IN THE COMPETITION APPEAL TRIBUNAL

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

Victoria House,
Bloomsbury Place,
London WC1A 2EB

26th July, 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

Claimant

and

AVENTIS S.A. & OTHERS

Defendant

AND

DEANS FOODS

Claimant

And

ROCHE PRODUCTS LIMITED & OTHERS

Defendant

Mr. Aiden Robertson (instructed by Messrs. Taylor Vinters) appeared for the Claimant BCL

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 Freshfields Bruckhaus Deringer) appeared for the Defendants Hoffmann –La Roche and Roche Products Limited.

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CASE MANAGEMENT CONFERENCE

THE PRESIDENT: Good afternoon ladies and gentlemen. The customary procedure in the Tribunal for case management conferences is to take the agenda that has been previously circulated as a working document, and to work through the agenda dealing with the various issues and, on the whole, it tends to cover most of the outstanding points. I think the agendas are broadly similar in each of the cases that we have before us this afternoon.

The first matter that is listed is the question of the forum of these proceedings, and it appears to be common ground that that should be England and Wales. We would like to comment in that connection that although the forum of the proceedings does seem by agreement to be correctly identified as England and Wales, this Tribunal has a jurisdiction has a jurisdiction over the whole of the United Kingdom, by virtue of its statutory constitution. If and when we arrive at considering the basic principles to be applied in a case like this it may be of relevance for us to consider how a claim of this kind would be dealt with under Scottish Law – and possibly also under Northern Irish Law – so that any solution that may or may not be arrived at is consistent, as it were, throughout the United Kingdom, without having to vary, depending on the technicality, whether the forum for the proceedings is technically England or Wales, or Scotland or Northern Ireland.

In that connection we would also add that if particular matters do have to be decided, since this is a claim arising under a breach of Article 81 of The Treaty, the possible application of rules arising under Community Law is also relevant, and at some stage that may involve at least some investigation as to what the domestic systems of other Member States, particularly for example, civil law countries such as France and Germany, would throw up when dealing with matters of this kind. Indeed, one issue may be whether, at the end of the day, the question of the applicable principles is itself a question of Community Law or whether it is purely a question of national law. It may be that Community Law will lead it to national law may itself be a question of Community Law which may, at a certain stage, wish to develop its own approach to actions for damages of this kind.

That series of considerations also raises in our mind, at least provisionally, the nature of the jurisdiction which the Tribunal has under s.47(A) of the Competition Act and, in particular the way the claim is put in this particular case. Among the matters we have to deal with today we do have to deal with an application for permission to amend in which the claimants seek to clarify how the claim is in fact put, which I gather is not opposed. However, for the record, s.47(A) of the Act states, under subsection (1) that:

(1) This section applies to –

(a) any claim for damages; and

(b) any claim other claim for a sum of money.

That may in turn raise the question of whether claims arising from infringements of the 1998 Act, or of Community Law are strictly speaking in the nature of damages in a way analogous to an action for tort or whether they can be looked at in some other way, for example, as some kind of claim that could perhaps go under the general heading of "Unjust Enrichment" – unjust enrichment in the sense of a defendant who has made an undue or "secret" profit, as a result of breaking the law.

As to those possible alternative ways of looking at the matter, in which both English and Scottish Law may have some relevance, we say in parenthesis at this point that some of the earlier cases in relation to recovery of loss for breaches arising in relation to the cases on swap deals and the local authorities where there was a considerable amount of consideration as we recall it in the House of Lords as to the various provisions applicable in English and Scots Law (*Kleinwort Benson* and related cases), those two different ways of looking at it could, among other things, give rise to one asking oneself two quite different questions. One question would be from the point of view the claimants "what has been lost?" A different question (which may or may not reach the same result) would be the question "what has been unjustly gained by the defendant?" It may be that s.47(A) would cover both possibilities. Which way one puts it, or which way one approaches it, might in certain hypotheses also affect the so-called issue of passing on, which may be more relevant to one way of putting it than it might be to the other way of putting it.

We simply make those extremely provisional remarks at the beginning to emphasise that the fact that the forum in this particular case is England and Wales is perhaps only the beginning of a series of intellectual conundrums that may or may not come to be debated at a later stage as this case proceeds.

That is probably a slightly longer exegesis than is customary on the question of the forum of the proceedings, but perhaps that is sufficient to set the scene for some of the later issues that we are going to consider today. Has anybody at this stage any comments on the forum of the proceedings, or any immediate comment arising out of what the Tribunal has just said? [*No comments*]

In that case all I think we need do is to note that the forum of the proceedings is England and Wales.

Do we take it, although it is not on the agenda, that we can treat the application for permission to amend as not opposed? Mr. Randolph?

MR. RANDOLOPH: I wonder if I could just make one point on that? I want to clarify the position on the amendment. There was an application, or effectively we sought to amend the Particulars of Claim with regard to the basis of the claim, statutory breach, and that was done, and consent was received by us from both sets of defendants and that has been clarified, particularly with regard to the third defendant – Aventis – in their skeleton received on Friday.

So, according to the Rules, Sir, there is no real issue with regard to the amendment we would suggest, and we would be grateful if the Order would simply make it clear that an amendment took place, dated today – because at the moment the draft amended claim is in the bundle.

THE PRESIDENT: Yes.

MR. RANDOLOPH: I hope you do have it at 10.1 to 10.9. The date is blank and I think it would be useful, in case there is an issue, that today's date be marked on so that we can mark it on the pleading for future purposes.

There is another issue with regard to my learned friend's strike out application, and that is not consented to as far as I am aware – I think there is some opposition to any application that I might have to amend. I do not have an application before this Tribunal on that matter, but we certainly will (if need be) seek to clarify our case on that. I do not want there to be any confusion as between the two forms of any kind of amendment. There is a formal amendment and there may be a future amendment with regard to any strike out application made by my learned friend.

THE PRESIDENT: It is the amendment to the basis of the claim that I was referring to.

MR. RANDOLOPH: Indeed, I am very grateful, yes.

THE PRESIDENT: Which we treat as made by consent, with the consent of the parties, taking effect from today.

That takes us on in the agendas that we have – the agendas now differ a little – the Deans' agenda, which perhaps we ought to take first, item 2 is to consider directions in relation to the application of 1st June on behalf of first and second defendants to have part of the claim struck out pursuant to Rule 41A of the Tribunal's Rules. I think that should be a matter on which we ought to just go around the course at this stage.

Mr. Hoskins, you are seeking these directions, I think it would be helpful if you could just briefly set the scene for us on this matter.

MR. HOSKINS: Sir, the application is to strike out the defendants' claim in so far as it relates to yellow carophyll. The application is in the bundle (tab 17, p.219), I do need to take you to

the detail of it at this stage, there is that and there is a supporting witness statement which gives some factual background.

The basis of the strike out application will be that the Commission Decision does not make any finding of infringement in respect of yellow carophyll, and one sees that in particular from para. 66 and 523 to 530 of the Commission Decision, where one finds specific findings in relation to I think both red and pink carotenoids are referred to, but there is no mention of yellow.

THE PRESIDENT: The yellow seems to have slipped down the crack.

MR. HOSKINS: Precisely, and we say the reason is because there was no infringement in relation to yellow. That leads into the jurisdiction point under s.47A of the Act, and it arises in particular because of subsection 5(a) which provides that:

"No claim may be made in such proceedings until a decision mentioned in subsection 6 has established that the relevant prohibition in question has been infringed."

We say that means if you want to bring a claim for damages, or unjust enrichment, in relation to a yellow carophyll infringement, there has to be a relevant Decision which has found an infringement in relation to yellow carophyll. It is not in the Commission Decision therefore ----

THE PRESIDENT: Over and out.

MR. HOSKINS: -- no jurisdiction.

THE PRESIDENT: Yes.

MR. HOSKINS: Obviously this has been put in correspondence, and the way that the claimant responded was to say that it intended to seek permission to amend its claim so as to include the loss incurred by our client in respect of carophyll yellow by reason of the prices having followed those of carophyll red as a direct consequence of the vitamins cartel, i.e. there is a finding of infringement in relation to red carophyll. The prices of yellow carophyll according to the claimant, followed those of red carophyll and therefore jurisdiction.

Having seen that statement, we asked for a copy of the proposed amendment and supporting evidence. It is all very well to put a one liner in a letter, but we said "Well fine, show us what the amendment is and show us the evidence you are going to rely on", which would presumably also show that the prices did, in fact, track. We asked for that on 8th July. On 9th July the claimant's solicitors refused to provide a copy of the proposed amendment. I will give you the references for the correspondence. Originally the letter suggesting the amendment is at tab 20, p.320. The Freshfield request of 8th July is tab 20, p.322. The Taylor Vinters refusal is at tab 20, p.324.

On 14th July we again asked for a copy of the proposed amendment and supporting evidence. The reference for that is tab 20, p.324C. That is where we have got to, because we have not seen a proposed amendment, nor the supporting evidence. Of course normally, when one brings a claim of this sort in the Tribunal the Rules require you not just to make the claim but to provide all the relevant evidence that you have at the time. So if it had been in from the start we would already have seen the evidence.

The first and second defendants, i.e. my clients, are asking to day for a timetable to hear the strike out application. That is a timetable for the claimant's evidence and response, our evidence in reply, exchange of skeletons, and a date for the hearing.

THE PRESIDENT: When you say "claimant's evidence", are you also seeking a specifically formulated amendment, or proposed amendment to the claim?

MR. HOSKINS: Sir, that is the point I was just about to deal with, because they obviously have to respond to the evidence we have already put in for the strike out application. But what has been said in the claimant's skeleton is that any amendment to its claim should wait until after the strike out has been determined which, with respect, seems to us a little bizarre, because if we are seeking to strike out the claim, and the respondent says "You should not strike it out because we are going to amend", then it seems to us that the obvious way forward is for the Tribunal to have the application for strike out before it, and at the same time the application to amend and the supporting evidence. Indeed, if this were to come up in the Commercial Court that is what one would expect – you do not deal with it in bits and pieces.

THE PRESIDENT: Yes.

MR. HOSKINS: There is a strike out application and the response is "We will amend and that will get rid of the problem", you would have it all before the Tribunal at the same time. We are suggesting that there should be a timetable dealing with the aspects I have suggested for the strike out but also that the claimant should be required to produce any proposed amendment to its pleading and the evidence supporting that proposed amendment – by that I mean the evidence that we rely on at trial, because that is the way that the procedure before this Tribunal operates. It should do that at the same time as it provides its evidence in response to our strike out evidence. In our submission that is the only sensible way in which to deal with the strike out on the one hand, and the intended application to amend, if indeed such an application is to be made.

THE PRESIDENT: Yes.

MR. HOSKINS: It is probably best at this stage to hear what Mr. Randolph has to say.

THE PRESIDENT: Yes, let us see whether Mr. Kennelly has anything to add on that part of the case.

MR. KENNELLY: Sir, no issue on this arises for us.

THE PRESIDENT: No.

MR. RANDOLPH: Sir, the position is this. It is clear that the Commission Decision does not make any adverse finding with regard to yellow carophyll, and I have caused inquiries to be made of the European Commission, because I thought this might arise, and they have confirmed that, as far as they are concerned, yellow carophyll was not a relevant product for the purpose of that decision. That, we say, does not impinge on, or affect, this Tribunal's ability to determine any claim for damages arising out of yellow carophyll because of the manner in which we put our case.

There is an infringement, it does not relate to yellow carophyll but it has had the effect, we say ----

THE PRESIDENT: The consequential loss.

MR. RANDOLPH: Exactly. If my learned friend's argument were correct it then it would emasculate this court's jurisdiction with regard to damages' claims, because you can think of lots and lots of examples where there is unlawful, elicit cartel activity which impinges by way of consequential matter on other issues, other products. So we say that is the logical way of dealing with it. If that be the case, issues relating to my client's claim for damages arising out of the higher prices it says it had to pay for yellow carophyll are a matter of causation and a matter of evidence for trial.

The key issue, as my learned friend has said, is a jurisdictional one – it is a pure matter of law really. What is the scope of jurisdiction under 47A? One does not need lots of evidence for that. One simply needs to determine it on the basis of what the law is.

On that basis, Sir, we would submit that it would be correct simply to hear the application as it presently stands, and we are ready for a timetable – we want to get this matter sorted because obviously my clients, who are here today, want the matter resolved "one way or t'other".

THE PRESIDENT: Yes.

MR. RANDOLPH: Just so the Tribunal understand, it is not the whole of our claim – I do not know whether you have had the opportunity of reading ----

THE PRESIDENT: It is a fairly major part of ----

MR. RANDOLPH: It is a relatively important part of it and therefore will be of significance to my client. Therefore, we are keen to get it resolved, but resolved correctly.

THE PRESIDENT: Yes.

MR. RANDOLPH: On the basis we put it, Sir, we would submit that the most cost effective and efficient manner in which this matter could be dealt with would be on the basis of a legal submission relating to the jurisdiction of this Tribunal with regard to s.47A – a finding one way or t'other. If we are vindicated, and if we successfully oppose the application, then it may be that voluntary particulars can be put in because effectively the pleading at the moment does not – nor does any pleading – go through extensively all the evidence upon which we will be relying at trial, for the very good reason that not all the evidence is in, for the very good reason in turn that disclosure has not happened. That is why disclosure precedes evidence, and evidence precedes the trial which determines which evidence is correct. So on that basis we would say that this is a preliminary point as to jurisdiction and we would submit that, yes, let us have a timetable; no, we do not need to amend our claim as it presently stands, and that if there is to be a timetable then that should take into account other aspects of the timetable obviously, because one needs to fit within the more general timetable that will be set out later out in the CMC, in other words with regards to disclosure and other matters. Obviously, one does not want to go all the way down the line on timetable items thus expending money, before there is a hearing on the strike out. I do not know what the Tribunal feels with regard to the timetabling of this application, where it should fit within the general timetable, because the timetable is relatively tight, although you will have noticed that we have suggested that two months for evidence after disclosure is a wee bit long, but nonetheless disclosure, for example is suggested (and we consent to) for 21st September. There is an issue as to when the strike out application should come on.

THE PRESIDENT: Our preliminary thinking on this point, Mr. Randolph, having regard to the state of the Tribunal's list and so forth, which is getting heavier and heavier, is to think in terms of hearing the strike out issue in the latter part of October, and we had provisionally identified I think Thursday, 28th October as a possible day for doing that. We had also (at least provisionally) come to the view that in that context it would be right to invite the claimants to frame a proposed amendment to their claim so that we have a fairly clear target as to what it is that the claimants are in fact saying on the question of yellow carophyll, and that can be done – I am sure you would need to be articulating the way you put it as a matter of preparing your skeleton argument. What we had envisaged was probably simply a skeleton argument that contained – or had attached to it – a proposed amendment to the claim that was prepared in a form suitable as an amendment to a pleading.

MR. RANDOLPH: We would be very happy to provide that on that timescale.

THE PRESIDENT: We will come back and think in a moment about a more detailed timetable, but the question I think that Mr. Hoskins will now probably jump up and raise is to say "What about the underlying evidence in support of this proposed amendment?" My own personal, off the cuff reaction, without having discussed it with the other members of the Tribunal, would be to say that the proposed amendments should at least set out what you assert the facts are, in terms of whether the prices of red and pink carophyll had a knock on effect on yellow carophyll, and if so an indication of what you say that is, so that for the purposes of a striking out application we are clear what the allegation is.

MR. RANDOLPH: Absolutely, and I see that entirely and, in fact, your suggested timetable of 28th October fits well, because if we are to be asked for evidence which, by its nature, will be in the hands of the defendants rather than ourselves, the hearing will post date disclosure by a month and a week, and we are very keen to have – amongst other things – other information, and we raised this in our skeleton, in addition to the classes already set out, we are very keen to have information relating to prices fixed and how the prices were fixed for products – and we would include in that yellow carophyll, because obviously if we are going to ----

THE PRESIDENT: When you say the price is "fixed", you mean the prices that the defendants were charging?

MR. RANDOLPH: The prices that they were charging for on sale to their customers.

THE PRESIDENT: Yes.

MR. RANDOLPH: Which, for this purpose, would include one of their suppliers which then became Roche UK – it was called Colborn Daws, because it will be part of our case that red carophyll and yellow carophyll are so closely linked they cannot be used individually, that one follows t'other up or down – and in this case, up – but it is almost impossible for us to prove that without access to the documentation from the defendant. We have the witness statements an we will have the evidence from the people who were purchasing, my clients purchasing managers, and maybe more importantly, the people who were purchasing direct from Roche and Aventis – the people in the middle – because our client did not buy direct.

THE PRESIDENT: These are witness statements still to come?

MR. RANDOLPH: There are witness statements in the bundle already, in before the Tribunal which deals with this but there will have to be more, but a lot of it will depend on disclosure, so we would be very content with the proposal put forward by the Tribunal, which is effectively that we put forward a proposed amendment together with any evidence

that we have at the time resulting from inter alia disclosure, so that the Tribunal has before it all that is relevant on this issue and can deal with it on that basis. It would be wrong, we would submit, for our claim as to yellow carophyll to be struck out for want of evidence relating to causation if, two months later pursuant to some other disclosure application, that documentation were to be made available. It would be unfortunate if we were caught on the wrong side of a timing issue here. It is quite right on a strike out application that you take the strikee's case, if you will, at its highest. But our highest must be what we have at the time, and therefore we would be very content with that approach, and we would provide the evidence in a reasonably short time post-inspection. At the moment it is suggested by my learned friend and, indeed, Mr. Kennelly for Aventis, that inspection take place a week after disclosure, which will be the end of September. Therefore, given the Tribunal's suggested timetable of 28th October, maybe it would be sensible that we undertake to provide our proposed amendment, together with underlying evidence arising from that inspection 14 days thereafter, so that would be the middle of October, which would give my learned friends sufficient time – two weeks – to prepare (if they need to prepare), I am sure it will not take them by surprise, for their application.

THE PRESIDENT: That would take us to 14th October, roughly speaking, upon which date you could serve a proposed amendment ----

MR. RANDOLPH: With any underlying evidence.

THE PRESIDENT: -- with any underlying evidence, and I think for convenience, insofar as still necessary, the outline very shortly of the skeleton argument in support.

MR. RANDOLPH: Absolutely.

THE PRESIDENT: I think you may have already sketched out what the argument is. It may not be an argument which benefits from very much elaboration.

MR. RANDOLPH: Absolutely, but I cannot think of a reason why it should change.

THE PRESIDENT: Does that more or less meet what you were hoping for, Mr. Hoskins?

MR. HOSKINS: I am slightly bemused by the way this has been put, because what Mr. Randolph has just described seems to me to be the definition of a fishing expedition. What he has said, or what his solicitors have said on his client's behalf is that the reason they are going to seek permission to amend is so as to include the loss incurred by our client in respect of carophyll yellow by reason of the ---

THE PRESIDENT: This is a chicken and egg, is it not?

MR. HOSKINS: Well it seems extraordinary that you can say that in correspondence and yet say that you cannot put forward any evidence whatsoever of it until you have seen disclosure.

They either believe that that is what took place or not. But let us leave that on one side, because ----

THE PRESIDENT: Well I think he said that he had some evidence, but he was hoping to get purchase managers and others to provide evidence.

MR. HOSKINS: In terms of a structured approach it would have been helpful if we had been told that rather than being simply refused that we could see the stuff, but we are not in the business of that, so let us look at where it goes from here.

THE PRESIDENT: Yes.

MR. HOSKINS: The suggestion is that then Mr. Randolph after disclosure puts the proposed amendment and the evidence on 14th October, which is envisaged to be some two weeks. In our submission that is potentially going to be too short. We do not know what is coming, but if the case is that yellow followed red and if there is to be some sort of analysis of the way the price has moved I am slightly concerned that if we are to be able to deal with it properly 14 days may not be enough time. But I am anticipating because I don't know what is coming, that is the problem.

THE PRESIDENT: What is coming in terms of ?

MR. HOSKINS: In terms of how they are going to prove their case after they have had disclosure of what they are sitting on already, so I guess my only concern for my client is that we should have sufficient time to put in any evidence we want in response. Indeed, what we may do, if there is evidence, we may want to treat it as a summary judgment application. Again, I don't know how it is going to come out, but it may not be quite as simple as "Oh look, they've produced some evidence". We may well want to put in something substantive on the other side but I want our clients to have sufficient time.

THE PRESIDENT: No, quite, fair enough.

MR. HOSKINS: I think that is what the point comes down to.

THE PRESIDENT: Fair enough. Mr. Randolph, if we have understood it correctly, your clients are purchasers of both red and yellow carophyll.

MR. RANDOLPH: Yes.

THE PRESIDENT: Is that right?

MR. RANDOLPH: Yes.

THE PRESIDENT: Are they not able from their own knowledge to say what the relationship is between the price of yellow carophyll and the price of red carophyll?

MR. RANDOLPH: Yes, to the extent that they can show the graphs rising, the prices rising between the two.

THE PRESIDENT: Yes.

MR. RANDOLPH: There is nothing which is going to take my learned friend by surprise because it is there in the form of the expert evidence from Colin Morrell, in terms of how the prices have moved up over time.

THE PRESIDENT: Is that not all you need for present purposes?

MR. RANDOLPH: Yes and no.

THE PRESIDENT: We would not on a strike out application normally determine the exact weight of the evidence, we would just need enough evidence to show there was an arguable case.

MR. RANDOLPH: Yes, but Mr. Hoskins put his case slightly higher than that when he was making his application just a moment ago. H e said "All the evidence upon which we would seek to rely at trial". Well, if it is all the evidence we seek to rely on at trial then it is going to be that including that which is disclosed and that, by its very definition, cannot take my Learned friend by surprise because it is his client's documentation. So at the end of the day, and especially given if ----

THE PRESIDENT: Forgive me for a moment. It is a slightly circular argument, and I may have misunderstood it, but we are in a slightly circular situation because I think Mr. Hoskins either has (or is about to) submit that information relating to the price of yellow carophyll is not actually discloseable until we have decided whether or not the amendment is to be allowed. Is that part of your argument, Mr. Hoskins, or not? I maybe putting words in your mouth.

MR. HOSKINS: It is certainly one of the problems, because there is no pleaded case as such at the moment.

THE PRESIDENT: No.

MR. HOSKINS: But it is not that Mr. Randolph has to produce everything he writes on the files, we are saying as far as practicable.

THE PRESIDENT: As far as practicable, so we are just debating what is practicable at the moment.

MR. HOSKINS: Mr. Randolph has a proposed amendment he says. Mr. Randolph say the proposed amendment was based on a particular evidential matter, which is that the price of yellow followed red. Let us just see what the evidence is that they have, and it may well be, having seen that that we do not need to proceed with the strike out application. But they have not told us what the amendment is and they have not shown us anything to show that yellow did follow red. We are not trying to make a fuss about this, if that is what they say

let us see the amendment, let us see the evidence they have and then we will take a sensible view.

That is all we say about it.

MR. RANDOLPH: I am very grateful for that clarification because I had obviously misunderstood Mr. Hoskins's application. I had understood that they were taking a bare jurisdictional point first, which is that you, the Tribunal, do not have jurisdiction to hear on yellow carophyll – whether or not we have any evidence to prove that there was any link. That is how I understood it. Then there after there is a causation point – can you prove that there was some kind of effect. But if that is not the case and it is simply a causation matter, an evidential matter – I can take instructions on this – we would be very happy to provide all the evidence (if we have not already) in the form of the expert report from Mr. Morrell and his supplementary evidence. If that were to cause the application to go off so much the better, not least to save costs. Sir, I am very happy to proceed down that particular path and I can give an undertaking, having taken instructions, that we could provide the relevant evidence that we have in our hands very quickly indeed to avoid any form of wasted time and cost. But what I am very keen not to do is to go down a path whereby we are at a disadvantage at the strike out application by virtue of the fact that there may be evidence which is relevant to yellow carophyll and yet we cannot see it. It is presently relevant, we say. The strike out application has not been heard. It is slightly chicken and egg, but then the Tribunal will, in its discretion no doubt ensure that justice is done as between the parties. We would submit the way of doing that is to have all the relevant information before it and then it can take the decision as to whether the application for the strike out is well founded.

THE PRESIDENT: How long would you like in order to formulate an amendment and identify what evidence you have at the moment or can reasonably obtain within a short period of time?

MR. RANDOLPH: May I take very brief instructions? (After a pause) Sir, I am instructed that the expert evidence from Colin Morrell is in but we have asked for further information from one existing witness, who has not reverted to us yet, on this point, because it has been flagged up and obviously it was right for us to take instructions. We are perfectly happy to put as much reasonable pressure on the individual as possible, however we are now at the end of July. I do not know what this gentleman's holiday arrangements are and so in the circumstances we would be asking for 21 days from today's date which would land us somewhere in the middle of August which is in very good time, we would submit – it gives

two months and a week prior to the Tribunal's suggested time for the hearing of the application and it is a month before disclosure. Obviously what we do not want to happen is for there to be an enormous dispute thereafter between my clients and Roche as to what is discloseable and what is not, and having applications for specific disclosure with regard to yellow carophyll if some form of agreement cannot be reached, but if agreement can be reached then so much the better.

THE PRESIDENT: I would have thought that at this stage we should invite you to serve your proposed amendment with such supporting evidence as you already have 21 days from today as you suggest, which would be 17th August. At that stage the amendment can either be agreed or, if it is disputed, we can still reserve the date in October in order to deal with it, and it may be that after you have served it if it is not agreed there may be possible further argument over further discovery or timetable, or whatever.

MR. RANDOLPH: Exactly.

THE PRESIDENT: But it is probably not fruitful to try to deal with that possibility by directions at the moment, but to cross various bridges as we get to them, which we will do perhaps in early September still giving us quite a lot of time before 28th October to sort out a timetable or to see where we are.

MR. RANDOLPH: Indeed, and we would have liberty to apply on this point?

THE PRESIDENT: Everyone has liberty to apply, so we simply leave it at this stage – seeing whether Mr. Hoskins is content with this – that is the claimant (Deans Food) will serve by 17th August a proposed amendment to their claim together with such evidence as is then available to them. If there is an issue as to strike out as a result of that proposed amendment we will provisionally hear that on 28th October and in between 17th August and 28th October the parties should apply to us for further directions if necessary as to the timetable and other matters that need to be dealt with before that hearing can take place, if it needs to take place.

MR. HOSKINS: I am delighted, that is precisely what I was asking for, Sir.

THE PRESIDENT: I am delighted you are delighted, Mr. Hoskins. Thank you very much.

MR. RANDOLPH: Everyone is delighted.

MR. HOSKINS: Things may go down hill from now! That just leaves the timetable for the strike out application.

THE PRESIDENT: Until we know that there is going to be a strike out application ----

MR. HOSKINS: Shall we just leave everything else?

THE PRESIDENT: I think we will just leave everything else and give directions in writing if we need to as to the timetable for exchanging skeletons and any other consequential matters we

need to direct which we can conveniently do, for example, in the first week of September, or as soon after the August break as necessary.

MR. HOSKINS: The only matter I was thinking of, and I do not think it is going to need a separate direction because part of the strike out application directions were for any evidence in response to our evidence. It may well be what Mr. Randolph is now doing in relation to yellow carophyll is the evidence in response, but I do point out that we do have a separate witness statement. I do not know whether it is convenient to have all the evidence in on 17th August or whether we could have part of it and then ----

THE PRESIDENT: When preparing the evidence that he is going to put in, or indicating what the evidence is that he is going to put in on 17th August, the claimants will bear in mind the existing evidence and seek to answer if and so far as they are able to do so at the time.

MR. RANDOLPH: Yes, and to be very brief on that, the evidence as far as I seem to recall from the additional deponent relates only to the Commission Decision and the fact that the yellow carophyll does not figure in it, and we have dealt with that in both the skeleton and orally today. I can repeat it ----

THE PRESIDENT: I think at the moment we just leave it to the parties.

MR. RANDOLPH: Exactly.

THE PRESIDENT: Who take their own line on this and then we will give any further directions that we need to give.

I think the next thing on our agenda is whether the cases should be heard separately or together, or consolidated, and in what order. Our general provisional view is that these cases should be heard together, not formally consolidated, so they remain separate cases.

In exactly what order we take speeches and so forth I think can be left for a later occasion, but the principle of the issues being heard together seems to us to be a sensible one.

Are there further submissions on that point?

MR. RANDOLPH: Sir, the only concern we have is with regard to costs. My learned friend, Mr. Hoskins, makes the point that it is silly to have cases heard sequentially because there are common witnesses – in our case I think there are two common witnesses maybe – noted and agreed, but we are concerned that our possible "little" claim will sit there in a corner not doing very much and then occasionally pop out for an outing and then go back into its box, whilst my learned friends battle out on the bigger ground, and we are concerned with regard to costs. Supposing the most unfortunate happens, and we were not to be successful in our claim, then there would be an application no doubt by my learned friends for their costs and one would not want them intermingled. It is just placing down a marker that one does not

want some kind of joint and several liability on costs – my clients would be very opposed to that. It would have to be separate and only the costs that were incurred in the context of our particular case save for where there is a generic issue, and there may not be very many generic issues. There are different points on facts and there are different points on evidence and we would be concerned if it were all intermingled, the costs, that is. So I am not asking the Tribunal to make any order as such, but I am just making our concern known because we are relatively small.

THE PRESIDENT: Our normal approach first, as far as costs are concerned we would sort that out on a fair and equitable basis at the end of the day, as we normally do; and secondly, I would have thought that, as Miss Simmons reminds me, we can deal with this problem to some extent nearer the time by establishing a timetable for the hearing that might mean that your clients did not necessarily have to incur costs all the time but could come in at pre-arranged moments and have their say, I just do not know.

MR. RANDOLPH: I am very grateful.

THE PRESIDENT: So the decision in principle is that we will hear the cases together, details to be settled nearer the time.

As far as the main issues in the proceedings are concerned, we are very grateful to the parties for having taken the trouble in their various skeletons to identify for us what they think the main issues are. I would have thought we can probably go on to the next question, which is (apart from the strike out we have already been considering) to what extent it is considered that matters should be decided as a preliminary issue or what issues should be decided in a preliminary way.

I should perhaps say at the outset that the experience, I think of all of us on this Tribunal, and perhaps of some of those in this room, is that it is sometimes counter productive to try to do too much by way of preliminary issue on assumed facts without having a reasonably good idea of what the evidence is and what the factual context actually is, especially in a case such as this when we are all, as it were, together exploring relatively new and unfamiliar territory. So I think we would be glad, with that indication, of some help from all the parties on how they see this side of the case proceeding from here.

Who would like to go first? I think it is probably for the claimants to go first. Mr. Robertson?

MR. ROBERTSON: Sir, at this stage we do no see that there are any preliminary issues that we would wish to have tried separately, so we make no application for any trial of any preliminary issue at this stage.

THE PRESIDENT: So BCL no preliminary issues. Mr. Randolph?
MR. RANDOLPH: None, apart from the jurisdictional point.
THE PRESIDENT: Apart from the one we have already discussed?
MR. RANDOLPH: Yes.
THE PRESIDENT: Yes. The defendants?
MR. KENNELLY: Sir, yes. Clearly we flagged up in our skeleton the issue of pass on, but we do not propose at this stage to make application for that to be heard as a preliminary issue. We are grateful for the guidance from the Tribunal and we are going to park that for the moment.
THE PRESIDENT: So you are not making an application at the moment?
MR. KENNELLY: No, we are not.
THE PRESIDENT: So we will allow the case and the evidence to unfold, at least for the moment, but not really with the idea of a preliminary issue in the forefront of our minds.
MR. KENNELLY: At this stage, yes.
THE PRESIDENT: At this stage. What do you mean by "at this stage"?
MR. KENNELLY: Certainly until the next CMC we make no application and we make no suggestion that the Tribunal consider that as a preliminary issue. We may wish to consider this again and I can only say at this stage we flagged in the skeleton argument and we make no application now that it be heard as a preliminary issue.
THE PRESIDENT: Yes, very well. Yes, Mr. Hoskins?
MR. HOSKINS: Sir, we raised the same point in our skeleton, and we take the same position. The reason why we say we are going to keep it under review is we have pointed out the large whole in all the claimants' cases and we may well want to revisit this issue after disclosure, whilst fully understanding what you said, Sir ----
THE PRESIDENT: The "large hole" being?
MR. HOSKINS: The lack of any evidence that intermediaries passed on any over charge to the claimants, i.e. if there was an overcharge, for example, by Roche to Trouw, and if Trouw itself assumed all that overcharging, did not reflect it in the prices it charged to customers, such as the claimants, then there would be no loss. So we have pointed out that problem with the case and we will keep it under review until disclosure. We fully accept that taking lots of preliminary issues is not helpful, but one of the suggestions, for example, was ADR, which we will come to, and if there is a realistic prospect for narrowing, for example, quantum or issues, then that is something we will keep under review, and this is one of the things we will do.

THE PRESIDENT: Well I am sure all parties will do their best to keep that under review, but it seemed to us – I am now speaking in very general terms – if you take the two cases together there are a number of different factual situations that possibly affect passing on. There are some instances where the claimants say they have been buying direct, and there are no intermediaries in which case one issue is whether the claimants themselves simply absorbed the alleged loss or passed that on to their customers and that would raise questions, for example, about the buying power of supermarkets and that sort of thing. There are other cases where there are intermediaries and that would raise the separate question, as you have just indicated, of whether the intermediary has in some way felt unable to raise its prices to the next layer down, and even if they had raised their prices to the next layer down, i.e. the claimants, there would then be the further question that arises in the first set of facts of whether the claimants themselves had passed that on to the next tier, as it were. All those sorts of issues are issues that we would, in principle, feel more safely decided in the context of a factual context and evidence that we can all understand and have some findings about, either by way of actual findings or by way of a fairly detailed agreement between the parties as to what the facts were so that we can address the issues. So that is how we are seeing it at the moment.

MR. HOSKINS: Sir, I think that is perfectly honest and fair, as it should be. That is how we are seeing it, which is why we flagged it but we are not pushing it.

THE PRESIDENT: Yes, so I think we just leave this point where it is at the moment. I was going to raise with you, since it crops up naturally at this point, some recent correspondence passing between the Tribunal and Freshfields about the position of Trouw, and about a letter that you have annexed to your skeleton argument from Linklaters which in a sense slightly pops out of the blue, as it were without its accompanying context, which raises a question mark in our minds about the use of material such as this from other proceedings. Are you able to comment or deal with that issue?

MR. HOSKINS: Sir, the question was asked, and it is probably our fault for not making clear the provenance of that letter and how it arose in the Trouw litigation. Was it bound by the implied obligation of confidentiality? That is the question we were asked by the Tribunal.

THE PRESIDENT: You have explained, I think, in correspondence that this document, or this letter does not arise as far as a disclosed document, so that the strict text of Rule CPR32 might not apply to it. However, we still have some reservations about the production of correspondence between the parties in one case being produced in another case, perhaps without knowledge in this particular instance, Linklaters, and what we were going to

suggest, I think, for good order's sake is that your clients should write to Linklaters and say that this letter has been produced and ask Linklaters whether they have any observations to make, and copy their answer into the Tribunal so that everybody is clear that nothing is being done, of which no one is unaware, as it were. We, for our part, feel it would be a wise precaution if we did not take that letter into account until that has all been cleared up and there is no confusion about what the status of the letter is or might be.

MR. HOSKINS: I apologise if we have caused a problem.

THE PRESIDENT: I think it is always a good idea when you are producing documents from third parties who may not be fully aware of what is going on, they are made aware of what is going on and that everybody knows where they are.

MR. HOSKINS: We will take that on board and we will obviously write the letter in the terms you have indicated.

THE PRESIDENT: Yes, thank you very much.

MR. RANDOLPH: Sir, can I make one small point? We were copied into the letter from the CAT to Freshfields, and you mentioned that a letter had been received by the Tribunal from Freshfields in reply. We were not copied into that.

THE PRESIDENT: Well you should have been.

MR. RANDOLPH: Or if we were we have not received it. I am sure my learned friend would not have any difficulty with ensuring that (i) we get the letter that was sent; and (ii) we get the letters that will be sent.

THE PRESIDENT: Yes, looking at a copy of the letter that has come to us from Freshfields it is true that it is not copied to other parties in the proceedings. I think the Registrar has a standing instruction that all correspondence to anybody should be copied to everybody so that we ----

MR. RANDOLPH: Unless objection is taken.

THE PRESIDENT: -- unless objection is taken for some reason and unless the Registrar is specifically told that it is not being copied and why it is not being copied, otherwise it gets quite impossible for us to track who has seen what. So perhaps that also could be kindly rectified, Mr. Hoskins.

MR. HOSKINS: Certainly, you would like us to provide a copy to?

THE PRESIDENT: I would like you to copy Freshfield's letter of 23rd July to the Tribunal to the other parties in these two cases.

MR. HOSKINS: You have seen the Linklaters' letter?

THE PRESIDENT: He has seen the Linklaters' letter but he has not seen the response, and in general if everyone copies everything to everyone, everybody knows what is going on. I am sorry, Miss Simmons? [The Tribunal confer]

Miss Simmons is just reminding me that there is again a somewhat chicken and egg problem. The claimants have seen the Linklaters' letter but we do not yet know, until we have heard from Linklaters, whether Linklaters does assert, or might assert any form of objection or any form of confidence in relation to the contents of that letter, so the better course is for that Linklaters' letter not to have any further circulation beyond the circulation it has already received until we have some observations from Linklaters. But in the meantime Freshfields' letter to the Tribunal of 23rd July 2004 ought to be copied to everybody.

MR. HOSKINS: There is one preliminary point that can be dealt with by agreement in the BCL claim, which is the right to sue point, because Taylor Vinters have indicated ----

THE PRESIDENT: They have accepted that they are going to ----

MR. HOSKINS: Exactly, provide evidence of their right to sue by 30th July 2004, so any order should record that.

THE PRESIDENT: So we should have a recital in our order saying that that is a matter that is being dealt with by consent.

MR. HOSKINS: Yes, to provide the relevant evidence or disclosure, however it is put, by 30th July 2004 as to their right to bring these proceedings. That was the only other preliminary point.

THE PRESIDENT: Yes, thank you. The next item on the agenda is the question to what extent matters could be agreed. At this stage it might be useful, although it is not on the agenda, to consider the separate issue of Alternative Dispute Resolution.

If we may once again express an extremely provisional and tentative view on the part of the Tribunal, Alternative Dispute Resolution and Settlement is, generally speaking, highly desirable but we note that in this particular case we are, all of us, in somewhat uncharted waters as to what the legal principles are that apply to the claims for loss that are advanced here, and we are somewhat doubtful as to whether, at this very early stage of the case, an alternative dispute resolution procedure would be an effective way of proceeding until at least some other basic matters of principle have been sorted out.

With that comment, could I invite the parties to express any views they want on either the extent to which matters may be agreed or on the possibility of an alternative means of disposing of the case – of course, any case can always be settled at any time. There is

nothing to stop anybody trying to settle it, but we have, as I say, some hesitation as to whether an actual ADR procedure would be useful.

MR. ROBERTSON: If I respond to that first on behalf of the claimants BCL in that case. I think there are two observations to make. First, it may well be that this is a point better visited after disclosure, once we have seen the state of the evidence. Secondly, the claimants in the BCL case will certainly keep the possibility of ADR open and would invite the defendants in our case to keep their minds open to going to ADR at an appropriate time. Obviously, ADR does sometimes have a lot of utility in cases where legal principles are not sorted out - often one leaves the law at the door at the ADR – so that is not a prerequisite for ADR, but we certainly take on board the Tribunal's observations.

THE PRESIDENT: From our point of view the only point is that there are some cases where the court may feel it appropriate to push the parties in an ADR direction and, at least at this stage of the case, we do not feel we are in a position where we should push anybody in any particular direction.

MR. ROBERTSON: This is just to place on record then that in the BCL case the claimants regard the ADR door as capable of being pushed open at any point.

THE PRESIDENT: Yes, well that is very much up to the claimants.

MR. RANDOLPH: I simply echo and follow my learned friend's suggestion.

THE PRESIDENT: Yes, thank you. Any observations from the defendants? [*No comment*]

Disclosure – where are we now on disclosure. We have a timetable, I gather?

MR. HOSKINS: Can I perhaps deal with this, there are some further points that have arisen, and I can indicate where we have agreed and hopefully we can narrow any issues that may be between us. You will see from the second paragraph of our skeleton in both the proceedings is that Freshfields originally wrote a letter with various suggested case management proposals, which included dealing with disclosure. Ashurst then wrote what they call a composite order, which had slight changes, which had disclosure by category as the basis. In the BCL case Taylor Vinters replied to that proposal first of all agreeing it in correspondence, but it appears in the skeleton argument that they now may not agree to disclosure by category. So we will obviously hear from Mr. Robertson, but that is the first scope for argument.

THE PRESIDENT: Standard disclosure versus by category?

MR. HOSKINS: Precisely, yes. By trying to identify the relevant categories we were envisaging – and I am sorry to use the jargon – a proportionate, focused disclosure. So we sat down and tried to think of the points of issue and focus disclosure in that way. Our intention,

having sent out that letter, that if the claimants thought of any other categories that were missing they would point it out and add to it. Certainly, Deans have done that and I will come to that in a minute. BCL having originally said "yes" to category now just say "no, let us have ----

THE PRESIDENT: So there is the position of BCL, yes.

MR. ROBERTSON: Sir, can I clarify the point right now, because I think we can curtail any discussion on the point. We are happy for disclosure to take place on the basis of the categories set out in the draft order, as we originally indicated. The reference in the skeleton argument, which is badly worded, and that is down to me, was just to make it clear that we regard that as being likely to cover all the relevant documents. Obviously if there are further points which arise as a consequence of that disclosure we consider whether it is necessary to make further applications to the Tribunal for disclosure, and that is all that was intended to convey.

THE PRESIDENT: And you are content with the categories as suggested by the defendants.

MR. ROBERTSON: Yes, Sir.

MR. HOSKINS: That is very helpful.

THE PRESIDENT: So that is BCL.

MR. HOSKINS: That is BCL. So in relation to Deans, I think one has to pick it up at para. 24 of their skeleton argument, because they say "yes", we like the categories, but we think it should be standard disclosure, and I think unless Mr. Randolph nods at me now, that is his position. He is not nodding, okay, so we still have that dispute with Deans. They also do suggest some other categories. It is para. 24. You see, just for completeness, 23 is where they say:

> "The claimant would suggest that the list is simply deemed to be a guide rather than a rigid obligation and that the general rule on disclosure should apply, that is to say that all documents relevant to the matter that is to be determined be discloseable."

So that is where they have joined on standard disclosure. On 24 they nonetheless do suggest, Sir, improvements to our proposal. The first of which is:

> "The claimant would suggest that it be amended to include disclosure of documents recording our evidence in the manner in which the defendants set their prices."

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

The second point raised at paragraph 24 is that it would seem from the draft order there are various intermediaries names, Colborn Daws is not one of the ones named but again we are happy for that to be added.

THE PRESIDENT: Thank you.

MR. HOSKINS: So if there is to be disclosure by category and there is agreement with BCL, and there is agreement with Deans as to what the categories should be if there it is to be by category.

THE PRESIDENT: Yes.

MR. HOSKINS: If I can just say a quick word on that issue - I have already dealt to a certain extent of "why by category" rather than generally. The purpose of it was to carry out disclosure in a focused way, and certainly we had envisaged that if after the disclosure of process is complete, and done on this category basis, if any party thinks there are gaps then obviously they can come back and seek specific disclosure. But the proposal we put forward was intended to be a helpful one and a structured one and that is why we do still stand by the suggestion of disclosure by the lists.

THE PRESIDENT: We regard it as a helpful proposal, thank you, Mr. Hoskins.

MR. RANDOLPH: Do you want me to respond to that, Sir?

THE PRESIDENT: Are you about to rise to your feet, Mr. Kennelly?

MR. KENNELLY: Sir, yes, just to confirm that we agree with what Mr. Hoskins has said, the general approach from our side to the letter from Ashurst was to the same effect. That is just to confirm my agreement.

THE PRESIDENT: Thank you very much indeed. Sorry, Mr. Randolph, I think the only point that is left a bit open – where we have got to so far is that disclosure by category is agreed. You are suggesting a further category in para. 24 of your skeleton and for myself I am not wholly clear exactly what it is you consider falls within that category ----

MR. RANDOLPH: There are two categories, the price setting and Colborn Daws.

THE PRESIDENT: Yes, Colborn Daws, I gather, is not contentious.

MR. RANDOLPH: And nor is price setting.

THE PRESIDENT: Nor is price setting.

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

THE PRESIDENT: Very well.

MR. RANDOLPH: So I think everybody is *ad idem*.

THE PRESIDENT: Let us just see, you are clear as to what the words "recording or evidencing the manner in which the defendants set their prices" is supposed to convey?

MR. RANDOLPH: Yes, to their sellers, to their purchasers.

THE PRESIDENT: To their customers.

MR. RANDOLPH: To their customers, yes.

THE PRESIDENT: You are happy with that formulation, are you, Mr. Hoskins?

MR. HOSKINS: I will take instructions.

MR. KENNELLY: Sir, if I may? One further point arising out of that. Again, in order to be wholly frank and helpful to the Tribunal and the parties ----

THE PRESIDENT: Thank you.

MR. KENNELLY: -- Mr. Randolph ought to be aware that from our side his new formulation is likely to produce very little because Aventis SA have no customers and set no prices in respect of any customers – just so that is flagged up for him.

THE PRESIDENT: Thank you.

MR. HOSKINS: Sir, there is a slight concern on our side as to exactly what is meant, but perhaps the best way to deal with it is for us to have a discussion between ourselves and come up with a form of words. I think we are pretty close to knowing what each other means and that may be the most efficient way of doing it.

MR. RANDOLPH: Absolutely, I entirely agree with that. There is the issue that we raised earlier with regard to relevant material and documentation and product. At the moment our claim

includes yellow carophyll. My learned friend has made an application dated 1st June which has not yet been heard, so strictly speaking any material relating to yellow carophyll should be disclosed. Now because of the way the timetable is set I just want to make sure that we do not have any misunderstandings. I assume that in so far as the categories for disclosure cover matters relating to yellow carophyll they will be disclosed because until this Tribunal orders that we are not entitled to proceed with our claim on yellow carophyll that product should be covered, we would argue.

MR. HOSKINS: I am afraid we are back in the chicken and egg situation which visits this case for a number of reasons.

THE PRESIDENT: I thought we might sooner rather than later, yes.

MR. HOSKINS: The problem with Mr. Randolph's argument is that if the Tribunal does not have jurisdiction to deal with the yellow carophyll claim, then there should not be any disclosure. Our suggestion is that we get on with disclosure of all the other categories – I think probably for us to be sensible we would prepare the documents on yellow carophyll but they should not actually be provided unless and until it is clear that the Tribunal has jurisdiction. So I will get on to the work, but they should not actually be disclosed until it is clear that the Tribunal has jurisdiction to deal with it, and hopefully that can be resolved – it will either be at the time that has been set for disclosure of the other matters or very shortly after if there is to be a hearing on 28th October, but it is not going to hold up the general timetable if I may put it that way.

THE PRESIDENT: In principle if there is a pending strike out application it would very often be the case that orders for disclosure waited until after the strike out application has been determined, otherwise you get disclosure on things which should have been struck out. On the other hand, you cannot really complain if the evidence they produce about yellow carophyll is a bit sketchy if we have not yet had disclosure. I think we will probably just have to leave this particular chicken half in and half out of its egg, basically, and see how we get on!

The parties will send us, what – a draft order that they want us to make?

MR. HOSKINS: I think that is probably the best thing. If we discuss that final point, and we already have a draft order on the stocks.

THE PRESIDENT: Yes, if you could just titivate that final point and then send us what you think and if you cannot agree then we will simply make an order, basically, on some basis that seems to us to be sensible.

MR. HOSKINS: Certainly.

THE PRESIDENT: The next item we have is "Issues relating to confidentiality". Are there any particular matters relating to confidentiality that any one wants to signal that we have not already touched on directly or indirectly? [*No comment*] It does not appear to be the case.

Are there any issues as to evidence that may usefully be considered at this stage? Any points anybody wants to raise? [*No comment*] Apparently not.

The last two points are to discuss a timetable for the conduct of the case, and to deal with any further issues raised or directions sought by the parties. If we deal with the last of those first, are there any other points upon which the parties wish to seek directions at this stage, or other issues that they wish to draw to our attention?

MR. KENNELLY: Sir, yes. In relation to BCL we wish to flag up the application for security.

THE PRESIDENT: You have a security for costs point, yes.

MR. KENNELLY: Yes. Unlike Roche we have an outstanding issue in that respect. I am not sure the Tribunal is aware of the difference in the size of the claims made against Roche. The claims against Aventis are, in the case of BCL, substantially smaller – it is less than half the size of the claim against Roche – in the region of £270,000 before interest.

My points in the skeleton I seem to repeat now. It would be disproportionate to give us anything other than a guarantee, anything that would require is to come back to the Tribunal in order to enforce the security would lead to a disproportionate increase in costs.

The claimants have offered some form of security and it is our submission that it would not be excessive or disproportionate to require them to give us a full security, simply from the point of view of the costs that would be incurred if we come to enforce it. We ask for a timetable for that application.

THE PRESIDENT: Yes, just help me with the detail, Mr. Kennelly. I think they offered a sum of £30,000?

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

THE PRESIDENT: And your application is that that should be supported by a guarantee?

MR. KENNELLY: A guarantee. First of all, Sir, it should be for the sum of £50,000.

THE PRESIDENT: You are asking for 50, yes.

MR. KENNELLY: We are, yes, and it should be in the form of a guarantee.

THE PRESIDENT: And what is being proposed – a guarantee given by the parent, is that right?

MR. KENNELLY: An undertaking by the parent is what is being proposed, yes, by BCL at the moment. There is little between the two from the point of view of BCL, but it is simply a question of costs for us. This claim is already incurring costs which are disproportionate relating to the size of the claim, and we seek to ----

THE PRESIDENT: And your objection to the undertaking, just forgive me for taking you through it, your objection to the undertaking given by the parent?

MR. KENNELLY: Is that it would require us to incur further costs to enforce.

THE PRESIDENT: Yes.

MR. KENNELLY: We are looking for the most cost effective form of security we can obtain in view of the overall size of the claim, and the distinction we make between ourselves and Roche is just that – our claim is for less than half of the claims to be made against Roche.

THE PRESIDENT: Yes. Thank you very much. Let us see what is said.

MR. ROBERTSON: As Mr. Kennelly said, this issue is no longer a live issue between BCL and Roche. As regards BCL and the Aventis companies we are confident ----

THE PRESIDENT: It is not a live issue because they are not seeking it, or you have satisfied them?

MR. ROBERTSON: No, because they have agreed with our proposal.

THE PRESIDENT: Yes, I see.

MR. ROBERTSON: So agreement has been reached for security of costs with the Roche companies.

THE PRESIDENT: And the agreement is what?

MR. ROBERTSON: £30,000, not £50,000 and that is an undertaking given b y the parent company.

THE PRESIDENT: And how would that be enforced in the event of it needing to be enforced.

MR. ROBERTSON: I am reminded that sum is to the second case management conference. As to enforcement, it is an undertaking given by a publicly quoted company.

THE PRESIDENT: So you would sue on the undertaking?

MR. ROBERTSON: Yes, Sir. Our submission is that is perfectly adequate and we would be surprised if this point could not be resolved in correspondence between the respective solicitors. If it cannot be resolved then we say it does not matter, it can be dealt with at the next case management conference.

THE PRESIDENT: This is in relation to if it cannot be resolved as between you and Aventis?

MR. ROBERTSON: Yes, but we would be surprised if the parties reached that position.

THE PRESIDENT: Well they do not seem very content at the moment, Mr. Robertson, however much you may be surprised.

MR. ROBERTSON: Roche did not seem very content only a few days ago.

THE PRESIDENT: I see. What is your objection to giving a guarantee?

MR.ROBERTSON: Just that that involves additional cost in providing some form of bank guarantee, they do not come free of charge. We say why incur additional costs when there is no reason to believe that Premier would not be good to its word.

THE PRESIDENT: Anything you want to come back on, Mr. Kennelly?

MR. KENNELLY: Very briefly, Sir. I hear what my learned friend has to say about the cost of getting a bank guarantee, but this is not an enormous sum of money that we seek, £50,000 and the cost would certainly be a lot less than the cost of Aventis suing on the undertaking. If the Tribunal is looking for the most cost effective form of security, the guarantee is still cheaper and more cost effective than suing the parent undertaking.

THE PRESIDENT: We assume that you would need to sue, that they would not pay and that you would have to sue them.

MR. KENNELLY: Of course, but we must assume that position for the moment based on what my learned friend has said.

THE PRESIDENT: Yes.

(The Tribunal confer)

THE PRESIDENT: At this stage the Tribunal is not persuaded that it is necessary to require BCL to offer a bank guarantee towards Aventis, as is suggested by counsel on Aventis' behalf. What we propose to do on this issue is to make no order today, but there is liberty to reapply at the next case management conference if it remains an outstanding issue. At present, we have no evidence that the parent company of the claimants – Premier – would not be good for the money, or that they would be unwilling to pay if the eventuality arose. Accordingly, we are not persuaded that at this stage we should put Premier to the cost of obtaining a bank guarantee, but we shall review the situation with an open mind at the next case management conference if further matters are drawn to our attention.

MR. KENNELLY: Sir, one further matter I ought to raise, and that is in relation to the right to sue. We sought in correspondence evidence of the right to sue.

THE PRESIDENT: Which they are going to produce by 30th July, is that right?

MR. KENNELLY: Sir, yes, but of course the reason why we wanted that before today was because if it was not adequate we could have indicated we were going to make an application to the Tribunal. Now, we have no evidence, we cannot make such an indication, but we need to keep that open because it may not be adequate and we may need to raise that very quickly with the Tribunal, and that is something that we will ----

THE PRESIDENT: I am sorry that there is a loose end in that respect from your point of view, Mr. Kennelly, but if you are not satisfied with what you get then you renew your application

before the Tribunal by making an application and we will determine it as soon as convenient.

MR. KENNELLY: I am grateful. My instructing solicitor informs me that 30th July is a Saturday as well, we really ought to get it on Friday, 29th - at the very least! If I can take that crumb from today, Sir!

MR. ROBERTSON: Friday by 5 o'clock, no problem.

MR. KENNELLY: Forgive me, if it is a Friday then I withdraw that.

THE PRESIDENT: Well he has offered Friday, so Friday by 5 o'clock it looks as if it is. That, I think takes us finally on to a timetable for the conduct of the case. I think I have to say at this stage that beyond indicating a provisional date for the strike out the Tribunal itself is not particularly advanced in its own consideration of what the succeeding timetable of the case should be. I think at this stage what we would welcome are some observations from the parties as to what sort of indicative timetable they would hope that we might collectively work to.

Have you any provisional views, Mr. Robertson, on where matters should go from here, and how they should unfold?

MR. ROBERTSON: We have the draft order, the composite order put together by Ashurst and Freshfield with which we have indicated in correspondence that we are content, and that probably takes matters about as far into the future as we can see at this stage.

THE PRESIDENT: Can you just take me to that?

MR. ROBERTSON: That is to be found in the BCL bundle at tab E2, p.442. If you have the Deans bundle it is tab 22, p.357.

THE PRESIDENT: Yes.

MR. ROBERTSON: That effectively takes us through disclosure and up to witness statements from the defendants, leaving open the time for the next case management conference. It may be from what the Tribunal has said that the Tribunal is not yet in a position to have an indicative date for that second case management conference.

THE PRESIDENT: Well let us just see how far this draft commands general support among the different parties. Mr. Randolph, are you broadly content with the thrust of this.

MR. RANDOLPH: Broadly, Sir. But as pointed out in our skeleton, we think at para. 22 (of the skeleton) we are happy with 4, 6, 7, and 8 of that consolidated version in terms of timetabling. We just do not quite see why there should be a delay of over two months between inspection of disclosure and when the evidence should be filed. My learned friends say that they are not quite sure – certainly Freshfield (for Roche) say that they are

not quite sure how much documentation will be generated on disclosure. Given the fact that most of the disclosure is in their hands they will (or should) know exactly how much will be generated. They also say in support of their stance that there should be over two months that they may have to obtain evidence from witnesses outside the United Kingdom. Well we do not live in the Victorian age any longer, email does exist, so whether they are in or outside the United Kingdom is, in my submission, entirely irrelevant.

I am not fixed on my suggestion, if really there is an issue and more than two months needs to be taken to get one's witness statements into proper order then so be it. We are keen to get this case on, which is shown by the fact that we are willing to produce relevant evidence and amendments in the middle of August with regard to the strike out issue. The claim was started at the beginning of this year, the Tribunal has stated in the past that it likes to get through cases relatively quickly.

THE PRESIDENT: Yes.

MR. RANDOLPH: I know this is a new and developing area of the law but it is not overly complex in terms of its facts. The disclosure may be complex in terms of the law – query – but it is certainly not (or should not be) massively complex in terms of the facts, it is relatively straightforward. At the end of the day we do not see why six weeks would not be sufficient for the process. Many cases have timetables which are much shorter than that, and Freshfields are not a tiny little firm of solicitors, I am sure they can have relevant people on the case to deal with the evidence as is required and so we would suggest that two and a bit months is a wee bit much – a month to six weeks would be more than sufficient. Then, at least, one can move on to where we go next, because obviously that will end the written part of the case and then one can deal with the time for trial. But the longer one puts off the evidence the longer the trial will take to set down and the Tribunal no doubt is busy, so the sooner we can put the evidence to bed the sooner this trial can take place.

THE PRESIDENT: Yes, that perhaps calls for three observations. Speaking for myself, I think it would be important to have the further case management conference envisaged by para.6 in December, before the Christmas vacation, so one is probably looking at provisionally something like the second week of December for that case management conference. I would have thought that the envisaged timetable ought perhaps to build into it a bit more flexibility between items 5 and 6 to enable the claimants (if so advised) to consider the possibility of serving witness statements in reply to the witness statements served by the defendants. In connection with the preparation of the witness statements we ourselves have one question, which I am reminded to pose by Professor Bain, which is whether at this stage we

need further witness statements, at least in any detail, dealing with pure matters of quantum. It may very well be that there are issues of causation and arguments of law that we can deal with, without needing at this stage for a lot of time and effort to be devoted to exact calculations of quantum, I do not know. That would leave me, myself, to wonder whether the proposed timing for the service of the defendants' witness statements – 26th November – is not perhaps bit generous and whether, as Mr. Randolph suggests, we might shave that by a couple of weeks, in other words, six weeks after disclosure. Mr. Hoskins?

MR. HOSKINS: We would like to stick with our two months – or at least make an attempt to stick with it. Given the timetable that has been agreed for disclosure of a list of documents for inspection, it is likely – given the way these things work – that inspection will not take place until 28th September 2004, because the inspection is set down for seven days after ----

THE PRESIDENT: Let us just see, this is disclosure by the 21st, inspection by 28th, so that would take us to?

MR. HOSKINS: 28th September 2004.

THE PRESIDENT: Six weeks from 28th September is 9th November.

MR. HOSKINS: The other points, and we have made some in the skeleton and some arise out of what Mr. Randolph has said – I am sorry.

THE PRESIDENT: It is all right, just a moment. [The Tribunal confer]

MISS SIMMONS: I wonder why the inspection is seven days after disclosure. It is a very old procedure, not in litigation of this sort, where people send their list and then they have to agree when they were going to come and inspect. I cannot see any reason in a case of this sort why the solicitors cannot get together and agree the way of doing the inspection up front, so that the seven days is not wasted. There may be a very good reason, but I do not understand it.

MR. HOSKINS: May I take instructions? (After a pause) The reason why seven days is built into the timetable is that after lists have been exchanged, it is then envisaged that discussions may take place because rather than simply copying everything there may be certain documents that the claimants do not want to see, or already have, so it is simply that sort of management in terms of which documents do you want copied? Now, if seven days is excessive we can cut that down to three or four.

MISS SIMMONS: I did not understand that that was the reason for the seven days because that explanation is that you give your list on day one and the other side come back and say they want all these documents copied. The old idea of seven days, which is why I say from my point of view it seems to be excessive, what used to happen is that that seven days was to

make arrangements in relation to personal inspection and then there was a date agreed for personal inspection and it would not be before seven days. Now, where you are dealing with copies, if that is the way it is going to be done and not personal inspection, then I do not see any reason why time does not start running from the first day and, if the claimants are particularly astute and write and say they want all the documents, why an extra seven days has to be built into the timetable – they may do it the next day. On the other hand, they may take three days. It does not seem to me that inspection in this sort of case between firms used to dealing with it has any relevance.

MR. HOSKINS: The only relevance is that if the lists are not exchanged until the last day, and discussion takes place about whether each side wants all the documents – they may not – because there may be a category of documents which fall within the disclosure obligations now identified which run to hundreds of pages which the other side does not want. So it is not a case in every piece of litigation the other side will simply say "Yes, we will have copies of everything".

MISS SIMMONS: Yes, but that is not what the seven days is about. The seven days was there was not inspection until the end of seven days so that you could not start that procedure in seven days, but I do not see why the procedure should not start on the first day if the other side say "Look, we want X documents", and they tell you on the first day, there is no reason why you should not be getting on with it.

MR. HOSKINS: With all respect I am not sure there is anything between us. I agree we are not talking about inspection in terms of physical inspection, but the way in which the timetable would run in this sort of case is simply exchange of lists, discussion about copying and provision of the copies.

MISS SIMMONS: Yes. If the claimants are prepared to have six weeks running from the original date, 21st September, then they are the ones penalised effectively because they are doing their witness statements and they want to see the documents, and if they are prepared to have six weeks I do not see the problem that you have because you have the documents.

MR. HOSKINS: We have to prepare our witness statements from a certain time of disclosure, but we are getting disclosure from him as well – we are each getting disclosure from each other, but the categories will include documents that will come from them, so there will be an exchange and what we are suggesting is that what is the old fashioned inspection period is when we discuss a practical way of copying rather than just copying everything and then it would be practical for us because it runs from certain date, but that is why, if it is to be

made seven days that is why the seven days are there and it is because we will be getting disclosure from them as well we envisage.

MISS SIMMONS: What you are really saying is that the seven days is the period during which you have to give your list to the other side as to what documents you want copied?

MR. HOSKINS: Yes, that is when the parties will discuss what needs to be copied, and that is why I say if seven days seems long it is just a classic time, but if it is three or four days it could be ----

THE PRESIDENT: If we said inspection to be completed within seven days.

MISS SIMMONS: No, I do not think that is what they are envisaging, but also I do not think the word "inspection" is right. I think what it needs to be is disclosure by 21st September, and if you are going to do it by copies then it ought to be agreed list of documents required by either 28th September or some other date, and then to be produced by a particular date, and then you know exactly what you have to do and when, because, if what you are telling me is it is when you receive the documents then that is not actually the old fashioned inspection.

MR. HOSKINS: But the parties have agreed an order which may not reflect what they are intending to do. My understanding of how this will work, how it is intended to work, is that the list of documents will be exchanged on 21st September, discussions will take place about what needs to be copied and within seven days thereafter the copies will be delivered to each side.

THE PRESIDENT: Why do you not see if you can revise the wording to reflect that a bit more clearly.

MR. HOSKINS: That is certainly the way we envisage it, and that is why one has the two step process perhaps unhappily worded as "disclosure" and "inspection", but that is certainly the way I think everyone intended ----

THE PRESIDENT: The disclosure being, as has just been pointed out, reciprocal, there is no built in timetable for any further evidence from the claimants at this stage.

MR. HOSKINS: Sir, before we move on to that we are still on the six weeks, two months, unless – before we move ----

THE PRESIDENT: Well it is relevant to ----

MR. HOSKINS: I am sorry, Sir.

THE PRESIDENT: It is relevant to the six weeks. If we, as the Tribunal – this is very provisional because none of us have necessarily complete diaries with us, but I think as a sort of target date we would be looking at something like 7th December for a case management conference, which is a Tuesday. If we fixed the further case management

conference provisionally for 7th December, I would have thought we could say at this stage the defendants' evidence could be served by 9th November, that is saving two weeks. There is always liberty to apply later on for further time if necessary, and on that timetable we could require any further evidence from the claimants in response by two weeks after that, as an indicative timetable which would mean, it seemed to us, that most of the stuff would be in by the time of the next case management conference on 7th December. I think that is the timetable we shall provisionally set unless there are overwhelming objections about to be made. [*No comments*] Very well, are there any other points anyone would like to raise?

MR. HOSKINS: There is only one point, Sir, which I think was raised but we may all have lost sight of, namely, what the evidence should relate to, whether it should cover quantum.

THE PRESIDENT: Yes, the quantum point.

MR. HOSKINS: I am not sure whether that was to be developed.

THE PRESIDENT: We simply throw it out that at this stage of the case there are probably important issues of law and important issues of causation, whether the parties need to spend a lot of cost working out precise details of quantum is something I think we would see as a subsidiary issue and not perhaps necessary to develop at this stage. We simply give that indication to the parties from the point of view of saving costs.

MR. HOSKINS: Certainly. Obviously we will take that away and if needs be there can be discussions between the parties.

THE PRESIDENT: There can be discussions between the parties or you can write to the Tribunal for clarification or whatever. When we are a little bit further down the line we will probably write to the parties anyway in good time before the next case management conference, or you can write to us with some further indications of what would be a sensible date for a hearing and time estimates, and how long such a hearing is likely to take. I think it is probably a little premature to go any further today than we have done. But on the envisaged timetable I think we are shooting for a hearing about February of next year, are we not?

MR. HOSKINS: It depends on the experts' reports.

THE PRESIDENT: It may well depend on all sorts of things.

MR. RANDOLPH: Including yellow carophyll, of course.

THE PRESIDENT: Including yellow carophyll, yes.

MR. RANDOLPH: I am sorry to come back to that, and the way we are doing disclosure at the moment is that they are going to get it ready but not disclose it to us, and if we are not in

agreement about how we should go forward then we will have the hearing on 28th October and so there would then have to be built in to any form of timetable – supposing we were successful, we went to the application, a day's application, and we succeed in opposing the application, they have to disclose the material, we then have to produce witness statements and the date 26th November would be with liberty to apply with regard to yellow carophyll, perhaps so that we could build in because you might not get the disclosure immediately.

THE PRESIDENT: Well let us see how we get on.

MR. RANDOLPH: Let us see how we go. It may be it will be sufficient, there is nearly a month there, it may be we can deal with it. I am grateful.

THE PRESIDENT: Yes. At the time of the strike out application - I do not know how you see that but we would not envisage the strike out application taking more than half a day to hear, and it may well be the sort of application that we can deal with pretty promptly.

MR. RANDOLPH: Yes, indeed.

THE PRESIDENT: Then one of two things, either you lose the strike out application in which case the whole thing goes away, we leave aside for planning purposes the question of an appeal for the time being, or you win the strike out application in which case we will give further directions then and there as to how that side of the case is to be progressed. So we hope for the best.

MR. RANDOLPH: Yes.

THE PRESIDENT: Thank you all very much indeed.

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