

IN THE COMPETITION
APPEAL TRIBUNAL

Victoria House,
Bloomsbury Place,
London WC1A 2EB

Case no. 1028/5/7/04
1029/5/7/04

17th December 2004

Before:
MARION SIMMONS QC
(The Chairman)

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 & OTHERS

Claimants

and

ROCHE PRODUCTS LIMITED & OTHERS

Defendants

Aidan Robertson (instructed by Messrs. Taylor Vinters) appeared for the
Claimants BCL Old Co & Others.

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

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

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

Transcribed from the Shorthand notes of
Beverley F. Nunnery & Co.
Official Shorthand Writers and Tape Transcribers
Quality House, Quality Court, Chancery Lane, London WC2A 1HP
Tel: 020 7831 5627 Fax: 020 7831 7737

PROCEEDINGS

1 THE CHAIRMAN: May I thank you all for your very helpful written submissions. I have
2 considered them very carefully and I would like to make some opening remarks as is usual in
3 this Tribunal on the various topics we need to cover today.

4 There is no particular order in the way I am doing it - I think I have taken it actually
5 from Roche's skeleton. First, the agreed Statement of Facts, which Roche have started drafting.
6 For my part I found that very helpful, and although it may, at the moment, be premature to
7 come to an agreed Statement of Facts, I would encourage all parties to endeavour to produce
8 an agreed Statement of Facts, and I am incorporating that in to a preparation timetable.

9 Secondly is the list of issues and I thank all the parties for their consideration of that
10 topic. What was in the mind of the Tribunal, when asking for a list of issues was much more
11 like what has been prepared by the Roche Defendants than what has been prepared by the
12 Claimants. I note the submissions of Deans as to the potential difficulties which they envisage
13 in defining issues. However, my experience is that it is helpful in particular, having regard to
14 the overriding objective for the issues to be clearly defined. For today it seems to me, subject
15 to any submissions, that the most helpful way to proceed is if we use the Roche list of issues,
16 but again I encourage the parties to work together to finalise an agreed list which contains all
17 the relevant sub-issues - and again I am including that in a preparation timetable.

18 Thirdly, expert evidence. Expert evidence is divided into first of all methodology and
19 secondly calculation. Mr. Morrell, as I understand it, uses methodology which is called the
20 straight line method and the currency adjustment. He assumes that the prices would have
21 progressed in a linear manner, and he then proceeds on that basis - I understand that is the way
22 that he is doing it. That can be seen I think in the BCL case at file 1 tab 8, para. 6.3.5 at p.21 of
23 his report. That raises the question, as I see it, of whether the methodology used, and the
24 assumptions made by Mr. Morrell are appropriate. The defendants submit that the
25 methodology and assumptions are inappropriate and they, as I understand it, want to call
26 Dr. Biro as an expert to give evidence that Mr. Morrell has proceeded in these respects on the
27 wrong basis, and for Dr. Biro to give expert evidence of what he says is the correct basis. As
28 I have said, it seems to me at the moment that what the claimants are doing are proceeding on
29 the basis of principles which Mr. Morrell is assuming.

30 As was mentioned at the last CMC by this Tribunal, this means that the claimants are
31 not producing any expert evidence to support Mr. Morrell, and that may mean that the Tribunal
32 is left by Dr. Biro's methodology being effectively unchallenged. That is the concern that
33 I think was being alluded to last week by the Tribunal. However, it appears from the
34 Claimants' skeleton argument that the Claimants do not wish to adduce further expert

1 evidence, save possibly in response to the Defendants' expert evidence and the Claimants are
2 represented by experienced and sophisticated litigators. So subject to any oral submissions that
3 are made today I am, at the moment, not minded to interfere with the way the Claimants wish
4 to present their cases, the Tribunal having made the remarks that they made last week, and
5 having regard to the submissions that have been put into the skeletons today.

6 Then we turn to the calculation element of the experts evidence, and it seems to me
7 that expert accountancy evidence as to the calculation of the loss is appropriate, and of course
8 that calculation needs to be based on the appropriate methodologies. So expert accountancy
9 evidence will be required to quantify the loss on both the methodology relied on or assumed,
10 by the Claimants, and the methodology relied on by the Defendants.

11 Can I thank the Defendants for obtaining the letter from Mr. Forbes, which I have
12 seen this morning. He appears to have the sort of relevant experience to deal with those
13 calculations as an expert. So it seems to me, having regard to the skeleton arguments, and
14 subject to any submissions today, that it would be appropriate for the defendants to instruct
15 separate experts, one on methodology and one on calculation.

16 The Tribunal hopes that there will be substantial agreement between the experts on
17 the calculations and that any disagreement is clearly identified, and that should become
18 obvious in the experts' statements following a meeting of experts. Can I just make one other
19 remark about the expert evidence? All the expert evidence is founded on the basis of
20 assessment being on tort principles. Although this is not a matter for today, I would just like to
21 remind all parties that this Tribunal, at the July hearing, and at the last CMC indicated our
22 concerns about that. It is not appropriate for me today to say any more as to this, save to
23 mention that, notwithstanding the correspondence which we have seen on the matter, there is
24 still a live question in the minds of the Tribunal.

25 Can I now turn to the timetable for preparation? We have, overnight, prepared
26 a provisional timetable which is based on, I hope, the various matters dealt with in the
27 skeletons, and I think the Referendaire is now going to hand it down. (Document handed
28 down). There are two pages and, at the moment, just look at the top page. It works bottom up,
29 because I started with 21st February, which is the main hearing and I have worked backwards,
30 so if we look at the bottom, at the last box - 7th January, Dr. Biro's report on methodology.
31 Then on 14th January Mr. Forbes' report on the defendants' calculations on the Claimants' and
32 the Defendants' methodology. Then on 21st January the Claimants' expert who, at the
33 moment, is Mr. Morrell, to reply on the methodology and the calculations.

1 On 26th January, the various Statements of Facts, issues, and the cross-examination
2 schedule to be prepared. On 26th January, also the index for the trial bundles. Then what
3 I thought might be useful, and this is subject to your submissions - it is all subject to your
4 submissions - to divide the meeting between the experts, so that there is a methodology
5 meeting and then there is the meeting of all experts, which is effectively applying the
6 calculations to the methodology and one was on 27th and one was on 28th so that there was
7 a clear break and there could be a consideration overnight. Then by 31st that all trial bundles
8 are prepared and served on the parties - not on the Tribunal but on the parties. On 2nd February
9 the experts should provide their statements of what is agreed, what is not agreed, and the
10 reasons for their disagreement, so we should have narrowed the experts' issues. Then on 11th
11 February by 4 p.m. the parties lodge with the Tribunal the written submissions which will be
12 effectively their opening statements, and the trial bundles.

13 I have included a pre-hearing review which we have timetabled into the Tribunal's
14 diary, so that the week before the hearing if there are any, as I call them "loose ends" that need
15 to be cleared up that can be dealt with the week before so that we do not waste time at the
16 beginning of the hearing. What I think we would propose for that is that I sat by myself
17 because it will be only directions. Then that gives time for the main hearing, and hopefully
18 there is ample time within that timetable that it is sufficiently flexible so that the case will be
19 prepared properly before the hearing. That is the possible timetable to give us something to
20 consider.

21 The next matter is further disclosure. The Roche defendants are seeking further
22 disclosure, as I understand it, of the underlying computer records of the Claimants' IT system,
23 which relate to the total amount of feed produced by the Claimants and the amounts of feed
24 consumed on the Claimants' farms for the period October 1991 to February 1999. It is not
25 clear to me whether this is sought from BCL as well as from Deans - I think it is just Deans.

26 It seems to me at present although, of course, I will hear the parties' submissions, that
27 if the position is that the information which Mr. Morrell accepted and on which he made his
28 calculations can be shown from some other disclosure in the case to be likely to be inaccurate
29 then the source information probably should be disclosed and considered by Mr. Morrell and
30 by the Defendants' experts. But it does seem to me that that is a matter which the parties ought
31 to be able to sort out between themselves, although from a letter which I think the Tribunal
32 saw yesterday that has not been the case. It does appear from the letter yesterday that the
33 Claimants are saying that this is not a matter to raise today. From what was said at the last
34 Tribunal hearing I certainly had anticipated that the matter would be sorted out during the

1 week and if it was not sorted out it was a matter that would come before me today. So I do
2 expect to be addressed on that.

3 The next issue is the redaction issue. Deans, in its skeleton, have referred to a problem
4 which arises because a large number of documents disclosed by Roche have been wholly or
5 partly redacted. It does not seem to me that that is a problem in the BCL case.

6 MR. ROBERTSON: It is not.

7 THE CHAIRMAN: It is not. Roche have not deal with that in their skeleton, so I do not know what
8 the Roche defendants' submissions are on that. It may be that it has been resolved, but if it has
9 not then that is a matter that we ought to address today.

10 The next topic is ADR. I note that the parties are all in agreement that a mediation
11 process should take place. As I understand it the parties do not seem to be *ad idem* as to its
12 timing and, subject to any submissions I hear today it does not seem to me that it would be
13 appropriate for this Tribunal to direct mediation to take place at any particular stage of the
14 preparation. For my part, I believe that it is a prerequisite of the mediation process that it
15 should be undertaken by parties who are willing to undertake it and therefore for me to direct
16 that it should be at any particular stage, where one party may not be willing to do it does not
17 seem to me to be in the spirit of mediation. But I would encourage the parties to undertake
18 mediation at the earliest practicable opportunity so as to avoid unnecessary costs being
19 incurred. But in saying that, I am not making any observation as to what I consider to be the
20 earliest practicable opportunity. I also note from para.6 of the Aventis skeleton, that it is still
21 being maintained that all purchasers and sub-purchasers are needed at the mediation, and all I
22 would say about that is that I remind all parties of the Tribunal's remarks as to that at the last
23 CMC.

24 Bundles for trial. Consideration needs to be given to the most appropriate method in
25 this case for preparing the files of documents to be submitted to the court, and to be used at the
26 hearing. That includes whether there should be one chronological bundle - earliest date first -
27 or whether there should be chronological bundles for each issue, or whether the documents
28 referred to by the witnesses should be annexed to their statements or whether there should be a
29 core bundle with the documents included chronologically and then the witness statements
30 having references to the core bundle, so that there is no duplication. I hope that the parties will
31 discuss that between them and agree a sensible format. It would be very helpful if the witness
32 statements cross referred to the place in the bundles as they are provided to the court. That is
33 the usual practice in the main court system. I assume that all the witness statements are now
34 complete and that is not outstanding. If it is not then we need to consider that.

Provisional timetable for hearing. On the second page of the document handed down by the Referendaire we have attempted to set out a provisional timetable for the main hearing. Having considered all the skeletons it seems that it is possible to hear this case in eight days. What I - and I am sure the other members of the Tribunal - hope is that the times for witnesses can be reduced once the facts and issues have been agreed, or we know what is not in agreement. The way that I have set that out in this schedule is that instead of having skeleton arguments I have called it "opening statements" which are written submissions, which will include the legal issues, and they should be provided by 11th February which is effectively just over a week before the hearing, which gives the Tribunal time to read them and therefore be effectively up to speed when we start, so that there will be, on this basis, no opening statements or openings at the beginning of the hearing and, instead, we will go straight into cross-examination. From the timetable which I think was included in all the skeletons very helpfully, the BCL cross-examination of the Defendants' witnesses and any re-examination ought to be able to be covered in a maximum of one and a half days, the Deans' in a day and the Defendants in two and a half days, so that five days should be sufficient for all the witnesses. That is witnesses of fact.

Then the expert witnesses and once the reports have been prepared, that there have been meetings, that we have the agreed statements, I would hope that the experts would not take more than two days. What I then anticipate is that written submissions are then provided and so we would have a break from 1st March so that that can be prepared, and I have allowed nearly a week for that. If they were provided in writing on 7th March then we can have a day for final oral submissions on 10th March. It is very important that we do manage to have the final oral submissions by 10th March because of the timetable of the Tribunal in other matters. I should also say that these are maximum time estimates and it is anticipated that when we get a bit nearer to the hearing date we will be able to narrow them a little bit more.

The next matter that perhaps I should mention is transcript arrangements. As you know, this Tribunal provides a transcript which goes on the website at some time after the hearing. That is not a daily transcript. So the question arises as to whether the parties would find it helpful to have a daily transcript in this matter or whether they are anticipating using Livenote. For my part, subject to the request of the parties, I do not think this is a case for Livenote unless everybody really wanted it, but I think the Tribunal would find it helpful if we had same day delivery of the transcripts, but how the transcripts are to be delivered and what arrangements are to be made for that the parties need to liaise together and then liaise with the Tribunal so that proper arrangements can be made.

1 The other matter, which is purely an administrative matter, is that the hearing is
2 intended to start on 21st February, which is a Monday, and this Tribunal would give access to
3 the parties on Friday to set up the court, so that may make it easier. We realise that possibly
4 counsel will not want to give up their papers over the weekend, but at least the rest of the court
5 can be set up and counsel can make arrangements as to where their papers are to go, so that
6 might be helpful.

7 The witness schedule that was provided as a pro-forma with a letter from this Tribunal
8 earlier this week: I think it was pointed out that we had not included all the witnesses. We only
9 intended to provide a pro-forma and we did intend that the parties would complete it.

10 I think the final matter that I have not mentioned is a typographical error in the last
11 order made by the Tribunal. I think that has been pointed out to us as well, and we are taking
12 steps to amend the error.

13 I hope I have covered all the topics. If there are any other topics which need to be
14 aired today, then I am sure you are going to let me know. If it is helpful I will rise for five
15 minutes, or a bit longer so that you can all consider what I have said and we can decide what
16 we need to air today in front of me. Would that be helpful?

17 MR. HOSKINS: Yes, indeed. Could I suggest perhaps 10 or 15 minutes?

18 THE CHAIRMAN: Yes, whenever you are ready if you would tell the Referendaire.

19 MR. HOSKINS: Thank you very much.

20 THE CHAIRMAN: Thank you.

21 (The hearing adjourned at 11 a.m. and resumed at 11.20 a.m.)

22 THE CHAIRMAN: Mr. Robertson?

23 MR. ROBERTSON: Madam, we found the Tribunal's indication of its provisional thinking very
24 helpful indeed and by and large we are in agreement with it. Perhaps if I just take the headings
25 one by one and let you have our observations on them.

26 The Agreed Statement of Facts. We know the Tribunal would find that helpful. We
27 will work with the defendants on an agreed Statement of Facts insofar as agreement is
28 possible. We note that in the indicative timetable, there is a deadline for that, and that seems to
29 us to be sensible.

30 The List of Issues. We note that the Tribunal prefers the Roche format to that of ours
31 and that is fine, we will work with that and we will let the Defendants have our comments on
32 their draft.

33 THE CHAIRMAN: Our point is that we would like a detailed list, it does not have to be the Roche
34 list as it is now, but we want a detailed list, with issues and sub-issues.

1 MR. ROBERTSON: More detail rather than less.

2 THE CHAIRMAN: Yes.

3 MR. ROBERTSON: Yes.

4 Expert Evidence. You very helpfully divided that up into two types of expert
5 evidence - methodology and calculation. If I can just deal with calculation first. That
6 essentially involves Mr. Forbes, which you have timetabled for submission by 14th January,
7 and we would seek permission to serve a further report from Mr. Morrell in response to that on
8 calculation.

9 THE CHAIRMAN: That was 21st January.

10 MR. ROBERTSON: 21st January, yes. The only comment I would make on that is Mr. Morrell is an
11 audit partner and January and February are his busiest times. We would hope to be able to
12 comply with that timetable, if there is a problem with that we would notify the Tribunal as
13 soon as possible, and seek a short extension of time, but we do not want to derail the timetable
14 that you have set.

15 THE CHAIRMAN: No. Normally I would want to be co-operative about that. However I think
16 maybe you can find out from Mr. Morrell now - within the next day or so - and see how he can
17 accommodate this timetable, because even a short extension could derail it.

18 MR. ROBERTSON: Yes, we do not want that because we think the timetable is very sensible. That
19 was just to flag up that possibility, but we will find out as soon as possible.

20 In response to methodology, it has only become recently apparent to us that that is
21 what Dr. Biro was being instructed on. We have said in our skeletons previously that we
22 would, if necessary seek permission for a further expert report and it does look, in the light of
23 what the Tribunal said about separating out the issues on expert evidence that it is going to be
24 necessary to have a separate expert on methodology. That does raise the question as to
25 whether the Tribunal, rather than allowing permission for Dr. Biro to serve a report, whether
26 the Tribunal would like to take the step of instructing an expert itself. It has the power to do so
27 under Rule 19(2)(l). It is a procedure that the European Court of First Instance adopts from
28 time to time. The attractions to it on this side are that there would be a saving of costs.

29 THE CHAIRMAN: Who would pay for the expert, the Tribunal?

30 MR. ROBERTSON: It would be within the costs of the action, and it would be a cost that would
31 have to be incurred by which ever party is ordered to pay costs at the end of the action. The
32 Tribunal would deal with it as part of its general discretion as to costs. It is not something that
33 we say should be funded by the taxpayer. It will be funded by part of the costs of litigation, but
34 that is within the discretion of the Tribunal generally.

1 THE CHAIRMAN: But then which ever expert was appointed, and whether it is a single-joint
2 expert, or one appointed by the Tribunal, however one does it, if you have one expert are you
3 suggesting that the one expert comes up with one theory, and therefore that is the
4 methodology?

5 MR. ROBERTSON: That is what the European Court has done on previous occasions, it itself
6 having a more inquisitorial approach than an accusatorial approach has itself relied upon
7 a report produced by an expert appointed by the court. It seems to us then that the expert is
8 viewing things from a single perspective and then the parties make their submissions on the
9 basis of that report. We flag it up as a possibility because we are concerned (as the Tribunal
10 knows) about the costs of this action spiralling out of control. The fall back would be for us to
11 seek permission to serve an expert on methodology in response to Dr. Biro if he is given
12 permission to serve his report.

13 THE CHAIRMAN: There is another fall back which would be a single joint expert, and that could
14 be Dr. Biro, or it could be someone else. Dr. Biro has started, or it could be somebody else.
15 One could see if one could agree a single joint expert.

16 MR. ROBERTSON: We could attempt to do that. I think Dr. Biro having been instructed probably
17 by the Defendants, that we would not regard him as perhaps the appropriate person in those
18 circumstances. I think if that were the Tribunal's thinking we would adopt the alternative
19 submission which is in the ordinary course of events, the Defendants having been given
20 permission to serve an expert on methodology, we would be given permission to serve an
21 expert report in response to that. It is within the Tribunal's timetable, which is -----

22 THE CHAIRMAN: If you were going to serve an expert's report on methodology, when could you
23 do it by?

24 MR. ROBERTSON: We thought we would comply with the Tribunal's deadline of 21st January in
25 your indicative timetable, so we would be serving expert reports on that day, both from
26 Mr. Morrell and from an expert on methodology. We assume that Dr. Biro's report would be
27 relatively focused and precise. It is dealing with a point of principle, it is dealing with one
28 paragraph of Mr. Morrell's report and therefore we would not expect it to be a lengthy expert
29 report. We would expect it to be focused, and we think we would be able to line up an expert
30 econometrician to respond to that within that timetable.

31 THE CHAIRMAN: That does mean that Mr. Forbes has done his calculations on Mr. Morrell's
32 assumed methodology, which may not be relevant in the hearing because there is some new
33 methodology.

1 MR. ROBERTSON: I think that is going to be inevitable, if we have Dr. Biro's report at the
2 moment preceding Mr. Forbes by a week. I think these are things which would have to be
3 sorted out at the meeting of experts, to see what was agreed, put forward what their alternatives
4 would be on the basis of the different assumptions.

5 THE CHAIRMAN: I am just looking at the timetable. Let us see what everybody else says on that.
6 Anyway, you would like now to have your own expert on methodology.

7 MR. ROBERTSON: That is our fallback submission.

8 THE CHAIRMAN: Well either your own expert or we appoint a Tribunal expert.

9 MR. ROBERTSON: Yes. That is the third heading "Expert Evidence".

10 Timetable for Preparation. We are happy with the indicative timetable, we think it is
11 realistic.

12 Further Disclosure and Redaction were both issues for Mr. Randolph on behalf of
13 Deans.

14 ADR. We note the Tribunal's comments. If this were a High Court action the High
15 Court would normally order a stay so that ADR could take place.

16 THE CHAIRMAN: I am not sure that they would normally, they might.

17 MR. ROBERTSON: Well they might. It is certainly a step the High Court could consider.

18 THE CHAIRMAN: It is a consideration which we have and which they have.

19 MR. ROBERTSON: Yes.

20 THE CHAIRMAN: But I have indicated.

21 MR. ROBERTSON: You have given your indications. We note that there is a very obvious window
22 in the indicative timetable to the main hearing of 14th to 18th January and we think that would
23 be a very suitable time for a mediation to take place.

24 Bundles for Trial. We note your comments and we will reach agreement with the
25 Defendants on the best way of presenting the evidence in a convenient form. I think our initial
26 thinking is a core bundle plus a chronological bundle of all the documents in the case, with
27 probably separate bundles of the witness statements minus their exhibits.

28 THE CHAIRMAN: Well I think once you are a little bit further down the line of knowing where
29 you are going you will know what needs to go in the bundles, and then the most convenient
30 way - so as there is no duplication.

31 MR. ROBERTSON: That is most important, yes.

32 The Provisional Timetable for the Hearing - the second page of the document that was
33 handed down. We are happy with that save that I think the Defendants' cross-examination of
34 the Claimants' witnesses ought to proceed our cross-examination of the Defendants' witnesses.

1 THE CHAIRMAN: Can I say that when I did this what I was doing was working out the number of
2 days. I was not working out actually the order. I think that may be something that we leave
3 over, that is either agreed or is dealt with at the pre-hearing meeting.

4 MR. ROBERTSON: We will attempt to seek agreement with the Defendants on that, and perhaps
5 timetable the actual witnesses themselves so you have it absolutely detailed who is turning up
6 when.

7 THE CHAIRMAN: Absolutely. Yes, that is what we intended.

8 MR. ROBERTSON: The sooner we do that the better, because people have commitments and so
9 on.

10 Transcript Arrangements. We would appreciate daily transcripts, so we will liaise
11 with the Defendants about obtaining that.

12 THE CHAIRMAN: Yes, because that is at the parties' cost, not at the Tribunal's cost.

13 MR. ROBERTSON: Absolutely, yes.

14 The Hearing and Access to the Court. That is very helpful.

15 Witness Schedule. We understand the basis on which that was produced; and the
16 typo, yes we note that.

17 Those are our submissions.

18 THE CHAIRMAN: Thank you very much. Mr. Randolph.

19 MR. RANDOLPH: Madam, I think I can take this relatively shortly save for the two issues that are
20 specific to Deans because, in essence, we agree wholeheartedly with my learned friend
21 Mr. Robertson and, therefore, mostly with what the Tribunal has put forward.

22 I would just make two or three comments, if I may. We note the Tribunal's wish to
23 have a more detailed explanation of the issues and I am grateful that you, Madam, referred in
24 your opening remarks to Deans' concern about this. We are more than happy to set out what
25 we see are the sub-issues and the issues in the case. What we do not want to do is to find
26 ourselves restricted in any way thereafter. This is the experience that has happened in other
27 matters whereby one sets out a template and that becomes a very rigid framework, but this
28 Tribunal, I know, does not work on that sort of basis and I just flag it and set it out. Obviously,
29 it will be of assistance to all parties and the Tribunal if we can see, but obviously if other issues
30 come up during the course ----

31 THE CHAIRMAN: Well they have come up and they have to be dealt with.

32 MR. RANDOLPH: Indeed, I am grateful.

33 THE CHAIRMAN: But one needs to focus the evidence, and one needs to know where one is going.
34 If it turns out that something happens at the hearing that is another matter.

1 MR. RANDOLPH: Indeed.

2 THE CHAIRMAN: But one should be able to focus where one is going beforehand and it is useful
3 that everybody knows where everybody is going - in particular the Tribunal.

4 MR. RANDOLPH: Indeed - well it helps if the Parties know where they are going.

5 THE CHAIRMAN: The Tribunal cannot know where it is going if the parties do not know!

6 MR. RANDOLPH: Yes, indeed.

7 Expert Evidence. We entirely agree with my learned friend. It is absolutely clear that
8 if the Defendants are to adduce specialist expert evidence on particular matters, then we must
9 have the ability to seek to put forward our own case on that matter. The question is how.
10 Deans' preferred option would be for an expert appointed by the court. We note what the
11 Tribunal has said with regard to the possibility of a single joint expert. That is fine, but it may
12 be more difficult simply because of the nature of these things, to have agreement between the
13 parties as to a single joint expert in the time that is available to us (which is not very much)
14 given the vacation that is coming up.

15 THE CHAIRMAN: You mean the agreement may take too long.

16 MR. RANDOLPH: The agreement may take too long to be effective and there would be in the usual
17 way - it is like seeking to appoint Arbitrators or whatever, there is a sort of too-ing and fro-ing
18 whereas if the Tribunal were to take the view that it would be sensible for it to appoint an
19 expert obviously that potential time issue would fall out of the equation and one would simply
20 be left with the Tribunal appointing its own expert, and that I think would be helpful and
21 would obviously be efficient, and would, from our point of view, obviously be advantageous
22 because of the cost implication.

23 THE CHAIRMAN: How would the parties deal with the evidence of the expert, they would just
24 accept it, would they?

25 MR. RANDOLPH: No.

26 THE CHAIRMAN: They would cross-examine him?

27 MR. RANDOLPH: Absolutely.

28 THE CHAIRMAN: On what basis though? How do they manage to cross-examine when they have
29 no basis on which they are going to put up evidence? You see I think the European Court
30 - I am not familiar with that procedure, as you know, but they do not have our cross-
31 examination basis.

32 MR. RANDOLPH: Generally they do not but the Court of First Instance is moving gently towards
33 a more flexible approach towards the examination of evidence, and has been known in the past
34 to allow for experts to be examined.

1 THE CHAIRMAN: Yes, but I suspect in a very kind way.

2 MR. RANDOLPH: Well kind, Madam, is relative. I think they would wish the evidence to be
3 examined, it is as simple as that. There are formalities and methodologies which could be
4 worked out. But the point is, as my learned friend, Mr. Robertson, pointed out, this is
5 something that is specifically set out in Rule 19(2)(l) whereby it says that the Tribunal may
6 give directions:

7 “...for the appointment and instruction of experts, whether by the Tribunal or by the
8 Parties and the manner in which expert evidence is to be given.”

9 The draftsmen of the Rules obviously had in mind the possibility that this might take place, and
10 may have had in mind the practice of certainly the Court of First Instance, and it is attractive to
11 the extent that it does two things. First, it will focus this narrow point in the mouth of one
12 particular individual and, secondly, for that reason it will impact positively on time taken and
13 costs expended. So for those reasons we wholly support Mr. Robertson’s suggestion and we
14 would hope very much that that would be given a sympathetic hearing by the Tribunal. In any
15 event, if that does not fall to the case, as Mr. Robertson said the fall back position is quite clear,
16 we would have to instruct someone to look at Dr. Biro’s ----

17 THE CHAIRMAN: And you will do that jointly.

18 MR. RANDOLPH: Oh indeed, we would not have two experts. But that would have to be done, and
19 obviously that would have to be done quite quickly because experts are busy and time is short.

20 THE CHAIRMAN: It may be that they would expect Dr. Biro’s evidence.

21 MR. RANDOLPH: May be they would. That can happen with experts, there is a remarkable degree
22 of agreement, but it often happens, also, Madam, as you know that experts do not agree, and on
23 this sort of area we have one expert which is saying “X” and we do not know what Dr. Biro is
24 going to say, we have not seen what he says - anyway, we will see how that goes.

25 THE CHAIRMAN: We have one expert who has assumed “X”.

26 MR. RANDOLPH: One expert who has assumed that, Mr. Morrell, indeed. But equality of arms
27 would dictate that if they are going to have an econometrician or an economist we should have
28 the ability to deal with that, but that is why the preferred option is obviously the expert
29 appointed by the Tribunal.

30 I do not know, Madam, whether you want to deal with the two Deans’ matters, but it
31 may be better if we dealt with the other aspects, more general aspects, and then come back to
32 disclosure and redaction, but I think they can be taken quite quickly - at least I hope they can.

33 I really do not have any other comments, except I am going to press the ADR point,
34 Madam, I apologise. Obviously I have heard what you said at the beginning of this hearing

1 and in reply to Mr. Robertson. We are concerned. We do not think that the Defendants'
2 suggestion is at all appropriate, because it is clear, by any stretch of the imagination, that
3 a large part of the costs which could be saved if this matter were successfully mediated would
4 have been expended by the time they suggest that ADR comes on ----

5 THE CHAIRMAN: Well can I take Mr. Robertson's suggestion, because I think he was saying
6 between 14th and 18th January ----

7 MR. RANDOLPH: Or 21st.

8 THE CHAIRMAN: -- or 21st, so at that stage they would have put in all their evidence.

9 MR. RANDOLPH: Absolutely.

10 THE CHAIRMAN: But they would not know on this new basis unless we factored in your expert, or
11 however it was done, at an earlier stage.

12 MR. RANDOLPH: Obviously they have Mr. Morrell's earlier report so they know the basis on
13 which we are going forward. We will see what their expert says if it is so compelling, who
14 knows? But one might assume that it will be contested on the same basis that Mr. Morrell's
15 evidence will be appropriate itself.

16 THE CHAIRMAN: Neither of you, as I understand it, are suggesting before 14th?

17 MR. RANDOLPH: No, the reason 14th has been chosen is because my learned friend's for the
18 Defendants have suggested "No, we could not possibly do any ADR prior to the experts being
19 disclosed." They have also - and I have to say we find it remarkable - when we asked them
20 about this in correspondence, the Roche Defendants have said "Well, terribly sorry, we have
21 not been able to take instructions from Switzerland on this yet". Well Switzerland is not ----

22 MR. HOSKINS: That is only between the last hearing and today so we could take updated
23 instructions.

24 MR. RANDOLPH: Yes, well, even so the last hearing was some time ago. Switzerland is connected
25 to the rest of the world. There are things called "telephones", "faxes", "e-mails", whatever, and
26 we for one find it remarkable that they have not been able to take instructions. It is quite clear
27 that this issue has been outstanding from our side since July of this year, and we are nowhere.
28 We do find this a matter of concern, madam. I hate to press this point, but we do find it deeply
29 concerning, because if no push is given by this Tribunal, apart from a general push - if no
30 specific push is given - and in that regard, Madam, I would point out as I think we make clear
31 in our skeleton, there are specific Rules in the damages section - I think it is Rule 44(3)(a) that:

32 "The Tribunal may in particular:-

33 "(a) encourage and facilitate the use of an alternative dispute resolution..."

1 I would submit, Madam, that that includes what you very usefully have done to date, but you
2 can go further, and you can encourage with a greater degree of vim, if you will, that the parties
3 do seek to mediate, obviously not seek to mediate with the result that the matter is settled - you
4 cannot do that obviously. But if this matter is left as is then it will be more likely than not in
5 my submission that the matter does not go to mediation prior to trial, because if the matter is
6 left much after 26th or some time near the end of January then it simply will not be worth going
7 to mediation because the costs will have been incurred. Obviously, my learned friends for the
8 Defendants are aware of the position, are aware of the case law with regard to mediation and
9 reasonableness, and unreasonableness with regard to entering into that process, and any cost
10 consequences that may follow there from, and the High Court and the Court of Appeal have
11 been very clear on that in the past few years. However, we would submit that notwithstanding
12 that recognition it would help a great deal and would be wholly in line with the specific rules
13 relating to this particular jurisdiction if the Tribunal were to be able to find itself able to push
14 forward a particular window, or at least put forward a window as being potentially suitable,
15 thereby putting the onus on the Defendants to show why that would not be reasonable in all the
16 circumstances.

17 THE CHAIRMAN: As I understand it, the Defendants were concerned that disclosure and experts'
18 report should be available before a mediation and as I understand it they are not saying that
19 they do not want mediate, they are saying they do want to mediate - there are nods on that side.

20 MR. RANDOLPH: Oh indeed, I think we are *ad idem* as far as that is concerned.

21 THE CHAIRMAN: The question is when is that appropriate, and what I think you both were saying
22 is that by 14th January most of the expert evidence, and certainly what they need to rely on is
23 on the table. They know where they are going - they may not know by 14th January where you
24 are quite going, but that is a matter for you and not them.

25 MR. RANDOLPH: And they will have a pretty good idea, because unless something extraordinary
26 happens Mr. Morrell's approach will be continued.

27 THE CHAIRMAN: Well we do not know that.

28 MR. RANDOLPH: No, I know, but that is why ----

29 THE CHAIRMAN: If you had a court expert that may or may not be the case, if you had your own
30 expert you might choose one that does. By 21st January, everything is on the table, save for the
31 experts' meeting.

32 MR. RANDOLPH: Absolutely.

1 THE CHAIRMAN: So I think what you both would say is by 21st January everything that the
2 Defendants have said they would like to have will be on the table, and probably they would be
3 in a position you would say, by 14th - is that really your submission?

4 MR. RANDOLPH: Yes, it is.

5 THE CHAIRMAN: We will see what they say about it.

6 MR. RANDOLPH: Very good, I am grateful, madam. On the transcript point, we will obviously
7 liaise with the Defendants for Deans' part in any event, we completely agree with the
8 Tribunal's provisional view with regard to the lack of necessity for Livenote because of the
9 expense, but obviously the utility of having a daily transcript - I am not quite sure how that
10 would be dealt with, but obviously we can liaise with the relevant parties.

11 THE CHAIRMAN: Well once it is agreed that the cost is paid by the parties ----

12 MR. RANDOLPH: Yes, indeed.

13 THE CHAIRMAN: -- then if you liaise with the Tribunal that can be dealt with.

14 MR. RANDOLPH: Super, because that obviously is extremely helpful, and the other matters I do
15 not think need my comment.

16 THE CHAIRMAN: Then we will come back to disclosure ----

17 MR. RANDOLPH: We will come back the interesting issues of disclosure and redaction in
18 a moment, yes.

19 THE CHAIRMAN: Mr. Hoskins?

20 MR. HOSKINS: Madam, just some very minor points of detail, and then I will come on to the
21 experts' issue and ADR, if I may. In relation to the timetable to the hearing, the only
22 observation we had was that on 26th January, 2005 the first entry (iii):

23 "The parties are to provide the following to the Tribunal:
24 iii) completion of the cross-examination schedules provided by the Tribunal to
25 the parties".

26 The only concern, obviously you have seen that I have at this stage done the best I can and
27 filled in that schedule. I am concerned about having a final version by 26th January for two
28 reasons. Cross-examination will not have been finally prepared by then, because I will not
29 prepare it until closer to the hearing date; and the other problem is that, even if I were to be
30 planning to do it earlier we will not have the experts' joint statement until later so, again, given
31 that a lot of the factual cross-examination is what underpins the experts' ----

32 THE CHAIRMAN: I think that is a good point.

33 MR. HOSKINS: I think that I may be struggling on that one.

1 THE CHAIRMAN: You would like to do it when you lodge the bundles on 11th February, or on 2nd
2 February - well, probably 11th February.

3 MR. HOSKINS: I think the 11th is going to be certainly easier. I think it is still going to be indicative
4 but less indicative by that stage. Obviously one can give a much better indication at that stage.

5 THE CHAIRMAN: All right, I will think about that, and possibly move that to 11th February as your
6 submission.

7 MR. HOSKINS: The next point on the timetable is a personal plea really. Currently, the pre-hearing
8 review is listed for 14th February, and I actually appear in a two day substantive appeal in the
9 Tribunal on 15th and 16th. I do not know if it is possible, but if it were possible, and suited
10 everyone, to have the pre-trial review on the 11th, which is the previous Friday?

11 THE CHAIRMAN: Well, I will tell you what the problem is, the problem is that you are only going
12 to lodge all the documents on 11th.

13 MR. HOSKINS: That is it, yes.

14 THE CHAIRMAN: Although between 11th and 14th it is unlikely I will have read them all, at least
15 I have some opportunity because 11th is a Friday, is it not, and 14th is a Monday, so I do not
16 have very much opportunity, but I have some opportunity to see what is going on.

17 MR. HOSKINS: Certainly. I think my personal convenience has just flown out of the window -
18 rightly so, I am not critical at all.

19 THE CHAIRMAN: That is one of the reasons why I said I would do that hearing myself.

20 MR. HOSKINS: No, that makes perfect sense, madam.

21 THE CHAIRMAN: But that is the reason, I am just trying to accommodate all the dates, and give
22 everybody enough time and it seemed to me that 14th was the latest we could do it.

23 MR. HOSKINS: That makes perfect sense.

24 THE CHAIRMAN: It is only if you could lodge all the submissions etc. earlier then we could do
25 that.

26 MR. HOSKINS: I do not think that is appropriate to suit my personal convenience, to be perfectly
27 honest.

28 THE CHAIRMAN: We did try to take into account most things.

29 MR. HOSKINS: I am very grateful. Moving on from the timetable to the hearing, the next point
30 was whether there was the possibility of other witness statements. One of the issues that was
31 mentioned very briefly at the last hearing was that there is something called the "BCL
32 Fresh/BCL Frozen" issue.

33 THE CHAIRMAN: Yes.

1 MR. HOSKINS: There has been correspondence, we received a letter from the Premier Claimants
2 on that, and we are still looking into it.

3 THE CHAIRMAN: So there may be.

4 MR. HOSKINS: There is an offer of if we wanted a witness statement to back up the information, so
5 I just flag it up - we have not looked at the position yet, there is a possibility of that.

6 THE CHAIRMAN: Should we put in here a date when all witness statements ought to be provided
7 because otherwise people cannot prepare.

8 MR. HOSKINS: If it could be done by 23rd December.

9 THE CHAIRMAN: Yes.

10 MR. ROBERTSON: Effectively the witness statement would be in the terms set out in the letter
11 that we wrote so there should not be any problem giving the witness statement in draft - it is
12 from Mr. Gosling and I do not know whether he is away on holiday, so we may not be able to
13 give a signed one, but we could certainly give it in draft because it is solicitor's instructions.

14 THE CHAIRMAN: What we do not want to happen is that it is a witness statement drafted by
15 solicitors, which then the witness comes into the box and says "Well actually I signed it, but it
16 wasn't my statement."

17 MR. ROBERTSON: No, it is something that we have been discussing with Mr. Gosling. He has
18 given very specific instructions. What he has told us has been set out in a letter to Freshfields,
19 and we said "If you would like that by way of witness statement..."

20 THE CHAIRMAN: So, shall we say "Any further witness statements by 23rd December".

21 MR. ROBERTSON: Yes, but it may have to be served in draft if Mr. Gosling is not available to
22 sign it, so he has given us his instructions, so it is not one which is drafted by solicitors which
23 he would then alter.

24 THE CHAIRMAN: Are you happy with that?

25 MR. HOSKINS: As long as Mr. Gosling is happy ----

26 THE CHAIRMAN: Well there is no real difference between 23rd December and 4th January, I
27 assume.

28 MR. HOSKINS: It would enter into my personal convenience and the answer is "no", madam.

29 THE CHAIRMAN: So shall we say "Any further witness statements by 4th January"? And then they
30 can be signed and there can be no problem.

31 MR. HOSKINS: The third heading I had some comments on was the timetable at the hearing. At
32 present the Claimants have been allowed two and a half days in total, which I think certainly
33 BCL have indicated will only be cross-examining six witnesses. Mr. Randolph has not give
34 any detailed breakdown of who he intends to cross-examine and how long. We, on the other

1 hand, have eleven witnesses to cross-examine, but still only have the combined total of two and
2 a half days.

3 THE CHAIRMAN: I think I have taken that from what you suggested.

4 MR. HOSKINS: Madam, I think my suggestion was that it would be safe to allow us three days ----

5 THE CHAIRMAN: Nine hours was it not?

6 MR. HOSKINS: Nine hours, but that was not taking account of swearing in, which is not
7 substantial, but it is 11 witnesses x 5 minutes, and any re-examination.

8 THE CHAIRMAN: Without being held to this, I have four days there and I have two days for the
9 experts. If it turned out that you were right and you needed more time, there is sufficient time
10 within this timetable to deal with it. On other hand, what the Tribunal hopes is that in fact
11 I have given too much time generally once we get the issues sorted out, and that in fact we can
12 do it in less than the seven days for that part of it. But hopefully seven days should be enough
13 to deal with all the witnesses, and I think that that is something that if it turned out when we
14 have the schedules - and that was the importance of getting the cross-examination schedules
15 early - when we have the schedules and see what is agreed and what is not agreed that we can
16 then revisit that on 14th. We should work to this timetable is I think the appropriate focus.

17 MR. HOSKINS: The only point I was going to make was the need for flexibility, but to make the
18 observation that there is flexibility in the timetable. My only concern was whether, if we need
19 it, the Tribunal would be able to sit on the days which are currently allowed for closing
20 submissions if that were necessary - that is the only point I would make. So for example, if we
21 do run over, on cross-examination of factual witnesses or indeed of experts by a day, for
22 example, I just do not know, but there is a risk if the Tribunal would not be available to sit ----

23 THE CHAIRMAN: I cannot promise that those days will be kept free, because that again is
24 proportionality between this case and other cases that are before the Tribunal.

25 MR. HOSKINS: Madam, yes.

26 THE CHAIRMAN: So I cannot promise that. Hopefully we can do it within this timetable.

27 MR. HOSKINS: Certainly.

28 THE CHAIRMAN: And, if it turned out that on 14th February it became clear we needed an extra
29 day, then subject to what else was in the Tribunal's diary for the extra day one would try and
30 accommodate it. I think seven days for evidence, in a case involving this size, etc. is being very
31 generous.

32 MR. HOSKINS: All I am trying to say is because of the nature of cross-examination it would be
33 helpful to have some flexibility and I simply raise the point.

1 THE CHAIRMAN: Hopefully, once there is some agreement as to what the issues are and as to
2 what the cross-examination is directed to, and the experts' issues are defined, it is not going to
3 take the length of time that it may now be envisaged to take.

4 MR. HOSKINS: That was the only observation, of course, the experts, we do not know how much
5 they are going to agree or not, but again one can only say there may be a need for some
6 flexibility, and I cannot put it any higher than that, but I thought it was sensible to flag the
7 point.

8 THE CHAIRMAN: We have heard what you say, but at the moment it is going to be eight days -
9 seven days plus the one day.

10 MR. HOSKINS: The other point, before I come onto experts and ADR, is a point which is not on
11 the agenda and it relates to security for costs, because obviously we made the application last
12 time.

13 THE CHAIRMAN: We reserved Judgment.

14 MR. HOSKINS: Madam, it is just to say that obviously our clients are concerned to have the
15 Judgment as soon as possible, because without it we are potentially exposed and once we have
16 it we know where we stand.

17 THE CHAIRMAN: I appreciate that.

18 MR. HOSKINS: Simply, if I can make that request.

19 THE CHAIRMAN: The Tribunal has heard what you say. I am here alone today.

20 MR. HOSKINS: If I can turn then to the methodology expert. In our submission, the appropriate
21 course is, as the Tribunal had anticipated, which is for Dr. Biro to put his experts' report in and
22 obviously, if the claimants' wish to put in an expert report in response we are perfectly happy
23 with that but we say that is appropriate procedure, and we say that for these reasons.

24 THE CHAIRMAN: This is the appropriate procedure?

25 MR. HOSKINS: It is the appropriate procedure, yes. First, because of the fact that there is a trial in
26 February it will not surprise anyone to know that Dr. Biro has already done a substantial
27 amount of work on this. In our submission, it would not be appropriate to throw away the work
28 that he has done. He is well advanced, he would have to be in accordance with the timetable,
29 and we should be allowed to rely on that report for that reason.

30 THE CHAIRMAN: Your letter to him was only last week, was it not?

31 MR. HOSKINS: We have been in contact him and working with him in relation to the litigation
32 generally. He was only formally instructed recently, but he has been working on the litigation
33 for longer, and he has been working intensively since he got the instruction letter.

1 The other point about Dr. Biro is that he does not just deal with methodology; he also
2 deals with the question of downstream passing on. Madam, you will have seen from our
3 skeleton why we need him to deal with that issue. It is because in particular the Premier
4 Defendants have said any disclosure exercise which may yield documents relating to the issue
5 of downstream passing on is disproportionate; therefore we do not think that we should do it.
6 Now, left with no factual basis, what we have done is to instruct Dr. Biro to deal with that by
7 way of economic analysis, and therefore we need his report in any event, because it deals with
8 the downstream passing on issue.

9 The third point is that any analogy with the Court of First Instance is not helpful here.
10 The reason being that the Court of First Instance does not have jurisdiction on competition
11 damages' claims. It is a different environment, and it is a different issue.

12 THE CHAIRMAN: I think that is what I was indicating about how do you cross-examine?

13 MR. HOSKINS: Yes, and we agree. That leads into my fourth point, which is, to be honest, the most
14 important point. The question of how one calculates competition damages is fundamental. The
15 Tribunal has already recognised that on several occasions by ----

16 THE CHAIRMAN: And mentioned it again this morning, yes.

17 MR. HOSKINS: Exactly. Our position is that given that this is the first case in which it will be
18 considered, it is important that the Tribunal should be as fully informed as possible as to the
19 possible approaches.

20 THE CHAIRMAN: Does that mean that you are going to deal with the approach that the Tribunal
21 has been indicating?

22 MR. HOSKINS: In terms of whether a restitutionary approach is appropriate?

23 THE CHAIRMAN: Yes.

24 MR. HOSKINS: We are still considering that, madam. You have seen our position on it; the
25 claimants have heard the Tribunal's suggestion. They have not taken it up, but it is certainly
26 not something we have dropped or ignored, but it is something that we are still considering.

27 THE CHAIRMAN: This Tribunal may want to revisit it before the hearing. It is not something I can
28 revisit today.

29 MR. HOSKINS: We are well aware, and it is not something that we are ignoring. It is not something
30 that we have decided to do nothing on. It is something we are considering the best way to deal
31 with it, given where we are in terms of the pleaded case, for example.

32 THE CHAIRMAN: If that is going to be considered constructively or positively the sooner the
33 parties indicate to the Tribunal the position the better, really.

1 MR. HOSKINS: The Tribunal has made that very clear, and obviously the Claimants have heard
2 that as well. The point on this in terms of methodology is the way in which the Tribunal can be
3 best informed on this issue is to have two different experts. Now, it may be they agree, and
4 then the Tribunal has comfort about the appropriate approach, but if they do not the best way
5 for the Tribunal to come to a fully concluded view is to have two experts here cross-examined
6 on either side.

7 THE CHAIRMAN: But of course, the methodology is different if you have restitutionary damages,
8 the whole basis of the case is different.

9 MR. HOSKINS: I appreciate that, absolutely.

10 THE CHAIRMAN: Disclosure is different.

11 MR. HOSKINS: We are fully aware of that. I guess the irony is if one has two experts who are
12 going to be cross-examined, because that is the best way to tease out this issue, of course, each
13 side is going to have to be fully informed in order to cross-examine - that is a problem if they
14 are joint experts, because how do you cross-examine a joint expert without having your own
15 expert to tell you what to ask. So the notion that joint expert is a nice short cut does not work,
16 and we say is not appropriate in this case, given it is the first time the Tribunal will have had to
17 deal with this matter.

18 The notion that a Tribunal expert is better than a joint expert because it is going to be
19 quicker to set up is also incorrect, because just as with a joint expert there would have to be
20 agreement as to the instructions. There would have to be a process whereby the instructions to
21 the Tribunal expert were drafted, and one assumes that the parties would be allowed to at least
22 make comments in relation to the form of the instructions. So the notion that there is some time
23 saving there again just does not stand up.

24 THE CHAIRMAN: I think the time saving was only that you would not have to agree the person
25 and therefore you have saved that time, because the person would be dictated by the Tribunal,
26 but at the moment I find that a little bit difficult. It is not a road that the courts have adopted,
27 although they have had the power to adopt it, and they have gone much more for the single
28 joint experts if there is an agreement between the parties.

29 MR. HOSKINS: Those are our submission on the expert. We say Dr. Biro should be allowed to put
30 in his report, and the Claimants obviously if they want to respond should be able to do so. But
31 for a variety reasons, timing issues, but also as I say the fundamental one of making sure the
32 Tribunal is fully informed on this issue - we say that is the best way forward.

33 In relation to ADR I just have to pick up Mr. Randolph's comment, that it is
34 "remarkable", etc. We said that we had not been able to take instructions since the last time.

1 The reason is that there was a meeting scheduled in Switzerland yesterday, and it was
2 considered appropriate to wait and have that issue discussed at a face to face meeting, given it
3 had been scheduled.

4 THE CHAIRMAN: So you do now have instructions or whatever.

5 MR. HOSKINS: We do, madam, and the instructions are these - they have not changed very much
6 in the sense that we have always said that mediation will only be sensible once the expert
7 evidence position has been clarified and, indeed, that was echoed by the President at the first
8 CMC we had. He recognised the force in that. Madam, the point you made is a very good one.
9 There is no point in forcing parties to mediate unless and until they think it is going to work.
10 Our position is, and we have been perfectly consistent and clear on this is, that we are willing
11 to mediate, but we will do it when we think it is going to work, and that is when we are
12 satisfied that the expert issues had been clarified.

13 THE CHAIRMAN: Well on this timetable what I understood is being put by the claimants, is that
14 having regard to what you say about when it is going to work, they are saying it could work
15 after 14th January. The question then is do you need to wait to see the claimants' experts? The
16 answer to that is "possibly not", because you know what your case is, you know where you are
17 and it may not make any difference as to the way you look at it to know how the other side is
18 looking at it.

19 MR. HOSKINS: Yes.

20 THE CHAIRMAN: So it seems that the Claimants might have come up with a realistic solution to
21 this.

22 MR. HOSKINS: We have heard what the Claimants have said, we obviously hear what the Tribunal
23 has to say on it. We have not been able to take detailed instructions because we did not have
24 this timetable and we have obviously heard what the claimants have said, we have heard what
25 the Tribunal has said, we will consider the position. We are not unwilling to mediate, we just
26 want to do it when we feel it is right for us, and that is the best time to mediate.

27 THE CHAIRMAN: I think what the claimants say, and you have heard what I have said, and I have
28 expressed my own personal beliefs about mediation in that way. But what the Claimants are
29 saying is "I think there needs to be some structure in this", and if both parties are willing to do
30 something at about the same time now, possibly the court or the Tribunal ought to assist in
31 providing a little structure, and that is what "facilitate" means in the Rule. Although in this
32 timetable at the moment I do not think it would be right to stay the action or anything of that
33 sort, it may be, having regard to what you all say a window indicated might be helpful. What
34 do you say about that?

1 MR. HOSKINS: To be perfectly fair I have not had chance to take detailed instructions on this side.

2 It would not be fair, I think ----

3 THE CHAIRMAN: Shall we come back at the end and see about that, because I think that is what is
4 being really said, and I can see some sense in that and that does not actually cut across what
5 I was saying about the parties being willing, because what I am told is all the parties are
6 willing. They all now agree that the window should be after the 14th, and if there was a window
7 in that week that might be an appropriate week to do it, and it would be in accordance with this
8 timetable, if you see what I mean?

9 MR. HOSKINS: Yes.

10 THE CHAIRMAN: So may be you could take some instructions and see what happens before we
11 finish today.

12 MR. HOSKINS: I think that would be the sensible way forward and then we can come back, and
13 hopefully come up with something constructive.

14 THE CHAIRMAN: I do not know if you have thought about a mediator between you because there
15 was no reason not to think about a mediator?

16 MR. HOSKINS: No, I think we have had ideas about a mediator, I think the other side may have
17 their own ideas, but we have not discussed them between us yet.

18 THE CHAIRMAN: It may be that you will need some help on that as well. I am not suggesting
19 whom, but so that there is a timetable for mediation - it might be helpful.

20 MR. HOSKINS: I think, Madam, the point you made earlier was the important thing about
21 mediation is that everyone should be happy with it.

22 THE CHAIRMAN: Absolutely.

23 MR. HOSKINS: So if it can be agreed between the parties without the gentle hand of direction, then
24 that is obviously the best way to do it.

25 THE CHAIRMAN: All I am thinking is that the happiness might be that some structure - I will not
26 say was "imposed" - was indicated by the Tribunal and that might be part of the parties being
27 willing, and that might be helpful. Anyway you can take some instructions.

28 MR. HOSKINS: Exactly, and then we will see where we are. Those were the only points I had on
29 the detailed issues, and obviously Mr. Randolph may want to come back to some of those
30 issues.

31 MR. KENNELLY: Thank you. In relation to the Statement of Facts and List of Issues, we have as
32 you have seen in our skeleton made certain amendments to the Roche Statement and List. We
33 have agreed with Roche, subject to those changes.

1 THE CHAIRMAN: The whole of that is in the melting pot because there is going to be something
2 coming out of Roche's and your amendments, and the Claimants now that I have given the
3 indication that it is to be as detailed as possible. I think everybody goes back and thinks about
4 what they actually want to put into it.

5 MR. KENNELLY: I am grateful. On the timetable up to trial I adopt what Mr. Hoskins said about
6 the cross-examination schedule. I also have a difficulty in producing something final, or even
7 nearly final by the time indicated, but I have heard you madam, on that, and I will say no more.

8 In terms of ADR in the timetable, like Mr. Hoskins I have not had an opportunity to
9 take detailed instructions on a date, but it seems to me, based on what we have heard from the
10 Claimants that if a further expert, potentially someone different to Mr. Morrell is to produce
11 a report by 21st January on methodology it would be more appropriate to have a mediation after
12 that date and may be, subject to what we agree with the other parties, that the first week in
13 February is the slot in order that the experts have properly considered their reports. I certainly
14 would not agree that by 14th January, based on what we have heard from the claimants today
15 and based on methodology, that we will all have a clear picture of where the claimants are
16 coming from in terms of the methodology they have proposed.

17 THE CHAIRMAN: This is what is going through my mind - do you really need to know what they
18 think when you are considering mediating and arriving at a sensible offer? That is a matter for
19 them, and they are the ones that are pushing mediation, everyone may be willing but they are
20 the ones that are really pushing it. I think what they are saying is "Maybe we can avoid some
21 of the costs of that if we mediate earlier." If they are prepared to go on a mediation on the basis
22 of Dr. Biro and Mr. Forbes, and not have shown you their own, that is their risk not your risk -
23 if you see what I mean.

24 MR. KENNELLY: Yes, madam, I do.

25 THE CHAIRMAN: I can see, I think, why they are pushing for 14th and if I was looking at it to see
26 where I would put it in the timetable I can see some benefit on their side and I do not actually
27 see the detriment on your side.

28 MR. KENNELLY: Only madam that we want a sensible solution, and even if the Claimants are
29 pushing for an early date, if they intend at the same time to produce methodology evidence
30 later, which may be in draft at the time of the mediation, notwithstanding their own enthusiasm
31 for an early date they may not produce a sensible result. We want a mediation that will be
32 effective and proportionate, and produce a final result and that is what we are concerned about.
33 If that can be done on 14th all the better.

1 THE CHAIRMAN: I think they have heard now what you have said about it, and what I have just
2 said about it, and perhaps when everybody is considering that and Mr. Hoskins is taking
3 instructions, they can take instructions as well, as to whether they feel more comfortable with
4 having their experts' reports having been shown to you or whether they are prepared to go into
5 a mediation where they are not going to be able to rely on what their experts are saying as
6 against yours. What is going to be on the table is your experts' reports.

7 MR. KENNELLY: Yes, madam, I think we have all heard you and I have nothing further to add on
8 that point.

9 On the issue of witness statements, madam, we are concerned for Aventis Rhodia to
10 make sure that the statements of Mr. Fitt, Mr. Oskam, and Mr. Drake are admissible in the
11 Aventis claim - they are the statements of the Roche Defendants. We wish to rely on those
12 statements. Two options are open to the Tribunal. One is that you, madam, simply direct, or
13 the claimants accept that those three witness statements may be admissible in the Aventis
14 claim, that is the Premier claim against Aventis, or that we get very short confirmatory
15 statements from those three witnesses saying that their evidence is good for the Aventis claim
16 as well, and that is something which is in your hands, madam. I have not actually spoken to the
17 claimants about this to see if they have any objection.

18 THE CHAIRMAN: Well we will hear from them about it.

19 MR. KENNELLY: There is no reason in principle why they should not apply. Their statements are
20 good for the Aventis claim also, the general comments on Mr. Morrell, for example.

21 Turning to the timetable during trial, I have some concerns and I will echo what
22 Mr. Hoskins said about the tightness of the timetable. Madam, I have heard what you have said
23 about your belief that it could even be shorter than the timetable set out. But what I wish to flag
24 is simply this. It assumes a great deal of agreement and simplification of the issues before the
25 Tribunal and it may be risky at this stage to assume that level of agreement since what we are
26 trying to do is to produce a realistic timetable that would cover all eventualities.

27 THE CHAIRMAN: Well I think it does not assume that. What I am assuming is on the basis of
28 estimates in the parties' written submissions, and we may be able to shorten it a bit more.

29 MR. KENNELLY: You will see from my skeleton at least that we would assume a little less and
30 certainly in circumstances where there are 11 witnesses for the claimants, four of whom will
31 actually be cross-examined by us in addition to the Roche cross-examination - I have set out in
32 my schedule why cross-examination by us will be necessary, and I have really kept that time as
33 short as possible, and we have of course left the Deans' proceedings subject to some
34 clarification, but nevertheless I simply flag our concern that it is very, very tight at this stage,

1 and that we hope the Tribunal will be flexible to a degree if things do not turn out as happily
2 as we all hope.

3 THE CHAIRMAN: This Tribunal will not be sympathetic with duplicated cross-examination. We
4 would expect that both counsel who are cross-examining get together and do not duplicate.

5 MR. KENNELLY: Madam, I should say that we had some concern in the directions from the
6 Tribunal, we note what the Tribunal said about the Defendants' counsel continuing their
7 co-operation and we were grateful to see that the word "continuing" was used, but no similar
8 direction was given to counsel for the Claimants and we hope that all counsel, for the
9 Claimants and the Defendants will co-operate, and that the Tribunal's direction in relation to
10 duplication will apply to all counsel, not simply to the Defendants.

11 Turning to the issue of experts. I echo what Mr. Hoskins said, and I will not duplicate
12 what he said in that respect. We have some concern that we have heard today that there maybe
13 a brand new expert produced, which may produce brand new methodology. Mr. Randolph is
14 not an econometrician, they expert may produce something completely different to what
15 Mr. Morrell said, and the Tribunal should recall that Mr. Morrell did give evidence as to
16 methodology in his report (para.6.3 in BCL report). He did make a very clear statement as to
17 what he thought was the correct and appropriate methodology and that was what Mr. Biro has
18 been addressing - it would be a waste of those costs if something different was produced, but
19 that is something that we would visit at a later stage.

20 Madam, I have nothing further.

21 THE CHAIRMAN: So you would be happy, would you, insofar as there was another expert on the
22 Claimants' side that they dealt with it by effectively a response ----

23 MR. KENNELLY: On 21st.

24 THE CHAIRMAN: -- and it would be 21st?

25 MR. KENNELLY: Yes, madam, yes.

26 THE CHAIRMAN: You are happy with that?

27 MR. KENNELLY: We are, yes.

28 THE CHAIRMAN: Mr. Hoskins, are you happy with that?

29 MR. HOSKINS: I am sorry, madam?

30 THE CHAIRMAN: That if I decide that the claimants' produce their own expert, that that expert
31 evidence is produced by 21st?

32 MR. HOSKINS: Yes, absolutely.

33 THE CHAIRMAN: And then everybody goes to the experts' meetings and sorts it out?

34 MR. HOSKINS: Yes.

1 THE CHAIRMAN: Right. Shall we deal with redaction and disclosure now?

2 MR. ROBERTSON: I think Mr. Hoskins would want to open these particular points. I am perfectly
3 happy to deal with them. I do not know what my learned friend for Aventis is doing?

4 MR. KENNELLY: Madam, it may be that we have nothing to add, and we are not in the Deans'
5 proceedings any more, so with your permission we could leave at this stage?

6 THE CHAIRMAN: Except you want to know what I do about experts?

7 MR. KENNELLY: Yes.

8 THE CHAIRMAN: And I thought I would listen to the whole thing and then come back with
9 experts.

10 MR. KENNELLY: Very well.

11 MR. RANDOLPH: Madam, I am in your hands. I am perfectly happy to deal with the two points
12 because I know what Mr. Hoskins is saying, because obviously he does not depart from the
13 scripts he might have set out in (i) the correspondence; and (ii) the skeleton, and so maybe that
14 is the quickest way rather than me hearing him and then me replying and him replying.

15 THE CHAIRMAN: What does Mr. Hoskins want to do?

16 MR. HOSKINS: I understood there were two issues here. One was our application for specific
17 disclosure in relation to ----

18 THE CHAIRMAN: I thought they were half and half - your application for specific disclosure and
19 their application was for the non-redaction.

20 MR. HOSKINS: Exactly, and I had understood the Tribunal to give an indication that the sort of
21 information that we seek should be disclosed.

22 THE CHAIRMAN: If it appears that there is some material which shows that it is unreliable. I put
23 that very carefully before because I do not know what the submission is about that. So it is
24 a matter of principle that I was specifying rather than detail in this case.

25 MR. HOSKINS: When we made this application the last time the way it was left was that the
26 Tribunal said it would need more information ----

27 THE CHAIRMAN: Absolutely.

28 MR. HOSKINS: -- as to why Mr. Forbes believed that it would be helpful.

29 THE CHAIRMAN: And you have given some indication in your skeleton.

30 MR. HOSKINS: Precisely.

31 THE CHAIRMAN: I do not want to pre-empt what Mr. Randolph may say about it. It may be
32 acceptable, it may not be acceptable, I do not know.

1 MR. HOSKINS: Our position is we have applied for the information. We have given an explanation
2 from our expert as to why he thinks he should see it and unless I can help you further I think it
3 probably is for Mr. Randolph to say why we should not see it. I suggest we deal with that as
4 a self-contained issue.

5 THE CHAIRMAN: And then deal with redaction after that?

6 MR. HOSKINS: And then deal with redaction separately, and Mr. Randolph can lead on that.

7 THE CHAIRMAN: All right. That is actually why I looked to Mr. Randolph because I could see
8 that it was your application.

9 MR. RANDOLPH: Yes, I am grateful, madam, and I am grateful to my learned friend for putting it
10 so shortly. Our position is that at the last hearing we had understood that the Roche
11 Defendants through Freshfields would write to us. That was effectively what was agreed, to try
12 and ----

13 THE CHAIRMAN: We did not understand that, but anyway, yes.

14 MR. RANDOLPH: I do not necessarily want to take up time.

15 THE CHAIRMAN: I do not think it matters. We are here today and we are going to deal with it.

16 MR. RANDOLPH: We are here today because we had to be told by whatever means, what the
17 position was, what the rationale for the request was. We received a letter yesterday setting out
18 from Mr. Forbes, in a letter dated 15th December, which in turn was a response to a letter from
19 Freshfields dated 13th December.

20 THE CHAIRMAN: Are they in the bundle?

21 MR. RANDOLPH: Have you seen these letters?

22 THE CHAIRMAN: I do not know if we have or we have not, and I do not know if we need to.

23 MR. RANDOLPH: Well, there are some issues relating to the request to Mr. Forbes, because we
24 had understood in the light of the evidence from Mr. Lawrence, which supported the
25 application I think dated 6th January which you were taken to on the last occasion, and indeed
26 from my learned friend, that they had asked the expert already what the problems were and the
27 expert had identified certain issues, which is why the application was made and why I think the
28 statement was made in Mr. Lawrence's witness statement - we went through it, I think it was
29 para. 34. There is a small point of prejudice I wish to raise, which is the fact that the letter
30 from Freshfields to Mr. Thane Forbes just simply asks:

31 "Could you set out whether, in your opinion, it would be appropriate for the Claimant
32 to provide you with access to the underlying computer records." etc.

33 So it looks as if Mr. Forbes was asked for the first time on 13th December rather than some
34 time prior - which was certainly the impression we had - what his position was on that.

1 In any event, he sets out in some detail ----

2 THE CHAIRMAN: Are these letters in your bundle? I can see they are in blue in yours.

3 MR. RANDOLPH: Yes, well I received it by fax at approximately 11.48 yesterday morning.

4 THE CHAIRMAN: So the likelihood is they are not in this bundle, is that right?

5 MR. RANDOLPH: I do not know when the bundles were actually delivered, madam.

6 THE CHAIRMAN: Well not until the afternoon.

7 MR. RANDOLPH: Well maybe they were on foot at that precise moment.

8 THE CHAIRMAN: That is the question.

9 MR. RANDOLPH: I do not think I need to take some of the more technical points that otherwise

10 I might because, in short, the covering letter from Freshfields attaches these two letters, i.e. the

11 letter from Freshfields to Mr. Thane Forbes and his response setting out where his concerns

12 lay, and said that they would like to know:

13 “....whether your client is prepared to provide the records sought which underlie the

14 documents relied on by Mr. Morrell in relation to the amount of feed consumed.

15 Please indicate your client’s position by 4 p.m. today.”

16 We have simply not been able to take instructions on this in that time. That is why I started by

17 saying in the transcript, from what I had understood, and perusing the transcript ----

18 THE CHAIRMAN: Forget about what happened last week, because that does not get us forward,

19 that gets us back. At the moment, as I understand it, there was some correspondence yesterday

20 - maybe I should have a look at that.

21 MR. RANDOLPH: My learned friend obviously has them because they are his documents.

22 THE CHAIRMAN: Does anybody have an objection to me looking at this correspondence now that

23 I have read the covering letter.

24 MR. HOSKINS: No, madam.

25 MR. RANDOLPH: It is not “without prejudice”.

26 THE CHAIRMAN: (Pause for reading) This letter from Mr. Forbes, which is really where we

27 should start now.

28 MR. RANDOLPH: Indeed.

29 THE CHAIRMAN: You received it at lunchtime yesterday, is that right?

30 MR. RANDOLPH: Just prior to.

31 THE CHAIRMAN: The fax time on **this** one is 16th December, 01.41.

32 MR. RANDOLPH: Yes, madam, but that is to Freshfields from Mr. Forbes.

33 THE CHAIRMAN: That is 1 o’clock in the morning, is it?

1 MR. RANDOLPH: Apparently, yes - either Mr. Forbes's clock is out or he is working jolly hard. In
2 any event I think you can see certainly 10.57 my instructing solicitor received this.

3 THE CHAIRMAN: Now, have you managed to take instructions on it?

4 MR. RANDOLPH: No, we have tried and we have not been able to.

5 THE CHAIRMAN: And who would you take instructions from?

6 MR. RANDOLPH: From Mr. Morrell and from Mr. Wright and from anybody else, and in particular
7 there are two issues here, specific issues, Mr. Langford and Mr. Hannigan. We have tried to get
8 in touch with people.

9 THE CHAIRMAN: Do they relate to the matters on which they are asking for disclosure, or are they
10 other examples which make him suspect that there may be problems with this particular matter
11 as well?

12 MR. RANDOLPH: He says he is giving two non-exhaustive examples of where he says there may
13 be problems?

14 THE CHAIRMAN: Yes, but those examples, are they directed to this particular issue, or are they
15 directed to some other issue?

16 MR. RANDOLPH: I think, so far as I am aware, they are directed to this general exercise in trying
17 to see the underlying data. They say they have to see the underlying data because they do not
18 think, on its face, that the data that Mr. Morrell relied on ----

19 THE CHAIRMAN: Well of course he says he thinks there are some mistakes, or maybe some
20 mistakes.

21 MR. RANDOLPH: There may be some mistakes in the spreadsheet because of course - we went
22 through this last time - Mr. Morrell did not go through the 53,000 lines of data which there are.

23 THE CHAIRMAN: If you look at the White Book - the CPR - in relation to experts an expert is
24 entitled to say in his report that he has relied on X ----

25 MR. RANDOLPH: Absolutely.

26 THE CHAIRMAN: -- and if he does that then he has told the reader that that is what he has done.

27 MR. RANDOLPH: And that is what happened here.

28 THE CHAIRMAN: The question then is that if the information on which he relied may be
29 unreliable, what I was indicating was that in those circumstances, it seemed to me, subject to
30 other submissions, that it may be appropriate to disclose something that goes behind, in order
31 to see whether it is unreliable.

32 MR. RANDOLPH: Yes, but first of all one has to determine whether there is any relevance in the
33 allegation put forward - "allegation" is probably a bit too strong a word - to the suggestion put
34 forward that the records may be misleading. It may be, because these two non-exhaustive

1 examples can be answered quite straightforwardly, but our initial point is we would love to
2 revert on this but only on instructions.

3 THE CHAIRMAN: But when are you going to get those instructions?

4 MR. RANDOLPH: As soon as?

5 THE CHAIRMAN: When?

6 MR. RANDOLPH: I do not know, because my solicitor spent a lot of yesterday from 11 o'clock
7 onwards trying to contact the relevant people, and they were simply out in meetings
8 unavailable. It is possible obviously, we are now Friday----

9 THE CHAIRMAN: Well, it is now half past twelve, could we do it by 2 o'clock?

10 MR. RANDOLPH: I do not know. We can certainly try, we can certainly try. But, Madam, I do
11 want if I may just to refer you to the transcript because at internal p.60 of that document, (p.66,
12 bundle 11) the President made it clear starting at line 19:

13 "Mr. Hoskins, I, for myself, feel that this is not a point that we particularly want..."
14 and then line 23, there are several ways:

15 "One is that a further effort is made to sort this out in correspondence".
16 Absolutely.

17 "...and it may very well be that if your experts have particular questions that they
18 want answered the easiest way is simply to ask the questions and I am sure the
19 Claimants will do their best to answer them."

20 Absolutely, but we have to have the time. I have to say that it is rather unfortunate that
21 Freshfields set out a timetable of between 11 o'clock and 4 o'clock for us to take instructions
22 and come back - anyway that is a passing piece of prejudice and I think we can move on. We
23 will do our best, we have tried, and we will certainly do our best to contact the relevant people
24 as we have been doing since the receipt of this. I am sure it can be sorted out, not necessarily to
25 the Defendants' satisfaction, but we can come back with an answer, either "yes" or "no"
26 effectively.

27 THE CHAIRMAN: And if your answer is "no" then there is going to be an application to me.

28 MR. RANDOLPH: Then there will be an application to you.

29 THE CHAIRMAN: What concerns me is that it is now 17th December, it is Friday, we have
30 effectively three working days next week, and if this is not sorted out before then, before the
31 end of next week that may cause a problem on the timetable.

32 MR. RANDOLPH: Well, it may.

1 THE CHAIRMAN: Therefore, it seems to me that it needs to be sorted out before the end of next
2 week, and it would be a very additional cost if everybody had to come trooping back here next
3 week because you have not sorted out. We have today, let us see if we can sort it out.

4 MR. RANDOLPH: Indeed madam, but with respect it is not our fault.

5 THE CHAIRMAN: No, I appreciate that.

6 MR. RANDOLPH: And we are keen, as the President said, we are keen to do our very best to
7 answer the queries. If an application is made then on instructions we may take the view that in
8 any event this information is not disclosable, and presently that may well be the position we
9 take, having heard what you, madam, have said. But in any event that is where we are, so I do
10 not think we can progress it very much between now and 2 o'clock, but we will take
11 instructions and do our very best to get something back to the Tribunal by 2 o'clock.

12 THE CHAIRMAN: Let us see where we are at 2 o'clock, because I am sure we will be here at
13 2 o'clock.

14 MR. RANDOLPH: Yes, because you madam have to rule on experts and ADR.

15 THE CHAIRMAN: Why do we not see where we are at 2 o'clock, and then see what the timetable
16 can be. I hear what you say about whose fault this is. I am not expressing any view on that, but
17 I am not actually very interested. What I am interested in doing is making sure that we progress
18 this so it does not cause a slip in the timetable.

19 MR. RANDOLPH: Yes, absolutely.

20 MR. HOSKINS: I am very grateful for the indication that what we want to do is sort this out, that is
21 what we want to do. But with respect Mr. Randolph's submissions are naked attempts at
22 avoidance, because this was first raised in correspondence on 30th November. We made
23 a specific application for disclosure a long time ago. The Morrell material was included in my
24 skeleton, which was available at 9 a.m. yesterday morning. The suggestion that they been
25 taken by surprise by this is a ridiculous one.

26 THE CHAIRMAN: Mr. Hoskins and Mr. Randolph, I am not going to get into the issue between
27 you as to who should have dealt with this. I am only interested in resolving it today.

28 MR. HOSKINS: Thank you very much, madam.

29 MR. RANDOLPH: I think we can now move on to redaction. Hopefully we can deal with this
30 before the short adjournment. The issue is short, madam. Much of the documentation that has
31 been disclosed by Freshfields, or a large important part of it, has been redacted, and Madam,
32 you will remember last time when I held up a page essentially black. Our position is this, of
33 course there is a High Court procedure, well known, and the authorities show that it has gone
34 back 100 years or more, whereby irrelevant material can indeed be redacted. Obviously where

1 there is confidential material that too can be redacted. The same is true for where there is
2 privileged material. The position as far as we understand it ----

3 THE CHAIRMAN: The test is different in relation to confidentiality - what you do is different.

4 MR. RANDOLPH: Absolutely. As far as we understand it, Roche's position is that the matters have
5 been redacted because they are in the main irrelevant. I say "in the main" advisedly because if
6 one goes through the correspondence, and I do not necessarily need to do that now, one sees
7 that over a period of a month or more they have tried to ride two horses, and maybe that is
8 perfectly fair because some documents are said to be confidential and others are said to be
9 irrelevant, but the most recent communications appear to point more towards irrelevance than
10 confidentiality. So far as anything remains on the confidentiality issue we would say simply we
11 find it difficult to understand how anything can be confidential given the date of the documents
12 in question. They go back to, at the latest 1999, and so that is five years old and we would rely
13 in that regard on the Tribunal's short Judgment in *Aberdeen Journals* where they looked at the
14 position of confidential data - I hand a copy to my learned friend - but the Tribunal found that
15 it was unlikely that such material could be deemed to be confidential given the age of the ----

16 THE CHAIRMAN: I am not sure that is terribly useful, either there is a plea for confidentiality and
17 then it would have to be made out.

18 MR. RANDOLPH: Exactly. I am sure my learned friend Mr. Hoskins will put me right if I am
19 wrong, but as it stands at the moment I understand their position to be based on irrelevance.
20 They have said we have a vast amount of data that is irrelevant to the issues in the dispute,
21 therefore we think we should be entitled to rely on the ordinary practice of blanking out. We
22 say two things. We say yes, we admit that there is this practice but it should be used
23 proportionately and it should be used correctly. We also say that if documentation is neither
24 nor privileged or confidential there is no good reason why any remaining irrelevant material
25 should actually be excised. There can be no prejudice and it simply arouses and excites the
26 interest of the party receiving the redacted documents, which it has done in this case - my
27 interest is aroused. That is the first point.

28 The second point is that my learned friend told me that he would be seeking to rely on
29 an authority of *GE Capital Corporate Finance Group Ltd v Bankers Trust Co and others*. Of
30 course, that is his authority, if he wants to open it, but I am happy to deal with it. Madam, you
31 know the authority probably. It is authority and I do not dispute the fact, it is authority
32 - a strong Court of Appeal - Lord Justice Dillon, Lord Justice Leggatt and Lord Justice
33 Hoffmann (as he then was) setting out why indeed there could be redactions of irrelevant
34 material. However, I would make the following short points.

1 First, this was prior to the CPR. References in the Judgment to the *Peruvian Guano*
2 test are obviously now otiose and irrelevant. The test is now clearly set out in Rule 31/6 of the
3 CPR which is different.

4 THE CHAIRMAN: And it is narrower.

5 MR. RANDOLPH: Well, I anticipated you might say that - it is different, and there can be
6 a narrowness certainly with regard to fast track. There is a distinction to be drawn but
7 obviously the crucial matter is now necessity, but query whether there is a huge difference
8 between the two. In any event it was based on *Peruvian Guano*, and *Peruvian Guano* is no
9 longer the matter.

10 Secondly, Lord Justice Hoffmann, in his Judgment looked at a particular document
11 that was referred to him and effectively in that document the vast bulk of that document was
12 open. There were about six to ten words blanked out, which related to specific figures, specific
13 names, whatever, and he went on to say and find that it was quite clear that the test for whether
14 on discovery part of a document can be withheld on grounds of relevance is simply whether
15 that is relevant, or irrelevant. In that case the court looked at the bulk of the document and said
16 that it is clearly irrelevant to the issues in question.

17 The point is picked up in fact ----

18 THE CHAIRMAN: I do not have a copy of the case.

19 MR. RANDOLPH: I do apologise, madam. [Document handed to the Tribunal]

20 THE CHAIRMAN: It is often useful to ----

21 MR. RANDOLPH: To have the authority in front of you, yes, indeed madam.

22 THE CHAIRMAN: Yes, but also it cuts it short sometimes.

23 MR. RANDOLPH: Absolutely. What I was going to, madam, is internal p.12 - Lord Justice
24 Leggatt's Judgment, the second paragraph. This just sets out ----

25 THE CHAIRMAN: "In the disputed documents ..."

26 MR. RANDOLPH: Yes.

27 "In the disputed documents the plaintiffs had blanked out the name, amount or other
28 confidential details of transactions unrelated to the magnet management buy-out."

29 So you can see that is what they were concerned with - name, amount or other confidential
30 material. So that is fine, it was on that basis that they held - in fact the whole court - in separate
31 Judgments all held that the practice over 100 years should continue and that the appeal should
32 succeed because at First Instance it had been held that such matters should be disclosed. That
33 is fine. I have no problem at all with that. But here we are faced with something completely

1 different. Here we are faced, madam, as you saw last week with whole pages - reams of pages
2 excised.

3 THE CHAIRMAN: What sort of documents are these?

4 MR. RANDOLPH: Well madam, I thought you might ask me that and so I have usefully prepared or
5 had prepared for me a copy of a part of the disclosure, and this has just been picked up at
6 random. The first page is a note from someone dated October 4th 1991. It says "quarterly list
7 prices", it is quite important. Then, over the page you have "List price, fourth quarter. Vitamin
8 and Fine Chemicals, VMF, Deutschemark and US Dollars", and the whole page is blank.

9 THE CHAIRMAN: Well why is the page relevant at all?

10 MR. RANDOLPH: Madam, it has been disclosed.

11 THE CHAIRMAN: Yes, why have they blanked out that bit, and not the heading?

12 MR. RANDOLPH: I do not know.

13 THE CHAIRMAN: Why is the heading relevant?

14 MR. RANDOLPH: It may well be relevant, madam. If it is a price list it could be relevant with
15 regard to prices, and if one could see the prices going up over a period of time, start from '91,
16 look at '92, look at '93 you can see that the prices from Roche to its purchasers went up over
17 time. That is rather important, we would imagine, but we cannot tell and we cannot be asked to
18 second guess, which is effectively what my learned friend - or Freshfields - have asked my
19 solicitors to do. They say "point out why this irrelevant material is relevant?"

20 THE CHAIRMAN: Can I just ask you something, or just make a remark and see where that gets us?
21 This is a price list. If you look at the fourth page they have not blanked out "Carophyll Yellow.

22 MR. RANDOLPH: Or Carophyll Red.

23 THE CHAIRMAN: Or whatever the next thing is.

24 MR. RANDOLPH: That is under "VM1" madam, what about "VM2", which is the next page.
25 VM3?

26 THE CHAIRMAN: The items that they have allowed you to see I assume are items that are relevant
27 to our case?

28 MR. RANDOLPH: Well, I assume so, yes, madam.

29 MR. HOSKINS: The answer is "yes".

30 THE CHAIRMAN: Is it possible that what have been blanked out are the prices of material that is
31 irrelevant to our case and that is why they have given you the whole of the list price ----

32 MR. RANDOLPH: This is the problem, because we simply do not know. We have asked time after
33 time after time in correspondence, "Please let us know why you are saying this is irrelevant."

1 Nothing has come back, they just flipped it back on its side, which is to say “You tell us why it
2 is relevant?” Well that is, with respect, absurd.

3 MR. HOSKINS: Madam, I am afraid that that is not correct. It has been explained to Mr. Randolph
4 the basis upon which it is irrelevant and indeed, it was contained in a letter to his own
5 solicitors.

6 THE CHAIRMAN: And do I have a copy or not?

7 MR. HOSKINS: Maybe in the bundles - it is in the bundles, I will find it for you. But if I can
8 explain, on 21st September 2004 there was a letter accompanying the disclosure given by the
9 Roche defendants. Freshfields explained to Taylor Vinters that material within the documents
10 disclosed has been deemed irrelevant where, and here I am quoting from the letter: “It refers to
11 a vitamin which is not a RELEVANT VITAMIN”, that is in capital letters - the relevant
12 vitamin has been defined for the action.

13 “Or to a product which does not contain any relevant vitamins or because it refers to
14 a sale to a customer who is not the claimant, or any of the intermediary companies
15 specified in the order. Redactions have been made on the basis that if such irrelevant
16 material were contained in separate document that document would not be considered
17 relevant to the disclosure categories.”

18 So madam, it is not correct that no explanation has been given as to why they are considered
19 irrelevant, and the explanation that has been given is completely consistent, as we see from the
20 sample document. The reason why one has pages completely blanked out is to ensure the
21 integrity of the document. Obviously, the claimants want to see the first page of the document,
22 and then within it ----

23 THE CHAIRMAN: No, I can see the sense of giving the whole of the document and blanking out
24 the bits, as you say the integrity of the document.

25 MR. HOSKINS: Madam, I hope that interjection is helpful, because Mr. Randolph’s understanding
26 was not an accurate one.

27 MR. RANDOLPH: I am grateful to my learned friend, but I was aware of the letter to which he
28 refers, and that has now been opened ----

29 THE CHAIRMAN: I have now got the letter. I cannot tell you where it is because it is in our ----

30 MR. RANDOLPH: It is at bundle 10 983 to 984.

31 THE CHAIRMAN: Do not worry, I have the letter from another bundle.

32 MR. RANDOLPH: As this has now been opened, I am afraid I am going to have to go through the
33 chain of correspondence.

34 THE CHAIRMAN: Then I am going to have to get it.

1 MR. RANDOLPH: Bundle 10, and bundle 8. We will start with bundle 10, if we may, p.1014. This
2 is our response to the letter of 21st September. At “1” we deal with this issue.

3 “1 The usual rule on disclosure is that, if a document is relevant, the whole
4 document must be disclosed. You have redacted a significant amount of the
5 documents disclosed by your client, on the basis that the redacted part is either
6 irrelevant to the issues in this case or potentially commercially sensitive. It is
7 difficult to accept that information contained in the disclosed documents is
8 still potentially commercially sensitive, given the time frame. We note your
9 offer that arrangements can be made to inspect the original documents,
10 however, we do not want to incur the costs of such additional inspection
11 unless it is necessary. Please provide copies of the original unredacted
12 version of the following documents, to enable us to consider this issue
13 further.”

14 We then set out what we want to see by way of sample. That is all we need to look at in terms
15 of bundle 10. Then open up old bundle 3, which is now bundle 8, and we can pick this up at
16 724. You will recall, madam, the letter we have just looked at, 1014, that was 14th October.
17 This is Freshfield’s response of 11th November. There we have:

18 “1. Redactions have been made in order to protect the potentially commercially
19 sensitive information ...”

20 So this is the commercially sensitive point.

21 “... and to exclude irrelevant information to the benefit (in terms of time and
22 cost) of all the parties”.

23 And then they say that they will provide sample documents on a WP basis, these are the
24 samples.

25 THE CHAIRMAN: But they did provide you with samples?

26 MR. RANDOLPH: Samples - we will see what happens. 726. This is the response to that from
27 Taylor Vinters dated 19th November.

28 “Your letter dated 11th November 2004-12-20

29 “1 We have reviewed the copies of un-redacted original documents. We have the
30 following comments:

31 “Document 68, 1 January 1993 Roche Price List - Redacted information on
32 page 2 relates to vitamin A and is potentially relevant to issues in this case.
33 Please give the precise basis on which redactions have been made, or
34 alternatively, if this redaction was made in error please confirm.”

1 And then another point is made in connection with document 89, and then document 147:

2 “The redacted document has a clear manuscript circle...”

3 “2 “Where information has been redacted on the basis that it is commercially
4 sensitive, please explain precisely the basis upon which it is claimed that such
5 information remains sensitive.”

6 I think the remainder of that letter does not need to be looked at. We can then move backwards
7 unfortunately, but onwards in time, p.660, and we were looking there at a letter of 19th. This is
8 Freshfield’s response to that, 22nd November.

9 “Disclosure given by the Roche Defendants.

10 “(1) In relation to the unredacted documents supplied to you:

11 “(a) the information relating to Vitamin A on page 2 of Document 68 relates to the
12 prices of food and pharmaceutical grade Vitamin A as indicated by the sub-
13 heading above the redacted information is therefore not relevant to the issues
14 in this case.

15 “(b) an unredacted copy of Document 89 dated 11th May 1993 is attached; and

16 “(c) the manuscript circle around the information redacted from Document 147
17 was inserted by Freshfields Bruckhaus Deringer for the purpose of carrying
18 out -----

19 THE CHAIRMAN: Yes, I have read it and the circle was in order to identify it.

20 MR. RANDOLPH: Absolutely, and then:

21 “(2) information has been redacted from the documents disclosed on the basis it is
22 not relevant to the issues in this case. It is commercially sensitive because our
23 clients are concerned to minimise the disclosure of pricing information,
24 particularly as the relevant businesses are now owned by a third party...”

25 So now we have the two horse point, we have irrelevant but confidential, or irrelevant and
26 confidential, or something in between.

27 THE CHAIRMAN: But they say it is irrelevant, but maybe they would not have gone through this
28 procedure, but it is also confidential.

29 MR. RANDOLPH: Well we will see what Mr. Hoskins says about that, but I will carry on with my
30 trot through the correspondence. 740, this is 29th November, response to the 22nd. This is
31 Taylor Vinters:

32 “Disclosure given by Roche.

33 “2 Generally a relevant document is disclosed in full, and the order of 26 July did
34 not provide for documents to be redacted. We find it difficult to accept that

1 information in relation to pricing remains commercially sensitive given the
2 time period relating to the issues in this case. We ask your clients to
3 reconsider disclosure of all relevant documents in unredacted form; otherwise
4 we will raise the issue at the CMC on 7 December for consideration.”

5 which we did. Then 756 is the response, which is a letter of 1st December, and under the title
6 “Redactions”:

7 “(4) In relation to the redaction of the documents disclosed by our clients on 21
8 September...”

9 So that is going all the way back.

10 “... we would point out that the redaction of irrelevant material is common
11 practice in High Court litigation, and we have no reason to believe that this is
12 not acceptable in proceedings before the Competition Appeal Tribunal. You
13 have now had the chance to inspect a sample of unredacted documents for the
14 purposes of assessing that redactions of irrelevant material have been made
15 appropriately in relation to which you appear to have no objections. We ask
16 again that you explain the basis on which the redacted material is relevant to
17 the Tribunal’s order.”

18 The response to that is, and we now move into a completely different bundle, back to bundle
19 10, 1020 is my solicitor’s response, and at the bottom:

20 “In your letter dated 21 September 2004 you indicate that “redactions have
21 been made in order to facilitate our respective clients’ review of the documents,
22 by enabling relevant material to be clearly visible. The redactions also enable
23 the legitimate protection of potentially commercially sensitive information of
24 our clients.

25 “The practice of redacting irrelevant material is only relevant where the matters
26 to be redacted are either confidential or privileged. The onus is on your client to
27 demonstrate that this is the case. If the redacted material is simply irrelevant
28 and neither confidential nor privileged, then there can be no prejudice in
29 disclosing it.

30 “Unless we receive your agreement to provide disclosure of all relevant
31 documentation in this case in unredacted form, or alternatively adequate
32 justification as to why such information remains commercially sensitive, we
33 reserve the right to raise this matter....”

34 THE CHAIRMAN: And as I understand it they have said that you can inspect the documents.

1 MR. RANDOLPH: Yes, they have, but as pointed out, we do not see why we should go through that
2 particular cost, because the inspection is at their offices - query whether copies could be taken.

3 THE CHAIRMAN: The old fashioned way was that that was how disclosure was done.

4 MR. RANDOLPH: Yes, that was the old fashioned way, exactly, madam.

5 THE CHAIRMAN: And then you would see exactly what was going on. We used to stick pieces of
6 paper over with clips.

7 MR. RANDOLPH: Yes, madam, well luckily ----

8 THE CHAIRMAN: That is what we used to do when I started.

9 MR. RANDOLPH: Very, very few years ago, madam.

10 THE CHAIRMAN: Only yesterday!

11 MR. RANDOLPH: But I think the problem is we do not see why we should go to that cost. Why
12 should my solicitor traipse down from Cambridge to central London - it will take some
13 considerable time going through all the documents, we are not just looking at some of them.
14 There can be no prejudice here. It seems to us that the confidential aspect has dropped out, they
15 are looking now at irrelevance. If it is irrelevant it will not enter into the bundle but we have
16 concerns. Providing a sample - fine. We looked at the sample, there were a couple of issues,
17 they could be answered, but they had to be answered. Now, we are in a situation where, as has
18 been pointed out, if there is no confidentiality, if there is no privilege, there can be no
19 prejudice, and it does arouse the interests of the party receiving the documents. We have to ask
20 ourselves why? Let us not forget, going back to what was said at the previous hearing, that we
21 are looking at a situation where these documents were produced contemporaneously to the
22 operation - the cartel. So I think that comes into your wide discretion, madam, in terms of
23 dealing with this matter, and there can be no prejudice to the Roche Defendants. There could
24 be prejudice to us, we are the victims, and at the end of the day the most proportionate and
25 efficient way of dealing with this is certainly not to allow this position to continue, but simply
26 allow my solicitors to have disclosure of the unredacted copies so that they can put their minds
27 at rest as to what the documents refer to.

28 THE CHAIRMAN: How many documents are there?

29 MR. RANDOLPH: 13 bundles, madam.

30 THE CHAIRMAN: 13 bundles - like this?

31 MR. RANDOLPH: Lever arch files not all full, I am told, so it is not a huge task. My solicitors
32 would be delighted to receive that by courier on Monday and then this could be put to bed.
33 I am just going to raise that point again, we have some concerns - I am not saying concerns
34 about the *bona fides* of Freshfields or anything else, absolutely not.

1 THE CHAIRMAN: Are you going to pay the costs of this?

2 MR. RANDOLPH: It would be the usual approach to disclosure. Sorry, madam, can I take
3 instructions - I said that bravely! (After a pause) Madam, there is an issue, we have already
4 paid for the redacted version, so there would have to be some degree of cost allocation on this
5 because we paid for things to be photocopied which are entirely black, which is unfortunate.
6 But I am sure, between the solicitors some sensible solution could be arranged, and that would
7 go a long way in assisting this, and it may well be that much of the documentation is not
8 relevant, but at the end of the day we would like to see it. This is in marked contrast, as I say,
9 to Lord Justice Hoffmann's case where, as Lord Justice Leggatt pointed out it was a name,
10 amounts, and certain other confidential material that were excised. This is not the case here, not
11 the case at all.

12 THE CHAIRMAN: This is irrelevant produce is what they are saying.

13 MR. RANDOLPH: And we cannot be asked to second guess, we cannot say "Oh yes it is bound to
14 be relevant because it is black and it is on p.5". That just does not work, for obvious reasons.
15 Madam, I do not think I can take it very much further, especially given the time.

16 THE CHAIRMAN: Let us see if Mr. Hoskins can deal with it shortly.

17 MR. HOSKINS: There is a challenge, madam! Mr. Randolph's application is baseless on a number
18 of grounds. The starting point is the *GE Capital* case. It is a useful encapsulation of what was
19 the position and still is the position.

20 "It was well established that a party is entitled to seal up or cover up parts of a
21 disclosed document on the ground of irrelevance, just as it could withhold an entire
22 document on that ground, provided that the relevant part could be covered without
23 destroying the sense of the rest or making it misleading."

24 The irrelevance ground has been explained.

25 THE CHAIRMAN: The irrelevance is on the basis that the products are irrelevant.

26 MR. HOSKINS: Irrelevant products. The confidentiality point is this: the presumption is, the rule is
27 that we are entitled not to disclose pricing, any information that is irrelevant. Here there is
28 pricing information, there may be a debate about its age obviously, but it is not just our
29 information because as we previously made clear we obtained parts of the disclosure from the
30 third party that now owns the business, because they bought the business from Roche. So first
31 we have irrelevance and that is free-standing, and that is enough, we say, to entitle us to redact.
32 Secondly, we do not want to disseminate widely pricing information that belongs to a third
33 party.

34 THE CHAIRMAN: Your third point is that you have offered to show it to the solicitors.

1 MR. HOSKINS: My third and fourth points are we have provided them with a sample of unredacted
2 material and said "Have a look". They told us what they wanted to see. We said "Here you
3 are". They could not find any problems, and they came back and said "We are still not happy."
4 We said "Well come and have a look", and they said "No." Now, the starting point is
5 important because Mr. Randolph says there is no prejudice, but that is the wrong approach.
6 The *GE Capital* case shows that if it is irrelevant it can be redacted. If Mr. Randolph is
7 suggesting that there is a problem with the redactions he has to come up with a reason, the
8 same way that we did, if you like, with Mr. Forbes in our specific disclosure application. But
9 Mr. Randolph cannot raise anything like that, so he has the wrong test. We are entitled to
10 redact irrelevant material and the test is not "Oh well, it will not do anyone any harm", and
11 Mr. Randolph's application has to fail on that basis.

12 THE CHAIRMAN: And is your offer still open?

13 MR. HOSKINS: To come and inspect - certainly, yes. Madam, the only other point is exactly the
14 same position arises in the BCL case and no objection has been taken by the BCL claimants.
15 Nothing in particular turns on that.

16 Unless I can help you further, those are our submissions.

17 THE CHAIRMAN: Thank you.

18 MR. RANDOLPH: Madam, the only point I would come on to is that we are still firm with regard to
19 the inspection.

20 THE CHAIRMAN: I know, you do not want to go there.

21 MR. RANDOLPH: We do not want to go, but we are happy to inspect them at our premises.

22 THE CHAIRMAN: But you are not happy to pay for that. So if you make them do something that is
23 totally irrelevant, as it turns out, then the costs just go into the pot.

24 MR. RANDOLPH: Well there may be some debate about that which can be sorted out, because as
25 I say there will be some costs which will be effectively incurred for nothing, because they
26 would be redacted. But we would be happy to inspect the documents under an inspection
27 regime at Taylor Vinters offices in Cambridge, which would certainly avoid travel to and fro --
28 --

29 THE CHAIRMAN: It is a very big distance between Cambridge and London , and there are no
30 trains, I know.

31 MR. RANDOLPH: Well madam, we are not a multi-national like Roche. We are a relatively small
32 company. Our claim is relatively small and it would involve a solicitor coming down and
33 spending overnight in London.

34 THE CHAIRMAN: Is it 13 files, how long is it going to take?

1 MR. RANDOLPH: Well madam, you have to go through them carefully. Certainly in my younger
2 days I have been involved in disclosure exercises or “discovery” exercises as they were called,
3 and you can flick through quite easily and then the dear old Leader comes in and says “My
4 goodness me, you’ve missed something”, and I am sure that those behind me would not be like
5 that. We are not putting up a straw man here, there is a real issue on costs and those are my
6 very strong instructions. However, we would be happy to inspect these in Cambridge, and that
7 would seem to be a very sensible approach - middle ground, a third way.

8 The only other point I would raise is with regard to *GE Capital*, it was based on its
9 facts, we say, although I agree that their Lordships did agree that the practice was age old.

10 THE CHAIRMAN: We all know, you have done inspection and disclosure and I have done
11 disclosure, and certainly I have done it on the basis that you used to stick things over the
12 relevant bit because it was before you could do anything else, and now you black it out.

13 MR. RANDOLPH: Now you black it out, but there are ways and means, and there are extents of
14 blacking out, and that is what we are concerned with. As I say, obviously short matters that is
15 fine, but where whole documents have been blacked out then we have difficulties with that, but
16 anyway we leave it in your hands, madam.

17 MR. HOSKINS: I am sorry there are two further points that come out Mr. Randolph’s submissions
18 there that I would like to pick up on. The rule is we are entitled to redact. We have gone
19 beyond making an offer. We are not prepared to make any further offer; they take it or leave it.
20 The second point is that Deans is not a small company. Its sales in the financial year 2003 were
21 £225 million, and it is part of a larger group. The suggestion that they are a small company is a
22 ridiculous one.

23 THE CHAIRMAN: The correspondence, Mr. Hoskins, it is all over the place so it is very difficult to
24 flick through it, but because there is the confusion between confidentiality and disclosure, and
25 because there is not a recent letter, where it is set out very clearly - and I am not saying that this
26 is the right or the wrong way to deal with it - but is one possibility for your solicitors to do a
27 witness statement to say that they have checked and all of this is irrelevant “for the following
28 reasons”?

29 MR. HOSKINS: That is certainly a possibility

30 THE CHAIRMAN: Except for the costs.

31 MR. HOSKINS: That is why I was hesitating.

32 THE CHAIRMAN: But they did disclosure originally ----

1 MR. HOSKINS: Madam, we have done the disclosure exercise and it is backed with a Statement of
2 Truth, I believe by the client, but obviously was supervised by Freshfields. So in a sense, one
3 already has the Statement of Truth which binds.

4 THE CHAIRMAN: Done by the client and not by the solicitor?

5 MR. HOSKINS: I think it is by the client, yes. If Mr. Randolph's clients want a witness statement,
6 fine, but they should be paying the costs of it because, as I say, the rule is ----

7 THE CHAIRMAN: No, no, I was just trying to think if there was an easy way of doing it, but if the
8 disclosure statement was done by the client and not by the solicitor, then the solicitor would
9 have to redo that bit of disclosure in order to check. I think that is what is being said, is it?

10 MR. HOSKINS: Mr. Lawrence is saying that if he were to do a witness statement he would want to
11 do a verification exercise.

12 THE CHAIRMAN: So we have the problem on both sides.

13 MR. HOSKINS: Madam, you have our submissions. If we wanted to we could withdraw our offer
14 now and say "tough" ----

15 THE CHAIRMAN: You have still got on the table the inspection offer.

16 MR. HOSKINS: It is still there if they want to do it, yes.

17 THE CHAIRMAN: Was there something else, or can we rise until 2 o'clock.

18 MR. RANDOLPH: I think we can rise until 2 madam.

19 THE CHAIRMAN: Shall we say 5 past 2 - is that enough time?

20 MR. RANDOLPH: We have to take instructions.

21 THE CHAIRMAN: Quarter past two.

22 MR. RANDOLPH: Yes, because it is probably lunch time in the farming business as well!

23
24 (The hearing adjourned at 1.15 p.m. and resumed at 2.15 p.m.)

25
26 THE CHAIRMAN: The Claimants have been relying on the expert evidence of Mr. Morrell, who
27 is a Chartered Accountant. The Defendants are adducing expert evidence both from a
28 Chartered Accountant and an Economist. The Economist is Dr. Biro and he is addressing the
29 appropriate methodology and the downstream passing on defence. Mr. Morrell is not an
30 Economist and has, in his report, assumed the methodology. He is not a specialist in the
31 methodology and cannot give expert evidence on that topic. His expertise is in the calculation
32 based on the methodology. Having heard what the Tribunal said at the last CMC, the
33 Claimants have submitted today that they would like an opportunity to adduce evidence from
34 an expert equivalent to Dr. Biro, unless the Tribunal appointed its own Assessor in place of Dr.

1 Biro. The Claimants submit that the Tribunal should appoint an Assessor in this case and
2 relied on the practice as to this in the Court of First Instance. However, the Court of First
3 Instance does not have jurisdiction in damages in competition cases and so there is not a clear
4 corollary between this case and a Court of First Instance case. In a case in which the evidence
5 of the expert is contested and where, as was clearly envisaged this morning by all parties, the
6 expert would be likely to be vigorously cross-examined as to his approach, it seems to me that
7 the course suggested by the Claimants is not appropriate and would not be likely to prove
8 helpful to this Tribunal in deciding what is a very novel issue. In that event, it seems to me that
9 the Claimants should be able to adduce expert evidence in reply to the evidence of Dr. Biro.
10 All parties are agreed that in that event such expert should produce his report in response to Dr.
11 Biro's report by 21st January 2005. So the order will follow that Judgment. I mention one
12 other matter - to which Mr. Kennelly may wish to know the answer - and that is on the
13 timetable and the timing for preparation of the schedule of cross-examination. I am going to
14 order that there is a draft schedule for cross-examination, which is not necessarily issue related,
15 by 26th January; and then a final schedule which is issue related by 11th February, to
16 accompany the written submissions and other documents. That seems to me to deal with the
17 matter both ways, because it does mean that all the parties will address the question of how
18 long it is going to take, and will then readdress it properly through counsel when they are
19 preparing for the case.

20 THE CHAIRMAN: I think those are all the matters that Mr. Kennelly needs us to decide.

21 MR. KENNELLY: Madam, yes, save perhaps your indication in relation to any mediation. There
22 was a debate before you in relation to which date might be appropriate. If you were to direct
23 anything to do with a date for mediation - if not then ----

24 THE CHAIRMAN: Were there going to be any more submissions on that?

25 MR. HOSKINS: There were by me, madam.

26 THE CHAIRMAN: That is what I thought, that is why I ----

27 MR. KENNELLY: In that event, madam, we may wait to hear Mr. Hoskins' submissions and your
28 decision on that.

29 THE CHAIRMAN: Does that mean you have to stay, because you tried to leave before?

30 MR. KENNELLY: We did, madam, but I may have to stay in any event. I am very grateful for your
31 decision.

32 THE CHAIRMAN: You were going to tell me, hopefully ----

33 MR. RANDOLPH: Yes, absolutely, but I do not know whether, to assist Mr. Kennelly, you want to
34 hear Mr. Hoskins.

1 THE CHAIRMAN: Are you going to take two minutes, or ----

2 MR. RANDOLPH: Yes, so far as I am concerned I will be very short, but Mr. Hoskins may ----

3 THE CHAIRMAN: Why do we not deal with the ADR issue first?

4 MR. RANDOLPH: Yes.

5 MR. HOSKINS: Madam, what we propose in relation to a mediation is that a mediator should be
6 appointed, who will obviously have to be agreed between the parties. The papers should be
7 delivered to the mediator on 14th January 2005 - actually, that is a Friday, it is probably
8 sensible if the papers are delivered on the Monday, I think we have until close of business to
9 put in our documents, and it is probably sensible that the mediator should get all the documents
10 at the same time.

11 THE CHAIRMAN: Yes.

12 MR. HOSKINS: So the papers will be delivered to the mediator on 17th January - that could be in
13 the morning, obviously, because they will be complete by then.

14 THE CHAIRMAN: Yes.

15 MR. HOSKINS: Then I think it is essential to allow a few days to elapse for two reasons. One is to
16 allow the mediator to read the papers and secondly, also it is common practice to have a pre-
17 mediation meeting. What I would envisage then is papers to be delivered on the morning of
18 17th ----

19 THE CHAIRMAN: Can I just ask you why can they not be delivered on 14th if you are delivering to
20 everybody else on 14th, because then he has the weekend.

21 MR. HOSKINS: They could I guess. We are due to submit by close of business.

22 THE CHAIRMAN: You are going to have copied all the papers on that day?

23 MR. HOSKINS: Yes. I am just trying to make it as practical as possible.

24 THE CHAIRMAN: Well we gain two days possibly.

25 MR. HOSKINS: Yes, if we send them to the mediator on the evening of the Friday, so that would be
26 14th. Then a few days would have to be allowed, as I said for mediator to read and then the pre-
27 mediation meeting, and we would envisage a mediation beginning sometime after 19th January
28 then.

29 THE CHAIRMAN: The exact date of the mediation could be sorted out when you appoint the
30 mediator, because ----

31 MR. HOSKINS: Madam, it would have to be because it would be subject to everyone's availability,
32 obviously.

33 THE CHAIRMAN: Absolutely.

34 MR. HOSKINS: So that is why I said after the 19th.

1 THE CHAIRMAN: It could be on the 19th?

2 MR. HOSKINS: Potentially, yes.

3 THE CHAIRMAN: And I suppose what the Claimants are going to say is they want to seek a date
4 before 21st if possible, depending on convenience.

5 MR. HOSKINS: It is the lawyers involved, plus the clients you have to attend obviously the
6 mediation and give instructions. I think that is probably as firm as we can be.

7 THE CHAIRMAN: Shall we see if the claimants are happy with that?

8 MR. ROBERTSON: Madam, the only thing that occurs to me is that the only paper which has
9 a deadline of 14th is Mr. Forbes' report, so a mediator could receive the papers actually well in
10 advance of the 14th and then supplemented by Dr. Biro and Mr. Forbes. So the mediator can do
11 the task of reading in a little bit earlier, and that may help accelerate matters. But as long as the
12 mediation takes place in the week of 17th.

13 THE CHAIRMAN: We seem to have an agreement that as long as that is convenient to everybody.
14 The indication has been given, if the parties agree a mediator sooner rather than later, and agree
15 that the mediation is to take place, if possible, before 21st then the arrangements about delivery
16 of papers and all of that can be dealt with amicably between the parties and the mediator ----

17 MR. ROBERTSON: That seems very sensible.

18 THE CHAIRMAN: -- as to how he wants them to be delivered, and whether he wants to read them
19 in two bites or in one bite.

20 MR. HOSKINS: Madam, yes. I think our position is we would not want to provide them piecemeal
21 for obvious reasons, but the crucial thing is mediation sometime - call it "as soon as possible"
22 if you like - after 19th January.

23 THE CHAIRMAN: I think that is a very helpful indication and shall we leave it at that. If there are
24 any problems you can come back to me, but that is very helpful and thank you very much.

25 MR. RANDOLPH: May I add my thanks to my learned friend for that, because that is exactly what
26 we were looking for, so we are very grateful for that. Mr. Kennelly I think can now be
27 released?

28 THE CHAIRMAN: Yes, Mr. Kennelly - thank you for staying.

29 (Mr. Kennelly withdrew)

30 MR. RANDOLPH: The only other two points, madam, on the agenda are those relating to disclosure
31 and redaction. If I take them in reverse order. We have managed to talk to Mr. Colin Wright -
32 not Mr. Morrell, Mr. Colin Wright - who is the man who is in charge insofar as Deans is
33 concerned, and is for this purpose the holder of the computer records. Just so no one is under
34 any illusion, he was away at a trade conference all day yesterday, so as we had said we did try

1 to contact him and he simply was not there. He is content to run the programme, which will
2 take about three days, to cause some 2000 pages to be produced, and once that is done it will
3 be delivered to Freshfields.

4 THE CHAIRMAN: That will be in a readable form, will it?

5 MR. RANDOLPH: That will be in a form that comes out from the computer - it is not going to be
6 squiggles, there will be numbers on it.

7 THE CHAIRMAN: No. I just had an experience this week where disclosure was given of some
8 computer programme and it needed another programme to read it so I am just being careful.

9 MR. RANDOLPH: As far as I understand the material will be readable, but then we are not going to
10 go through the exercise of reading it for Freshfields or Roche. Just one point that was raised by
11 my learned friend, with regard to the amount of time we have had since we have known about
12 this. He referred to a letter of 30th November - I just want to make this point before we get into
13 any point on why we have taken the position we have. That letter can be found, madam, at
14 bundle 10, p. 891.

15 THE CHAIRMAN: Sorry, what is this going to?

16 MR. RANDOLPH: Mr. Hoskins mentioned in passing before the short adjournment the point about
17 "We only got this letter yesterday" ----

18 THE CHAIRMAN: I thought we had decided that we were looking at everything today and we were
19 not worried about yesterday?

20 MR. RANDOLPH: Good, well if we do not have to worry about yesterday or what happened on the
21 30th ----

22 THE CHAIRMAN: Not at the moment.

23 MR. RANDOLPH: -- and you are not interested about that then that is fine, I do not have to deal
24 with that.

25 THE CHAIRMAN: We have now got to a stage where you are going to disclose something. Let us
26 see what happens with the disclosure.

27 MR. RANDOLPH: Maybe I was being overly cautious, madam, and we can move on. In so far as
28 redaction is concerned - Mr. Hoskins has one point on specific disclosure.

29 MR. HOSKINS: Our only concern is that we get is the information which the schedules were based.
30 Remember, there are two schedules, one exhibited to Mr. Wright's witness statement, and one
31 is attached to Mr. Forbes' supplementary report. Madam, you raised the point very properly. If
32 one just gets sheets without any means of understanding them.

33 THE CHAIRMAN: It looks as though we have some instructions.

1 MR. RANDOLPH: We have indeed, on the hoof. **This** is a sample of raw data that I have been
2 given, but they are going to get something better than that, because that means very little to me,
3 but maybe it means a great deal to their expert. But they are going to get something which
4 makes it more - the computer programme that was used in connection with this raw data to get
5 to the table that Mr. Morrell used will be provided or run on this raw data, so that they get the
6 basis for the table. That is what I have been told, and I am sure that is what will happen. That is
7 why it takes three days, because otherwise it would just be a question of printing it.

8 THE CHAIRMAN: Unless you see what you are going to get you will not know whether what you
9 get is what you want.

10 MR. HOSKINS: That sounds like it is what we want and hopefully that is what we get.

11 MR. RANDOLPH: Indeed.

12 THE CHAIRMAN: Is this going to be run over the weekend?

13 MR. RANDOLPH: I do not know madam. It has started, the button has been pushed.

14 THE CHAIRMAN: So it is running over the weekend, and when he comes in on Monday
15 morning ----

16 MR. RANDOLPH: The button was pushed, I do not know whether it shuts down over the weekend,
17 but they will get it as soon as. So that is that.

18 Then there is the redaction issue, and I am glad to say that solicitors for both parties
19 have met and it has now been agreed that one of my instructing solicitors should attend
20 Freshfields and look at a slightly larger sample and then matters can progress.

21 THE CHAIRMAN: That sounds very sensible.

22 MR. RANDOLPH: That will mean that effectively there will not be an overnight stay or anything
23 like that. I know it is small, and perhaps parochial, but it is important we feel. So we are very
24 grateful to my learned friend for that.

25 THE CHAIRMAN: So that has dealt with those issues, I do not need to rule on either of them.

26 MR. RANDOLPH: Absolutely, so there we are.

27 THE CHAIRMAN: Very sensible, thank you very much.

28 MR. HOSKINS: Madam, can I say, in relation to specific disclosure, we would like an order to be
29 drawn up if that is the basis. If it is within three days, can we say by 23rd December?

30 THE CHAIRMAN: Do you actually want to do that, because you do not now know whether or not it
31 is what you want.

32 MR. HOSKINS: It is simply we have applied for specific disclosure, we have been told we can have
33 it within three days it just seems sensible to have an order, given that the indication was made.

1 THE CHAIRMAN: What they have offered to do is to provide you with whatever these documents
2 are by - he is saying 23rd, which is ----

3 MR. HOSKINS: We were told three days, I am assuming no work at the weekend.

4 THE CHAIRMAN: Thursday 23rd.

5 MR. HOSKINS: I am allowing some leeway.

6 MR. RANDOLPH: Madam, the button has been pressed; we are using our best endeavours. What
7 I am concerned about is that an order is made and then the computer blows up. Obviously we
8 have liberty to apply.

9 THE CHAIRMAN: Use your best endeavours to provide it by 23rd - is that all right?

10 MR. RANDOLPH: Yes. I am very grateful.

11 MR. HOSKINS: Yes, madam, I am just concerned because obviously our expert has to consider it
12 and I am trying to avoid slippage if possible.

13 MR. RANDOLPH: Absolutley.

14 THE CHAIRMAN: I do not know what these documents are called?

15 MR. RANDOLPH: Relevant computer records as requested.

16 MR. HOSKINS: There is a formulation which is set out in our specific application.

17 THE CHAIRMAN: That may be wider than these documents, that is what I am concerned about.

18 MR. HOSKINS: It may be, but I think the language can certainly be ----

19 THE CHAIRMAN: What is your language?

20 MR. HOSKINS: It is in bundle 9 in Deans.

21 THE CHAIRMAN: We now have red flashes on our Deans' bundles so we know which ones they
22 are.

23 MR. RANDOLPH: I know we will sort this out, but there is one point on the numbering - I suppose
24 by having a red flash on your bundle that may avoid it - but for those of us without a red flash
25 we are going to have two sets of bundles with the same numbers, or similar numbers, so there
26 will be two x1, two x 2 ----

27 THE CHAIRMAN: That is why there are now red flashes on the bundles.

28 MR. RANDOLPH: Yes, maybe we should follow that.

29 THE CHAIRMAN: That is what I was just going to show you that that is what we have done.

30 MR. RANDOLPH: Yes, I am very grateful.

31 MR. HOSKINS: Sorry, madam, the application is at the front of the Deans' bundle 9. It is in
32 Part A of the application, it is 2(b), and it is couched in wider terms, but the language I think
33 can be taken:

1 “... the underlying computer records from the Claimant’s IT system which relate to
2 the total amount of food produced by the Claimant, and the amounts of feed
3 consumed on the Claimant’s farms for the period October 1991 to February 1999.”
4 THE CHAIRMAN: Is that what is being provided?
5 MR. RANDOLPH: Yes Madam.
6 THE CHAIRMAN: Because what I do not want to do is to make an order and then it turns out that it
7 actually was not quite what is being provided and then we have a problem.
8 MR. RANDOLPH: Both my learned friend and I are in agreement, I think, as to what they are
9 looking for and what we are going to provide. Insofar as it is limited to the underlying
10 computer records from the Claimant’s IT system which relate to the total amount of feed
11 produced by the Claimant, and the amounts of feed consumed on the Claimant’s farms for the
12 period 1991 to 1999, and perhaps we could add there “as averted to in the letter of Mr. Thane
13 Forbes”.
14 THE CHAIRMAN: Is that all right?
15 MR. RANDOLPH: We are happy with that.
16 THE CHAIRMAN: You are happy with that wording?
17 MR. RANDOLPH: We are happy with that wording insofar as I think we both know what we are
18 talking about.
19 THE CHAIRMAN: All right. So, “The Claimants to use their best endeavours to produce by 23rd
20 December those records.”
21 MR. HOSKINS: Madam, thank you. In relation to redaction I would like to apply for my costs of
22 that issue in any event. I can make the submission very quickly. We said in a letter of 22nd
23 November, to which you were taken, that we were withholding on the basis that they were
24 (a) irrelevant; and (b) commercially sensitive. So it does not really matter because irrelevance
25 clearly was sufficient in itself. We then offered a sample, which was taken up and we dealt
26 with the queries from the sample, and nothing else came out of that. We then offered
27 inspection and in fact our submission is that the Claimants have actually spent more money
28 arguing about this point than would have been spent if they had simply taken up our offer to
29 come and inspect it immediately we made it. I appreciate the Tribunal does not want to take
30 every single tiny element and make costs’ orders, but in this case really the reasonable
31 approach was to accept our offer when we made it, and that is why I make the costs’
32 application.
33 MR. RANDOLPH: Madam, we would oppose that application. As, madam, you pointed out earlier
34 it has not been made clear still which documents they claim confidentiality for, and which

1 documents are irrelevant. The question of the samples was taken up, yes, and we looked at it,
2 and certain queries were made, but that did not necessarily lead to the end of the matter.
3 Inspection of all the documents would have been, we say, wholly disproportionate and overly
4 expensive.

5 There is an argument, we would submit, for saying that all the documents should be
6 redacted. We have heard what you, madam, have said this morning and in the light of that we
7 have been happy to come to this middle ground which is, as I emphasise, a middle ground. It is
8 not what was initially offered and it is not what we were looking for either, it is somewhere in
9 the middle and that is the way these things work at the end of the day. Overall, we would say
10 there is absolutely no reason why they should get the costs of this application. We say the
11 application was perfectly well founded and, as I have said, we have got to a position which is
12 some form of a compromise between the two. I would submit that our approach has been
13 perfectly proportionate and reasonable and in those circumstances the correct order would be
14 costs in the case.

15 MR. HOSKINS: Madam, we have not reached a middle ground. We said "Come and inspect as
16 many documents as you want", unilaterally, they have said "No, no, we will just come and look
17 at some of them". I do not need to add anything.

18 THE CHAIRMAN: It seems to me that it is premature to deal with costs because we do not know
19 what the result of the inspection is going to be, and although it is unfortunate that it has taken
20 this long to resolve the inspection part of it, I think the matter needs to be left over and let us
21 see where inspection takes us.

22 MR. HOSKINS: Thank you very much, madam.

23 THE CHAIRMAN: Anything else?

24 MR. RANDOLPH: I think that is it, madam.

25 THE CHAIRMAN: Thank you all very much for today. I think it has been a useful day. Of course
26 permission to apply on any matter, and can I just say it is important that everybody works to
27 a particular timetable as they are clearly doing, and if there are problems in relation to
28 preparation then it may be helpful once the problem appeared and was not resolved, if it is
29 helpful to apply here then I will try and make myself available, and in that regard can I say that
30 I will not be available almost certainly the week 4th, 5th, 6th and 7th because I am sitting
31 elsewhere and it would become I think very difficult. The following week (the week of 10th
32 January) I am probably sitting elsewhere but I can probably make myself available but not
33 during normal court hours. But if we fix something for, say, 4.30 or something like that, that
34 would be possible, and I think the President indicated last week that that was something that

1 we would offer as a service here, so that would be possible. After that there should be no
2 problem in fixing anything. Hopefully everything will be resolved amicably and there will not
3 be any necessity to come back, but if there is then it would be better to come back than cause
4 a problem on the timetable.

5 MR. HOSKINS: Thank you very much.

6 THE CHAIRMAN: I also note what Mr. Hoskins said about the principles, and as I said before it is
7 important that that is addressed at an early stage or at the earliest stage it can be, and that may
8 be a point on which one might need the whole of the Tribunal not just me, I do not know.

9 MR. HOSKINS: I appreciate you are looking at me because we dealt with it, but as we have said
10 this issue is really in the Claimants' hands however they want to progress it. It is not something
11 that we can push unilaterally.

12 THE CHAIRMAN: I am sure it is being given consideration everywhere and the consequences of it
13 are being given consideration.

14 MR. ROBERTSON: Madam, it is under active consideration and very much in mind, particularly
15 the consequences.

16 THE CHAIRMAN: If there is nothing else. The costs are reserved for today and if there is nothing
17 else then thank you all very much.

18 (The hearing concluded at 2.45 p.m.)