it has been done with an eye on particular CPR Rules. We took the view, as I said, for reasons of cost effectiveness it would not actually be particularly useful – I am sorry if we were wrong – to produce a 10 page document with everything itemised.

THE PRESIDENT: No one is suggesting that, we are just seeking to understand it, Mr. Hoskins.

MR. HOSKINS: Sir, unless I can help you any further?

THE PRESIDENT: No. Thank you very much.

MR. HOSKINS: That is the application.

THE PRESIDENT: Yes, Mr. Kennelly?

MR. KENNELLY: Thank you, Sir. Just to add that in addition to those points the point has been also raised against Aventis and Rhodia that we have been disproportionate in our expenditure

on this case, and the Tribunal has seen the letter sent arguing that our costs are wholly disproportionate.

THE PRESIDENT: Can you very kindly just take us to where we find your costs?

MR. KENNELLY: Yes. The evidence setting out our costs to date, are in the second witness statement of Mr. McDougall behind tab 3, near the very beginning of file 2 of the supplementary bundles – that is the one on the spine which says "bundle for hearing and CMC on 8 December 2004, file 2, that may be the easiest way to find it.

THE PRESIDENT: Just a moment. Sorry, what page did you say?

MR. KENNELLY: First of all, just to establish, Sir, that you have the correct bundle, because it is confusing, it should say on the spine simply "Bundle for hearing and CMC on 8 December 2004 file 2".

THE PRESIDENT: That is what it seems to say.

MR. KENNELLY: Very good. It is behind tab 3 near the beginning, at p.290.

THE PRESIDENT: Yes.

MR. KENNELLY: That is the second witness statement of Mr. McDougall, and you can see over the page at 291, para.6 that Aventis and Rhodia's costs up to including 7th December are estimated to amount to around £229,500.

THE PRESIDENT: Yes.

MR. KENNELLY: Mr. McDougall stresses in that statement, and it is my submission before you today, that the Aventis and Rhodia defendants have really tried as hard as possible to be very proportionate in their expenditure on this litigation. We have sought not to duplicate the work that has been done by Freshfields and as the Tribunal has seen we have not instructed leading counsel, on the contrary they have instructed me, and I am very far from being leading counsel, and we have tried not to duplicate in our written or in our oral submissions the points made by Mr. Hoskins, and that is for two reasons. First, the Tribunal must not forget the value of the claims made against Aventis and Rhodia which, in comparison to the ones made against Roche, are relatively small. Also, it is in our interests as well to be as sparing and careful with our expenditure on this case. It cannot be said against us that our expenditure has been disproportionate. The Tribunal has seen our application notice, which is in the same bundle behind tab 1, and the draft order is behind tab 2.

THE PRESIDENT: So you are asking for 195?

MR. KENNELLY: Sir, yes. In relation to the comments made by the Claimants generally, the Tribunal I hope should take some heart from the comparison between the various sets of costs that are placed before you to be satisfied in your own minds that Aventis and Rhodia have tried

to be as careful as possible in their expenditure on this – as Mr. Hoskins said, and we agree – very complex litigation.

I have nothing further.

THE PRESIDENT: Thank you.

MR. LEGGATT: I have a few submissions that may take a little while, and it may be more convenient if I started ….

THE PRESIDENT: Yes, thank you for drawing my attention to that. Shall we start again at 2 o'clock?

MR. LEGGATT: … rather than do it in two parts.

THE PRESIDENT: I am sure that is a good idea. Thank you very much indeed. 2 o'clock.

(Short Adjournment)

MR. KENNELLY: Sir, Mr. Leggatt has very kindly agreed to allow me just to check if the Tribunal has the bundles that we handed up at the break, the short bundles – these are the ones I mentioned this morning – containing the further witness statement of Mr. McDougall? In that the fourth witness statement of Mr. McDougall behind tab 6 also relates to the security for costs application, and the fact that it is a parent guarantee. It has also been sought by the Aventis defendants.

THE PRESIDENT: I have to say, Mr. Kennelly – I was going to say a little bit at the end – but all this stuff has come in very late.

MR. KENNELLY: I understand, Sir, yes.

THE PRESIDENT: We really cannot get on top of things at this late stage. I know the date was moved by one day but it has been in the list for quite a while.

MR. KENNELLY: I understand, Sir, and I apologise in relation to the security issue, but in relation to disclosure we were waiting for responses from the Claimants and rather than trouble the Tribunal with further evidence, we were hoping to resolve it in the correspondence, that is why that was late.

THE PRESIDENT: Thank you. Yes, Mr. Leggatt?

MR. LEGGATT: Sir, the jurisdiction of the Tribunal to order security is under the Tribunal Rules, Rule 45. Just to remind the Tribunal it is sub-rule 4 is the starting point:

(4) The Tribunal may make an order for security for costs under this rule if -

(a) it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order; and

(b) one or more of the conditions in paragraph 5 applies."

Now we accept that one of the conditions in para.5 applies, so that condition is met. The question is whether it is therefore just in all the circumstances of the case to make an order and, if so, in what amount, and for the amount we go back to para.3 on the previous page:

"(3) Where the Tribunal makes an order for security for costs, it shall -

(a) determine the amount of security;"

and we submit what would appear must be intended that in setting the amount as well the Tribunal should have regard to all the circumstances and set such amount as is just.

THE PRESIDENT: Yes.

MR. LEGGATT: The Tribunal is aware that £60,000 has already been provided by way of security and that occurred following the first Case Management Conference, £30,000 to each Defendant.

THE PRESIDENT: By way of ----

MR. LEGGATT: By way of guarantee. The brief history of that is that the Claimants offered £30,000 to each Defendant to cover the period up to the date of this Case Management Conference. That appeared to be accepted, at least by Ashurst. Freshfields (for Roche) said that the £30,000 should only go to the end of the period of time for discovery, which was in September. There was then an agreement which resolved that dispute at the hearing outside court on the first Case Management Conference. Unfortunately, there is a disagreement of recollection as to what was agreed, but Mr. Lawrence of Freshfields is adamant that it was agreed to decide all questions at this Case Management Conference and therefore there was effectively no agreement – or nothing more than an interim agreement and the Tribunal, I hope, has seen a short statement from Mr. Peretz in which he says that although he has a different recollection, in view of the difference he does not wish to press the point, and therefore we accept that for today's purposes the Tribunal can determine matters afresh.

THE PRESIDENT: Yes.

MR. LEGGATT: But we do say that nevertheless those sums that were provided already are indicative of the sorts of amounts of security that are appropriate in this case and were reasonable amounts in respect of the period up to today, and the Defendants at that stage were taking a reasonable and realistic approach towards the sorts of sums that should be provided by way of security which they now appear to have lost sight of.

The amounts that they now claim, in our submission, are wholly unreasonable and excessive amounts, and there are seven points that I wish briefly to make – and I can make them shortly – that we ask the Tribunal to take into account in fixing an appropriate amount for security. The first point is that this is, of course, a quantum only trial that is to take place,

liability already being established by the European Commission Decision. We accept, of course, that there is a legitimate dispute over quantum, but it is an unlikely result we would respectfully suggest that the result will be that no loss whatever has been incurred.

Secondly, and this has to be seen in conjunction with the first point, the Defendants have made no payments to settle under the Tribunal Rule 43 that we were looking at this morning, and we would therefore suggest that it is an unlikely outcome that there will be orders in their favour, or orders certainly for the whole of the costs in their favour at the end of the day.

Thirdly, we say that the Tribunal can (and should) take into account the possibility that this case may not go all the way to trial because ADR is contemplated and it may be settled, and not all those costs may be incurred.

Fourthly, and this is a point on which we attach great emphasis, we submit that the costs which have been incurred by the Defendants, and particularly by the Roche Defendants, are wholly disproportionate in the context of this claim. The Freshfields' bill that has been put before the Tribunal, which leads to a figure of "Total costs to date and future estimated costs £839,000", it is almost as large as the principal sum claimed by the Claimants in this case, which on the highest figure in the Claimants' expert report is £900,000. If one adds the Ashurst's costs to date they have not given an estimate for their future costs but that is another 229. One has already eclipsed in costs the sums that are being claimed.

So that the Tribunal has a further comparison, I can tell you on instructions what the Claimants' costs to date are. They are approximately £200,000 of which £130,000 is the cost of lawyers, that is solicitors and counsel (including myself) and £70,000 is the costs of experts. Another remarkable feature of the Freshfield's bill which has been put before the Tribunal is that you may have noticed that costs of over £500,000 to date in that bill include no amount for experts. That is entirely lawyers' costs, and that sum must be compared on the Claimants' side with costs of proceedings against both sets of Defendants of £130,000 for actual legal costs to date. The costs, I calculate from the Freshfield's bill to the end of December, which is just after disclosure took place on 20th September, and so it is a figure that is useful to compare with the £30,000 which Roche Defendants were prepared to agree to accept as security until disclosure – that was their offer which did not actually result in an agreement, but in July they were prepared to accept that. That compares with a figure of costs that they claim now to have incurred to the end of September of some £284,000.

Mr. Hoskins suggests that it is a red herring to look at the actual costs that are being incurred by the Defendants, but we submit that it is not at all red herring, and it is very much to

the point because the sums that the Tribunal is being asked to order by way of security have to take as their starting point some estimate of what is a reasonable amount of costs to incur in the conduct of these proceedings, and it is our submission that the amounts that the Roche Defendants are incurring bear no reasonable relationship to an appropriate, or recoverable set of costs in the proceedings, and should not form the starting point on which the Tribunal assesses security.

There is a further point – and this is the fifth point of the seven that I ask the Tribunal to consider – which is that the Defendants have chosen to be represented by two different firms of City solicitors in this case. We are not aware that there is any reason why that should be necessary, their interests are certainly not conflicting. There is no contribution claims against the other. Of course, it is their privilege to be represented by different solicitors if they choose to, but we do submit that there is no reason in justice why the Claimants should be compelled to provide security for that privilege by providing security in double, as it were. We have no objection of course, if the Defendants agree that this is appropriate, for the overall amount of security to be divided in two between them, but it should not, we submit, as a matter of justice be greater than the amount that would have been appropriate had they not chosen to be separately represented. There should, in other words, be a single set of defence costs and security assessed by reference to those costs however the Defendants choose to allocate it between them.

The sixth point is that the Roche Defendants are being very frank in their evidence about the reasons why they have been spending money at the rate they have on legal costs in this litigation. They set it out in a letter of 22nd November, and they have quoted the letter in full in the witness statement of Mr. Lawrence that they rely upon, and I would just ask the Tribunal to look at that quotation in file 1, at p.134.

THE PRESIDENT: Yes. If the Tribunal has p.134 Mr. Lawrence is there quoting a letter of 22nd November (in italics) and it is the first paragraph where he is setting out the position from his client's perspective. If we look down about half way down that paragraph:

> "Our clients do not accept as a matter of general principle that any losses were suffered. There are important issues principle at stake (some of which are novel) and you are well aware of our client's potential exposure to future claims in the UK and elsewhere in Europe if encouragement were to be given to those in the Claimants' position. In these circumstances our clients are entitled to seek to defend themselves properly."

THE PRESIDENT: Well we were trying to get a little closer when Mr. Hoskins was addressing us as to exactly how all this money had been spent. We have not yet got very far with that.

MR. LEGGATT: Yes, that is right, Sir, but what you are told by Mr. Lawrence is that they are unconstrained, as it were in their attitude to spending simply by the amount that is at stake in this litigation because they see this potentially as the tip of an iceberg, and one of their express objects in this litigation is to discourage others from suing them, either here or in Europe.

THE PRESIDENT: You say it is a "money no object" type of exercise we are embarked on here?

MR. LEGGATT: Exactly, so far as they are concerned, and of course it is their privileged to spend as much money as they like on the litigation, the Tribunal has no power to stop them spending whatever sums they think appropriate to discourage other people from suing them, but the point I make is that it is wrong that that attitude to expenditure, driven by broader considerations should be visited on the Claimants by being reflected in the amounts that the Claimants are required to provide by way of security. I should make it clear that the Claimants have no wider interests at stake in this litigation, their only interest is in the sums of £900,000 plus interest which are the amounts of their claims.

The last point we make, the seventh point, is that there is a point, we would respectfully submit, about access to justice to this Tribunal at stake here, because security for costs is always a weapon in a Defendant's armoury, and if large sums are required before a Claimant can have his case heard before the Tribunal, even in a case like this where liability and illegal conduct that went on over many years, has already been established, then the result can only be to deter litigants, unless they have very large claims, from bringing their claims before the Tribunal because it simply will not be cost effective to do so. We do not object to providing security in principle, but we do submit that it should be moderate and reasonable in amount. We submit that the amount of £60,000, which has already been provided, was an appropriate sum to cover the period up to this Case Management Conference, and we suggest that a further sum of £60,000 would be appropriate for the remaining period of this litigation, making £120,000 of security in all, and we are quite content to divide that between the Defendants however ----

THE PRESIDENT: I am sorry, there is 60 on the table at the moment?

MR. LEGGATT: 60 has already been put up. Our submission is that that 60 is adequate to cover the costs up to today.

THE PRESIDENT: Yes, I see, so 60 plus 60.

MR. LEGGATT: 60 plus 60, 120, divided equally between them if that is how they wish, or available to both of them jointly if they prefer.

THE PRESIDENT: Mr. Leggatt, can I just ask you, and I shall ask the others in a moment to deal with two possible considerations? The first one takes us to Rule 55 of the Tribunal's Rules, which is the Rule dealing with costs before the Tribunal. In normal civil litigation, although the Rules are expressed in discretionary terms, it is fairly clear that the normal practice is that costs follow the event. Rule 55(2) of the Tribunal's Rules does not provide for costs to follow the event. It provides a very general discretion as regards costs, and one question that is certainly at the back of my mind is to how far we can think about the issue of security for costs without thinking, at least to some extent, as to how we might exercise our discretion to award costs were the defendants to succeed bearing in mind, as you have just said, that the Claimants' case is founded on the illegality that is now established against the Defendants – illegality which would, were it now to be committed in this country would amount to a criminal offence – in which, as you also submit, a quantum is not at issue and effectively as far as we can see, it is really only the passing on Defence, or mainly the passing on Defence, that stands between you and what you say is appropriate compensation.

MR. LEGGATT: Yes.

THE PRESIDENT: So the first question is how all those considerations play in relation to a security for costs application, and relating that also back to Rule 45(4), where you started, which requires us to be satisfied, having regard to all the circumstances of the case, that it is just to make an order, to what extent should we take account of the fundamental circumstances of this case which are that the Defendants, having been found guilty of illegal conduct (and are therefore at first sight liable in this action) entitled to protect themselves or, to put it another way, to call for the aid of the judicial system to protect themselves against the possible consequences of their own illegality, which may be a circumstance that might or might not distinguish a case such as this, from the sort of situation that might arise in commercial litigation in the commercial court for example.

MR. LEGGATT: Yes, Sir, those are plainly very relevant points, and I was perhaps coming at it too much from a commercial court perspective in ----

THE PRESIDENT: It was not a barb in that direction at all, Mr. Leggatt, but this is a rather special jurisdiction and it has been created as a special jurisdiction. As we embark on this special jurisdiction we need to think about its specific characteristics and how the rules should, as a matter of principle develop in that regard.

MR. LEGGATT: That obviously, if I may so, must be right, and these are if not novel proceedings then early proceedings and the Tribunal at the moment is, as it were, shaping the principles which will govern not only this but potentially future cases as well.

THE PRESIDENT: Yes.

MR. LEGGATT: So if I can address each of those points that you have raised. As to the first, I would submit it plainly is one of the circumstances to which the Tribunal can and should take account, first of all as to what the scope of its own jurisdiction is for ordering costs at the end of the day under Rule 55; and secondly, although obviously not here on a final basis but on any provisional view, about how it might promote the exercise of that discretion.

THE PRESIDENT: Yes.

MR. LEGGATT: It must therefore be a relevant consideration that the position in this Tribunal is not the same as it would be in High Court proceedings where there is a rule that costs ordinarily follow the event subject to a discretion to take account of other circumstances, but that is the starting point. But the Tribunal has here, as it also had in the earlier provision that we were looking at this morning, a much wider discretion to do whatever it thinks fit in relation to costs. We do adopt the point that it will certainly be relevant in exercising that discretion at the end of the case to take account of the illegality that is a matter already of established record in relation to these Defendants. That comes into the equation, both in the way that I submitted because liability being already established that the likelihood of them being ordered to pay nothing at all and therefore for even being in the position where they could in the High Court be expected to recover costs is one point, but there is a further question in any event as to whether it would be right that they should recover costs even if they did succeed on terms of quantum arguments in knocking down the claim against them, even if it were to nothing.

THE PRESIDENT: Yes.

MR. LEGGATT: So that is something, we submit that the Tribunal can and should have in mind, not obviously having made up its mind in advance how it will exercise the discretion but having regard to considerations that are relevant.

THE PRESIDENT: At least that there is a discretion?

MR. LEGGATT: That there is one, and that it would be relevant to take account of those factors in it, and they influence the overall approach of the Tribunal.

Secondly, on the security for costs' point itself, again I would submit that the point you made, Sir, must gain, if we may say so, a right one that says having regard to all the circumstances of the case it is deliberately inviting the Tribunal to take account of all circumstances which are relevant, and one relevant circumstance to what it is just to do must again be that those who are asking for security here are companies who have been found guilty of a long standing and blatant disregard for competition law and that does affect the justice of their claim to have security in a number of ways. First of all the basis upon which they come

before the Tribunal at all; and secondly, it reinforces the importance of the Tribunal not setting any security in a way that would discourage claims being made in these sort of circumstances. I suppose it would be a most unfortunate result, as I was seeking to suggest at the end of my submissions, that the approach taken by this Tribunal towards security had the effect of deterring people for whom this jurisdiction was designed.

So we would, with respect, submit that all those are relevant factors which the Tribunal should take into account in the overall evaluation of the circumstances. I am grateful, thank you.

THE PRESIDENT: Thank you. Yes, Mr. Hoskins?

MR. HOSKINS: Sir, if I can deal with Mr. Leggatt's seven points, and then obviously I will deal with the Tribunal's point?

THE PRESIDENT: Yes.

MR. HOSKINS: The first point was that this was a quantum only trial. Yes, obviously a large part of this trial is quantum, but it is perfectly possible that at the end of the day we will not be required to pay any damages, and that is because if the Claimants had not passed on any overcharge there may have been downstream, they will have suffered no loss, and it is very important not to loose sight of that fact, and that will be a very important part of the trial – I am giving nothing away in saying that. So it is not correct to say it is a quantum only trial, because the quantum may be zero because they may have suffered no loss.

The second point was a surprising one. Mr. Leggatt says the Defendants have not made a payment under the CAT Rules. I said earlier there are a number of ways in which parties can seek to protect themselves from costs whether they be by Calderbank Letters or offers outside of the CAT Rules, and I am certainly not going to make any comment on what has or has not happened in terms of settlement, and it is really not fair of Mr. Leggatt to point to one particular prospect of settlement and invite the Tribunal to draw an inverse inference the other way from it.

THE PRESIDENT: I nearly said at that point, perhaps I should have done, that we do not really need or should know whether anything has been done at all really.

MR. HOSKINS: Precisely. I suggest that item two gets struck from everyone's minds – obviously not from the record – it is simply not an appropriate point to make.

Mr. Leggatt's third point is that the case may not go all the way to trial, it might settle. Well if it settles, then any settlement will no doubt take account of the costs' position. Again, it is really irrelevant to deciding whether there should be security or not. Security is available for a party to protect itself up to and including trial. It may settle, if it does costs will be dealt with,

but it is really not a very relevant consideration, when one is looking at the question of security.

The fourth point said that our costs are disproportionate. We obviously disagree with that, but I do not have to go into the detail of the costs. It is interesting, Mr. Leggatt, on instructions, says that the Claimants to date are £200,000, so one can imagine that by trial they are going to be in the region of, let us guess, £300,000, and what sum are we asking for by way of security? £250,000. So in terms of whether we are asking for a reasonable sum in terms of security the costs that the claimants themselves have incurred show that the figure we have asked for is entirely reasonable.

The fifth point was the Defendants have chosen to be represented by two sets of solicitors. These companies are competitors. I think eyebrows would probably have been raised if they had been represented by the same set of solicitors because of the possible passage of information between them as to strategy, costs, etc. Indeed, one can imagine settlement discussions might have been quite interesting if one set of solicitors is acting for both parties – you can see the problem for conflict. The conflict exists, in fact, on the Claimant's side as well, because yes, the Claimants have one set of solicitors, but as we pointed out to them early on they cannot have one solicitor dealing with both actions because there are conflict issues, and confidentiality issues as between the actions. Although they have instructed one set of solicitors, those solicitors have two distinct teams, so it is a non-point. The claimants have instructed one set of solicitors but need two teams. We have instructed two sets of solicitors precisely for the same reason – there are confidentiality issues, and potential conflict issues. So that really is another non-point.

The sixth point was that we have said this was an important point of principle for us. It is because it may well be that other claims, both in the UK and Europe-wide, might arise out of precisely the same circumstances. Sir, you made a comment it is a "money no object" case. I come back to the point that we are only asking for £250,000 and if the claimants' costs are going to be of the same order there is nothing unreasonable in the amount sought, and that is why the amount actually spent is a red herring.

The seventh and final point was the access to justice point, the security for costs was described as a "weapon", but again – and I am sorry to go over old ground – the parent company guarantee we are seeking is from a company that is in the FTSE 250. There is no suggestion that it cannot financially give that guarantee. As I have said before the guarantee will only cover the reasonable costs that we may win up to and including a total of £250,000. So there is no suggestion of denying access to justice to these claimants because they had not

suggested that they cannot, for financial reasons, give that guarantee. It has not been put forward.

The final point was the point raised by the Tribunal which is effectively if, at the end of the day, we are to succeed is it possible that the Tribunal would say we should nonetheless have no costs because we infringed the competition rules. I hope I summarised the position correctly – it is perhaps a crude way of putting it, but I think that is what it comes down to. In our submission one cannot say that people who infringe the competition rules can never have security for costs. That is precisely because that the rule that provides for security for costs, Rule 45, appears in Part 4 of the Competition Appeal Tribunal Rules, and Part 4 deals with claims for damages against parties who have infringed the competition rules. So it is expressly envisaged by the CAT Rules that security for costs will be available to the parties who have infringed the competition rules. So once one sees that we say it is inappropriate to then look forward and say "What if, at the end of the trial, we say because you have infringed you are not allowed any costs"? That is not an appropriate analysis, we submit.

THE PRESIDENT: Mr. Hoskins, what does trouble me a bit about this whole application is that we do know that there is a Decision against your clients establishing very serious infringements of the competition rules. At first sight that would give rise to a situation in which your clients would be liable to pay damages to third parties. The principal point that you seek to argue in order to stave that off, and you are perfectly entitled to argue it, is the passing on Defence as it were. But taking into account all the circumstances of the case, as we are required to under Rule 45(4) should the Tribunal in a sense lend its aid and the power of the court to a Defendant in that position by ordering security for costs in a case where, there has been no application to strike it out as frivolous or vexatious, it is a perfectly respectable case and it is being brought by parties who have, at first sight, a respectable claim. There is perhaps underneath it a point of principle there that we ought to at least reflect on as part of this developing jurisdiction.

MR. HOSKINS: Sir, with respect, that is the point of principle that I am trying to address. By definition any damages claim that comes before you under s.47(a) will be against a party who has already been found to have infringed the competition rules, because that is how your jurisdiction works. One of the ways you have jurisdiction under s.47(a) is once the infringement has been found, but it has to have been found. Then if one looks at the rules – as I say, the rule for security for costs comes generally in the section relating to damages claims. It would be extraordinary, in my submission, for the Tribunal to side step what is the clear intent of the Rules, which is that a party who is subject to a damages claim, who has been found to infringe, is entitled to security for costs protection.

THE PRESIDENT: We may find cases in this jurisdiction, there may be cases that are obviously dubious or obvious try-ons where, for one reason or another, the Tribunal is satisfied that its leg is being pulled or the wool is being pulled over its eyes or whatever, but that is not this case. This is, on the face of it at least, a perfectly respectable case being brought under a specially created jurisdiction. Should we just apply the High Court Rules without making any allowance for the particular circumstances of this jurisdiction.

MR. HOSKINS: Sir, can I make three points in relation to that? First, you say this is not obviously a frivolous case, but in almost all instances you will not be able to tell a frivolous case from a non-frivolous case in this context. Infringement has been found and then someone will plead quantum and until you have actually had the thing pleaded out and seen the evidence, the Tribunal is not going to be able to make that distinction.

The second point is that Rule 45 – you say, Sir, should the Tribunal follow the normal High Court Rules? My submission is that what the Tribunal has to do is follow Rule 45, and rule 45 says that the Tribunal has jurisdiction in a case such as this where the Claimant has no funds, which could meet an order as to costs. So the person who drafted the Tribunal Rules has not said "Security for costs can only be granted in this sort of situation where the Tribunal has reasonable grounds to believe that the claim is frivolous" – far from it. What has been done is, in effect, that the High Court rules have been transposed into the Tribunal. So that is why we say it would be wrong for the Tribunal to read into the scheme and the rules some notion of "only in frivolous cases". That would be going against the intention of the drafter of the rules in this case, and we say that is quite clear.

The third point does relate to the issue of settlement, because if it is right that a party in my client's position can never get security for costs, the incentive to actually try and settle the case becomes a lot less, because the whole point about making payments is the stick if you like – the carrot and stick is we make an offer to you, if you do not accept it and if you do not beat us at trial you will be liable for our costs. Now in a case like this ----

THE PRESIDENT: Well you can turn that argument on the head and say that if this is a jurisdiction in which it is very difficult for a claimant in your client's position to get costs or security for costs then that in itself might assist the settlement process rather than otherwise – it is just to encourage people to make sensible offers to settle.

MR. HOSKINS: The whole thesis which underlies settlement in the High Court is the carrot and stick approach of having the costs there. The security for costs is necessary in this case because the claimants are men of straw. If you take away the possible security for costs in this case, you are taking away one of the recognised incentives for settling.

Sir, the point of principle was the important one, I agree, but in our submission, if the Tribunal is to read in something to Rule 45 that says that cartelers can never get costs, or only in frivolous cases then ----

THE PRESIDENT: No, it is simply trying to grapple with what we are supposed to have regard to in relation to, quote, "all the circumstances of the case and the justice of the order", that is what we are grappling with.

MR. HOSKINS: Sir, my point is that the fact that we have been found to have partaken in a cartel is certainly not a trump card and is not something which should rank very highly. Of far more importance is, for example, the strength of the case and we have said "you have not seen our expert evidence yet".

THE PRESIDENT: How can we assess the strength of the case at this stage?

MR. HOSKINS: Well that is my point. What you are faced with is security of costs going forward. You say there is a reasonable case on one side from the Claimants. We say we have a perfectly respectable case, and it is based on passing on. There is no magic in passing on, of course it is a defence that is raised in these cases. Indeed, passing on is particularly relevant when you have indirect purchasers, because there is a chain. They have to show not only that they did not pass on to the customers, they will also have to establish that the overcharge was passed on to them because they did not buy direct from my clients. So if you are going to give the benefit of the doubt to the Claimants and say "It is reasonable", then at this stage you have to say it is reasonable for us to raise this defence, and that it is a reasonable defence. It would be unfair otherwise. But at the heart of this is: are you going to say cartelers can never get security, and our submission is that is wholly inappropriate given the nature of the Rules.

I do not think I can add anything else.

THE PRESIDENT: Thank you.

MR. HOSKINS: Thank you very much.

THE PRESIDENT: Yes, Mr. Kennelly?

MR. KENNELLY: Thank you, Sir. On just a couple of Mr. Leggatt's points, under ADR he made the point that future costs before trial may not actually be incurred if the claim is settled. Of course, the Tribunal will be aware that our application for security is only up until the 7th as you said in the original application notice. Obviously we may have to apply for further security ----

THE PRESIDENT: I am sorry, you are therefore slightly different from Roche, is that right?

MR. KENNELLY: That is correct, Sir, yes. They are claiming for security up until trial.

THE PRESIDENT: Thank you for reminding me of that, yes.

MR. KENNELLY: In a number of instances I think some of Mr. Leggatt's points related only to Roche, and in part he referred explicitly to Roche and not to Aventis, and when my learned friend has not referred explicitly to Aventis and has referred to Roche, I presume he is not referring to us.

The other point that Mr. Leggatt made was in relation to the costs incurred by BCL, but of course the costs of the Claimant are on a par with the costs incurred by the Aventis Defendants in this case. Mr. Leggatt said £200,000. The Tribunal has sent the witness statement of Mr. McDougal referring to our costs and in the region of £229,000. The Tribunal as already heard my submissions on the efforts we have made to be proportionate in our expenditure on this matter.

Mr. Leggatt's fifth point was that he said it was a privilege for the parties to be represented by separate firms of solicitors. I adopt obviously what Mr. Hoskins said about how it would look, apart from anything else, and the difficult conflict issues that would arise if one firm were acting for both Roche and Aventis defendants. But also, where we have been able to save money by co-operating we have done so. We have sought not to duplicate our submissions before the Tribunal either orally or in writing, and we have shared our expert evidence in order to save costs. So where we have been able to save costs by co-operating we have done so in a transparent fashion.

Turning, perhaps most importantly of all, to the points raised by the Tribunal. The Tribunal referred, as Mr. Hoskins said, to the possibility that no costs might be awarded to the Defendants, even if no damages were awarded to the Claimants and the Tribunal was grappling with the issue of the meaning to be given to all the circumstances of the case. We agree with what Mr. Hoskins said that in principle cartelers must be able to provide for security and if the Tribunal had a particular discretion to pay particular heed to the Commission decision we say that would have been spelled out. However, I accept the Tribunal's concern that in all the circumstances of the case it appears very broad. But on that point, the Tribunal must be very careful to examine the pleadings and the Commission decision in this case if they are to have regard to that in this application, because in particular in relation to Rhodia the Tribunal will be aware that nowhere in the Commission Decision is Rhodia identified as having committed any unlawful activity. It is not identified as having participated in the Cartel, it is not an addressee of the Decision. That is a circumstance to which the Tribunal ought to have regard.

Similarly, Aventis SA, although fined under the Decision is not referred to as having anticipated in unlawful activity. There is a reference to the word "participation" in relation to Aventis SA but that, as the Commission explains in the Decision, is more to do with (i) the fact

that Aventis SA was the parent of a subsidiary that committed the unlawful acts. Nowhere in the Decision is there a statement that Aventis SA itself, or any executive of Aventis SA committed any unlawful activities. It was fixed with a fine because of the behaviour of its subsidiary. That is also a relevant circumstance to which the Tribunal ought to have regard.

THE PRESIDENT: Yes, thank you.

MR. KENNELLY: I have nothing further. Do you want to come back on any of that, Mr. Leggatt?

MR. LEGGATT: No, thank you.

THE PRESIDENT: Thank you. We will rise for a short time.

(The hearing adjourned at 2.48 p.m. and resumed at 3.05p.m.)

THE PRESIDENT: The Tribunal proposes to reserve its Judgment on the security for costs point because there are quite important issues of principle there and we will let you have a Judgment as soon as we can.

MR. LEGGATT: Sir, I have an application, if I may, whether I might be allowed to leave?

THE PRESIDENT: Of course, Mr. Leggatt. Have we dealt with all the matters that affect you?

MR. LEGGATT: You have dealt with all the matters that I was proposing to make submissions on and Mr. Robertson will deal with everything else on our behalf if necessary, if that is acceptable to the Tribunal?

THE PRESIDENT: Yes, of course, thank you very much.

MR. LEGGATT: I am very grateful. Thank you for your help.

(Mr. Leggatt withdrew)

THE PRESIDENT: I think we now move on probably to disclosure issues. Is that next on our agenda? Mr. Peretz has been patiently waiting. Mr. Hoskins, I think just before we start to set the scene, as it were, on disclosure, we are very conscious of the weight of litigation like this and if one is going to have further disclosure it seems to us that one needs to define rather closely what issues it is that the disclosure relates to and whether that disclosure is really necessary. So we are somewhat in the dark at the moment – or perhaps we had not sufficiently understood yet – what particular issues some of the suggested disclosure goes to, and whether or not we should collectively, and not necessarily today, make some further effort to define those issues a bit more closely before we can actually decide whether disclosure is necessary or not. That is a specific point about disclosure, but there is another, as it were, wider point, about this litigation which is of some concern to the Tribunal, which is exactly what is the basis of the claim?

There are two broad ways of looking at it, and there certainly has been, I think, some exchange about this. One is, shall we say, the orthodox way, of saying that it is for the

Claimants to prove their loss and to be put back into the situation they would have been in if the "tort" had never been committed. That is one way of looking at it. The other way of looking at it is to say "Well, here is a situation where a wrongdoer has made (or can be presumed to have made) a profit of some kind out of others, and it is up to the others to come forward and claim some share of that profit, which is a completely different way of looking at it, and would involve all sorts of different issues from the other one. The second way of looking at it – perhaps also the first way, but at least the second way of looking at it – would involve thinking about how to bring all the relevant parties, as it were, before the court. You on behalf of Roche today have already emphasised the difficulty of other claimants popping out of the woodwork at various stages, and this is also of course related to some of the arguments that bear on the passing on defence. Should there have come a time or not where the court makes some effort to ensure that all relevant claimants are at the given moment before the court, so that one can see what the overall situation is. Or is it the situation that the Defendant is, as it were, sued successively by various Claimants as they happen to come along, and that leads one back to the question of what is the conceptual basis of the action? Although those last points are somewhat broad brush, and very high principle points, they do actually lead one back and back more into the detail of what disclosure one is actually looking for on particular issues. So with those rather daunting remarks, would you like perhaps to start sketching out where we are on disclosure and how you see the disclosure question and the issues to which it relates?

MR. HOSKINS: Certainly, Sir. If I could sketch out what the disclosure issues are first of all, in terms of how they tie in with issues in the case.

In relation to Deans, there were two matters that I wanted to raise today. The first relates to disclosure of documents which were in categories 3 and 7 in annex 1 to the Disclosure Order that the Tribunal made, I think on 26th July 2004. So we are not looking for anything that has not already been agreed to be relevant, if you like, that was the category that was agreed, and it was deemed important to bring you up to speed in relation to where we are with that because there has been movement on that since we made our application.

The other issue in Deans is that Mr. Morrell in his report relies on certain figures which come from Mr. Wright's first witness statement, and we were intending to ask for specific disclosure of information that Mr. Wright relies on in making his statement, and that goes to the calculation of quantum because Mr. Morrell relies on it in coming up with his quantum, and our experts have asked us for that information so that they can check Mr. Morrell's quantum calculations. So that is the arithmetic, if you like, side of it. So that is in Deans.

In Premier there are four issues. The first one is the same as the first one in Deans, it is disclosure of documents in categories 3 and 6. So again those have already been agreed.

THE PRESIDENT: You said 3 and 7 I think earlier.

MR. HOSKINS: They are different, each case has a different set of disclosure ----

THE PRESIDENT: But it is the same documents, they are just numbered differently?

MR. HOSKINS: Precisely the same category of documents, it is just that the numbers are different. I should say that the reason why those categories are in as far as we are concerned is primarily to deal with downstream passing on. It is to do with the setting of prices by the Claimants, and how they dealt with their own customers, etc. So it all goes to the issue of downstream passing on.

The second issue in relation to Premier are the disclosure of Mr. Morrell's audit files, and these last three are short points. The reason why that is significant we say is that Mr. Morrell surprisingly actually gives some factual evidence in his expert report and he recognises as such that it is factual evidence, and we would like to be able to test that factual evidence by seeing the information which underlies it, because he says he obtained information in his capacity as auditor of two of the Claimants.

The third and fourth issue in relation to Premier are matters that have arisen very recently, because we have asked the questions of the Claimants because there are certain documents, which I will show you, which indicate that there may have been inter-group dealings, so I am afraid it is a matter of, query – whether the Claimants are the right Claimants? We are not at this stage saying "Fight it all out", but we are trying to get to the bottom of it and we would like some help from the Claimants to tell us what the position is, and that is as far as I want t take that today, but I can take that point quite briefly.

So that would go to the question of whether the Claimants are actually the ones within the Group who suffered the loss, or whether there should be other companies in the Group who are parties ----

THE PRESIDENT: Well it is just other subsidiaries of the same group, you mean?

MR. HOSKINS: They are all within the same group, yes.

THE PRESIDENT: They are all in the same group?

MR. HOSKINS: They all within the same group, yes. They are all within the Premier Group, as far as we understand.

THE PRESIDENT: Yes, I see.

MR. HOSKINS: So it is not a right to sue issue in the sense of "Have they been sold on?" etc., it is simply "Have they got the right corporate claimants.

Those are the only issues I wanted to raise.

THE PRESIDENT: I see.

MR. HOSKINS: The real substance, in a sense, is in the downstream passing on documentation where there has been a lot of movement with Deans, but with Premier I need to take it in a bit more detail, but those are the issues that I would like to raise.

THE PRESIDENT: Yes, thank you, Mr. Hoskins

MR. RANDOLPH: I am sorry to interrupt Mr. Hoskins, but I understood him, when he was giving a useful exposé of his disclosure applications today, he listed two particular points on Deans, and the second one was with regard to Mr. Morrell. He specifically said that he was keen to see figures that had been referred to by Mr. Morrell that appeared in Mr. Wright's evidence. He then went on to the Premier – his synopsis of his disclosure application with regard to Premier, and talked about Mr. Morrell in that and talked about various IT or audit files.

Now, I had understood, and certainly the witness statement from Miss Stabler had gone to this point and indeed the application of Roche had dealt with Mr. Morrell on the basis of the IT and the audit files and no mention had been made with regard to Mr. Wright's statement. Maybe Mr. Hoskins effectively described what he thought was a Deans' application, but rather would be an application made against Premier. I do not know, but certainly if it is with regard to Deans it is the very first time we have heard anything about that at all.

THE PRESIDENT: In relation to Mr. Wright's figures?

MR. RANDOLPH: They have raised the issue about Mr. Morrell, about audit files, and certainly about IT files, and that is actually set out quite clearly, Sir, in the application notice issued by Roche, which is in the supplemental bundle for the hearing at p.838(b) where they say they are looking for:

> "…all remaining documents and information underlining the evidence of Mr. Morrell in reaching his conclusions set out in his report and the update to this report including, but not limited to, the underlying computer records from the Claimants' IT system."

So that is what we have been prepared to deal with today and, as I say, unless it is an error – just reversing or confusing one with t'other – then we would take serious objection to the application made on that basis because we have been given absolutely no notice of it.

MR. ROBERTSON: I do not think it is a point that has been taken previously against Premier either. So I do not think it is just a simple reversing.

THE PRESIDENT: Sorry, which point has not been taken against Premier?

MR. ROBERTSON: The point that Mr. Randolph has just mentioned, he said it might just possibly be a transposition ----

THE PRESIDENT: About Mr. Wright's figures, you mean?

MR. ROBERTSON: Yes, and if so it is the first we have heard of it.

THE PRESIDENT: Yes, thank you.

MR. HOSKINS: Sir, I do not put the cart before the horse, because otherwise we would plunge into the detail of this. The application against Mr. Randolph's client is the one which is mentioned in our application for specific disclosure. There is a bundle "Application for specific disclosure" ----

THE PRESIDENT: Yes, just a minute let me sort out my bundles. (After a pause) Yes.

MR. HOSKINS: The application is at the front of the bundle, we seek two orders. The first one relates to categories 3 and 7, and the second one is:

> "All remaining documents and information underlying the evidence of Mr. Morrell in reaching the conclusions set out in his report, including but not limited to the underlying computer records from the Claimants' IT system which relate to the total amount of feed produced by the Claimants and the amounts of feed consumed on the Claimants' farms."

So it is information taken from the Claimants' IT system in relation to the total amount of feed. Now, what happens is that Mr. Morrell in his report refers to Mr. Wright's witness statement, and he says "I adopt a particular figure" and he footnotes it to Mr. Wright's witness statement. So where one actually finds the underlying information, which is what we seek, is in Mr. Wright's witness statement, and that is why I have put it the way I have today because that makes it clearer.

MISS SIMMONS: It appears that Deans Foods did not understand that that was what was being sought.

MR. HOSKINS: Yes.

MISS SIMMONS: Is there anywhere in the documentation where you have previously said what you are looking for is Mr. Wright's information?

MR. HOSKINS: Madam, it is precisely the same information.

MISS SIMMONS: No, but is there anywhere where you have said what you are looking for is Mr. Wright's information.

MR. HOSKINS: In the first statement of Mr. Lawrence in Deans Foods, which is in this application for specific disclosure bundle, it is just behind the application, para.33. At para.33 he sets out the specific computer records we are looking for, and specifically indicates that they are in

Mr. Wright's witness statement.

THE PRESIDENT: I think one of our problems – or at least one of my problems – with some of this, Mr. Hoskins, is that this witness statement and this application is dated 6th December, which is Monday ----

MR. HOSKINS: To be fair, what I would like to do in terms of specific disclosure, is take you through it, I have prepared it to take you through it in an economical way. I did not want to jump into the middle of something and start having a debate because, of course, it is difficult for the Tribunal to focus. But these applications are not something that have come out of the ether suddenly, as I will show you. They have been set up in correspondence for months, and what we were faced with was this CMC happening, we had not got anywhere in the correspondence, and in order to make sure it was before the Tribunal we had to bring an application, so I think it would be very unfair then to criticise us for that.

MISS SIMMONS: All I was trying to ascertain is in relation to Deans Foods – whether they noticed it or not – whether they had been told the information that was required was the information on which Mr. Wright had relied.

MR. HOSKINS: Yes.

MISS SIMMONS: And the answer to that is "Yes, in a letter of 30th November".

MR. HOSKINS: Yes.

MR. RANDOLPH: Sir, to be fair to Mr. Hoskins, when he said "Mr. Wright", but then did not specify, it is not really for him to specify, but did not specify that it was the computer database issue that was being looked at, had he mentioned that then I would not have risen to my feet. I was thinking this was a new point over and above the computer database and the audit files which we had dealt with and there is no problem. I now understand my learned friend and I apologise. It is a non-point now after clarification, but I am grateful to my learned friend for having clarified it.

MR. HOSKINS: And thank you to Mr. Randolph.

THE PRESIDENT: Just before we let Mr. Hoskins go on, that being the case – and just taking it in stages on Deans – how much dispute is there on these two classes of documents you are seeking?

MR. HOSKINS: In relation to the first category, disclosure of documents in categories 3 and 7, I will try and put this as briefly as possible. The CAT made an order on 26th July 2004 and in annex 1 to that order, order of categories 3 and 7. In the Deans' bundle that order is behind tab 1. It is exhibit JAL1. One sees the order, para. 4 is disclosure of documents in annex 1 by 21st September 2004, categories of documents are in the annex 3 and 7.

THE PRESIDENT: So it was movement in price and determination of price?
MR. HOSKINS: Yes.
THE PRESIDENT: Yes.
MR. HOSKINS: And in the list of documents originally provided, which is at tab 2, there was no disclosure given under categories 3 or 7. We were told that the reason why there was no disclosure was either because they did not exist and/or because they were irrelevant. We pursued that matter in correspondence over a long period. I will not bore you with all the correspondence, but the bottom line is, the punch line is that Taylor Vinters provided some further disclosure on 25th November 2004 and substantial further disclosure on 6th December 2004, and they produced a further list of documents on 7th December ----
THE PRESIDENT: Which is yesterday.
MR. HOSKINS: -- which is yesterday, and they provided copies of the documents to us this morning.
THE PRESIDENT: Yes.
MR. HOSKINS: They also provided yesterday a witness statement setting out what steps had been taken in respect of searching for categories 3 and 7.
THE PRESIDENT: Yes.
MR. HOSKINS: Those two things are what we have been pushing for since September – "Tell us what you have done to search, and give us anything you have found." We got the documents this morning. An initial glimpse at them looks as if they are going to be relevant to passing on. It might be useful if I hand up just one document.
THE PRESIDENT: Are you beginning to tell us that most of it has now been resolved under the pressure of the hearing date, or are there still outstanding ----
MR. HOSKINS: Again, the punch line is we have just been given a large amount of substantial disclosure. We need to review internally with the experts, and I am just asking that when we come to setting timetables, etc., we need to take account of the fact we have only just received material that looks as if it will ----
THE PRESIDENT: But you are not asking as of today, now this afternoon, for any further order from the Tribunal in relation to those matters?
MR. HOSKINS: No, Sir, I was explaining to you what has happened.
THE PRESIDENT: Good, well that is very helpful. What is then the situation regarding Premier?
MR. HOSKINS: Well there is the Mr. Morrell computer records point – would you rather I finished Deans first or go on to Premier?
THE PRESIDENT: All right, well what is left on Deans then?

MR. HOSKINS: The Mr. Morrell underlying information.

THE PRESIDENT: The Mr. Morrell underlying information – okay.

MR. HOSKINS: Perhaps it is better if I show you Mr. Morrell's report – I will show you the way this arises.

THE PRESIDENT: This is the only point on Deans, and it is the same point on Premier, is it?

MR. HOSKINS: No, it is a different point.

THE PRESIDENT: Different on Premier.

MR. HOSKINS: It is the audit files on Premier.

THE PRESIDENT: But they both go to Morrell.

MR. HOSKINS: They both go to Morrell.

THE PRESIDENT: Yes.

MR. HOSKINS: I will just get the reference for the Morrell Report. (After a pause) It is the Deans' supplementary bundle for hearing, and it is at p.906.

THE PRESIDENT: Yes.

MISS SIMMONS: It is behind the big divider 3.

MR. HOSKINS: It is behind big divider 3, and then small divider 1. If I can ask you to turn through to p.914. It is para.3.2.2. of the report:

> "Bob Firth, the Claimants' systems analyst and Christopher Sanders, the Claimants' divisional accountant, have extracted from the Claimants' computer record database the feed consumed by the layer farmers into an Excel spreadsheet. From this Mr. Sanders calculated the tonnage of feed consumed by mill by year."

At footnote 16, "Witness statement of Colin Wright". So it appears that Mr. Morrell was provided with some sort of extract or summary of the underlying information. Where that information comes into the case, if you like, is in Mr. Wright's witness statement – I will get you the reference for that.

MR. RANDOLPH: If I can assist, Sir, it is in the first file entitled "Deans Food Limited" and it is at big 3A5 and that is at pages160 to 164.

THE PRESIDENT: Yes.

MR. HOSKINS: You see it is a very short witness statement from Colin Wright in which he describes the exercise of extracting information from the Deans computer archives, particularly at para.2.1.

THE PRESIDENT: So what is it that you are seeking, Mr. Hoskins?

MR. HOSKINS: What we are asking for is an order that the Claimant discloses all of the information extracted by Bob Firth from the Deans Computer archives as referred to in the

witness statement of Colin Wright made on 29th January 2004. We would like to see the underlying information – or rather our experts would like to see the underlying information.

THE PRESIDENT: You have the results of the exercise and the accompanying spreadsheets, is that right?

MR. HOSKINS: All we have is the spreadsheet at exhibit CW1, and our experts have said that they would like to see the underlying information.

THE PRESIDENT: For the purpose of doing what exactly?

MR. HOSKINS: Well they do not necessarily accept the accuracy of the spreadsheet, is the first point. They must have been working through this material in some detail, and this is a specific thing that our experts have asked us to arrange. They would like to check the figures.

MISS SIMMONS: Do we know why they consider that the figures may not be accurate, or is this putting icing on the cake?

MR. HOSKINS: Certainly, I think we do know the reason but I will just check so that I express it the right way?

THE PRESIDENT: Do we have any evidence about it, Mr. Hoskins? Do we have a witness statement or anything?

MR. HOSKINS: Sorry, Sir?

THE PRESIDENT: Do we have a witness statement setting out why you need this particular information?

MR. HOSKINS: It is dealt with in Mr. Lawrence's witness statement I have shown to you. It does not go into the detailed terms of the question that I have just been asked, Sir, no. What the experts have told us is that when working through they have spotted what they believe may be inconsistencies, or uncertainties, but today I cannot tell you specifically what those are, we have not gone into that in that level of detail with the experts. It is simply they have flagged this up that this is a matter that they would like to see the underlying material on. Sorry, I think somebody has had chance to speak to the experts. Specifically as well they want to check – we have been told that external sales of feed have been excluded from the claim, and our experts believe that that may not be the case and they believe that that question may be answered by seeing the underlying material.

THE PRESIDENT: Well there are various ways of thinking about problems like this, Mr. Hoskins. One is the Tribunal's general reluctance in other parts of its jurisdiction to go on ordering discovery upon discovery upon discovery so that yet a further layer of verification can be verified, and I have in mind the kinds of principles of proportionality discussed in *Claymore* and other cases – that is one problem.

Secondly, if your experts at some specific stage have a particular question or strike a particular issue, it may very well be easier to sort it out by simply writing a letter saying "What is the answer to the question?" or putting the experts together and getting a great deal of extra discovery which is, by its nature, a somewhat cumbersome way of solving problems and may sometimes be a bit of a sledge hammer to crack a nut.

MR. HOSKINS: Sir, I understand that. In relation to correspondence, we have pursued it in correspondence, the only reason I am making the application now is because we have not got anywhere. In terms of the experts meeting obviously that is something that we envisage will happen, but it is difficult for our experts – our experts, I imagine, will probably want to see the information in order to have a meaningful dialogue, because otherwise Mr. Morrell did not actually do the exercise of going through the underlying information, he was just given the spreadsheet, so I am not sure how there can be a meaningful dialogue if neither of the experts has seen the information.

THE PRESIDENT: Please correct me if I am wrong – this information at the end of the day goes to the quantification of the loss?

MR. HOSKINS: Precisely, Sir, yes.

THE PRESIDENT: Which is a stage that we reach a little bit down the line if this case follows orthodox procedure – after one has established liability there is then the question of quantum. Is that right?

MR. HOSKINS: Well except that there is not a liability issue here.

THE PRESIDENT: When I say "liability", I mean there is not a liability issue there is a quantum issue, but within the quantum issue there is the whole passing on question, but we need to resolve that before we get to **this**. Is that right?

MR. HOSKINS: At the trial the main issues will be passing on, upstream and downstream ----

THE PRESIDENT: Yes.

MR. HOSKINS: -- and calculation of an appropriate figure, so those I think will be the three main issues at the trial.

MISS SIMMONS: Does this information go to the passing on upstream and downstream, or does it go to the third limb.

MR. HOSKINS: It goes to the third. What I ask for is that our experts see the information so that they can consider it, but the nature of disclosure, of course, we do not know what it is going to say, but the point is our experts have said they think it would be helpful for them to see it. They will look at it and if needs be obviously there will be a meeting of experts, they will discuss it with Mr. Morrell, but at this stage we are being asked simply to accept a spreadsheet

which our own experts have concerns about, because we simply want to be able to see that information and it must exist because we are told that that is what Mr. Firth did. It is not that we are asking them to go and search for new material, or to make something up. It is "What did Mr. Firth produce?" and it must be somewhere. One presumes that given Mr. Wright bases his witness statement on it and a summary is produced on the basis of it, it seems a question of saying to Mr. Firth "Can we have the information you produced? It is not an onerous exercise.

THE PRESIDENT: Yes, I was just searching to see if I could put my hands on Mr. Lawrence's statement in support of this particular application.

MR. HOSKINS: It is in the specific disclosure bundle, 4D.

MISS SIMMONS: Is this para.32?

MR. HOSKINS: That is what we looked at before, yes.

MISS SIMMONS: The same paragraph?

MR. HOSKINS: That is right, correct, yes. Documents underlying Mr. Morrell's evidence, paras.32 to 34, and we looked at para.33, the extract from the letter which asked for the material underlying Mr. Wright's witness statement.

MISS SIMMONS: From here it appears the response is "You have had it" or "You have everything that we have".

MR.RANDOLPH: Not quite, madam. That was the response we made to the application with regard to categories 3 and 7, and that is set out in Miss Stabler's witness statement which, for the Tribunal's benefit, is in the new supplemental bundle that was served, I think, this morning, at p.897.

THE PRESIDENT: That is all sorting itself out?

MR. RANDOLPH: That is sorting itself out, but it is also dealing with the Morrell point. My learned friend, Mr. Hoskins – sorry, am I interrupting ----

THE PRESIDENT: Well we have probably reached the stage where it is useful to see what light the Claimants can throw on the situation from the practical point of view.

MR. RANDOLPH: Exactly. I am grateful, Sir. With regard to Mr. Morrell the position has always been understood by my clients that they were seeking the underlying records of the computer database because that is what they thought Mr. Morrell had looked at in order to come to his expert opinion set out in his witness statement. That is how we understood it, and that is how we addressed it in our correspondence, and then our responsive witness statement of yesterday, which responded to Mr. Lawrence's witness statement of Monday. We tried to do it as fast as possible, and we set out what the position is at paras.14 to 17 of Miss Stabler's ----

THE PRESIDENT: Where do we find that?

MR. RANDOLPH: Where we find that is in the most recent supplemental bundle – there are many supplemental bundles apparently before the court, but this is the most recent one – which is entitled "Deans Food and Roche & Ors. Supplemental bundle for hearing." If the Tribunal is confused as between supplemental bundles, if you look at the first page it should start with "1. Skeleton Arguments and outline submissions."

MISS SIMMONS: And where do we find it in that one?

MR. RANDOLPH: And where we find it in that, madam, is at 2(vi) page 897. Just if I may make a passing remark about the bundles, we have found it somewhat difficult to navigate through them, not least because there are so many numbers. Just throwing it out – normally the Claimants do the bundles, and we would be delighted to do the bundles, because I think we do it slightly differently, but if the bundle job is to remain with Freshfields (who produced this bundle) and we are very grateful that they have produced this bundle, maybe it would be helpful not to tab every single individual letter, because that does lead to a plethora of different numbers, but anyway that is my little whinge out of the way, Sir.

MR. HOSKINS: The claimants can do all the future bundles – they are very welcome to the job! [Laughter]

MR. RANDOLPH: Good.

MR. ROBERTSON: Sir, if I can add a serious point on bundling, one of the things that is quite useful for the Tribunal is that you number all the bundles as they come in sequentially. If there is some way of liaising with the parties so that we were all operating on the same numbering system, then we would not have this problem whoever did the bundles.

THE PRESIDENT: One of the problems with the present case is that a huge number of bundles arrived this morning at a stage where it was not possible for the Tribunal to absorb them, and we came within a whisker of sending the whole lot back and simply adjourning this matter to another day, and I am not at all sure that is not what we should not do now, but let us press on for a few more minutes.

MR. RANDOLPH: Well, Sir, let us see how we go.

MR. HOSKINS: Sir, I do have to say in Freshfield's defence again, there were people up all night doing these bundles.

THE PRESIDENT: I am sure they were. I am sure everyone is trying to do their best.

MR. HOSKINS: I know the people behind me put heart and soul into this.

THE PRESIDENT: I know, I am sure they have. I do not mean to be critical, but it is very, very difficult for you and particularly for us to take all this in at very short notice and make useful orders, especially if underlying issues are very important.

MR. RANDOLPH: Indeed, Sir, and that is why I in particular applied for permission, very gratefully received, for an extension of time for my skeleton, because obviously it is more helpful for the Tribunal if skeletons can refer to documents in the bundle properly paginated.

THE PRESIDENT: Well we need to read the skeletons, we need to circulate them all over the Country – one member of the Tribunal lives in Scotland, etc. etc. but nobody lives in London.

MR. RANDOLPH: No, apart from counsel.

THE PRESIDENT: Well, you may live in London, we do not all live in London [Laughter]

MR. RANDOLPH: Well there or thereabouts. The position on Mr. Morrell is set out at paras.14 to 17 of Miss Stabler's evidence, and you can see what is said: "All the documentation was provided to Mr. Morrell for the purpose of the preparation … has been disclosed." So the question was right to that extent, and effectively at 17 we deal with what the defendants are seeking in terms of underlying records of the computer database. Miss Stabler says she is not entirely clear what precisely is sought.

> "Mr. Morrell had limited time, two weeks prior to the expiry of the limitation period. Mr. Morrell did not have access to Deans' IT system for the preparation of his report and, as indicated above, all the documentation provided to Mr. Morrell for the preparation of his report has been disclosed."

On instructions I can say that what he looked at in this context was that spreadsheet that we looked at earlier attached to ----

THE PRESIDENT: So that is what he based himself ----

MR. RANDOLPH: That is what he – and it was on the basis of that is how the application was put effectively, insofar as we were concerned the correspondence leading up to it, the way that Mr. Lawrence put it in his supportive witness statement was: "Look, Mr. Morrell has had a look at this, we want to see what he has seen, because he is the expert and you can effectively …"

THE PRESIDENT: So he says "When I saw the spreadsheet …"

MR. RANDOLPH: Exactly, if we have seen the spreadsheet, absolutely no way you should be able to go beyond that. Today is the first time, as far as I am aware, that the point has been made that the reason why this documentation is sought is because the experts of Roche are concerned about the figures in this spreadsheet at page 164, and in particular that external sale feeds have not been excluded from the claim. So we just simply have not been able to deal with that, because that has not been raised before.

MR. HOSKINS: This is para.34.

MR. RANDOLPH: I am grateful. (After a pause) Yes, absolutely. For a corroboration of the Claimants' position, para.34 of Mr. Lawrence's witness statement, which is the same bundle, supplemental bundle, at 849, sets out that they wanted the relevant computer records, agree that it says they were needed by the experts for corroboration of the Claimants' position, but it does not set out - no, I do apologise – "that amounts of feed sold externally have been excluded from claim." I do apologise, and I take that point back. But in any event, it does not assist, we say, because they have seen what was seen by Mr. Morrell, and that is all that they are entitled to see.

We say they cannot just go swaning through all the documentation willy-nilly. We would also point out that if this application is pursued then we would be making a submission on the law that insofar as the procedures of this Tribunal are akin to, or the same as the procedures for disclosure relating to expert evidence in the High Court then there is authority from the Court of Appeal which we say would support our position

(The Tribunal confer)

THE PRESIDENT: Sorry, Mr. Randolph, you were just saying there is authority?

MR. RANDOLPH: There is authority in the Court of Appeal and I gave my learned friend, Mr. Hoskins, a copy of this authority last night. It is *Lucas v Barking, Havering and Redbridge Hospital NHS Trust* 2003 EWCA Civ. 1102 which we say supports our point insofar as disclosure of materials looked at by experts are concerned and, effectively what they say there is that it is a relatively restricted rule and Lord Justice Waller and Lord Justice Laws in that case made it clear that only in certain specific circumstances should material that has been looked at by an expert for the purpose of making that report be actually discloseable and we say the relevant criteria have not been met in this particular case. But that is by the by in the main because at the end of the day we have disclosed what Mr. Morrell looked at, and had reference to when coming to his opinion, and that really should be the end of that. If the Roche wishes to make the point that this spreadsheet is simply not relevant they can do it by way of cross-examination, but to seek to simply drag down or investigate vast areas of database which may or may not be relevant for this purpose we simply say is not proportionate. They have seen what has been relied on and that is all that they should see.

THE PRESIDENT: Mr. Hoskins, I, for myself, feel that this is not a point that we particularly want to rule on tonight. With the best will in the world from all concerned, we are suffering from an avalanche of paper. There may be some quite difficult issues relating to the disclosure of underlying material which experts have seen and it occurs to me there are at least two possibilities. One is that a further effort is made to sort this out in correspondence, and it may

very well be that if your experts have particular questions that they want answered the easiest way is simply to ask the questions and I am sure the claimants will do their best to answer them. It is in the claimants' interest to have all their cards on the table as much as possible – that is the first possibility. The second possibility is that if it is not sorted out, and cannot be sorted out by correspondence, then the Tribunal, which I think in this case would be a Tribunal consisting of Miss Simmons sitting alone for this purpose, as she is authorised to do under our Rules, can convene next week if necessary to have a special hearing on a specific issue like this to decide whether specific disclosure of these documents is appropriate, rather than at this hour trying to struggle through all these interesting, well presented but somewhat overwhelming bundles, in order to try and make a ruling tonight.

MR. HOSKINS: Sir, our concern is that there is a trial date set in February ----

THE PRESIDENT: Yes, I appreciate the concern, I appreciate all that.

MR. HOSKINS: We are working as hard as possible to make sure that could be done. Our experts need the information, if we have to take time ----

THE PRESIDENT: Well you say the experts need the information but we are not at all clear on what point it is the experts have in mind on which they do need the information.

MR. HOSKINS: Sir, if it is to be that we are to have further hearings so be it, but in our submission that is going to make it very difficult for us all to prepare for a trial in February.

THE PRESIDENT: Well, it can be done if necessary by a written application, you do not have to come along, or you can ask us to decide it on the papers that we have already got, but at the moment I am very hazy as to what point it is that the experts wish to resolve by this disclosure, and whether disclosure is the right means of resolving it.

MR. HOSKINS: Sir, I have expressed my side and you have explained where we are and that is where we are.

THE PRESIDENT: That is where we are.

MR. HOSKINS: Precisely.

THE PRESIDENT: And it is not always in this case that disclosure is the best way of sorting these sorts of things out.

MISS SIMMONS: I would just add that what was said before, it is important that the expert says why he needs this information. I am not clear why he needs it. He may need part of it. You need to find out from him whether he just said well he has not got the information and it would be interesting to check it, or whether he has seen something which means there are some discrepancies which need to be investigated.

MR. HOSKINS: Madam, we will do that.

MISS SIMMONS: Because it does seem to me – and I do not know about the *Lucas* case – it is one thing to go behind what an expert says, but just for the purposes of checking you should be able to rely on the expert and if he has done a proper audit of the information then that is fine, but if there is a reason to go behind it because – I will put it in accountancy terms – the audit criteria have been wrongly selected, or because you can see that there is a problem, then we need to know what that problem is and on that basis then, I do not know, but the *Lucas* case may say something different.

MR. HOSKINS: For the record, … says Mr. Morrell has not audited this information. The actual cross-examination would be of Mr. Wright in this instance.

MISS SIMMONS: Sorry, I used the word "audit" and I said that I was using it in an accountancy way but I understand that is not what happened here.

MR. HOSKINS: So those are all the issues on Deans.

THE PRESIDENT: Right, yes. So that takes us to Premier.

MR. HOSKINS: Sir, there are four categories in relation to Premier. The first relates to disclosure of documents in categories 3 and 6 which are the equivalent of 3 and 7 in Deans and, as I have explained, it has already been agreed that they are relevant because that is why we had that category in the order and, in particular, we say they are relevant in exploring the downstream passing on issue.

THE PRESIDENT: Yes.

MR. HOSKINS: In relation to this matter, again it has been pursued in correspondence.

THE PRESIDENT: Has there been a last minute ----

MR. HOSKINS: There has not been a last minute in this case, I am afraid, Sir.

THE PRESIDENT: Right – hope springs eternal, Mr. Hoskins.

MR. HOSKINS: Absolutely. Unless Mr. Robertson is about to say otherwise. I think I do need to quickly show you the correspondence. There is a "BCL application for specific disclosure bundle".

THE PRESIDENT: File 15, yes.

MR. HOSKINS: At the front you should have the application notice and you will see categories 3 and 6 and then the audit files, which are different Mr. Morrell issues.

THE PRESIDENT: Which we are coming to in a moment?

MR. HOSKINS: Yes. Then there is Mr. Lawrence's third witness statement. It would be quicker for me to take you through the points that go through that. If I could ask you first of all to look at tab 27?

THE PRESIDENT: Yes.

MR. HOSKINS: Because this was the disclosure that was provided pursuant to the order. You will see down the side there is 1, 2, 3, 4, 5 etc. those are the numbers that relate to the numbers in the annex to the order. So we are concerned with numbers 3 and 7. In relation to 3 what was said was the best records under this category are the management accounts, which are set out in the attached list. So it seems to suggest there were other documents within category 3, but they were only going to give us what they considered to be the best records.

THE PRESIDENT: Then in relation to category 7: "Our clients do not have any documents to disclose". I am sorry it is category 6 here: "See category 3 above, so they are saying again the best records are the management reports. It seems there may be other documents, or there are other documents in category 3.

> "Insofar as any additional information exists, our clients believe this information will have been passed on to the various purchasers of the businesses and is not therefore in the claimants' possession or custody."

So they say there it looks as if there is other information, it has been passed on to the purchasers of the businesses. So they have given us the best records ----

THE PRESIDENT: On the categories we are concerned with, which are prices charged, and movement in prices, and how the prices were determined, what we have is these management accounts.

MR. HOSKINS: And that is it, yes. You see the list of documents is over the page, the category 3 lists management accounts of various firms in the group, and category 6 says:

> "See category 3 above. Such documents as fall in this category are no longer within the Claimants' possession or custody"

– presumably because they have been passed to the purchasers.

THE PRESIDENT: Yes.

MR. HOSKINS: And then on 21st September Freshfields wrote a letter arising out of that disclosure. That is the first document behind tab 28 – I should say, Sir, we have concerns about many of the categories of disclosure but what we have tried to do is focus on what we consider to be the most important, certainly for our case, and that is why we are pursuing this disclosure, but it has been done in a focused way, we are not just picking up every point we could – far from it. Freshfields wrote on 21st September raising a number of problems, and in relation to categories 3 and 6 one finds that on the second page of the letter – page 2 at the bottom of the bundle. Paragraph 6 – "In relation to categories 3 and 6". Perhaps I will just ask you to read that very quickly.

THE PRESIDENT: Yes. (After a pause) Yes, we have read that.

MR. HOSKINS: You see at the bottom:

> "Please also confirm that your clients have no rights of access to any of these documents under the relevant sale and purchase agreements."

That is very important, and I will come back to that. There are a couple of chasing letters, but the next substantive letter is from Taylor Vinters on 2nd November, and that is at p.8.

> "The Claimants have no storage facilities of their own. When the business of each company was sold such of the documents under the disclosure categories as may then have existed were passed to the purchasers."

So again we see that point. Then over the page at the bottom in relation to categories 4, 5, and 6:

> "In short, the Claimants do not know, and nor are they easily able to ascertain what documents still exist in categories 1,3, and 6. Insofar as the claimant had any documents relevant to these categories they will have parted with possession of them at the time the businesses were sold."

So again we say they have "passed them on", if I can use that phrase. Freshfield's letter of 10th November 2004. Freshfields say:

> "… not happy that you have complied with obligations. We are going to focus on category 6. Potentially important issue about passing on. Category 6 documents go to this issue."

And then in the middle of p.12 they ask for an explanation, as one would expect in a disclosure statement of an identification of what documents have been passed on to third parties, and which documents have been destroyed, which has not happened, or had not happened and so ask for that to be rectified, and 4 again say:

> "Please could you also explain the extent to which the Claimants, or any of them, has a right of access to relevant documents now in the possession of the purchasers of their business."

So again chasing those points.

Next, 17th November, we get a disclosure statement finally from Taylor Vinters. The disclosure statement tells us what steps were taken, and there is nothing in the disclosure statement to indicate that an attempt was made to obtain documents from the purchasers. I will explain the significance of that in a minute.

29th November Freshfield's letter, paras. 4 to 6 again. It is the same questions from Freshfields because they still have not had an answer, and again in 6, at the bottom of the page:

"We now need an urgent explanation of whether your clients have any rights to access relevant documents in the possession of the purchasers of your clients businesses under the relevant sale agreements, i.e. do you have power to get these documents?"

You will see that that question has been asked on a number of occasions.

THE PRESIDENT: Yes.

MR. HOSKINS: Taylor Vinters' response 1st December at p.27, and we have for the first time an attempt to explain what category 6 documents the Claimants may have had and what may have happened to them. So we have price lists, they say it was overwritten on the computer system. 2 and 3, in relation to discounts:

"Ledgers and memoranda passed between Premier and Buxted and their customers. These were negotiations and discounts and documents arising from those negotiations. These were documents relating to the business and were passed on to the purchaser."

That is important, Sir, because it shows that there were relevant documents, or that there were relevant documents, and they were passed on to the purchasers, so there is something relevant to the passing on issue there.

"3. Records of negotiations, see 2 above." So that is the same point, there are relevant documents, they have been passed on to the purchasers.

THE PRESIDENT: Yes.

MR. HOSKINS: "4. Internal strategy papers. It does not say whether there are or are not such papers, but ask what we mean by that. Item 5 "Audited financial statements" says "May be available and investigations have been made." So these are category 3 and 6 documents that should have been disclosed and have not been at this stage.

The next part of the chain is 3rd December. There is a Freshfield's chasing letter in the middle, 2nd December, I think you have probably got the gist of where they are coming from. 3rd December is at p.34 – I am sorry, that is Freshfield's letter, it is p.33 I am sorry.

THE PRESIDENT: There is something on p.33.

MR. HOSKINS: It is, it is the Taylor Vinters' letter, 3rd December, it is p.33. Here we have for the first time an indication of an attempt to get documents from one of the purchasers.

"It is our understanding that the position in respect of Daly is that the only documents at now exist are unlikely to be found following a reasonable and proportionate search" – query what that means.

"…limited documents held by Deans Foods Ltd., the purchaser of one of the businesses…"

and then they set out what they are, but it is very minimal. Finally a Freshfield's letter, it is the one at p.34, and this is very important because it goes to the question of whether the claimants have the ability to require the purchasers to provide documents and you have seen that question was asked on a number of occasions and no response was given. So Freshfields write the letter, and if I can pick it up, perhaps, at para.4.

THE PRESIDENT: Yes.

MR. HOSKINS: The bottom of p.34:

"We draw your attention to the sale agreements listed below." It lists them, and then para.5: "In each of the agreements listed above …"

THE PRESIDENT: We have the point. You say that under the agreements they could have called for the documents?

MR. HOSKINS: Yes, I am sorry to take such a long time, it is the only way I can manage to get this information ----

THE PRESIDENT: We have managed to hold on to your coat tails, I think, thank you.

MR. HOSKINS: So the point is, the punch line again is the Claimants have documents in their control, and I use that in the technical sense relating to categories 3 and 6 which they have not even searched for, by which I mean approached the purchasers, let alone disclosed. These are documents which relate to passing on which I think we can all accept would be a central issue in the case. That is why we are looking for an order that they now take steps to search for those documents and disclose them.

THE PRESIDENT: Yes, thank you.

MR. HOSKINS: And that is the basis of that application. It is probably better for me to sit down at this stage and deal with that issue.

THE PRESIDENT: Yes, absolutely.

MR. ROBERTSON: Sir, I think the fundamental problem that we have in locating category 3 and category 6 documents is that they are with the purchasers. They were transferred on the sale of the businesses. We have taken some steps, and I apologise this has not been set out in correspondence before, but I have made inquiries, we have taken some steps to carry out searches for those documents. The problem is that those documents have not been archived in any systematic form.

THE PRESIDENT: Are you talking about documents that you still have or documents that are with the purchasers?

MR. ROBERTSON: With the purchasers. This was referred to in the disclosure letter of 20th September, actually in relation to categories 1 and 2, but it is illustrative of a more general problem with the documents. In that letter, which is the first letter that appears under exhibit JAL27, it is said: In relation to BCL and PFF [Buxted and Premier]:

> "No system of recording historic invoices and other documents relevant to this category was employed by either company. Such documents as may exist have not been stored in any organised way. This means a manual search through each and every document, the vast majority of which are irrelevant. By way of further illustration, such purchase invoice as have been located for Premier for an arbitrary period, October 1997 to July 1998 are stored in 36 boxes which contain at least 43,000 invoices."

That is illustrative of a more general problem. Those instructing me did visit the Premises occupied by 2 Sisters, one of the 2 Sisters companies, in an attempt to find documents. They were confronted with, they estimated, some 300-500 bankers' boxes containing documents including some documents which would have been relevant to one of the Premier companies, but it is not apparent from the outside of the boxes where those documents are to be located. They are mixed up with other 2 Sisters documents we understand.

THE PRESIDENT: Yes.

MR. ROBERTSON: And that is the problem that we have encountered in trying to track down the documents. Yes, if money was no object one could trawl through all of those documents, but it is a huge, huge task and we have attempted to approach this claim in a reasonable targeted, focused proportionate way. As the Tribunal will be aware, under the Civil Procedure Rules, rule 31.7 you are under an obligation when carrying out disclosure to carry out a reasonable search, and disproportionate searches are not reasonable under that rule.

THE PRESIDENT: And your essential position is, is it, that technically speaking these documents may be under your "control", as a result in the provision in the purchase agreement, but in practical terms any sensible effort to find and disclose these documents is to all intents and purposes hopeless, because of the chaos reigning as regards their storage and retrieval?

MR. ROBERTSON: Yes. I cannot make that submission for all the purchasers. This was just 2 Sisters. There is another company, I do not recall which one of the other purchasers it is off the top of my head, where the documents were literally shovelled into what was described as an "outhouse", not even in bankers' boxes. I am reminded by those instructing me that we have drawn this to Freshfield's attention, both the sets of Defence attention, in a letter of 10th September, which I shall just read out – it is the one that is cross-referred to in the letter of 20th

September. It is p.406 of the first supplementary bundle for the hearing, a letter from Taylor Vinters to both sets of Defendants on 10th September referring to the Tribunal's order for disclosure.

THE PRESIDENT: I am not quite sure what we are on. I have a supplementary bundle to the supplementary bundle.

MR. ROBERTSON: It is not that, it is the original supplementary bundle – precisely what it is supplementary to I am not sure. Sir, if I just read the passage.

THE PRESIDENT: Just read the passage, I am just waiting for someone to give it to me.

MR. ROBERTSON: We refer to the order of the Tribunal, 26th July 2004 and to the categories of documents for disclosure.

> "What our searches have revealed is that buried amongst a vast number of old invoices for the Premier companies, are an almost insignificant number of invoices from the Vitamins companies. It took two senior two people two hours to trawl through the invoices relating to March 1998. There were some 3500 invoices and of these only 10 appeared potentially relevant. Consequently it appears that the process could be wholly disproportionate in respect of those companies which still have the old invoices. There is no automated record within our clients' control so far as we are aware which can identify these purchases."

THE PRESIDENT: And that is 10th September?

MR. ROBERTSON: Yes.

THE PRESIDENT: Basically no change since then?

MR. ROBERTSON: There has been no change. We are happy to clarify the position in relation to each of the purchasers who are joined to the action and check. The Tribunal has seen the letter from Birketts acting on behalf of one of the Broomco companies saying it does not believe it has any documents which are relevant to the action, so that our basic problem is that to produce more documents in relation to categories 3 and 6 is just going to involve plainly disproportionate expenditure of time and money and that is the fundamental problem. It was set out in the letter of 10th September, where we thought that the Defendants had appreciated that was the fundamental problem. If we have not been sufficiently clear about that then my apologies, but that is the fundamental problem we have in relation to categories 3 and 6.

THE PRESIDENT: Yes, thank you. Yes, Mr. Peretz, at last ----

MR. PERETZ: I get the opportunity to say something.

THE PRESIDENT: Yes.

MR. PERETZ: Our position is I have been spending today running to keep up on disclosure. I am pretty sure it is the case that this is the first time that we have seen certainly all of the correspondence relating to categories 3 and 6 passing between Taylor Vinters and the Defendants' solicitors, so I have been trying to run to keep up with what has been happening.

Our position is simply that we may have some records. We did take delivery of computers from the business when we bought them, as well as documents. The relevant staff of my clients who were involved with those records have since left and we are now in some difficulty in ascertaining what we have. In fact, today was the first, I am afraid, that we had heard of the visit paid by Taylor Vinters to our client's premises – it may be because it has been going on at a level beneath the level of those instructing us, and so we are running to try and keep up. What I can say is that in principle, and subject to proportionality issues we are happy to do our best to provide what we have got. It is correct that under the purchase agreements, as I understand it, the relevant provision as far as I can see is clause 17.2 of the Sale Agreement. The vendors, that is to say, Mr. Robertson's clients have a right to access our documents and they are obviously entitled to that, but we are in some difficulty in knowing exactly what we have got, and there are obviously issues, particularly relating to computer systems that may take a little bit of time to work out what we have, and what can be recovered now. I think all we can promise is to do our reasonable best.

THE PRESIDENT: Yes, thank you. Well we have a practical problem, I think, Mr. Hoskins, have we not? I do not know quite how we go about solving it. There is not a great deal of point in ----

MR. HOSKINS: Can I suggest something?

THE PRESIDENT: Please do.

MR. HOSKINS: Mr. Peretz has very kindly said they are prepared to do their best. It seems to us the best thing we can do is for us to liaise with 2 Sisters to indicate with as much specificity as possible the types of documents we are looking for, and it is particularly useful, because obviously we have had documents from Deans recently, and if we can liaise with them, and if 2 Sisters are happy to liaise with us in that way I think that is the way to take this forward.

THE PRESIDENT: I think that is probably a sensible suggestion. It may not be that you are going to get very far, but I suspect that it is just a practical situation. We are not going to order disclosure of 43,000 invoices in some shed somewhere.

MR. HOSKINS: I do not think we would want 43,000 invoices.

THE PRESIDENT: And you would not be able to make head nor tail of them even if we did. If they have not got the documents that may go or may help them to prove their case that is too bad for them. There it is, we just have to do the best we can I think without the documents.

MR. HOSKINS: Our concern is that we have the documents that we have in relation to passing on.

THE PRESIDENT: I understand entirely your concern, but the various concerns and interests just hit the practical situation here. If you can make some progress with Mr. Peretz so much the better, and I think probably the only thing we can do is just leave it on that basis.

MR. HOSKINS: That is why I make the suggestion.

THE PRESIDENT: Thank you, well we accept the suggestion.

MR. PERETZ: I simply rise to say that Mr. Hoskins mis-paraphrased me in one respect. I said "reasonable" best, not necessarily our best, there may be a distinction between the two.

THE PRESIDENT: No, no, reasonable best. It may be that nothing comes of it but I think that is all we can really do in practical terms.

MR. PERETZ: Yes, and a second point, I simply reserve our position on this, it is a point as to the costs of the exercise. We would submit there is no difference in principle in this respect between our position as of today having been joined, and the position of a non-party who would usually expect to receive some assurances to the costs of undertaking an exercise such as this.

THE PRESIDENT: Well if that is as far as we can get with categories 3 and 6, that leaves Mr. Morrell's audit files. Is that right, Mr. Hoskins?

MR. HOSKINS: It does, Sir, yes. There are two other issues I want to flag up, but I am sure they will be dealt with in the same way, because they have arisen recently we will have to deal with them between the parties as best we can.

THE PRESIDENT: Yes.

MR. PERETZ: That may mean that I can now go?

THE PRESIDENT: I am sorry you have had to spend the time. Thank you for your help.

(Mr. Peretz withdrew)

THE PRESIDENT: Yes, Mr. Morrell's audit file. The Tribunal, for various reasons, is a bit reluctant to sit much after 4.30 tonight.

MR. HOSKINS: Well I am in your hands, Sir.

THE PRESIDENT: Yes, well let us go on and see what we can do.

MR. HOSKINS: In his expert's report Mr. Morrell gives actual evidence, and he expressly recognises it as such relating to passing on, and he says that he obtained that information in his

capacity as the audit partner for Daly and Premier Poultry. I do not know whether you want to see it – I can take you to the paragraph?

THE PRESIDENT: I suppose we had better just glance at it.

MR. HOSKINS: Let me get the reference for you. It is in the set of bundles delivered today, i.e. the supplementary bundle to the supplementary bundle in the BCL case, file 1, p.758. The relevant passage is at p.785, para.7.2.4.

THE PRESIDENT: "My recollection…"

MR. HOSKINS: Precisely. Perhaps again if I can ask you to read that?

THE PRESIDENT: Yes, we will quickly read it. (After a pause) So he is saying that he remembers some discussions.

MR. HOSKINS: That is correct.

THE PRESIDENT: Which, as far as his recollection has tended to confirm, they were under price pressure at the time?

MR. HOSKINS: That is correct, yes. The correspondence in relation to this is in the specific disclosure bundle for BCL, so that is the slim bundle.

THE PRESIDENT: Yes, our 15. Page?

MR. HOSKINS: If you could turn to tab 28, and it is p.11.

THE PRESIDENT: Yes.

MR. HOSKINS: Paragraph 7 of that letter on p.13. That is what we want and that is why we want it.

THE PRESIDENT: What was the answer to that?

MR. HOSKINS: It is in the Taylor Vinters letter of 1st December 2004, p.27, and it is dealt with at the bottom of p.28. They say it I based on discussion, which is what he says. It was not based on any review of information contained in the audit files.

THE PRESIDENT: Yes.

MR. HOSKINS: Then at p.36, this is Freshfield's letter of 3rd December 2004, item 11.

MISS SIMMONS: Has that been answered?

MR. HOSKINS: It has not, no.

THE PRESIDENT: That is 3rd December, yes.

MR. HOSKINS: So we say Mr. Morrell gives factual evidence which we reserve our position on, we will be making submissions about that trial, obviously it is very unusual. He gives factual evidence, he gives factual evidence obtained as the auditor of two of the parent companies, and what we have asked for is for them to revisit the audit files to see if there is any information in

there which is relevant to the information Mr. Morrell has given, either that supports him or detracts from his evidence. That is all we are asking for.

THE PRESIDENT: Well as I read Mr. Morrell's statement, all he was saying was "I remember them telling me at the time that things were very difficult – or words to that effect.

MR. HOSKINS: Precisely. In the audit files, Sir, that he kept, he may have notes of meetings and he may have notes that go to that sort of issue. We are simply asking for a review to be made of those audit files to see if there is something that goes to that passing on issue. That is the extent of the request.

THE PRESIDENT: Yes. Yes, Mr. Robertson?

MR. ROBERTSON: Well I recall at the first Case Management Conference Mr. Hoskins using the phrase "The very definition of a fishing expedition", and that is our submission on this. Mr. Morrell, it is perfectly plain what he is saying in para.7.2.4 of the report. He refers to factual evidence that is being given by two witnesses in this action that things were tough and they could not pass on increases to their customers, and he is just saying his recollection is that is what people said to him at the time. That is not a prompt for the defendants to embark on a trawl through his files to see if there may be any documents that relate to that issue. All he is doing is just confirming that what those gentlemen are saying accords with his recollection at the time. That would be a disproportionate exercise to order disclosure of those documents.

MISS SIMMONS: The problem, as I see it, is they are giving you an opportunity, because when Mr. Morrell gets in the witness box he will be asked whether he had any notes. If he says "Oh well I have not looked" that is not a very nice position for Mr. Morrell to be in. The matter is really for you as to whether you want him to do it or not, but the fact is that at the end of the day Mr. Morrell, if he is going to give evidence of what he remembers and he has notes normally a witness would look at those notes before he gave the evidence.

MR. ROBERTSON: It may well be that the principal evidence relied on in this regard is the evidence from the witnesses of fact. This is little more than context from Mr. Morrell. We want to give disclosure within reasonable bounds in this action, and the Tribunal has seen today how costs have been racked up so far and we are concerned to keep disclosure within proportionate and reasonable limits. Obviously my clients will take on board the comments that you have made and may reconsider the situation, but at the moment that is the position that we just do not think the expense would be justified.

MISS SIMMONS: But, as I say, you are leaving Mr. Morrell very exposed if you take that view.

MR. ROBERTSON: We take those comments on board.

(The Tribunal confer)

THE PRESIDENT: Mr. Hoskins, we are not minded to make an order in relation to these documents. It certainly looks to us as this is Mr. Morrell saying "I remember these witnesses saying words to the effect set out in their statements at the time". The probability is that the key issues will be what those witnesses say rather than what Mr. Morrell remembers them saying. You can make the point to him that he may have mis-remembered it, or he has not got any notes, or if he has got any notes he has not produced them. But our Judgment at the moment is that this is not a sufficient ground for opening up Mr. Morrell's audit files in order to find out whether there is documentary support for what he remembers to have been said at the time.

MR. HOSKINS: Sir, can I just put down this marker? If at trial I ask the question "Do you have notes?" and he says "Oh yes", we would expect to be provided with copies of those notes in advance, if it is something that Mr. Morrell himself produces in preparing for the trial.

THE PRESIDENT: Yes. Very well, does that deal with disclosure as far as we can, today?

MR. HOSKINS: Sir, there are two further issues. We cannot deal with them now, but ----

THE PRESIDENT: You mentioned the inter-company issues.

MR. HOSKINS: I think it might be useful for the Tribunal, because I can show you them very quickly, and you will see what the issues are.

THE PRESIDENT: Are these the inter-company issues?

MR. HOSKINS: They are, yes, Sir.

THE PRESIDENT: Do we need to see them today? I think, if we may, Mr. Hoskins, it is better if you can sort this out amongst yourselves.

MR. HOSKINS: We will try our best, Sir.

MR. ROBERTSON: Sir, if I can assist, we will be writing on the inter-company points to the Defendants.

THE PRESIDENT: Sorry, Mr. Kennelly, you have applications too?

MR. KENNELLY: I always pop up at the end when everybody wants to go home.

THE PRESIDENT: No, it is always a pleasure! [Laughter]

MR. KENNELLY: You have before you, of course, an application for specific disclosure by Aventis as well, which is contained in the slim bundle which is put before you today and in it we seek an order in relation to categories 3 and 6 of the July order also, along the lines set out in the witness statement of Mr. McDougall. I simply draw the Tribunal's attention to the following matters. First of all, of course the Tribunal made the order on 26th July where we debated what the categories were. We narrowed them down to those categories and those are still the categories in that order.

In relation to Mr. Peretz's point I simply want to make it clear that of course the purchasers which are now joined as parties to these proceedings must be also subject to this order of 26th July. They must have the ordinary disclosure obligations ----

THE PRESIDENT: Well we can always amend, qualify, modify or adapt our orders, depending on circumstances.

MR. KENNELLY: That is correct, Sir, but as a matter of principle, and in order to resolve this case we would say fairly and justly, the purchasers must also be subject to this order. We sought to narrow the disclosure issues as much as possible, that was the point of the categories set out, and the purchasers must be subject also ----

THE PRESIDENT: But we have simply joined the purchasers for reasons of procedural economy and safety so that there is no subsequent argument as to who the money eventually goes to and no double jeopardy from the point of view of the defendants. I am not sure we have joined the purchasers in order to expose them to discovery applications.

MR. KENNELLY: Well, Sir, just two points. First, we ought to remember the purchasers may well be the beneficiaries of the claim ----

THE PRESIDENT: We have not made any order yet, we have not drawn the order yet, but if there is a trap we are about to fall into we had better be alerted to it.

MR. KENNELLY: Well they seek the benefits of the claim, potentially and in those circumstances they ought to be subject ----

THE PRESIDENT: It is not their claim, it is the Claimants' claim, it is not the purchasers' claim.

MR. KENNELLY: It is open, there is a possibility that they may be the ultimate beneficiary to the claims and in circumstances where they themselves admit, as Mr. Peretz said, they hold documents which are relevant to the issues before you. It would be extraordinary if the purchasers were not subject to the same disclosure obligations. It is crystal clear that they hold relevant documents, and the simplest thing to do would be to make them subject to the 26th July order, and that in my submission would also be proportionate.

THE PRESIDENT: Well at this stage I am not at all sure. What had been going through my mind was that we would be making a formal order joining the purchasers as Defendants to solve a procedural problem which related to, among other things to whom the benefit of the claim inured, to get round the problem of the equitable legal assignment. The Tribunal has not so far seen this as opening up a second front, as it were, of litigation, involving all kinds of discover applications against the purchasers.

MR. KENNELLY: I have some sympathy with the Tribunal's position because of the lateness of some of the documents that were placed before you.

THE PRESIDENT: The existing order does not, on its face, apply to the purchasers because it was made at a time before the purchasers were a party to the action, so to make any order for disclosure against the purchasers you have to make some new order and tonight would not be the time to do it anyway.

MR. KENNELLY: Sir, I agree. Could I ask simply ask, because I realise a great deal of material has been put before you, that the Tribunal consider the witness statements and the correspondence contained, at least to Mr. McDougall's statement.

THE PRESIDENT: Which one is it?

MR. KENNELLY: It is in the slim blue bundle.

THE PRESIDENT: Is it the fourth witness statement?

MR. KENNELLY: It is the third witness statement of Mr. McDougall, and the correspondence is behind tab 4.

THE PRESIDENT: The third witness statement which was on 7th December.

MISS SIMMONS: Behind tab 3.

THE PRESIDENT: And then the fourth witness statement also on 7th December, and yet a fifth witness statement presumably on the same date, also yesterday, yes.

MR. KENNELLY: I should say, and I understand the Tribunal's concern, but in Mr. McDougall's defence, as you will see this follows a chain of correspondence where the clients were put on notice. We sought as much as possible to deal with this between ourselves, and it is a last resort we come before the Tribunal for this order. But if the Tribunal could consider the correspondence, and hopefully then realise the importance obtaining these crucial documents which the purchasers themselves hold in the interests of justice to ourselves and to the Claimants. It is in everyone's interest to get relevant documents out as quickly as possible.

THE PRESIDENT: Well you have heard Mr. Peretz say that he will do his best.

MR. KENNELLY: His "reasonable" best, Sir.

THE PRESIDENT: Sorry?

MR. KENNELLY: His "reasonable" best.

THE PRESIDENT: No doubt proportionate as well! [Laughter] We have one purchaser who is sitting on the sidelines, who does not seem to want to have anything much to do with the case, but is not quite prepared to say that he wants nothing to do with the case, but anyway is not here today; and we have the two others who have been joined for rather roundabout, formal reasons. I would have thought still that your principal avenue is still directly against the Claimants and if it is right that such documents as the purchasers hold are in the state that has

been described to us it is not going to be a fruitful exercise trying to get discovery of all those by now rather moth eaten and mouldy documents in sheds.

MR. KENNELLY: I will not pursue the point any further. I ask only that the Tribunal consider the documents before it.

THE PRESIDENT: We will note it and we will read the material carefully.

MR. KENNELLY: Finally then – and this is my last point – in relation to what I mentioned this morning about my potential application for permission to amend. We have had a discussion with Deans, and I heard Mr. Leggatt today say ----

THE PRESIDENT: This is on the compromise point?

MR. KENNELLY: The compromise point. Mr. Leggatt said that contrary he had from the correspondence, Deans disavowed any interest at all in the BCL Old Co. claim. Having spoken to Mr. Randolph, if he could clarify and re-state that point for the record it will not be necessary for me to seek permission to amend, and the issue of the compromise maybe, it seems, successfully resolved between solicitors, and I need not trouble the Tribunal further on that point. But what I need from Mr. Randolph to put this to bed is a clear statement that Deans have disavowed any interest in any present/future claim in the BCL Old Co. action.

MR. RANDOLPH: I am surprised at what Mr. Leggatt said was not sufficient, and I am perfectly happy to recite what has already been said in correspondence – I am surprised that it is being said that contrary to the impression given in correspondence – and that is this:

> "Deans does not assert that DFL's right to sue in this action has been assigned to it. Any rights of action that may have been acquired inadvertently have, in any event, been re-assigned to Daly as a result of an agreement entered into by Deans, which expressly disavows any claim to be the assignee of the relevant right."

That seems to cover the point, and that was set out in writing on 3rd December. So I would hope that that would draw a line under this particular point and then we could have successfully compromised this particular part of the claim which will impact on how the trial goes forward in a positive fashion, in other words, there will not be that claim to deal with. I hope that that will be sufficient.

THE PRESIDENT: Does that deal with it, Mr. Kennelly?

MR. KENNELLY: If Mr. Randolph agrees that what he has just said is the same as what I have just said then it does. But I must stress that that was not -----

THE PRESIDENT: You can see why these compromises fail at the last minute.

MR. KENNELLY: Yes, it is all the lawyers' fault. But if he gives us that assurance, it should be very straight forward since I think he is saying it is the same thing.

THE PRESIDENT: He has just read out what has been said in correspondence.

MR. RANDOLPH: Yes, and that is what we are saying. Personally I cannot see the difference between that and what my learned friend has just said, but if my learned friend thinks that what I have said does not cover what he wants then he should let us know. But I cannot see the difference myself.

MR. KENNELLY: It is a question of an interest. It is the issue of whether they are potentially an equitable assignee. They seem to suggest that 15th October Agreement was not valid, but if he agrees that I have accurately summarised the position then I will say no more.

THE PRESIDENT: Well we cannot preside over negotiations across the courtroom as to what was agreed or not, I think you will just have to sort this out as best you can behind the scenes. If, by chance, there is a compromise what is the knock-on effect of the compromise for the trial and the unfolding of the action?

MR. RANDOLPH: The knock-on effect, Sir, is the following: we would withdraw our claim against the third Defendant in 1029, and our agreement would be the agreement as between ourselves in the usual way, and I think that would be all. We might, if need be, agree a form of wording that might be set out in any background statements made in any Judgment when the Tribunal wanted to set out what had actually happened, and we would probably quite like the Tribunal to reflect what the parties would like said publicly on that point – aside from that, that would be it. Obviously it is positive to the extent that you, the Tribunal, do not have to deal with that claim, however small it was in the context of the other claims. It is helpful to that extent.

Sir, while I am on my feet, you will have seen we have put a supplemental skeleton in and I am grateful for the extra time. Two points: one was ADR which we have not tackled, the other was redaction, which we also have not tackled. It may well be that we do come back in front of Miss Simmons next week in any event on other issues, and I just want to flag up that we are keen to debate this issue of redaction because, rather like a sort of Blue Peter thing, this is a sample of something we received yesterday or the day before, and there are times when you can redact, there are times when you cannot, and we say much of Roche's approach (or Freshfield's approach) to redaction is not actually helpful or correct. So we will wish to articulate that, and the only reason I am mentioning it now is so my learned friend, Mr. Hoskins, does not feel that it has been dropped – it has not been, and I will be pressing this point quite strongly.

THE PRESIDENT: I think we have now probably run out of time so far as today is concerned. There is one point the Tribunal would like to make about the issue of experts, which we have

not tackled yet, which is of some slight concern to us. It is whether the expert evidence, as it is unfolding, is unfolding in an efficient way. We have Mr. Morrell who, as it were, combines a sort of audit function with some economic evidence. We have a proposal that there should be an expert on behalf of the Defendants, who is Dr. Beero I think, and another expert who is a Mr. Thane Forbes, whose expertise seemed to us at first sight to be slightly different from the expertise of either of the first two. So one of the things that I think probably needs to be discussed next time is the whole topic of the expert evidence, and to what issues it is related and how it should be handled in the most efficient way, with the object among other things of making sure the experts are actually addressing the points that the other is making. That is experts.

I am conscious that we have not talked yet about EDR, and there is the point that Mr. Randolph has just made about redaction. It may be that further progress can still be made behind the scenes on various points, but I think so far as tonight is concerned we are probably going to have to stop there and further directions will have to be adjourned to a date to be notified pretty rapidly, which will probably be next week, in front of Miss Simmons to keep the pot boiling, as it were, and keep this case moving forward. I think that is as far as we can take it tonight, unless there are specific points anyone wants to flag up or signal before we adjourn.

MR. RANDOLPH: Sir, there is the final point which is that of timetable. Would it be suggested that Miss Simmons deals with timetabling ----

THE PRESIDENT: Yes.

MR. RANDOLPH: Because that is actually quite – I was about to say "quite important" which obviously has the wrong connotation, it is obviously relevant in terms of the availability of the other members of the Tribunal, and so maybe it would be for the Tribunal to deal with.

THE PRESIDENT: Well, there are ways by which Miss Simmons can keep in touch with the rest of the Tribunal for sorting out that sort of thing, but if there are obviously matters which a chairman cannot deal with sitting alone then we need the whole Tribunal to deal with it, but that would have to be probably after Christmas now.

MR. HOSKINS: Sir, in terms of fixing another hearing if it is to be next week, I have a floating case in the Chancery Division Tuesday/Wednesday/Thursday, and obviously it is important for my clients that I be available.

THE PRESIDENT: Of course.

MR. HOSKINS: So I just suggest if there can be a degree of consultation.

THE PRESIDENT: Yes, absolutely.

MR. RANDOLPH: I too am engaged in another matter on the 14th.

THE PRESIDENT: We will do our best to fit in everybody, and it can be convened at non-standard hours of the day – I will not say the night, but non-standard hours of the day. We do not necessarily need the full attendance of everybody who is here now to sort some of these issues out.

Thank you very much indeed everyone for your help today.

(The hearing adjourned at 4.45 p.m.)