IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1060/5/7/06

Victoria House
Bloomsbury Place
London WC1A.2EB

4th September 2006

Before:
MARION SIMMONS QC
(Chairman)
PROFESSOR ANDREW BAIN OBE
GRAHAM MATHER

Sitting as a Tribunal in England and Wales

BETWEEN:

HEALTHCARE AT HOME LIMITED — Applicant

and

GENZYME LIMITED — Respondent

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

Mr. Christoper Vajda QC and Mr. Michael Bowsher (instructed by Manches) appeared for the Respondent.

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CASE MANAGEMENT CONFERENCE

THE CHAIRMAN: Good morning. Can I just say a few words before we start. Can I thank you for your detailed skeletons which we found extremely useful. It might be helpful if I outlined what our concerns were at the moment, having read the skeletons.

First, in relation to what is covered by s.47(a), it seems to us at the moment that the crux of the matter is what is meant by the word "Decision" in s.47(a). It seems to us that this must cover the findings of facts relied on for the identified infringements. I am not going to go into that any further, I assume you will understand what I am addressing at that point.

Second, it seems to us important to understand the purpose of s.47(a). Our preliminary view is that its effect is to allow a Claimant to rely on the findings of fact and law in the Decision. Whereas *issue estoppel* normally applies only to the parties, s.47(a) provides that a person who has suffered loss can also rely on those findings which are found in the Decision.

Third, in looking at what is the Decision, it is informative to look at the original OFT Decision, which included the remedy section. It seems to us at the moment that the division of infringement from remedy in this Tribunal as two different hearings was done for expediency and it does not affect the substantive position. In that connection, we would refer you to paras.390 and following of the OFT Decision. Our preliminary reading of that is that the Decision is that there is an infringement until it is brought to an end, rather that an infringement between certain dates.

Fourth, if we turn to the amount of an interim payment, assuming that is where we get to, then it seems to us that a starting point may be the 6.5 per cent, which Genzyme offered on 1st July 2005.

Those are the matters in relation to the Decision point.

Turning to the CMC generally, at present we are not minded to take the case in stages, but we are minded to impose a strict timetable. We note that a March hearing date has been indicated, but we would like to discuss the timetable in greater detail.

In relation to not taking the case in stages, our preliminary view is that to deal with exemplary damages as a matter of law in isolation is not actually going to achieve a saving since, if we did it, we would still have to decide the damages on both bases, non-exemplary and exemplary. Otherwise there may be a significant delay caused if the exemplary damages, in principle, was appealed and we had to wait until that was determined and then come back to deal with damages generally. It seems to us that we do not get a saving by just dealing with the principle.

I think that is all the matters I was going to refer to. I do not know if you want to think about anything for a few minutes or whether we can continue now. Mr. Brealey?

MR. BREALEY: I think we can continue. That is extremely helpful and I think it does shorten the submissions. It broadly covers what I was going to deal with, so if I can just kick off.

THE CHAIRMAN: Yes. So that we have a timetable for today can I ask you how long you think you are going to be?

MR. BREALEY: I would imagine no more than an hour on s.47.

THE CHAIRMAN: Mr. Vajda?

MR. VAJDA: The same, but while I am on my feet could I say that we also have listened with great interest to what the Tribunal has said in relation to the directions. I have already mentioned to my friend before coming in here that there may be quite an element of common ground now between the two of us. What I would invite the Tribunal to do, particularly in the light of the Tribunal's observations, when we have finished the argument on the s.47(a) point, is have a short break and I can discuss the matter with my client and Mr. Brealey and it may be that we can come back with an agreed formula, obviously subject to the views of the Tribunal.

THE CHAIRMAN: That was really why I was asking about timetable. It sounds as if we can do the Decision this morning.

MR. VAJDA: Yes.

THE CHAIRMAN: And then come back at two o'clock and deal with the timetable. That will give you lunch. Is that feasible? It might be helpful then if I read off my list on the timetable.

MR. VAJDA: Yes, that would be helpful.

THE CHAIRMAN: I am not saying it is comprehensive, but it is what is going through my mind.

MR. VAJDA: Yes, this is on effectively from now on?

THE CHAIRMAN: From now on, yes. The pleadings and making sure that the pleadings are closed; the next thing would be disclosure; factual witness statements; the question of experts and who are the experts and permission to have them and then their reports. The rest of it, we would have to think about the other matters, but the things that I am thinking about are the meetings of experts, the statement of agreed and non-agreed and why not agreed; a statement of agreed facts; a statement of the issues to be decided by the Tribunal; a schedule of cross-examination, if there needs to be any ----

MR. VAJDA: The statement of agreed facts, and then the next one, madam?

THE CHAIRMAN: Statement of agreed facts; issues to be decided by the Tribunal, fact and law; a cross-examination schedule – in other words, a schedule saying, "These are the issues, these are the witnesses, that is what we are going to cross-examine on", so that it is both precise and we know where we are going and which witnesses are needed in relation to which issues.

MR. VAJDA: Yes, I may come back on that one.

THE CHAIRMAN: That has worked quite well previously. It needs quite a lot of thought, but it is quite useful because it refines the issues. Then trial bundles, written skeletons and chronology, et cetera. Within that timetable there may need to be various CMCs in relation to the procedural matters; and then we would need a pre-hearing review two or three weeks before whatever the date is.

MR. VAJDA: May I throw it out at the moment, this is for everybody: if we are going to be thinking of, say, fixing a time, one thing we will need to give some thought to is the likely duration of the trial.

THE CHAIRMAN: Absolutely.

MR. VAJDA: It may not be something we can actually determine today, but that is certainly something we need to be bear in mind.

THE CHAIRMAN: I think we are going to have to determine it in a preliminary way in order to put a diary fixture in, and we do want to put a diary fixture in today. I did look at the *Vitamins* case and how we timetabled that in making my list. That might be helpful.

MR. VAJDA: If there is something the Tribunal could make available us to have a look at before two o'clock in relation to the *Vitamins* case that might be helpful.

THE CHAIRMAN: I do not think it will help. I think my list is sufficient. Let us hope we can finish the main part by lunchtime. Mr. Brealey?

MR. BREALEY: Madam, just picking up on some of the topics that you mentioned, what is the Decision and you mentioned the original OFT Decision, the fact that the judgments is divided into two parts does not affect the substance. Can I then examine that as regards the Tribunal's judgments as well? We would submit that both judgments – that is the substantive and the remedies – constitute a Decision within the meaning of s.47(a)(6)(c). We are not looking at the plea Decision as such, we are looking at 6(c) a Decision of the Tribunal, that Chapter II prohibition has been infringed.

We would say that they have to be read together. There are two reasons for this at least: first, the plain meaning of both judgments. On a proper reading of both judgments, and I would like to take the Tribunal to them, they both determine the nature of the infringement and they should be read together. That is the first reason.

The second reason is a teleological construction of s.47, what is the purpose behind s.47? We would say that when one looks at the purposive construction it leads to the conclusion that both judgments have to be read together. This is essentially the effective jurisdiction of the Tribunal – if I can call it the "effective jurisdiction of the Tribunal".

If I take the first reason first, both judgments determine the nature of the infringement. Could I go first to the 11th March judgment, sometimes called the "Substantive Judgment", and go to

para.654. Effectively what Genzyme is attempting to do is to freeze the damages claim as at March 2003. It says that the Tribunal does not have jurisdiction to award damages after that date. It says that is the period of infringement essentially. In our submission, it is simply incorrect just to focus on para.654. I think they would also rely on para.640, but 654 is sufficient. One is essentially even truncating the substantive judgment. What Genzyme do, Mr. Vajda, he ignores, for example, para.655, the margin squeeze must now be terminated. There, on the face of this judgment, on the record, there is a determination that the margin squeeze is continuing. So again, when one looks at s.47(a)(6) and asks the question, "Is this the Decision of the Tribunal that Chapter II is being infringed?" we would say, "Of course, look at 655".

THE CHAIRMAN: And the date of the judgment.

MR. BREALEY: And the date of the judgment. So it is wholly illogical, we say, just to cut it off, freeze it, at March 2003 when in March 2004 there is the Tribunal determining that the margin squeeze is continuing.

What the Tribunal is doing in this section (c), the Tribunal's findings – this is the Tribunal's findings – it is determining the period of abuse and it is starting the process of determining the precise nature of the margin squeeze. Is the squeeze 1p, 10p, 20p, what is it?

So the two key finds, the difference between the parties, the period of abuse and the nature of the margin squeeze, when it comes to this judgment – we are not even at the remedies judgment – I would ask the Tribunal to note para.655, which, as I say, is clearly determining that the margin squeeze is continuing. I would also ask the Tribunal to note para.660 where the Tribunal is clearly determining that it has jurisdiction to determine an infringement post March 2003. It has jurisdiction to put an end to the serious infringement that is continuing. It is not dependent on the OFT's Decision, which is a cut-off date of march 2003.

So that is the period of abuse. We would rely on the face of the substantive judgment, paras.655 and 660, to support our case that, yes, the Tribunal here is determining that Chapter II has been infringed.

THE CHAIRMAN: I do not know if you are going on to this. Are you going on to para.711? I have not looked at this, so it has just a thought that has crossed my mind:

> "… the Tribunal unanimously decides:
>
> "(1) Paragraphs 293(i) and 386(i) of the decision … are set aside
>
> "(2) The last indent (ii) of paragraphs 293 and 386 of the decision, which refer to raising barriers [et cetera] …"

I just wonder if one would go back to look at the Decision at that point to see what was set aside, because everything was left, I assume.

MR. BREALEY: Yes, certainly the bundling abuse was set aside. I take the point that one goes back to the Decision, but what I am trying to do is establish here that we still fall within s.47(a)(b)(c). We are relying on the judgment of the Tribunal which establishes that this abuse has not lasted for two years, but for longer than two years. It is continuing. So we say there is a binding determination that it is not just two years, there is a binding determination that this abuse has been continuing.

What do I take out of this section C, the Tribunal's findings? First of all, as to the period of abuse, it has gone on beyond the two year period and that Genzyme's cut-off date of March 2003 is not appropriate. Also the Tribunal starts at para.672 to determine the nature of the squeeze. Is it 1 or 2 per cent? Should it be 6 per cent? Should it be 7.2? What the Tribunal does at 672 to the end of this section at 679 is to begin to examine on the evidence that it had the nature of the squeeze. As the Tribunal knows, if one looks at 679, it adopts a pragmatic approach and it gives the parties six weeks to try and work out what the squeeze actually is. It is there reciting, or starting to recite, some of the evidence which would determine the squeeze. The squeeze is inextricably linked with the abuse. You have squeezed the margins by how much? The abuse is a margin squeeze and therefore whether it is a squeeze of 6p, 20p, is all part and parcel inextricably linked with the abuse. As the Tribunal knows, what happens at 679, the Tribunal adjourns – we see the word "adjourn" there – adjourns this determination of the nature and extent of the margin squeeze for the parties to reach an amicable settlement, which does not happen. That word "adjourn" shows that you do read the remedies judgment and the substantive judgment together. It is one continuous process of determining the nature of the abuse.

Before I go to the remedies judgment, Genzyme not only seek to ignore the remedies judgment and say we cannot rely on it; they also seek to ignore everything after para.654. They will say you cannot rely on 655, the squeeze must be determined. It is continuing.

If I turn then to the remedies judgment, we say in our skeleton argument that it was not six weeks, it was over 16 to 18 months before the Tribunal actually reached a conclusion. I think it is quite clear in the Tribunal's view why it took so long, because of Genzyme's delay. We see this from the September 2005 judgment, para.8:

> "Since the handing down of our Judgment in March 2004 we have however been provided with extensive further submissions of remedy, hundreds of pages. We express our regret notwithstanding indications that it has not been possible to reach an agreed solution."

I think it is quite clear that it took so long because of the delay of Genzyme. Paragraphs 216 and 222 make the same point: 216, again further delay because of Genzyme's stance; and para.222, again why did it take so long? Because of Genzyme's delay.

For the present purposes we rely on the September 2005 judgment, again because it deals with the period of infringement and the nature and extent of the abuse – in other words, the actual margin squeeze, how many pence is it? For the continuing nature of the infringement – that is the first point – we rely on para.224:

> "From March 2001 to the President's interim order of 6th May 2003, Healthcare at Home received no margin at all out of which to fund Homecare Services and remained in the market. Only hope that these proceedings would be favourably resolved. The interim margin ordered by the President in May 2003 was below the margin of 5 to 6 per cent which Genzyme indicated to the OFT in December 2004 was the minimum commercial margin which it required and well below the margin of 6.5 per cent which is the basis of the bulk pharmacy price that has apparently been offered by Genzyme since 1st July 2005."

Then the last sentence:

> "In these circumstances, the effects of a serious infringement of the Chapter II prohibition in fact continued for over four years since March 2001."

In our respectful submission, that cannot be a clearer determination of infringement by the Tribunal within the meaning of s.47(a)(6). It had continued for over four years. If ss.(6)(c) is to be given any proper meaning at all, there you have a determination, it continued for over four years.

Then we have in the draft direction right at the end of the judgment:

> "Genzyme shall forthwith bring to an end the infringement referred to at para.640."

So bring to an end the infringement. Again, on any reading of that, the infringement must be continuing.

We rely on both judgments, the substantive and the remedies in September 2005, to establish our case that there is a four year abuse and not merely a two year abuse.

Then we look at the remedies judgment to see how the Tribunal dealt with the nature of the abuse, the nature of the margin squeeze. The margin squeeze is not there in a vacuum. Margins have been squeezed by so much. Here, as the Tribunal know, the Tribunal looks at the mass of evidence and you can see this begs at para.272:

> "The final issue is how to calculate the profit margin."

I should go to para.247 first where the Tribunal says:

> "We turn now to the substantive main issue that arises for consideration …"

– the substantive main issue –

> "… the appropriate level of discount."

We say that substantive main issue is still part and parcel of the nature of the infringement. We cannot divorce the pence here and just say, "Well, it does not matter".

To pick up a point, madam, that you made, at para.252, the last sentence, we see:

> "Genzyme has acknowledged *de facto* that a margin of at least 6.5 per is appropriate."

That goes back to para.218 where we have the reference to the statement by the Genzyme management that they needed a margin of between 5 and 6 per cent.

There we have Genzyme acknowledging *de facto* that a margin of at least 6.5 per cent is appropriate, and what we are seeking obviously is the 7.2 per cent that was ultimately determined.

In these paragraphs, para.248 onwards, the Tribunal examines the nature of the squeeze. We see here a reference to a mass of information, para.251, a mass of detail, para.250, a mass of information at information at para.251, which Genzyme in its submissions is seeking to ignore completely. We say that it is clearly a waste of court time and litigants' costs to ignore this.

The conclusions on the nature of the abuse – the nature of the squeeze – are at paras.279 to 281. Paragraph 279 sets out its conclusion reviewing the evidence, the actual margin to be set is not a matter of precise mathematics. Then it gives several reasons for setting the margin.

Then para.280:

> "Taking all these considerations into account, we consider that this discount of the existing NHS price at which a bulk pharmacy price should be offered should be not less than 20p per unit. That is equivalent to 7.2 per cent and we propose to set that margin."

At para.281, half-way down, the Tribunal says that it does not consider that that would over-compensate providers of homecare services.

We would submit that is the price, that is the margin which should have been given, should have been paid. It is based on historical evidence, it is based on a mass of information.

So I come back to the main question on the preliminary issue, "What is the Decision?" We would submit that reading the first judgment, the March 2004 judgment, and this judgment, in both judgments the Tribunal is determining that s.18 Chapter II has been infringed. It would be wholly artificial essentially, which is what the effect of Genzyme's argument is, to end everything at para.640 or 654 and ignore the rest.

That is the first reason why we say both Decisions have to be read together. On the face of it, on the record, they are determining the nature of the infringement, the period and the actual squeeze.

I said there were two reasons. The second reason why we say that they must be read together, it is a pragmatic approach to s.47(a) because if Genzyme is correct and the s.47(a) claim for damages is frozen as at the end of the OFT Decision, 2003, it would substantially reduce the effectiveness of the Tribunal's jurisdiction to award damages. We would submit that in construing s.47 and the nature of the remedy it is permissible to adopt a purposive interpretation. That this is a permissible approach – I do not think we need authority for it – but the application of this principle one can see from para.226 of the September 2005 judgment, the remedies judgment, where the Tribunal actually applied the principle of effectiveness when dealing with its jurisdiction under s.33. At paras.226 to 238 what the Tribunal is concerned here with is the fact that Genzyme has slightly altered the nature of the infringement, it changed its position. There had been a management buy-out. The question was whether the Tribunal had jurisdiction to put an end to the margin squeeze as it saw it in September 2005 or could it just say, "I do not have the power"? We see the application of this effectiveness principle at para.233:

> "In our judgment, the power to make a direction under s.33 of the Act includes the power to ensure that an infringement is not repeated if the OFT, in its discretion, considers that such a direction is necessary. Moreover, in our view, the power to bring the infringement to an end covers conduct closely linked to or the like effect as the infringement found, otherwise s.33 would be ineffective. Similarly, the Tribunal's powers to give such directions or make any decision the OFT could have given must, it seems to us, be construed as a power to give a direction that is adapted to the developments that have taken place in the course of proceedings provided that the underlying problem to be addressed remains the same or similar, otherwise the kind of 'catch as catch can' could arise in which a dominant undertaking could, by constantly changing its arrangements, keep the Competition Authorities at bay indefinitely."

So what the Tribunal is doing here is construing s.33 and its powers so as to make its statutory powers effective. We would say that similar considerations apply here because if a s.47(a) claim is frozen at the date of the OFT Decision, and where the Decision has been upheld by the Tribunal, but the conduct has continued in the meantime, it means that no litigant is ever going to bring s.47(a) damages in a Tribunal, because otherwise it is going to be a duplication of costs, a duplication of claim forms, of procedure. If it wants to bring a case in the Tribunal it would bring the case in the Tribunal up to 2003 but then it would have to fall back to bringing a claim form in the High Court after that period. We would submit that is just an absurd position, and one can adopt purposive construction to this to avoid that absurd result.

Those, in summary – I hope I am not taking it too quickly – are the two reasons why we say the two judgments constitute a Decision for the purposes of s.47(a)(6). Both judgments, as a matter of record, and the construction of s.47(a) do determine the nature of the infringement. Very quickly dealing with Genzyme's second point, "if they are, so what", we would adopt the Tribunal's preliminary point which is that if it is a decision the binding effect – and we are looking at ss.(9) here – must relate to the matrix of fact identified in the judgment which make up the infringement. That is the binding nature of the Decision. It is not just a one liner, "There has been a breach", the matrix of facts which form the foundation, the basis, of that infringement, the period, and the nature of the margin squeeze, the 20p, forms part of that infringement decision.

In construing what is meant by "binding" in ss.(9), we would respectfully adopt the sentiments of Laddie J. in *Iberian*. Obviously it is not the same case but the public policy issues are the same, we would submit. As the Tribunal knows, *Iberian* is in the bundle at p.224, tab 7. As the Tribunal know, the dominant company sought to reopen the findings of fact which made up the Decision when sued for damages in the High Court. Although, as the Tribunal indicated, it is not *res judicata* in the true sense, it is between the same parties, Laddie J. said – we see it in the note:

> "… whether as a matter of *res judicata* or above of process, it would be contrary to public policy, where parties had disputed he same issues before the Commission and had had reasonable and real opportunities to appeal from an adverse Decision, to allow them to deny in the domestic courts the correctness of the conclusions reached in such proceedings; and that the Decision of the Commission and the judgments of the Court of First Instance and the Court of Justice were conclusive in the proceedings by writ, both as to the facts found and as to the issues of interpretation and applicability of article 86 …"

We see that the nature of the question posed – I will only take the Tribunal to a couple of paragraphs – if one goes to p.235, where Laddie J. is approaching the matter as one of principle – he essentially sets out the battle lines:

> "Approaching the matter as one of principle, it appears that the question to be decided can be put as follows. In all the circumstances of this case should the complainant and investigatee be allowed to open and dispute in these proceedings the final conclusions of fact or law reached in competitions proceedings in Brussels and Luxembourg? If the answer to that is in the negative, it does not matter whether it is categorised as a part of the law of *res judicata* – i.e., that the complainant and

> investigatee are bound by those conclusions – or as part of the law of abuse of process …"

He answers, essentially, that question at the bottom of p.243 to 244.

> The *Hunter* case was concerned with whether a litigant could relitigate an issue determined in previous proceedings …"

Then essentially this is the essence of it:

> "To adopt the sentiments of Jeremy Bentham, to allow the defendants to argue afresh here all those points which they argued and lost in the course of eight or nine years of detailed proceedings before the competition authorities in the European Community would be absurd. I can see no compelling reason why they should be allowed a second bite at the cherry for the purpose of persuading the English courts to come to a conclusion inconsistent with that already arrived at in Europe."

So we would pray in aid those sentiments when interpreting ss.(9). The Tribunal is bound by any Decision mentioned in ss.(b), and the Decision, as the Tribunal has indicated, must mean those findings of fact which identify the infringement. For present purposes, for the purposes of this interim payment application, that covers the period of four years and continuing (see para.224 of the remedies judgment) and the actual nature of the squeeze, which the Tribunal determined after a mass of detailed evidence. It would be a complete waste of the court's time, the Tribunal's time, to go through that exercise again.

Those are the reasons why we would submit both judgments do constitute a decision, a binding decision, within the meaning of s.47. I hope I have not gone too quickly.

THE CHAIRMAN: No, that has been very useful. Thank you very much indeed.

MR. VAJDA: Madam Chairman, what I propose to do first is to give brief answers to the questions that you posed at the beginning, just so that I do not forget to do it at the end, and I will then elaborate the reasons for it.

In relation to the first point, we agree entirely that the critical question is what is covered by s.47(a). The way that the Tribunal has to approach this, of course, is as a matter of statutory construction. Although you, Madam Chairman, Professor Bain and Mr. Mather, may be very keen to hear this damages action yourself, I am sure you will put that completely out of your mind in the impartial way that we know the Tribunal operates, because the question is, looking at it, how would the Court of Appeal approach this in a totally neutral way, how would the Court of Appeal construe s.47(a), and that is the way I invite the Tribunal to approach it. So we agree that it is a matter of statutory construction. We agree also the crux is what is meant by "Decision" in s.47(6)(a).

We agree also, Madam Chairman, with your first comment, which is that it must cover the findings of fact of the identified infringement.

We also agree, Madam Chairman, with your second comment that s.47(a) goes wider than *issue estoppel* in the sense that it applies to, if I can put it this way, third parties. I think implicit in that observation was the fact that *issue estoppel* in the narrow sense would not be of any assistance to these Claimants because they face the same problem that was faced in *Iberian*, which is the point that we have dealt with in the skeleton argument.

Your third issue raised is what is a "Decision", and you said that it would perhaps be of assistance to look at the OFT Decision and I will look at that. You then went on, I think, to say that the fact that the remedy and the substantive judgment was split was, in a sense, done for convenience and that cannot determine the question as to whether or not the remedy judgment is within s.47(6)(a). I agree entirely with that. The fact that it is in two pieces of paper, one, is not something the Court of Appeal is going to say, "Oh, this makes a difference". What one does have to look at is much more fundamental, "What is the basis of jurisdiction for the Tribunal when it looks at substantive matters and what is the basis of jurisdiction when it looks at remedies", and it does not matter whether it does it all at the same time, two months apart or two years apart.

Our main point here, which is a point that we have elaborated on in the reply skeleton argument, which I will develop, is that there is an important distinction that, as a matter of the Act, a decision in s.47(a) does not include direction and that, we say, is the end of the point. That is a pure Court of Appeal point of law point and I will develop that in due course.

Finally, I think, Madam Chairman, and please tell me if I missed a point, in relation to amount you indicated that the Tribunal was attracted – I slightly paraphrase – to the 6.5 as a starting point, that was what Genzyme offered in July 2005. In relation to that, we do not accept that at all. It would be, with respect, a serious error of law, because obviously what the Tribunal has to work through is, first of all, is this a decision within s.47(6)(a). If it is not, we do not get to 6.5 at all.

THE CHAIRMAN: Can I just explain why I was doing it that way. If the Claimants were wrong and the amount is not part of the Decision then one has to go Rule 46 of our Rules about interim payments and look and see what a likely amount is, et cetera. It was in the context of that that the Tribunal was thinking that a starting point would be what had been offered. So we are moving on.

MR. VAJDA: I am very grateful for the clarification.

THE CHAIRMAN: It was not in relation to the Decision, it was in relation to the ----

MR. VAJDA: Yes, in relation to what the level ---- Obviously in relation to interim payment, Madam Chairman, there are two issues. The first issue is really s.47(a), because if the Tribunal accept our submissions on s.47(a) we would say that that would reduce considerably the scope for making an interim payment.

The second point on interim payment is this: in any event, as I will show – and I hope we have spelt it out in our written material – there is a great difference between what was being offered in July 2005 to, if you like, settle the remedies question to the question in head 1, which is what would Healthcare at Home have got had Genzyme been told, "You cannot do this, this is illegal". They are two different questions.

For instance, the issue of causation, if it is the case that, in fact, had Genzyme been told that they would have employed Clinogo, then plainly any award under head 1 simply could not be made because there would be no recovery of any amount at all. That is what one calls a causation issue. That is very important to bear in mind.

If we are right on this, it would be inappropriate, in our submission, to make an interim payment.

Can I ask the Tribunal to take copies of the Competition Act, and I want deal with the key issue which, as Madam Chairman rightly identified, is a question of statutory construction. We need to look at where this all fits in. What I would like to is to start right at the beginning. We have got Part 1, which is dealing with, as we know, Competition. We have got Chapter I and Chapter II infringements. Then what I would like to invite the Tribunal to do is to go to s.25, which is headed "Chapter III – Investigation and Enforcement". One sees there that the OFT is given numerous investigation powers. What we can see if we go to s.31 is that one of the powers it is given is to take a decision following investigation. You will see that there is a convenient definition of "Decision following investigation" at ss.(2):

> "For the purpose of this section and s.31(a) and (b) 'Decision' means a Decision of the OFT …"

Then we see that language. For the Tribunal's note we will see that the language in 31(2) is pretty much the same as – and we will look at it in due course – 47(6)(a) to (b). "Decisions" in 31(2) are plainly infringement decisions.

That is the powers under investigation.

Then if we go on we come to s.32, and this is now a new head, "Enforcement", and we see that the OFT is given various powers. We see that it is given powers to make directions. The relevant power in this case, because we are dealing with a Chapter II case, Madam Chairman, is s.33 "Directions in relation to Conduct".

Then we see as well – and this is important so one sees where one has the distinction in the Act – that it has the power to give a direction in relation to interim measures, 35, they are called "Directions"; and then 36:

> "On making a Decision that agreement has infringed Chapter I the OFT may require an undertaking to which the parties are in agreement to pay the OFT a penalty in respect of a Decision."

It is, if you like, another form of decision, but it is a decision of a different nature from that at 31(2), Madam Chairman.

You, Madam Chairman, referred us very helpfully to the OFT Decision in relation to direction. Could we just take that up for a moment. That was an all in one document and, as Madam Chairman quite rightly says, it does not matter whether it is in one or two documents. If one goes to para.388, a new section, "The Director's Proposed Actions", you will see that the legal basis, the jurisdiction, for this part of the Decision is s.33. To put it another way, Madam Chairman, if s.33 did not exist in the Competition Act, this part of the OFT's Decision would be without legal basis. The legal basis of this part of the Decision is s.33, not s.31(2), that is important. We will see, when we come to look at the Tribunal's Decision that it effectively invests itself with the same power that the OFT took under s.33.

If we just put that to one side and go back to the structure of the Act, can we now move forward to the section headed "Appeals", which starts at s.46.

> "46(1) Any party to an agreement in respect of which the OFT has made a decision may appeal to the Tribunal against the Decision."

Also then "Conduct". So that was an appeal under 46(2) pursuant to that part of the OFT's Decision that found an infringement. Then we see very conveniently a definition of "Decision" set out in 46(3). Just pausing there, one sees (a), (b), (c) and (d). They replicate the language that we saw s.31(2)(a) to (d). In fact, I think the language is identical, or put it this way, it is not materially different in any way at all. One is "as to whether", and 31 is "that", but effectively they are infringement decisions for Chapter I, Chapter II, 81 and 82. Interestingly, you then see that Parliament has decided that there are some other decisions, apart from those at (a) to (d) which should be appealable to the Tribunal. One sees at what I might call the tail-piece to 46(3), Madam Chairman, the words, "and includes a direction under s.32, 33, 35 or any such Decision under this part as may be applicable". So what that is doing is it is deeming for the purpose of an appeal that you can appeal a direction as well as a Decision. Of course, that was necessary because without those words there would be no possibility of an appeal against directions. Those words are, of course, important because it meant that Genzyme were able to appeal not just the infringement Decision – that was the bit

taken before para.390 in the OFT Decision – but also the direction bit. So you have, if you like, a one-stop shop to the Tribunal.

Then 47, I do not think we need trouble ourselves with that. That is third party.

We then come to the critical provision which is s.47(a). The critical provision here is ss.(6) Really what one needs to look at is ss.(6) and ss.(9). Perhaps we could take ss.(9) first:

> "In determining a claim to which this section applies the Tribunal is bound by any Decision mentioned in ss.(6) which establishes that the prohibition in question has been infringed."

Those are the Decisions that you are bound by. It is, in my submission, absolutely plain from the language, and indeed one sees the difference between the definition and the Decision in 46(3) and 47(a) that the draftsman took a deliberate decision – in fact, we say it could not really be clearer – that "Decisions" in s.47(6)(a) do not include directions – a very simple point of statutory construction. The sections follow on from one another, it would have been the easiest thing in the world to say "and includes a direction", and it did not say that.

If we then look again at (a), (b), (c) and (d), those mirror in material identical words 31(2) – if I can give the codes to the Tribunal, 31(2)(a) and (b) match 46(3)(a) and (c) and match 47(a)(6) and (a). They are all dealing with Chapter I and Chapter II. 31 and 46 split out Chapter I and II into two sub-sections; 46(a) puts them all together. Then if we look at 47(6)(b), which is 81 and 82, that matches 31 and 46.

We say on that basis that it is absolutely plain, there is no question about it, that a direction is not a "Decision" within the meaning of s.47(6)(a). As I say, had it been the case Parliament would have said so, as they did in relation to 46.

Before I finish on the question of statutory construction, can I take the Tribunal to two other provisions. The first is 58(a). This is, if you like, a parallel provision to 47(a) in the High Court. I will come to my friend's teleological argument, but the Tribunal is well aware – and although I have asked the Tribunal to put out any degree of bias or favouritism in saying, "We want to hear the Genzyme case, it will be nice and exciting", I am sure no doubt a number of Chancery judges would like to hear it as well, the Tribunal will act impartially in this. There is an equivalent provision if these proceedings were brought in the High Court, and one sees there in 58(2) that in such proceedings the court is bound by a Decision mentioned in ss.(3) once any period in ss.(4) which relates to the Decision has elapsed, and there you see again those Decisions. So there is a parallelism, if I can put it like that, with the Decisions that bind a Chancery judge and the Decisions that bind the Competition Appeal Tribunal. Neither of them, as I say, extend to directions.

The last provision that we need to look at is Schedule 8, and this is important. These are the powers of the Tribunal. What I would like to focus on briefly is para.3(2) of Schedule 8:

> "The Tribunal may confirm or set aside …"

That is a Decision of the OFT, which is the subject of appeal, and may (a) remit the matter to the OFT. Then we see (d):

> "Give such directions or take such other steps as the OFT could itself have given or taken; and
>
> "(e) make any other decision which the OFT could have made."

That provision was, as one would expect, the subject of careful analysis by the President, and perhaps we can just go back to the remedies judgment to look at his analysis. The first question that any court has to ask itself is, does it have jurisdiction? An absolutely fundamental question. So the President had to satisfy himself that the Appeal Tribunal had jurisdiction itself to make a direction as opposed to remitting it back to the OFT. That was an important question that the Tribunal spent a few paragraphs on. My friend has taken us to a bit of this, but we see at para.226 that the President sets out s.33, which gives the OFT the powers to make directions. He then sets out the bit in Schedule 8 that I have referred to. He then sets out the fact that the OFT's direction is currently suspended. Then he makes certain remarks in relation to what has happened so far.

Then critically, if we go to para.233, Madam Chairman, he says this:

> "In our judgment, the power to make a direction under s.33 of the Act includes the power to ensure that the infringement is not repeated if the OFT in its discretion considers such a direction is necessary. Moreover, in our view, the power to bring an infringement to an end covers conduct closely linked to or to like effect of the infringement found, otherwise 33 would be ineffective. Similarly, the Tribunal's powers to give such directions or make any Decision the OFT could have given or made must, it seems to us, be construed as a power to give a direction that is adapted to the developments that have taken place in the course of the proceedings."

There are two important points that emerge from the words of the President here. The first is that the President is effectively saying that, as a matter of jurisdiction, the Tribunal has jurisdiction because it is exercising a power that the OFT itself has, and that is a power found at s.33, and that is the power that then gives this Tribunal jurisdiction.

The second point that he makes, which is, we say again, of importance is he says:

> "… a direction that is adapted to the developments that have taken place in the course of the proceedings."

That is important because, of course, what one is seeing and indeed what one knows from the chronology here is that the remedies judgment was given in September 2005 when, if I can put it this way, a bit of water had flown under the bridge. But the point is, and the President is well aware of this, that there are developments that have taken place which the Tribunal quite rightly said, "We are going to take account of in fixing our direction", but that emphasises, if emphasis is needed, that what the Tribunal is doing on a jurisdictional basis in the remedies judgment is very different from a decision finding an infringement. I come back to what is in s.47(6)(a).

We say that, as a matter of statutory construction, the position is absolutely clear and, as I say, it does not matter – if, for example, there had been no appeal from the OFT Decision and my friend had relied on the OFT Decision and the OFT Direction the argument would still have been exactly the same even though it is all in the one Decision. The question is, would they be entitled to rely on the Direction?

If we just go back to one passage in the substantive judgment, Mr. Brealey took us to para.655, the margin squeeze must now be terminated but one also has to look at para.654:

> "We have found that Genzyme has abused its dominant position by imposing a margin in the period from May 2001 to March 2003 …"

which is exactly the same period, Madam Chairman, that the OFT found and indeed Madam Chairman made the interesting observation that one also ought to look at the position at the time of the OFT Decision, because of course the Tribunal, when it is hearing an appeal, is acting as an appellate body. It does not have original jurisdiction to find an infringement in relation to a period not covered in the OFT Decision. It certainly has power to make a direction for a different period, but in relation to the infringement – indeed it is trite, this is called the Competition Appeal Tribunal, it is not the Competition Tribunal, it is hearing appeals from the OFT.

THE CHAIRMAN: That begs the question, does it not, as to whether the finding was that there is an infringement which must be terminated or there is an infringement between a period? That is why I went back to look at the OFT Decision.

MR. VAJDA: With respect, no, because the statute is absolutely clear, one is looking at a Decision, not a Direction.

THE CHAIRMAN: Where does the statute help as to whether it is a Decision for a period or a Decision that there is an infringement which must be terminated? One looks at the wording of the statute. There is nothing that I think you have shown me which deals with the period, it is essentially terminated.

MR. VAJDA: The point is this – again it is a short Court of Appeal point: the OFT found infringement from 2001 to 2003. That was the ----

THE CHAIRMAN: Well, did it? That is what I am wondering. What it found, I think, was that there was an infringement which must be terminated.

MR. VAJDA: It did nothing beyond March 2003. It could not have done anything because that was when it took its decision.

THE CHAIRMAN: What it said was, "We are making a decision that these facts amount to an infringement and that infringement must be terminated".

MR. VAJDA: Yes.

THE CHAIRMAN: Therefore, is the date part of the Decision or is the Decision merely the infringement? If you have those facts, they amount to an infringement.

MR. VAJDA: Yes, but again we have got to be careful because the facts that the OFT had were the facts in relation to the period 2001-03. Those were the facts it had. There was then an appeal in relation to that. For instance, one of the things that happened subsequently was that the OFT made a direction to effectively terminate, and that direction was suspended by the President who put in place a separate direction. What my friend is saying is, "Actually when you get to 2005, it is quite clear, looking at it retrospectively, that the President takes the view that there has been an infringement going on for four years". The difficulty with that argument is that you cannot rely on the remedies judgment because the remedies judgment is not a judgment which fits with s.47(6)(a). It has got nothing to do with the fact that the remedies is on a separate piece of paper.

THE CHAIRMAN: I understand your point on that. Assuming you are right, you still have to look to see whether the original Decision is a Decision that those facts amount to an infringement; or those facts amount to an infringement between a period, so that period is the overriding feature.

MR. VAJDA: At the moment, the pleading that is being relied on is the Tribunal's finding. The Tribunal's findings are, "We have found that Genzyme has abused its dominant position by imposing margin squeeze in the period from May 2001 to March 2003".

THE CHAIRMAN: Then the next paragraph which says, "and it is continuing".

MR. VAJDA: The next paragraph ----

THE CHAIRMAN: "And must now be terminated".

MR. VAJDA: Must now be terminated. I would be astonished if any court were to say that that was a finding of an infringement beyond 2003 because that was way before there had been any evidence as to what the level of margin is. What you have to remember is that the facts in front of the OFT were that there was zero margin. What happened was that the OFT made a

direction. Perhaps we should just look at the direction that the OFT made. The direction was made – I hope I am right in saying it is accurately summarised at para.395:

> "… direction that the price at which Genzyme supplies sales to third parties should be no higher than the stand-alone drug price as agreed by Genzyme with the DoH with respect to Cerezyme."

That was also appealed within the composite appeal, and the President in his interim judgment of 6th May 2003 suspended that and put a new order in place. The facts actually change. Obviously one might say that, with the benefit of hindsight now in 2005, one can see that what happened in 2003, these directions did not remedy the infringement, but what one, with respect, certainly cannot do is to say, "Well, there was a finding of infringement in the OFT Decision or the substantive judgment up to June 2005".

THE CHAIRMAN: How do you make a direction that you must cease for the future unless you decided that if those facts continue that amounts to an infringement? If you have not decided the latter part you cannot make the direction because there would be nothing for that direction to hang on.

MR. VAJDA: The first question is, was there an infringement on the facts found, zero margin? Answer, yes. That is the first question. Question two is, what shall we do for the future? What margin is necessary? The OFT took one view and the OFT view in relation to direction was formed – if I can put it like this and this is not meant to be critical of the OFT – without much evidence. They just said, "You should do this". The Tribunal's approach was different. They had, as my friend says, a mass of evidence and the Tribunal then said, "We are going to vary, we have already suspended the OFT directive, we are going to put in a different directive", and there was a fact finding exercise for the Tribunal to come to its conclusion at 7.2. All that post-dated the infringement, because had the Tribunal not found an infringement at all one would never have got to the direction. The direction, if you like, is stage two and it is the follow-on stage from infringement which is stage one.

I can see that what Madam Chairman is putting to me is that there may be some overlap, as it were, between stage one and stage two, and I accept that in some cases there may be some overlap. With respect, the fact that there is some overlap and that the direction might then cast light retrospectively on the infringement does not mean that you can then say, "We can take into account the direction for the purpose of s.47(6)(a). That is simply, in our respectful submission, an error of law.

I know that the Tribunal members are eager to hear this case. All these problems would have been avoided had the case gone to the Chancery Division. The situation here, and I am sure you, Madam Chairman, are well aware of it, is that the jurisdiction of this Tribunal is statutory.

It is circumscribed and it does not have the width of jurisdiction that the Chancery Division has.

THE CHAIRMAN: The Chancery Division would have the same problem.

MR. VAJDA: No, it would not.

THE CHAIRMAN: They would have to hear all the new evidence.

MR. VAJDA: No – why do you say that?

THE CHAIRMAN: Because the question here is what can a Tribunal or the Chancery Division rely on for the purpose of ----

MR. VAJDA: No, with respect, that is not the question.

THE CHAIRMAN: I appreciate that there is another question, because we can only do that and they can do something else.

MR. VAJDA: Yes.

THE CHAIRMAN: We can do A and they can do A and B.

MR. VAJDA: Absolutely, yes.

THE CHAIRMAN: I, for my part, see it as a question of if we can only do A, then the Chancery Division in relation to the statutory reliance can only do A. That is the way I was looking at it.

MR. VAJDA: Yes.

THE CHAIRMAN: That raises the question of whether the Chancery Division would say – they would have the same problem because they would have to decide whether they would have jurisdiction under s.57 or s.58 in order that they can rely on the Decision or whether all this new evidence has to come in.

MR. VAJDA: With respect, we are slightly at cross-purposes. The first question is the question of jurisdiction. There is a separate question, once you have jurisdiction, if I can put it like this, of evidence. There is no problem for the Chancery Division in terms of jurisdiction. In relation to evidence, could the remedies judgment be relied on as a matter of evidence in the Chancery Division, other than 58(a)? There may well be, for instance, *Iberian*, or things like that, that enable, depending on how the matter is argued in front of the judge. It is not an open and shut case like it is for the Tribunal. That is the point that I am seeking to make.

THE CHAIRMAN: Are you suggesting that even though we have no jurisdiction, you say, to deal with it under s.47(a), it is not part of the Decision that we can rely on and therefore it is out?

MR. VAJDA: Yes.

THE CHAIRMAN: When you get to the Chancery Division they would have no jurisdiction under, is it, s.58? They could not rely on it under s.58, but they might rely on it under abuse of process?

MR. VAJDA: Possibly that may be right. Again, one has to bear in mind that this is the Tribunal looking at it through the statutory limitation that Parliament put in place.

THE CHAIRMAN: It is difficult to imagine that that was the intention of Parliament.

MR. VAJDA: With respect, I do not follow that.

THE CHAIRMAN: The idea was that these cases should come here and that you should be able to rely on what happened before, or it goes to the Chancery Division and they should be able to rely on what happened before, and there should not have to be a re-hearing. It seems, if I can use words that I think the President used in a different context, rather Dickensian ----

MR. VAJDA: It is not a question of Dickensian, it is a question of what Parliament said. It is all very well to say sitting in this Tribunal, "Yes, let us have lots of cases", which is my friend's argument, but actually the Act does not say that. There is an opportunity for bringing actions. In a classic cartel type case there would not be a problem. Indeed in this case ----

THE CHAIRMAN: Most cartels continue until the infringement is stopped.

MR. VAJDA: Sections 47(a) and 58(a) are, if you like, intended to some extent to be a statutory acknowledgment, if I can put it like this, of the *Iberian* principle. In this case we have accepted that there is an infringement for the relevant period. In relation to 2003 and 2005 there may be arguments where you can rely on the remedies judgment but the difficulty is that here the Tribunal's jurisdiction is statutory. That is what Parliament has done. Parliament made it absolutely clear that directions are not binding. Of course, there is an important reason for that. This is a damages action. In damages you basically have to prove liability, causation, quantum, remoteness. What s.47(a) is doing is saying that in relation to liability where there has been a finding by the OFT or a finding by the Tribunal in relation to liability for a specific period you cannot re-open that. I fully accept that the argument here is, "Does the Tribunal accept our submission or does the Tribunal accept Mr. Brealey's submission?" It is a matter of looking at how you apply s.47(6)(a). We say that it is absolutely clear that you cannot bring into s.47(6)(a) the direction, and once you do that you are left with the period.

I can see that Madam Chairman may not be terribly keen on the submission but, as I said, and I am sure Madam Chairman will approach it in a purely impartial way, in the way that the Court of Appeal would approach it which is that we must not start favouring one Tribunal over another, we have to decide what ----

THE CHAIRMAN: It is a statutory construction point. You do not have to keep repeating that. I think we are well aware of that.

MR. MATHER: I wonder if I might ask about another paragraph and invite Mr. Vajda's comments on two elements. The final sentence of para.224 of the remedies judgment was drawn to our attention by Mr. Brealey, and it introduces the concept of the effects of the infringement:

"In these circumstances the effects of a serious infringement of the Chapter II prohibition in fact continued for over four years since March 2001."

Then if we look at para.238 the Tribunal says:

"We are therefore of the view that we have jurisdiction to make a direction with a view to ensuring that Genzyme's infringement of the Chapter II prohibition is terminated and to prevent that infringement or any similar infringement from arising in the future. Indeed, all parties invite the Tribunal to rule on the outstanding issues between them."

I just wonder if you have any observations to make on those two paragraphs in the context of what we are looking at now?

MR. VAJDA: In relation to the first passage that Mr. Mather took me to, that in a sense reinforces the point. What it is talking about is the effects of what lawyers call causation of damages, that sort of thing. Those are effects. What the Act is talking about is liability, whether you have actually committed an infringement. For example, you could have a price fixing cartel which lasted a year, but it might have effects that last for three years. Effects and liability are different things.

So far as 238 is concerned, what I take particularly the last sentence to mean is that all parties invite the Tribunal first of all effectively to deal with it itself rather than sending it back to the OFT, which is one option. One saw the President very carefully said, "No, I do not need to do that, I have jurisdiction". That is point one, that the Tribunal should deal with it itself. That is the point that is being made because we see the beginning of 238 is, "We are therefore of the view that we have jurisdiction". What the parties were saying to the Tribunal was, "Yes, yes, we think you have jurisdiction, please you do it, we do not want to go back to the OFT". That is all that 238 is saying, in my respectful submission.

PROFESSOR BAIN: It seems to me that there are two issues here. The first is, do we have jurisdiction beyond March 2003? That is one issue. There is a second issue as to whether or not the facts found in the remedies decision are binding on anybody. You did seem to suggest, I think, that it might be regarded as an abuse of process in the Chancery courts not to take account of those facts. It might not, there was a possibility that it might. Are you suggesting that our position, if we do have jurisdiction, would be any different from that of the Chancery court?

MR. VAJDA: No. I hope the Tribunal appreciates that in our reply we accept that plainly the remedies judgment is binding in the sense that it has made a binding finding of 7.2 per cent which has not been appealed. The question that arises in this case or today, as it were, is whether that means that effectively head 1 of the claim, the Tribunal can say, "Right, on the

basis of the remedies judgment we can actually give judgment today on head 1 of the claim for £3.3 million without hearing any evidence as to what have happened had Genzyme been told they could not do that". We say that it does not enable the Tribunal to do that because, for example, the issue of causation was not relevant. What the Tribunal were saying is, "We want to have" – am I allowed to use Latin in this Tribunal – "an *in rem* remedy for the future across the board". What the remedies judgment was not was, if you like, part one of a damages action.

THE CHAIRMAN: Can I just ask you something else: when you decide the infringement – this is me trying to think it through – you have to decide there is a margin squeeze?

MR. VAJDA: Yes.

THE CHAIRMAN: A body deciding whether there is an infringement may go into various levels of detail as to whether there is a margin squeeze. It seems to me a little artificial to say if it appears that they stop, having got to the stage where they say, "I have got enough evidence to decide there is a margin squeeze, therefore there is an infringement, I will now go on to decide how much that margin squeeze is in order to decide the direction". If they have enough evidence at the first stage it may go into the decision; if they have not got enough evidence they may say, "Look, we found margin squeeze, we have found the infringement and we are now going off to look at that in more detail in order to provide whatever directions need to be provided". So you would have one case where it is in the Decision and another case where it is not in the Decision. Can you help me with that?

MR. VAJDA: Yes, that is perfectly possible but that comes back to a construction of s.47(6)(a).

THE CHAIRMAN: Does that not show that one has to look at the substance of what is going on and whether this is something which is part of the Decision or whether this is actually part of a direction and the direction is that you must not charge more than X, but the question of that amount of X is actually part of the Decision, part of the margin squeeze. The fact that you have shifted it over to a second stage, the form does not overtake the substance which is that it actually is part of your Decision.

MR. VAJDA: That may or may not be a hypothetical situation. It did not happen here. The facts were that there was no margin at all. This was not a case, for example, where Genzyme said – you will recall under the contract, and my friend will correct me if I am wrong, I think Healthcare at Home were earning something like 28p per unit – "We are now going to give you, say, 3p per unit", and Healthcare at Home have then gone off to the OFT and said, "That is an insufficient margin", and there had been an argument in front of the OFT as to whether 3p would be right or wrong. That was not this case at all on the infringement, because the infringement was a very simple case. There was no margin at all. So the OFT never went into

the question of whether, in fact, it should be 3 per cent, 2 per cent, 5.6 per cent or whatever. It was a case where there was zero margin and that was the basis on which the OFT Decision proceeded and that was the basis on which the Tribunal Decision appealed. Of course, what then happened is that the President varied the interim order and he, in fact, imposed the margin.

We see, with the benefit of hindsight, that the margin imposed by the President, in his view and that is now binding, was not sufficient to end the margin squeeze. I think he said 3 and his final decision was 7.

The important point here is that when we were at stage one there was not an issue as to whether or not it should be 3, 2, 4 or 6, it was zero, and the argument was, if I can put it like that – I was not involved at that stage of the proceedings – was essentially an issue of principle, "Well, this is not an abuse".

THE CHAIRMAN: That means that in cases where the OFT look into it, it will be part of the Decision, and in cases where they stop because it is absolutely obvious it is not part of the Decision, and that seems a very odd form substance argument.

MR. VAJDA: I would not, with respect, say that. Take, say, a price fixing case. You might have a complaint about price fixing and the OFT investigate it and then the thing comes to an end, but somebody might say, "Actually, okay, we did fix prices but for some very important reason we want to exchange information", or something like that, "and we think there are some very good reasons why you should be allowed to do that". If the exchange of information aspect is then, if you like, part of the complaint, part of the decision and there is exchange of information and that is part of the infringement which then can be relied on, if it is not dealt with in the Decision, but then there is an exchange of information afterwards it is not an infringement which has been found. I hesitate to use this expression but it is like "the accident of litigation".

So I would not, with respect, say it was a fair characterisation of my argument to say it is a question of form over substance. I would say what one has to look at is, what infringement did the OFT find? I say here it was a zero margin. It was not an issue of quantification that arose at all at the liability stage. It was like an issue of principle because Genzyme said, "We can do this", and the OFT said, "No, you cannot".

THE CHAIRMAN: Can you remind me, what was the OFT's direction?

MR. VAJDA: The OFT's direction was that the stand-alone price – I think it is at 395 ----

THE CHAIRMAN: "Should not be higher than the stand-alone drug only price". So what it said was it is the stand-alone drug only price, effectively. Let us just assume that it should not be higher than the stand-alone drug only price, so they should charge the stand-alone price. So it

was part of the direction, but the evidence for that is in the Decision. Is there nowhere in the Decision that says that the abuse is a margin squeeze of that amount?

MR. VAJDA: No.

THE CHAIRMAN: On what evidence do they rely to get to para.395?

MR. VAJDA: One is having to disentangle the past from the future, but the issue here was whether the margin of nil was an abuse. That was the basis on which ----

THE CHAIRMAN: Where is the paragraph that deals with that? I am sorry, I am ----

MR. VAJDA: No, I much prefer that these points are put to me now rather than I find them later on the judgment and think, "This is terrible, I was not given an opportunity to address them". I am more than happy to do the best I can to assist.

THE CHAIRMAN: I was thinking aloud.

MR. VAJDA: I have asked Mr. Bowsher to help find the relevant passage in the OFT Decision.

THE CHAIRMAN: Is there an index to the Decision?

MR. VAJDA: (After a pause) If one goes to the Tribunal at 478, which is their findings on abuse, I do not know if that assists.

THE CHAIRMAN: This is as regards the margin squeeze abuse?

MR. VAJDA: Yes. The effect, had no margin with which to compete. The whole case was based on it being a no margin case.

THE CHAIRMAN: If it is within the Decision that it is a no margin case and therefore anything higher than whatever it is an abuse, then that is in the Decision.

MR. VAJDA: Yes, but the Decision is that selling at no margin was an infringement. The Decision was not selling at a margin of 3 per cent.

THE CHAIRMAN: When the Tribunal came to look at that they said, "No, that is not right, what it is selling at whatever figure it is, 6.5 per cent, 7.5 per cent, 5 per cent or whatever it is", and that is the abuse. It shifts. Even though it was dealt in the remedies part it could have been dealt with in the substance part.

MR. VAJDA: That is a hypothetical question. As I said, the margin squeeze in this case was zero margin. Let us assume for the moment that no direction had been made by the OFT, no direction made by the Tribunal, there would be no question but that Healthcare at Home could rely on, if there had been an appeal, the substantive judgment in relation to the liability under s.47(a). We would not be allowed to re-argue the question as to whether the margin of nil was an abuse or not. That has been determined. There would then simply be the question, "Let us quantify what damages Healthcare at Home suffered from that abuse". The cause of action was complete in that sense under s.47(a) once the OFT took a decision which would not have been appealed or, as we know in this case, the Tribunal. Put it another way, the Claimants

could have brought s.47(a) proceedings even if, as we said in our skeleton argument, there had never been a remedies judgment. Supposing the matter had settled, they could still have brought proceedings under s.47(a).

THE CHAIRMAN: Yes, but then one goes back to the OFT Decision and one might have the same point. We need to find in the OFT Decision how this is dealt with.

MR. VAJDA: Yes.

THE CHAIRMAN: We can leave that and come back to it.

MR. VAJDA: My friend has pointed out that there is a whole mass of evidence in relation to the point, but of course all that mass of evidence took place after the substantive judgment, after the judgment which found that there had been an infringement of Chapter II. It is all within the context. If the President had decided that he did not have jurisdiction under Schedule 8 there would have been no remedies judgment. The only reason there was a remedies judgment was because he had jurisdiction. The basis of his jurisdiction was Schedule 8 and there is nothing in the Competition Act which says that the CAT is bound by findings that the Tribunal made in relation to a direction under Schedule 8.

We will keep on hunting for the OFT – we have got a bit of time ----

THE CHAIRMAN: You can hunt for it over lunch and give me the references that you would rely on.

MR. VAJDA: I am conscious of the time, but it is partly because I have been ----

THE CHAIRMAN: No, it is my fault.

MR. VAJDA: No. As I said, this is, we say, the way that the state is to be construed. So far as Mr. Brealey's purposive construction point, if I can put it that way, is concerned my answer to it is, and it is really the answer that is already in the reply, first of all, one has to construe an Act of Parliament according to its clear language. We have explained that it is wrong to suggest that in any way Parliament has favoured this Tribunal over the Chancery Division. We make the point that, in fact, the Chancery Division is now the specialist Competition High Court Tribunal, and as you, Madam Chairman, know, all the Chancery judges have done Competition training and the practice direction, and so on. So we would say that would be, with respect, an impermissible way for this Tribunal ----

THE CHAIRMAN: There is one distinction, which is that we sit with experts and they are part of the Tribunal, which the Chancery Division does not.

MR. VAJDA: I would have thought it would be a difficult submission to make, but this Tribunal would be better equipped to hear a damages action than a Chancery judge.

THE CHAIRMAN: Do not forget, I could be a Chancery judge sitting here. They are all members of the Tribunal. So you would be addressing a Chancery judge with this argument that he

should go off to the Royal Courts of Justice and sit without the two Tribunal members. That is effectively your submission. The fact that I am not a Chancery judge, I could be in this position. Therefore, I think one has to look at it on the basis that there you have a Chancery judge with two experts sitting in accordance with the Competition Act, or a Chancery judge sitting in the Royal Courts of Justice by himself, and how he would address that argument. If he has no jurisdiction here and he has jurisdiction when he walks down the road, fine.

MR. VAJDA: I think that is my simple point really, that it is ----

THE CHAIRMAN: I think there is a difference between the two Tribunals. One cannot say that they are equally specialist in the same way. It was the intention of Parliament, it must have been, that cases should be decided with the experts and then it is rather odd that one says, "Well, actually, when there is going to be lots of evidence and everything it should not be decided with the experts".

MR. VAJDA: Again, it is a jurisdiction point and I am either right or wrong on that.

THE CHAIRMAN: We accept that the Chancery Division are deciding private actions all the time.

MR. VAJDA: Yes, and they are the specialist Tribunal for Competition cases.

What I would like to do is to move on rapidly to the *Iberian* point. There are really two points on *Iberian*, one of which is already made in the skeleton argument and which I need to elaborate on. Can you go to our reply skeleton at the bottom of para.6 on p.2, we say that *Iberian* cannot extend the jurisdiction of the Tribunal. That is our first point.

The second point that we make in relation to *Iberian* is that in *Iberian* it was precisely the same issue that had been decided by the European Commission, the Court at First Instance and the ECJ that *Iberian* was seeking to re-argue in the High Court. I hope I will be forgiven if I can just go through very rapidly through certain passages in *Iberian*. One sees the pleadings that were set out at 226 and 227, and what we see at p.227, the right hand column, is the plea of the defendant which is that they denied that there had been any infringement at all. They denied that there had been an abuse. If we then look at the preliminary issues which are on the right hand column of p.228 we see the four preliminary issues, and for the convenience of the Tribunal they might want to put "Yes" after (b) and (d) because those were the answers that Laddie J. gave to (b) and (d).

We see then at 229 something headed "171" in type:

> "This really highlights the battleground between the parties. The plaintiff wants to be able to rely on conclusions of fact reached by the Commission … It wants to be able to proceed with its claim without having to prove from scratch that the defendants have abused their dominant position in the United Kingdom."

The equivalent here would be saying there is no margin squeeze at all.

I think this is common ground, and we have set it out in our skeleton, that what the judge found was that there was no *issue estoppel* in the sense that we know it in English law. Can we go to 231, "This leads to the first way", that is where he deals with *issue estoppel*, and his conclusion on *issue estoppel* is at p.234. He accepts the submission of Mr. Paines that because they were not parties to the lis before the Commission, it does not *per se* mean they were not parties to the lis before the CFI or the ECJ but he concluded that Mr. Paines was right on that.

THE CHAIRMAN: We go round in a circle, do we not, because either s.47(a) has created an *issue estoppel* to a third party or it has not, and that depends on what is in the Decision. *Iberian* does not help in that sense because if we have not got jurisdiction that is the end of it.

MR. VAJDA: Absolutely, that is right, but then the next question is, supposing you were to hold against me that you do have jurisdiction, can you award summary judgment or interim payment in relation to head 1? The question is, what are the findings? Plainly, if I win on my first point we do not need to get into ----

THE CHAIRMAN: Then the question is, what are the findings in the Decision?

MR. VAJDA: Absolutely, yes.

We then have what the judge very helpfully calls "A broader approach". This is the point where he decided against Mr. Paines and BPB. Again, we see the argument if one goes to p.235. He records the submission of Mr. Paines in the right hand column:

> "Nevertheless, Mr. Paines says that none of this should persuade a court to set aside its normal rules of evidence and, I assume, discovery. The plaintiff should make out its case from scratch."

That was the issue, you have to start all over again, you completely ignore what happened in Brussels and Luxembourg.

Importantly then, in rejecting that submission, the judge makes some interesting observations which we see beginning at p.236, "*The special characterises of Community competition proceedings*", and what he says there, and this is a constant theme one hears in the courts of this country is that one must avoid conflicting decisions by the Commission and national courts, and that is one of the reasons why he comes to his conclusion on the broader approach he says, effectively, if Mr. Paines is right you could reach an unfortunate situation where the Commission and the ECJ could find one thing and the High Court could find something else. One sees that at p.240, his conclusion, right hand column:

> "In my view these cases reinforce and support the following propositions. (1) The court here should take all reasonable steps to avoid or reduce the risk of arriving at a conclusion which is at variance with a decision of, or an appeal from, the Commission in relation to competition law."

THE CHAIRMAN: Do we have to read the OFT for the Commission and therefore the OFT plus the Tribunal, because it is the same problem?

MR. VAJDA: I have not understood that there has been a material disagreement between me and my friend in relation to that. Here we have got OFT and CAT; there we had Commission, CFI and ECJ.

THE CHAIRMAN: The same principle applies?

MR. VAJDA: I would have thought the same principle applies. That is certainly my submission. If my friend disputes that perhaps I can come back on that, but I do not think it has been suggested that a different principle applies.

Can we then go to p.241. The judge says this a few lines down the first paragraph:

> "Of course due regard has to be paid to the interests of justice to the parties. But where, as here, the parties have disputed the same issues …"

The point there is exactly the same issue and the issue was the issue of liability.

Then if we go to the final page which my friend took us to this morning, 243 and 244, the *Hunter* case and the sentiments of Jeremy Bentham, one has to read that, of course, in the context of the facts of this case which is the special position held by the Commission in relation to competition. So you must conflicting decisions. Then he says:

> "I can see no compelling reason why they should be allowed a second bite at the cherry [the defendants] for the purpose of persuading the English courts to come to a conclusion inconsistent with that already arrived at in Europe."

So what the judge was saying is, "We cannot have a situation where we have a trial in the Chancery Division and I find there is no infringement when, in fact, the Commission, the Court at First Instance and the ECJ have found that there is an infringement".

The short point that we have here is that in relation to the remedies judgment it was not deciding the same issue as arises under head 1. I can test it in this way: assuming, for example, that the Tribunal were persuaded on the evidence that if Genzyme had been told, "You cannot margin squeeze", they would have awarded to the contract to Clinogo, assume the Tribunal were to find that, and so there is no recovery under head 1. That decision would in no way be inconsistent with the remedies judgment. It would simply be a decision on a separate question.

THE CHAIRMAN: Are we dealing here with the actual facts? The actual facts are that the Claimants paid over the odds.

MR. VAJDA: I am sorry, I do not quite follow that.

THE CHAIRMAN: The actual facts are that the goods were supplied and there was a margin squeeze during the relevant period. Why does one have to go on, and what is the likelihood of saying, "Well, actually if you wipe the slate clean they would not have been supplied at all"?

MR. VAJDA: Because it is an issue that is raised in the pleadings.

THE CHAIRMAN: So we have to go back to how we award interim payments and assess ----

MR. VAJDA: I can see the Tribunal might say, "We are going to take at punt at the likelihood of success on head 1". What I am saying is that the Tribunal need to be very cautious and careful because what is being said by my friend is that effectively this issue under head 1 has already been determined in the remedies judgment. We would say that is not correct because we have had, for instance, no discovery yet from Healthcare at Home. Another example – I just throw this out to show the point about how there would be no conflicting decisions – probably had Genzyme been told, "You cannot do this", a number of things might have happened. One of them is that there might have been a negotiation between Genzyme and Healthcare at Home. Indeed, there might be interesting documents held by both parties as to what their position would have been in that situation.

THE CHAIRMAN: I thought that is what actually happened, that the OFT said, "You cannot do this", and they continued to do it and that is why the remedies judgment ----

MR. VAJDA: We have to go back to the position now, if you are looking at damages, which is assuming that they have been told they could not do it – you have to remember that Genzyme's case is that what it was doing was lawful and therefore it continued with lawful conduct.

THE CHAIRMAN: It was not lawful once the OFT told them that they could not do it.

MR. VAJDA: That is true, that was in 2003.

THE CHAIRMAN: Therefore, they continued to do something which was not continued to do something which was not lawful, so how do you say, "I knew it was unlawful but I would have done something completely different and therefore the Claimants have no loss"?

MR. VAJDA: The relevant decisions were probably taken in 2000/2001 when the contract was terminated. Obviously what one has to do is to look to see, in this case, what would the parties have done? The basis, as you know, was that Genzyme set up a homecare division and the idea was effectively to bring the whole thing in-house. They were told that they could not do that and they received a Decision by the OFT at the end of March 2003. Indeed, it is pleaded in our Defence, that Genzyme acted in the belief in 2001 that that is what they were entitled to do. They got it wrong, but that was their position. One would then have to investigate, had they been told otherwise in 2001, what would have happened, what the terms would have been. The Tribunal may think, "Actually, we think that probably nothing much different would have happened, if there had been negotiations they would have got it at 7.2 per cent". That is a

possible outcome, I fully accept that. What I do not accept is that effectively the remedies judgment has determined that issue so that this Defendant is shut out from arguing the point at all.

THE CHAIRMAN: That submission relates to the question as to whether the remedies judgment decides head 1, whether it needs an interim payment.

MR. VAJDA: Exactly.

THE CHAIRMAN: If it is an interim payment then we have got to consider what the realistic prospects are.

MR. VAJDA: Yes, absolutely. My submission is that the remedies judgment does not decide head 1. The Tribunal may agree with me on that, but the Tribunal may then say, "We think it is pretty likely that it is going to and we are going to award X". That is a possible option. What the Tribunal need to appreciate is that there are issues on the pleadings that have not yet been ventilated at all. There has been no discovery and therefore the Tribunal should not proceed on the basis that head 1 is dead and buried, the issue is complete.

Mr. Bowsher reminds you – and I am sure he is more familiar than I am with your powers to award interim payments – that the Tribunal must not order an interim payment of more than a reasonable proportion of the likely amount ----

THE CHAIRMAN: That is what I was referring to.

PROFESSOR BAIN: Mr. Vajda, you seem to be suggesting that there is a possibility that we should be considering that Healthcare at Home would not have got the contract at all, it would have gone elsewhere, and in that event they would not be entitled to any compensation. Are we to ignore the fact that they incurred very substantial costs over a period of years in actually doing the work because somebody else was not doing it? Are they not entitled at least to compensation for the expenses they incurred because they were a matter of fact doing it?

MR. VAJDA: They may well be, but would be a different head of damage. That would have to be pleaded in a different way. That is effectively compensation for work carried out.

PROFESSOR BAIN: It seems to me very like a substantial part of head 1.

MR. VAJDA: I can see that, putting it in terms of compensation, one might say, "Yes, they did this and they are entitled to some form of compensation", and the question is what the quantum is and then the tribunal can take a view on it. My main point is that effectively it is not determinative of head 1.

THE CHAIRMAN: So that nobody is under any illusions here, are you taking a pleading point? Are you saying that they have not pleaded it that way?

MR. VAJDA: No, I am seeking to answer Professor Bain's question.

THE CHAIRMAN: So it is within head 1, the compensation point?

MR. VAJDA: Yes. The way that Professor Bain has put it is ----

THE CHAIRMAN: If it is not within head 1 it may well be, I do not know, that the Claimants might want to consider whether they want to amend.

MR. VAJDA: We might want to amend our Defence.

THE CHAIRMAN: They may want to amend in order to close off that Defence.

MR. VAJDA: I will put it this way, if I can, and Mr. Brealey will leap to his feet if I have misunderstood his pleading: as I understand head 1, it is essentially an arithmetical calculation saying, "We purchased X, we are entitled to Y", which is the amount that the Tribunal said, that is the amount. It is not actually put that this is effectively remuneration for what we have done. It may be that it is meant to be implicit in that. As I read head 1, it is simply saying it is X times Y equals Z.

THE CHAIRMAN: Shall we leave this point over, because it might be that it needs to be considered by both of you?

MR. VAJDA: Yes.

THE CHAIRMAN: One does not want to get to the end of this on a pleading point.

MR. VAJDA: No, absolutely. We obviously have got a few pleading points to argue, but our position basically on pleading points is that we will accept that, subject obviously to the normal rule on costs. This case is not going to be won or lost on pleading points. That would be Dickensian.

As I say, to wrap up on *Iberian*, it does not extend jurisdiction under s.47(a); and two, we say that there is an important distinction between *Iberian*, which was where the issue was liability, and here – and we are moving on to the question now of quantum – where the issue is what damages is Healthcare at Home entitled to, and the question in the remedies judgment, which was what remedy do we have to put in place in the future in relation to the world at large? We say that we would should be entitled to run the points in our pleading. Effectively, what we mean is strike out our pleading on that point. I see Professor Bain smiling or half smiling. The Tribunal may have taken a dim view of the pleading, but the pleading is there and if the Tribunal is then going to proceed to award an interim payment it needs to bear in mind the observations that I have made.

PROFESSOR BAIN: Mr. Vajda, I accept there are two different questions. Are you saying that the analysis required to answer the two questions is substantially different?

MR. VAJDA: What I am saying is that it may be different. In damages actions what one has is discovery as between the parties as to what options they were doing, and this, that and the other. We have not had any of that in this case. We had a huge amount of disclosure of material for the remedies judgment. Mr. Mather will remember this, the OFT produced two

reports, if I am not mistaken, and it got information from a lot of people, and so on and so forth, and there was indeed an application, if I recall, for disclosure of documents in relation to the OFT. There has been nothing here. In relation to the remedies judgment, the remedies judgment did not go into the question of what damages they would be entitled to had the infringement not taken place.

PROFESSOR BAIN: There was a great deal of evidence on costs, as I understand it, before the Tribunal that was dealing with the remedies issue. Are you saying that that evidence on costs before the Tribunal then is not equally relevant to the question that needs to be addressed here?

MR. VAJDA: It may or may not be. Plainly, one of the things with litigation is that one is able to take a better view of the case, say, when one has had recovery, and so on and so forth. What one is concerned with here is really the view one takes of it today. My point is that it would be wrong to shut out the Defendant here for seeking to argue these points, and it would be wrong, in my respectful submission, for the Tribunal to effectively strike out those paragraphs in the Defence.

PROFESSOR BAIN: Presumably you would not expect us to ignore the evidence on costs that had been given earlier on. We would not expect that Genzyme would come along with totally different costs figures from those that it provided to the OFT, for example.

MR. VAJDA: No. As I said, so far as the remedies judgment is concerned, in the sense that 7.2 is the margin that was fixed by the Tribunal, that is a finding which is binding and in relation to other findings of fact one has the Civil Evidence Act, quite apart from *Iberian*, where one can rely on things like – for instance, one used not to be able to rely on Monopoly and Merger Commission Reports, Competition Commission Reports. In fact, I remember a case many years ago where there was successful action to strike out a reliance on the Competition Commission. I thought things had moved on from those days.

What I am saying is that one cannot say here and now, "This is done and dusted", this question, because what the Tribunal were looking at was a forward looking remedy for the future for the whole world and what we are looking at here is what Healthcare at Home is entitled to in damages.

It may well be, because we are of course at the state of the interim payment, that having heard the evidence the Tribunal may come to the conclusion, "Yes, head 1 is fully made out". I am not seeking to strike head 1 out. All I am saying is that the Tribunal is not in a position today to effectively give summary judgment on head 1, and in looking at the interim payment the Tribunal needs to form a view as to the likely level of success on head 1.

PROFESSOR BAIN: I am just trying to think of the evidence that there was before the previous Tribunal where you had some learned experts saying that really you did not margin of more

than 1 to 2 per cent to do this work. That evidence was effectively discredited by subsequent evidence from Genzyme itself. Are you suggesting that we cannot take the view of the previous Tribunal and the remedies judgment as – I am not quite sure whether "binding" is the right word – something that we should look at very seriously on this issue as to the order of magnitude that would be appropriate without accepting for a moment, subject to what is decided, whether or not the remedies judgment is binding. Subject to the fact that it was not binding, we would not necessarily accept 7.2 per cent, but 2 per cent would be too low and 10 per cent would be too high.

MR. VAJDA: I am not going to be coming along in March and saying, "Well, actually the Tribunal really got it wrong because it should be 1 to 2 per cent". I cannot do that, and I am not proposing to do that. I have to accept that 7.2 is the correct figure for terminating the margin squeeze and the Tribunal may find that in relation to head 1 there is no other or compelling evidence to suggest that they should do anything other than award 7.2 per cent for effectively the issue of causation of quantum that decided. That is certainly a permissible outcome. All I am saying is that one has to be to careful, and it would be wrong to say that is bound to be the outcome, if I am allowed to use the word "bound".

THE CHAIRMAN: Professor Bain is looking at it from the point of view of your information on your side on your disclosure and you are saying that you are not going to go behind that, quite rightly. I think what you are saying is that in order to quantify and assess damages you are entitled to see the disclosure which is relevant of the Claimants – and this is what I do not understand – and that somehow that is going to, or may, allow you to make submissions on causation, remoteness or whatever. What disclosure is going to come out of the claimants that is going to assist you? When you answer that, can you think about the way that Professor Bain has put the claim as well as the way ----

MR. VAJDA: Yes. In relation to this issue there are, effectively, as I see it, two areas of evidence. First of all, there would be the evidence of Mr. Johnson, who would be giving evidence on behalf of Genzyme.

THE CHAIRMAN: That is on the basis that you would not have supplied at all and you would done something else?

MR. VAJDA: I fully accept it is a hypothetical situation, "What would have happened had you been told you cannot do this", and that is, if you like, what I call a causation issue. There is then also a quantum issue. I simply throw this in, this is pure speculation, but it could have been the case that the parties would have sat down and said, "Okay, you say we are too expensive, let us have a negotiation", something like that, "and we will seek to do it at a lower price". We do

not know what Healthcare at Home's attitude would be, whether Healthcare at Home ever considered that, whether they ----

THE CHAIRMAN: Are you saying that they should have come to you?

MR. VAJDA: No, what I am saying is that there may be documents there, and indeed there will be obviously quite a lot of discovery in relation to how important this contract was to them, and so on. There may be internal discussions within the relevant executive of Healthcare at Home as to how far they would go to, if I can put it this way, hang on to the contract. I do not know whether such documents exist. There may be no such documents, but if there are such documents they would, we would say, cast some light on what might have happened had Genzyme done something differently.

THE CHAIRMAN: Surely, even if there were those sort of documents, they are in the context that you will only supply with the margin squeeze. Therefore, because of the decision that there has been an infringement they have suffered a loss because that context would no longer be there. So the likelihood of disclosure from the Claimants actually reducing the loss which is the margin squeeze, at the moment I am groping to see how it could assist.

MR. VAJDA: We simply do not know. You, Madam Chairman, have taken a view that the likelihood is limited.

THE CHAIRMAN: I have not taken any view. I am trying to grope to see how it could assist. What you have suggested is in the context of the margin squeeze and the context of an infringement.

MR. VAJDA: Mr. Bowsher reminds me of what we say in para.19 of our Defence, which is at p.155 of the bundle.

THE CHAIRMAN: Yes, this is your other point.

MR. VAJDA: Yes, and I was really looking at 19b, which is the negotiation point.

THE CHAIRMAN: In the context of an infringement decision that is a bit unrealistic, is it, or not?

MR. VAJDA: I am sorry?

THE CHAIRMAN: In the context of the fact that there has been an infringement, that your clients were infringing at the time and there had been that decision, is that not rather unrealistic?

MR. VAJDA: One sets out, it is really 15 to 17, how one deals with damages in actions of tort:

> "… the Defendant is entitled to rely upon the principle that where the Defendant had a choice as to whether or how to comply with an obligation, damages for breach of that obligation are to be assessed on the assumption that the Defendant would have performed its obligation in the manner most beneficial and least burdensome to itself. The Claimant is entitled only to compensation in respect of its minimum lawful entitlement."

That is a different question. I can see that Professor Bain may think it is pretty similar to the question that the Tribunal addressed in the remedies judgment, but it is a different question.

PROFESSOR BAIN: Perhaps I can reiterate what I think I was trying to say at the last case management conference. The Tribunals are unhappy about hypothetical models that have been produced of what might have occurred that bore no relation to the facts of what actually occurred and for which there was no evidence of active consideration at the time at the time at which they would have had to be implemented. I was suggesting that this Tribunal might be equal sceptical of any such models that were produced. If there is good documentary evidence to say that the following 15 possibilities were considered in 2000 or 2001 then naturally we would be interested to see them, but if, five years after the event, people start inventing models that they might have thought about but did not we will probably not be terribly interested.

MR. VAJDA: This is not an invention of models point, because one thing that one is not going to do is to sit and say, "Let us have a new model from Ernst & Young or Deloittes", whoever it is, "to try and re-invent what happened". What we are saying as a starting basis is, "Let us get all the relevant contemporary documents", and it may be that there is nothing on either side and it may be that then a view is taken that the point goes nowhere, who knows. What I am saying is that it would be wrong to basically rule the point out. In fairness, there is not an application, as I understand it, for summary judgment in relation to this.

THE CHAIRMAN: No, it is only an interim payment.

MR. VAJDA: It is only an interim payment, and all my submissions are is that the Tribunal needs to be aware that there is still a live issue. That does not preclude the Tribunal from making an interim payment, but what the Tribunal needs to take a view on is these issues that are raised here in the pleadings. It has to take a view, in a sense, without there having been discovery, but that obviously is a matter for the Tribunal. That is my submission.

THE CHAIRMAN: We will have to consider those paragraphs in those of our Defence and decide how much weight to give it in the whole of the assessment.

MR. VAJDA: Absolutely, that is the point I am making.

Mr. Bowsher reminds me, and I think you have the point, that what we are looking at is the position in 2000, which is before the OFT Decision. What happened was that there was a decision to terminate the contract, to set up Genzyme Homecare and there was the complaint to the OFT which then led to the Decision in ----

THE CHAIRMAN: Yes, but the same applies. At the end of the day there was an infringement and you have to go down some sort of little avenue that ignores the infringement in order to make the submission, so it must be in the context that there was a decided infringement and one

weighs those paragraphs of the Defence to the amount that one might, if one decides to do that ----

MR. VAJDA: Yes, but bearing in mind obviously that the relevant Decisions were Decisions in 2003.

THE CHAIRMAN: I appreciate that.

MR. VAJDA: I am very conscious of the time. Mr. Bowsher has found something. I am told that perhaps we should take two minutes to go through it if the Tribunal would bear with me. I am told that we should go to para.116 of the OFT Decision under heading 6, "The current position". It sets out effectively the new terms and conditions. Then I am told the next passage is 364, then 373 and 375. As I have indicated, this is effectively the point I was making earlier, that this is a case of zero margin and those were the facts that the OFT was looking at. Then the second sentence of para.373:

> "This arrangement does not allow Healthcare at Home a margin on the sale of this drug and it forces it provide homecare services for free."

THE CHAIRMAN: That has been substituted by what the Tribunal has said. That is part of the Decision, not part of the ----

MR. VAJDA: With respect, no.

THE CHAIRMAN: That is what we are going to have to decide.

MR. VAJDA: That is what you are going to have to decide. Assuming that there be no appeal to the CAT, 375 is the finding of infringement and that is the basis for a s.47(a) application. As I said, even on the basis of this Decision they could not invoke what happened at 390 onwards, because that is dealing with the direction under 33.

Subject to that, I am very conscious that I have gone on for twice as long as Mr. Brealey, but that is partly because the Tribunal has obviously been seeking to test a number of propositions with me.

THE CHAIRMAN: How long have you got?

MR. VAJDA: Subject to anything the Tribunal has to say I am now ready to sit down, in fact I am happy to sit down.

THE CHAIRMAN: Yes, you can sit down.

MR. VAJDA: I am grateful. Thank you very much.

MR. BREALEY: With the Tribunal's permission, could I just make two short points in reply and then, given we have only got about seven or eight minutes, if there is anything else perhaps I can deal with it after lunch.

THE CHAIRMAN: We will not close it, so that if anybody thinks of anything else over lunch we can have those submissions after lunch.

MR. BREALEY: Thank you very much indeed. The two point that I have noted in reply, first is the direction point, the s.33; and secondly, the causation point.

On the direction point, we submit that this a wholly artificial exercise on the part of Genzyme, because a s.33 direction is based on an infringement. We see this from the terms of s.33, which are set out in para.226 of the remedies judgment.

> "If the OFT has made a decision that conduct infringes Chapter II it may give such persons as appropriate such directions."

They are inextricably linked. So when at para.280 of the remedies judgment the Tribunal said:

> "Taking all these considerations into account we consider that the discount off the existing NHS list price at which a bulk pharmacy price should be offered by Genzyme to *bona fide* healthcare providers should not be less than 20p per unit …"

that is bringing the infringement to an end. Somehow to try and divorce a direction from a decision that there has been an infringement is wholly artificial, because you can only make a direction once there is an infringement. That is a very short point in answer to Mr. Vajda's statutory construction on s.33.

The second short point concerns causation. We have not sought to knock out paras.15 to 19 of the Defence, but we would urge the Tribunal to give those paragraphs absolutely no weight at all because they are a charter, a utopia for tortfeasors.

No authority is given for the proposition, for example, the first sentence of para.18 which says:

> "Thus, damages are to be quantified by reference to the losses that the Claimant would have suffered if the Defendant had chosen to undertake the course of action alternative to the Infringement which was the least costly or most beneficial to the Defendant."

If that is the state of play in the law of tort then, with the greatest respect, heaven help us, because I run somebody down driving on the wrong side of the road and damages are to be measured by reference to as if I had been on the right side of the road. It does not make sense and Mr. Vajda can bring the authorities to court and make good his submissions, but we live in the real world and, as the Tribunal have said, there was an infringement and what the Tribunal did was set out, after a mass of evidence was adduced to it, how that infringement was to be terminated, and that was 20p per unit.

Those are the two short points, but if I could ask the indulgence to make any additional points after the break.

MR. MATHER: To what extent do you accept Mr. Vajda's point that there is a difference between the remedies judgment and the quantification of damages in that some circumstances may be discovered on disclosure from documents of Healthcare at Home?

MR. BREALEY: The point is a thoroughly bad one for two reasons. The first is the damages should be referable to the overcharge. We should have been given a discount which we were not given. That is the first point.

The second point is that nothing is going to alter that analysis. One does not measure damages by reference to what the Defendant would have done lawfully. We cannot think of anything that will come up by way of disclosure which will alter the fact that there was an overcharge.

THE CHAIRMAN: Coming to my mind is another principle of tort law which is that you take the victim as you find him.

MR. BREALEY: Yes, absolutely. I do not know whether that is a convenient moment.

THE CHAIRMAN: Yes, two o'clock. Thank you.

(Adjourned for a short time)

MR. BREALEY: Madam, subject to any questions, those are my submissions.

THE CHAIRMAN: Thank you very much.

MR. BREALEY: I was just trying to agree with Mr. Vajda as to how we progress the case.

THE CHAIRMAN: Have we come in too quickly?

MR. BREALEY: No, not at all, I think we are almost at the end. As they are Mr. Vajda's dates shall I let him indicate what he has done.

MR. VAJDA: What I have done is put a date by the various stages that you mentioned this morning. I am not sure it all quite works, but if I can just give them to you. I have given them to Mr. Brealey. So far as pleadings are concerned and amendments to the pleadings, we would suggest two weeks.

THE CHAIRMAN: Who is pleading what, and where have we got to?

MR. VAJDA: As I understand it, the Claimants have had two second goes.

THE CHAIRMAN: There were the two pleadings that they were going to do.

MR. VAJDA: Which have now produced in draft. We responded in draft to the pleading which we got at the end of July. We have not yet responded to the new pleading.

THE CHAIRMAN: Do we accept the pleadings in draft, permission is given if permission is needed? Is that not where we should start?

MR. VAJDA: In relation to that, we will accept those subject to the costs occasioned by the amendment, which is normal.

The other point which I just would mention very briefly is that in Mr. Brealey's skeleton argument he mentions that Deloittes have been doing work to support their case. There is quite a lot of reference to Deloittes at para.2.1 and on p.3.

THE CHAIRMAN: Are you going to say that something referred to ----

MR. VAJDA: What we are saying is that we have been served with something. We have not had the annexes to the report, and we would say that if an amendment, which we do not object to, is given permission to that we should have the annexes to what has already been served on us.
THE CHAIRMAN: Is there a problem about that?
MR. BREALEY: I understand that was all served without prejudice.
MR. VAJDA: It is actually referred to in the skeleton argument.
THE CHAIRMAN: When you say it is served without prejudice, without prejudice to what?
MR. BREALEY: To any further amendment, it is a draft. It is done with the aim of assisting Genzyme, but whether we are in a position to serve it in its final form in the next couple of weeks I doubt very much.
THE CHAIRMAN: I am sorry, the pleadings?
MR. BREALEY: Just on the question of the pleadings, I do not believe that the pleadings refer to the Deloittes report.
MR. VAJDA: No, they do not.
THE CHAIRMAN: What are we referring to?
MR. BREALEY: I think Mr. Vajda was referring to the skeleton argument for the case management.
THE CHAIRMAN: Can we stick to the pleadings because otherwise we are going to get into a muddle.
MR. VAJDA: We do not object to the amendments sought to be made by the Claimants, subject to the costs occasioned by the amendments. What we would like to tag on to that is that we should have sight of the annexes to the Deloittes report as a condition of the Tribunal giving permission to amend, given that reference is made to the Deloittes report in the skeleton. As the Tribunal is well aware, matters are going on, not just in terms of the litigation but other matters and there is an open letter in relation to mediation on the file, and we just want to get on with it.
THE CHAIRMAN: That would have to be dealt with separately if you want to make an application for that reason. It is a question of whether it is part of the pleading.
MR. VAJDA: It is only referred to in the skeleton argument.
THE CHAIRMAN: I am just going to look at the skeleton.
MR. VAJDA: It is referred to at pp.2 and 3.
THE CHAIRMAN: All this is saying that it comes from some draft Deloitte & Touche report. You are trying to be helpful.
MR. BREALEY: Yes.
MR. VAJDA: We are also trying to be helpful because the sooner we see this the better, and since extensive reference is made in the ----

THE CHAIRMAN: I do not see how it is something to tag on to the pleadings. Either there is permission to amend the pleading or there is not. They have told us that that is where they have got it from. Then the question arises as to whether you want to make an application that you have early sight of the expert's report. The answer to that will be, "It is only in draft, we will have to explore that".

MR. VAJDA: There it is. I have put it forward. I am not making a formal application. I put it forward simply as a condition. If it does not appeal to the Tribunal, so be it and we will deal with it in due course.

(The Tribunal conferred)

THE CHAIRMAN: We are not going to make it a condition. You are happy with your pleading as it stands, are you, those two pleadings? It would be the second pleading, would it not?

MR. BREALEY: Yes.

THE CHAIRMAN: So there is permission to amended Particulars of Claim, is it, with the usual order as to costs.

MR. VAJDA: If I could just put down a marker, we have not taken any point in relation to the amendments, but if we are going to have a moving target – for example, we have now had a claim in Fabrazyme, which never materialised ----

THE CHAIRMAN: If they want to amend again they will have to come and you will make your submissions.

MR. VAJDA: It is just, through the Tribunal, to indicate to them that time may be running out for any major amendments.

THE CHAIRMAN: I am sure they have taken the point. So you need to put in an Amended Defence.

MR. VAJDA: Yes, and what I suggest is that we are given two weeks to put that in, and we do not seek to put in our current draft, because the current draft is incomplete.

THE CHAIRMAN: Today is the 4th, so two weeks would be the 18th. Are you happy with the 18th?

MR. VAJDA: Mr. Bowsher is nodding in agreement.

THE CHAIRMAN: Yes, I was looking at him. So 18th September.

MR. BREALEY: Could we just have seven days?

THE CHAIRMAN: So Reply, if so advised, 25th September.

MR. VAJDA: In relation to what we can now call the "Professor Bain point", which was put to me this morning, and you quite properly said to me, "Is this a pleading point?" and I said, "No, it is not a pleading point", it might be sensible for the sake of argument if both parties – it is obviously a matter for my friend as to whether he thinks his head 1 is ----

THE CHAIRMAN: Can that not be dealt with in a letter because either it is in or it is out?

MR. VAJDA: Fine. It is just that we should be clear on the pleading. It is entirely a matter for my friend as to whether he wants to effectively adopt in express words what Professor Bain has said. If he does, so be it. I suppose actually, if he does want to do that ----

THE CHAIRMAN: He should have seven days. Mr. Brealey, what do you want to do? I have not looked at the pleading in that way, so I make no comment as to whether or not it is necessary or not, or whether I think it is necessary or not.

MR. BREALEY: Is it possible to leave it as it is and then we will revisit it if need be?

THE CHAIRMAN: Can it be dealt with in the Reply? No, it cannot.

MR. VAJDA: If we were to say Mr. Brealey could have, say, seven days and then he can decide what to do with it, and then if he decides to do nothing ours gets put back by seven days and then he can do his Reply seven days thereafter.

THE CHAIRMAN: I will leave it like this: if Mr. Brealey feels that he needs to amend he probably can do it overnight and then we are back with the timetable. The point is in his mind at the moment. After seven days it may not be. Is that all right, Mr. Brealey?

MR. BREALEY: Yes.

THE CHAIRMAN: So if there is going to be an amendment you will have it tomorrow, so that should not put Mr. Bowsher back. Is that all right?

MR. VAJDA: Good.

THE CHAIRMAN: The next item I think was disclosure and the date that we had ----

THE CHAIRMAN: That is the next thing on the timetable, is it not?

MR. VAJDA: The next thing on your timetable, yes.

THE CHAIRMAN: I am just wondering if it would be the next thing. I do not know what is going on in this case. I just listed the things that I could see.

MR. VAJDA: I think from the Bar we agree that the next thing would be disclosure. The date that we have proposed – when I say "we", that is our side – I have told Mr. Brealey and he may or may not agree with this date, 31st October. I do not know what day of the week it is, is it a Friday?

THE CHAIRMAN: It is a Tuesday.

MR. VAJDA: It was chosen because it is the end of October. Obviously there is a quite a lot to be done there.

THE CHAIRMAN: Are we leaving it to the parties to decide what disclosure there is or is there going to be another CMC?

MR. VAJDA: Obviously we will have to see. There may be issues about disclosure, but I think you had indicated, and for our part we would agree, we ought to have CMCs as we go along.

THE CHAIRMAN: Absolutely, and we need to fit those in and then abandon them if we do not need to have them so that they are in the diary.

MR. VAJDA: Experience suggests to me that we would be very lucky to get through without any issue of disclosure, but I may be wrong and this case may proceed smoothly in relation to that. That actually brings one to the next point, which is when one should have witnesses of fact.

THE CHAIRMAN: Shall we deal with disclosure. You say 31st October?

MR. VAJDA: Yes.

THE CHAIRMAN: Are you happy to do it by 31st October?

MR. BREALEY: Yes.

THE CHAIRMAN: So that is exchange?

MR. VAJDA: No, that is list of documents.

THE CHAIRMAN: List of documents, both sides?

MR. VAJDA: Both sides.

THE CHAIRMAN: 31st October, and then inspection seven days thereafter? Is that how it is going to be done? I think there is some other new way of doing that which does not have the seven days in it.

MR. VAJDA: If I just read out what I have got here and then people can say whether they like it or do not:

> "The parties shall indicate to each other within seven of exchange of list of documents for disclosure which copies they wish to receive copies of, any such copies to be subject to agreement to pay all reasonable costs of copying."

That is the standard direction now.

THE CHAIRMAN: Is that all right?

MR. BREALEY: Yes, that is, I think, in their draft order.

THE CHAIRMAN: You will have that standard form. That is disclosure. It may be that somebody can keep a running draft, maybe Mr. Bowsher, so that we can get it. Normally we draw up the drafts, but it may be easier if you draw up the draft.

MR. VAJDA: May what we can do is draw it up between us and then submit it jointly to the Tribunal.

THE CHAIRMAN: Yes, and then we can have a look.

MR. VAJDA: I am sure we are happy to assist in that respect.

THE CHAIRMAN: That is disclosure. The next thing is?

MR. VAJDA: The next thing is witnesses of fact, and that we have suggested for that is 15th December 2006, and I am not sure what day of the week that is.

THE CHAIRMAN: 15th December is a Friday.

MR. VAJDA: There is quite a period, but we have got to get the documents, and all the rest of it. It might be sensible for the first CMC to be possibly after disclosure because there may be some issues that arise.

THE CHAIRMAN: Yes, I would have thought we need to put one in after that.

MR. VAJDA: Yes, but subject to that, if everybody is agreeable for that date for witnesses of fact.

THE CHAIRMAN: Mr. Brealey, what do you think?

MR. BREALEY: That gives us some leeway.

THE CHAIRMAN: Do you think you need six weeks?

MR. BREALEY: We can probably do it earlier, but it gives the parties some leeway if they want it. We can do it earlier.

THE CHAIRMAN: I would prefer not, in a way, to have the leeway if we can do it in a shorter time, because one then has some time for slippage.

MR. VAJDA: My instructing solicitor says we have already had draft witness statements. We are not in that position at the moment.

THE CHAIRMAN: You could start getting on with it. The witnesses are not really going to be dealing with the other side's disclosure, they are dealing with your own disclosure. The witnesses cannot get evidence of fact on things that happened internally on the other side.

MR. VAJDA: That is true, but having said that the normal course is to have witness statements ----

THE CHAIRMAN: I am not saying that you should not have the opportunity but ----

MR. VAJDA: The other thing that one has to bear in mind is, for instance, in the TCC one fixes the trial date and works backwards ----

THE CHAIRMAN: That is what I am trying to do.

MR. VAJDA: If one is going to have a trial in January then I could see, "Okay, we let us move backwards", but we are working, I should say informally ----

THE CHAIRMAN: I will tell you one of the things that I am a bit concerned about regarding the 15th is that we are getting very near Christmas and therefore if we need a CMC after witness statements, which could happen, that may ----

MR. VAJDA: I should have thought it is unlikely. Disclosure, I can see there may be an issue, but in relation to witness statements ----

THE CHAIRMAN: Only if the witness statements result in somebody thinking there should be some specific disclosure in a particular area which does happen and then we are a bit tight before Christmas and it all slips.

MR. VAJDA: Assuming that you, Madam Chairman, are happy with 12th March as the start of the trial, what we have tried to do is have a smooth progression. Plainly if there is a view that

having this on the 15th compresses things too much thereafter then maybe we should move that forward a bit.

MR. BREALEY: Can we propose, let us say, the beginning of December.

PROFESSOR BAIN: 1st December.

MR. BREALEY: 1st December, and then liberty to apply if there is any difficulty.

THE CHAIRMAN: The feeling from the Panel is that it should be 1st December, and if there is a problem you have liberty to apply. How many witnesses are there? Do we have any idea at the moment what the weight of witnesses is? Any idea about how many witnesses?

MR. VAJDA: Certainly Mr. Johnson will be giving evidence, who is sitting there. We are at the moment unclear whether there will be other witnesses.

THE CHAIRMAN: So it is not a huge number. I think four weeks from disclosure is sufficient.

MR. VAJDA: I am happy to go with 1st December with liberty to apply.

THE CHAIRMAN: There has to be a good reason on the permission to apply.

MR. VAJDA: I would not dare trouble my Lady with anything other than a good reason!

THE CHAIRMAN: All right, that is 1st December. The next thing is experts, is it?

MR. VAJDA: This maybe should be moved forward. We have put down 26th January.

THE CHAIRMAN: There are a number of stages about experts. You need permission. I do not know at the moment what the expert evidence is going to go to here, although one does know about the figures and the accountants' reports that you have referred us to on the other side. Should we not be dealing with that at some point, be giving permission before experts go off, unless it is just accountancy evidence.

MR. VAJDA: We will certainly be ----

THE CHAIRMAN: Calling an accountant.

MR. VAJDA: We will be calling an accountant and we will be certainly be seeking permission.

THE CHAIRMAN: Will you be wanting to call anybody else or is it just an accountant?

MR. VAJDA: At the moment we certainly want to call an accountant. I suspect that we will want to reserve our position until we have seen ---- At the moment it is just an accountant. What I cannot say is whether there will be another expert. I am not in a position to indicate that.

THE CHAIRMAN: If there is to be another expert then of course you need permission from us, and that ought to be dealt with sooner rather than later, although we have got to know enough about it to decide whether or not there should be.

MR. VAJDA: Might I tentatively suggest, or more than tentatively suggest, firmly suggest, that that be put on the items for the CMC in October?

THE CHAIRMAN: I agree, yes.

MR. VAJDA: Then I am in a position to assist the Tribunal in a greater way than I am this afternoon.

THE CHAIRMAN: Yes. You were making an application before that the experts' report on the Claimant's side be disclosed to you now. They say that is not in a state to do that. I am sure they are anxious, when it is in a state, to provide it to you, because that is something, I assume, that you want to do. When is it going to be in a state to do it?

MR. BREALEY: (After a pause) What Mr. Burrows is telling me is that we have given them 96 pages of a report. It is still going to take some time to get the appendices. We have not had the underlying data yet to support the 96 pages and that is still going to take ----

THE CHAIRMAN: The data must be available before you write the report.

MR. BREALEY: It is, but it has got to be in a form which is going to be relevant. I have got Deloittes here, but it is still ----

THE CHAIRMAN: Are Deloittes sitting behind you?

MR. BREALEY: Yes. We have tried to be as constructive as possible.

THE CHAIRMAN: How long is it going to take? If they are sitting behind you they are going to be able to tell you how long they think it is going to take.

MR. BREALEY: (After a pause) Essentially what I am being told is that they have got as far as they can, but when you have experts they want to have access to the disclosure and to the evidence so that although ----

THE CHAIRMAN: Your disclosure or the other side's disclosure?

MR. BREALEY: Both sides. What they want to do is, when they verify their figures, have a cross-check as to what is happening in the industry on the other side, so that they can be as sure as they can be that what they are saying is correct.

THE CHAIRMAN: Is that going to cause an amendment to the pleading?

MR. BREALEY: I do not think it is going to cause an amendment to the pleading at all, it is just whether the accountant feels safe proceeding at this really early stage and then being told, "That is your final report"; or, as is normal, one has disclosure, one has the witness statements so that they are comfortable before they serve their final report.

THE CHAIRMAN: So they want until 1st December, I suppose, something like that, four weeks? Are they going to want to see the witnesses of fact as well?

MR. BREALEY: I am told that they would, so that they are in possession of all the evidence that experts normally are in possession of before they go to the Tribunal or the court and say ----

THE CHAIRMAN: It will have to be sequential exchange of experts' reports because the other one needs to answer.

MR. VAJDA: Madam, I do not want to press my friend too hard today, but if we just look, for example, at head 5, which is a very large head of damage – I am sure Professor Bain has already carefully analysed head 5 – it is difficult to see where in relation to head 5, for example, disclosure evidence of fact is required from the Defendant. This is lost contracts caused by the margin squeeze, lost costs savings from delayed investment, lost savings from delayed investment in compounding units, and then a section on return on capital employed. As I say, I do not want to ----

THE CHAIRMAN: Is it going to make that much difference though?

MR. VAJDA: I think the important point is provided that there is sequential exchange, because obviously what you, Madam Chairman, are driving to, which is eminently sensible if I may say so, we seek to have as large agreement as possible, and obviously that can be facilitated by sequential exchange, but the earlier we get it the better and ----

THE CHAIRMAN: Is there any point in doing it in different bites of the cherry?

MR. VAJDA: I think there probably is not.

THE CHAIRMAN: It is just going to become confusing.

MR. VAJDA: I agree, and I think the real issue is the date. If one is going to have sequential one needs to have sufficient time for our experts to look at that, then to produce a report, and then of course we want ----

THE CHAIRMAN: They will have to meet.

MR. VAJDA: What we are proposing for meeting is to have something like, "The experts shall meet no later than", which does not preclude them, in fact, meeting before, for instance, our experts produce their report. It may be that they only want to meet after they have produced their report but there should be nothing to stop them meeting earlier.

THE CHAIRMAN: No. If one can narrow the issues before your side's report is written that may be very sensible.

MR. VAJDA: Absolutely, that is what we had intended. I know you had mentioned that we wanted to have something about meeting, but we agree absolutely, but it is the "no later than" formula.

THE CHAIRMAN: Let us just see when they can do it by. How many weeks after the witnesses of fact, two weeks?

MR. BREALEY: Mr. Vajda had 26th January. What I was going to suggest is that if we served ours on 22nd December, that gives the other side over weeks.

THE CHAIRMAN: Except there is Christmas. What about 15th December? I doubt whether the witnesses of fact are going to make much difference to the report. The report is already in draft.

MR. BREALEY: Yes, we are a long way down the road, it is just a matter of how comfortable they feel.

THE CHAIRMAN: It is a matter of dotting the I's and crossing the T's, because you will done everything else. You will have done everything else, you will have had disclosure. It is really icing on the cake, is it not?

MR. BREALEY: The 15th December, I think everyone can live with that.

THE CHAIRMAN: Right, so Claimant's expert accountants' report, 15th December. You wanted until 26th January?

MR. VAJDA: Yes. Our accountant expert, we have instructed Ernst & Young, they are not in court, but we did ask them last week in terms of timetable and they said they would ask for four weeks. It could be done in two weeks, but that would cost more because you would have ten people instead of two people.

THE CHAIRMAN: Four weeks is a reasonable time without it being too expensive.

MR. VAJDA: Yes, and taking account of Christmas.

THE CHAIRMAN: So Defendants' accountancy expert is 26th January.

MR. VAJDA: Yes, and what we were then proposing is something ----

THE CHAIRMAN: Actually four weeks is 19th January, is it not?

PROFESSOR BAIN: It depends whether you allow one or two weeks for Christmas.

MR. VAJDA: Yes, I was working on ----

THE CHAIRMAN: Let us take out the Christmas week for the time being and see what happens.

MR. VAJDA: That takes us, I think, to the 26th. I think I might be quite unpopular at wherever Ernst & Young are if I tell them they have got to work over Christmas!

THE CHAIRMAN: The next thing is experts to meet "not later than". It will be one week after 26th January, will it?

MR. VAJDA: Yes.

THE CHAIRMAN: That is 2nd February. I would not give them too long after that, I do not know if a week is enough, or ten days, to do an agreed statement.

MR. VAJDA: I would have thought ten days.

THE CHAIRMAN: Wednesday, 14th February, experts' statement of agreement and in so far as not agreed, why not agreed. You can word that, can you?

MR. VAJDA: I have got a note of it. I will just read out what my note says, which is "There be an agreed statement of the experts by 14th February, and in so far as they are not agreed, why not?" Does that get the gist of it?

THE CHAIRMAN: Yes, as long as Mr. Bowsher understands what I mean.

MR. VAJDA: I think the next thing on your list was the statement of agreed facts. I think that was the next thing I had a note of this morning.

THE CHAIRMAN: Yes, that probably is the next thing after that, is it not, because we have got all the evidence. A week after 14th February, because then you know where the experts are?

MR. VAJDA: Yes.

THE CHAIRMAN: So that is 21st February, statement of facts agreed and list of issues to be decided.

MR. VAJDA: Yes. Indeed, I respectfully suggest that we might then have a CMC after that stage?

THE CHAIRMAN: Yes, I will come on to the CMCs in a minute because then we can deal with all the CMC dates together. I suspect that there ought to be one before that as well. I suspect that will be the third one that we will timetable in. Whether we need the second one, I do not know, but just in case. I think also on 21st February we can have what I call my cross-examination schedule.

MR. VAJDA: In relation to that, I would respectfully suggest that we do not take a decision on that today. It is the first time that this has been put to me. I do not want to spend a lot of time dealing with that now. I see that obviously the Tribunal is anxious that we do not have cross-examination going into the never-never and we need to have a timetable, I see all that. I think there are some real issues of principle that arise with a schedule of cross-examination. I would prefer, if the Panel wants to deal with that, that I can consider that point which has been thrown at me for the first time today.

THE CHAIRMAN: Can I tell you what I am thinking? We have got a list of issues, we have got a list of witnesses by then. The first thing is to link the witnesses to the issues. I do not think there is any problem with doing that, is there?

MR. VAJDA: No, there is probably not a problem with that.

THE CHAIRMAN: So that we know where we are going at that stage when we have the CMC, can we have that?

MR. VAJDA: What I would respectfully suggest is that we park this issue and we deal with it at the next CMC. I have heard what you have said and I would like to give that some consideration.

THE CHAIRMAN: What is wrong with actually just saying, "This witness is going to deal with this issue"?

MR. VAJDA: There may not be a problem with it but, in my respectful submission, it would be wrong – and this is a matter that has come out of the blue to me today, cross-examination, it is not normally something that is done in this way, and I ----

THE CHAIRMAN: It is here.

MR. VAJDA: It may be here, but it is certainly not done in any other ----

THE CHAIRMAN: I have done it elsewhere as well.

MR. VAJDA: I do not want to be difficult about it. The trouble is that if something goes in and we know what it is, people do not want to take it out. I am not saying that I oppose it, what I am saying is that I would like to think about it and come back and seek to deal with it in a constructive way.

THE CHAIRMAN: That will have to go to the next CMC – witness schedule of cross-examination. Mr. Brealey, is that all right?

MR. BREALEY: It is, yes, thank you.

THE CHAIRMAN: Then we get on to bundles and that sort of thing.

MR. VAJDA: Yes. Mr. Bowsher has a point that he wants to put to me, could I have a moment?

THE CHAIRMAN: Yes, of course.

MR. VAJDA: (After a pause) The point that Mr. Bowsher was explaining to me, is this, and it is a point which arises out of head 2, which is "loss of margin on lost sales caused by existing patients switching and new patients subscribing". Obviously there may be issues of confidentiality there, but on the other hand clearly we need to know who these individual patients are. I have just been asked to flag that up. That is something the parties can sort out.

THE CHAIRMAN: You can sort it out with some sort of confidentiality ring, if necessary.

MR. VAJDA: Possibly, but we will need to know and I am using the Tribunal as a sort of sounding block.

THE CHAIRMAN: Why do we not put confidentiality into the October CMC – is that all right?

MR. VAJDA: Yes, absolutely.

THE CHAIRMAN: We are getting a long list for October.

MR. VAJDA: If that has not been sorted out ----

THE CHAIRMAN: Yes, you can come back. It will be about the right time because there will be a month or six weeks to sort it out.

We then get on to preparation for trial. What was your date for trial, 12th March?

MR. VAJDA: 12th March, yes.

THE CHAIRMAN: In fact, once you have got the experts you can prepare the bundles, or can you prepare the bundles before the experts?

MR. VAJDA: We need to prepare the bundles before skeleton arguments, but I would have thought it might be a recipe for disaster to start preparing the bundles too early.

THE CHAIRMAN: I see that, but I am just looking at the January and February dates.

MR. VAJDA: Bundles could be done by ----

THE CHAIRMAN: You have to have them in time to be able to prepare for 12th March. That is why I was working back. You probably want them. It is awful having to work off a bundle and then it turns out you get a bundle with different numbering.

MR. VAJDA: I would have thought this is something we can agree between ourselves, and if we cannot then the Tribunal can make an answer next time.

THE CHAIRMAN: We will leave bundles, skeleton arguments ----

MR. VAJDA: Yes, and chronology.

THE CHAIRMAN: ---- and chronology for the October/November hearing.

MR. VAJDA: Yes.

THE CHAIRMAN: The main hearing is 12th March. How long is this going to take, a rough guess at the moment?

MR. VAJDA: I have two points to make in relation to that: first, that we should set aside three weeks. It may be that that is going to be too long, but the idea of this case being part-heard would be an absolute disaster. My experience with many other Tribunals one would have all sorts of problems. That is not to encourage the parties to take three weeks, but it would be safer to book out three weeks.

THE CHAIRMAN: What you are suggesting is that we book out three weeks now and if we have a CMC at the end of December or the beginning of January we can review the situation.

MR. VAJDA: In so far as the issues narrow the length of the trial will reduce.

THE CHAIRMAN: We should book out three weeks so everything has got three weeks clear in the diary. For your part and for our part the sooner we know if time comes free, the better, because people are committing themselves and then cannot do anything else, and we are a part-time Tribunal. It is just like a barrister's diary.

MR. VAJDA: I think the length of trial should be kept under constant review at each CMC and if issues get knocked out that is plainly going to have an effect on the length of the trial.

THE CHAIRMAN: 12th March is?

MR. VAJDA: It is a Monday.

THE CHAIRMAN: At the moment we will provisionally say three weeks.

MR. VAJDA: It is the last three full weeks before Easter of next year.

THE CHAIRMAN: Easter is early, is it?

MR. VAJDA: It is on 8th April, I do not know if that is early or late, I suspect it is in the middle.

THE CHAIRMAN: It is sort of average! Is there anything else?

MR. VAJDA: Yes, there is one other matter. In terms of the scope of the main trial, the one point that I would respectfully make a submission on is in relation to exemplary damages. What we would suggest is that in the main trial we deal with what I might call issues of liability in

exemplary damages, the factual matrix, the legal advice, the time, *Rooks v. Barnard*, all that sort of stuff, but we leave over the question of what I might call quantum. One of the aspects that has been claimed – of course, that may or may not arise, depending on whether the claim for exemplary damages succeeds and also how is an account of profits, and traditionally an account of profits has been done subsequently because they are lengthy, laborious and expensive. If, in fact, there is no claim then there will have been a large sum of money that will have been unnecessarily wasted. That is why in many exemplary damages one sees it has been done in that way.

THE CHAIRMAN: Your disclosure was not going to include an account of profits?

MR. VAJDA: It would cover everything other than account of profits, yes.

THE CHAIRMAN: Having regard what I indicated at the outset about taking exemplary damages as a preliminary point, does not leaving over the account of profits have a similar problem because you then have to come back and maybe summon the same witnesses, we all have to get back in it, it may be years later. It is not, I would have thought, a very sensible approach.

MR. VAJDA: It is effectively going back to the point you made on the occasion I was not here about if a head does not arise then why should work arise. In relation to the exemplary damages, it is a major point of law and if, if you like, the disclosure aspect of that is one document, or something, one could say, "Okay, let us have everything at once".

THE CHAIRMAN: The account of profits is only being put on a exemplary damages basis? It is not being put on any other basis, is it?

MR. VAJDA: That is as I understand it, yes.

THE CHAIRMAN: Is that right, Mr. Brealey, you are not claiming it in any event by some other route? I do not think you are at the moment, but I just wondered. One does not want to be faced with some other route at the hearing.

MR. BREALEY: Certainly in the relief sought we say we seek an account of profit. The account of profit goes to the exemplary damages.

THE CHAIRMAN: You would have to be entitled to exemplary damages before you were entitled to the account of profits?

MR. BREALEY: Yes. For the reason the Tribunal has just put, we would resist the application. It is merely delaying the finality of this trial beyond April 2007. We have got a tight timetable, let us roll up our sleeves and get on with it. Mr. Vajda has already said that part-heard would be a disaster, and that is exactly ----

THE CHAIRMAN: Exactly a way of making it part-heard.

MR. VAJDA: What I meant was part-heard in the sense that we set aside too little time and we have got to come back. The issue on exemplary damages, whatever the Tribunal decides, will almost certainly go to the Court of Appeal.

THE CHAIRMAN: That is what concerns me. There is going to be another problem because if it goes to the Court of Appeal would it not be better that it went to the Court of Appeal both on liability for exemplary damages and the quantum of exemplary damages, because that would be a relevant consideration and that would be cheaper than doing it twice over? Otherwise the Court of Appeal have to look at it in a vacuum. There is no reason to suggest that the quantum of exemplary damages will not be as litigious as the liability for exemplary damages, especially since the way it is being put, account of profits, is not necessarily a standard way of doing exemplary damages.

MR. VAJDA: The main point here is that account of profits is a self-contained issue which will involved, I am told two to three weeks of solicitors' work in terms of expenditure. If that turns out to be expenditure which is completely wasted and it is a genuinely self-contained topic ----

THE CHAIRMAN: If that is the way the Claimants are putting it and if turns out to be completely wasted they have taken the risk on that. If it is not wasted then it should be done.

MR. VAJDA: Not necessarily, because after all one does preliminary points. Indeed, you, Madam Chairman, were quite attracted, as I read the transcript carefully ----

THE CHAIRMAN: No, I was raising it because I wanted to make sure that the parties had both properly considered it in order to work out what was the best way of doing it.

MR. VAJDA: I see that, but in relation to exemplary damages it is common ground that the account of profit is self-contained and does not arise anywhere else. I have been told on instructions – I do not have an affidavit here – that it is about two to three weeks of time to do that.

I fully accept the point that you are putting to me and it is a question of striking a balance. That is the sort of situation we have seen. I mention the *Kudas* case, which went to the Lords which was done on that basis. That was a case where there was much less discovery required than in this case. I accept obviously that it means that if the Claimants win on exemplary damages they do not get an award of exemplary damages on 10th April or whenever the Tribunal give their judgment. I accept that and I can see that ----

THE CHAIRMAN: They have to come back and it must be more costly the second time round because we have all got to get back into it. It may be years afterwards if this is taken all the way up to the House of Lords.

MR. VAJDA: Again, in my respectful submission, one needs to look at this realistically. One of the reasons that courts do occasionally set down issues for a preliminary trial is, if you like, the saving.

THE CHAIRMAN: Yes, but we have decided in this case not to do that.

MR. VAJDA: With respect, you have not decided to do that.

THE CHAIRMAN: Generally.

MR. VAJDA: In relation to the other heads, I see that, we have happily reached agreement. What I am submitting is that exemplary damages raises very big issues on liability. One of the reasons and indeed one of the points made, I think, in *Steel v. Steel* is that with careful consideration, Neuberger J. (as he then was) in looking at it, one of the things that one might see is the sort of thing that might, say, encourage settlement. Quite often, if there is a decision on liability you never do come back for quantum because the case settles. I fully accept that if the Claimants win on exemplary damages there could be a hard fought case on account of profits, but what I am saying to the Tribunal is that the Tribunal needs to sit back and think about this realistically. It is a balancing exercise. It is not that I have got all the cards in my hand, it is a balancing exercise. I would urge the Tribunal to consider that because, as I say, it is self-contained. On one view there will be unnecessary expenditure and it is not, in a sense, an answer simply to say that one gets the money back because one does not actually get all the money in litigation back in any case. This is just the sort of thing that courts have regard to in determining whether or not we ought to have a preliminary issue on the point. It is a question of weighing it up.

THE CHAIRMAN: I think that you have said all that you can say.

MR. VAJDA: I have said all that I can say, yes.

THE CHAIRMAN: Mr. Brealey, have you said all you can say as well?

MR. BREALEY: Just to endorse the point that you made about if there is going to be point of law it is better to know how much; but also it is incorrect to say it is self-contained because the data relevant to head 2, the switching of the patients to Genzyme, and also head 6(c), lost sales of Fabrazyme to Genzyme is relevant to the exemplary damages. So there is some overlap between head 2 and exemplary damages and 6(c) exemplary damages. So it is not quite correct to say it is a self-contained point.

(The Tribunal conferred)

THE CHAIRMAN: The Tribunal is of the view that we ought to deal with the whole case and we should deal with the account of profits at the same time, so that means that disclosure should include the account of profits.

MR. VAJDA: Can I ask for a reasoned decision on that point?

THE CHAIRMAN: Shall we do that at the same time as doing the other decisions?

MR. VAJDA: Yes, right.

THE CHAIRMAN: Am I going to see clearly from this the point about head 2 and 6(c)? If I am going to do it I had better make sure that I have got the material.

MR. BREALEY: Head 2 is at p.71, tab 4.

THE CHAIRMAN: I have got head 2 here, hopefully, para.13?

MR. BREALEY: One looks at the headnote before that.

THE CHAIRMAN: Loss of margin on lost sales caused by?

MR. BREALEY: Existing switching to Genzyme Homecare. So there is an issue of switching patients to Genzyme Homecare and new patients subscribing to Genzyme Homecare. So the amount that Genzyme actually made in respect of those two lost sales would be relevant to exemplary damages. It is not just a question of compensation to us, but how much money they made out of it.

Similarly, the lost sales of Fabrazyme Homecare – p.79 ----

THE CHAIRMAN: Sorry, can you give me the paragraph numbers because I am looking at a bundle that does not have your page numbers.

MR. BREALEY: Paragraph 50, head 6(c). Again, there is the same issue. This is the latest version of our claim, which says lost sales of Fabrazyme Homecare Services.

THE CHAIRMAN: Paragraph 50, 6(c)?

MR. BREALEY: Page 79, para.50.

THE CHAIRMAN: I am looking at a document with the draft Amended Claim for Damages under s.47(a), and it has got blue and red amendments.

MR. BREALEY: I do apologise, my blue and red amendments still have 6(c), para.50.

THE CHAIRMAN: The numbering has changed. I have got it.

MR. BREALEY: The issues are the same.

THE CHAIRMAN: Paragraph 56(c), yes.

MR. BREALEY: On our case at least the issue is that they took patients away from us, they took markets away from us, the compensatory element will compensate us for our loss, but if we are correct on exemplary damages and they intentionally did this then, on our view of the law, there should be an element of accounting for the profit. Tort does not pay. It is not correct to say that exemplary damages are simply a self-contained element.

THE CHAIRMAN: Some of the evidence, as I have understood it, that would be in the main action will be relevant to the exemplary damages?

MR. BREALEY: Absolutely.

THE CHAIRMAN: That is what I understood when I came to the conclusion before, but I just wanted to make sure.

MR. VAJDA: I think I will refrain from seeking to improve it further, but I do not accept what Mr. Brealey says, but I will leave it that.

THE CHAIRMAN: Well, is it ----

MR. VAJDA: No, I am not going to say anything more.

THE CHAIRMAN: All right. Does that leave us now with dates of the CMCs? Is there anything else?

MR. VAJDA: I think we were going to have the first CMC some time after 31st October.

THE CHAIRMAN: If one looks at the timetable, disclosure is 31st October, so one would want probably 14 days after that?

MR. VAJDA: Yes, there also the question of the availability of counsel. I do not know whether the Tribunal has a particular date in mind and I do not know what Mr. Brealey's availability is?

(The Tribunal conferred)

THE CHAIRMAN: 15th November at 10.30.

MR. VAJDA: Mr. Brealey does not whether he is available to attend.

THE CHAIRMAN: As you can see these are not easy to arrange.

MR. VAJDA: No, but on the other hand, it is important ----

THE CHAIRMAN: It is important, I appreciate that. The alternative date would be 16th November.

MR. VAJDA: What I might respectfully suggest is that we let the Tribunal know today whether for the 15th or the 16th.

THE CHAIRMAN: The most convenient date for the Tribunal is the 15th, but with a push we could do the 16th.

MR. VAJDA: Yes.

THE CHAIRMAN: That CMC will include dealing with the identification of experts, if I can put it that way, other than accountancy; the question of a witness schedule you are going to consider; the question of confidentiality and the bundles, skeleton arguments, et cetera, preparation for trial. That needs to be done sufficiently in advance, certainly the bundles, so that you can do your skeleton arguments so that we get them in advance.

Can I just explain, because everything has to be sent out to the members here, it is not like in court where you can give something and the judge gets it the night before and can read it. It has got to come in, it has got to then be sent to the members. That takes time. It is the day it comes in, then it is the day of the posting or the courier, so there is an extra three or four days in that. Can you allow that in your timing?

MR. VAJDA: Certainly, yes.

THE CHAIRMAN: With this Tribunal for one of us it has to go up to Scotland.

PROFESSOR BAIN: It normally gets there the next day, but life is not always normal!

THE CHAIRMAN: The next CMC: I raised the question of whether after the witnesses of fact there may be some disclosure issues. There may be some issues after the experts' reports, so what I would suggest is that we have a CMC probably before the Defendants' experts' report, possibly either at the end of December or the beginning of January. I suspect at the beginning of January.

MR. VAJDA: I am sure I speak for all members of the Bar, we are delighted to come to CMCs here but ----

THE CHAIRMAN: I am not saying we have to have it, all I am saying is we need to diarise it.

MR. VAJDA: Just in terms of diary, at the moment I would have thought it would be more convenient to have it after our expert report is served.

THE CHAIRMAN: That is 26th January. I was thinking of having one at the end of February, and therefore I was just putting another one in just in case. We are not committed to it, and we would all be happy if it does not take place but I think if we do not have it in then we have to scramble around to find a date.

MR. VAJDA: On that basis, if I could ask, what particular issue is there?

THE CHAIRMAN: The issue that I was considering was that out of the witnesses of fact it may well be that there are disclosure issues, and also it may well be that out of the Claimants' experts' report disclosure issues might arise which your experts may want. Therefore, that was why I would have thought it was sensible to put it in. Hopefully there are not any disclosure issues and we can forego it, but that is the reason in my mind. I do not know if there are any reasons in Mr. Brealey's mind, but it is me that is suggesting this, not him.

MR. VAJDA: CMCs are useful, but they involve cost for the parties.

THE CHAIRMAN: We certainly do not want it to take place if we do not need it. These are very tight timetables compared with what happens in the RCJ. You need to have the opportunity to be able to come, so I think we ought to put something in now.

MR. VAJDA: Yes, particularly with the lay members having to arrange it in advance. I can see the advantage of doing that.

THE CHAIRMAN: Absolutely, and I will come on to that in a minute as well. January: I do not know when terms starts, not that I am wedded to whenever terms starts.

MR. VAJDA: It would probably start on 8th or 9th January.

THE CHAIRMAN: I am wondering whether we should do it on 8th or 9th January. Is that when terms starts?

MR. VAJDA: Shall we say on the 9th?

THE CHAIRMAN: I think 9th January is possible. I will not be here for the next three days after that. I cannot do it on the 10th, 11th or 12th, because I am doing a JSB course.

MR. VAJDA: What about the 15th?

THE CHAIRMAN: I was just wondering whether we should do it on 8th January rather than the 9th. I think we can do it on the 9th. Hopefully we will not need it.

Then I would have thought we need one somewhere after 21st February. (After a pause) Because of the Tribunal's diary we have to do it on 23rd February.

MR. VAJDA: I would respectfully suggest we do not do it on the 23rd February. I am not doing a JSB course, but I am actually sitting in the Crown Court that day and it would be ----

THE CHAIRMAN: Another public duty.

MR. VAJDA: I am very happy to do it on the 26th.

THE CHAIRMAN: We have a problem. All right, 26th. That one will take place.

MR. VAJDA: Yes. Are we assuming that these will be at 10.30?

THE CHAIRMAN: Yes, 10.30.

MR. VAJDA: And probably what, half a day.

THE CHAIRMAN: Yes. One does not know what is going to transpire, so I think it is better to put them in for 10.30 and then nearer the time we can timetable them either to know how long they are going to take or whether the middle one is abandoned.

Sometimes for procedural matters the Chairman does by him or herself rather than getting the whole Tribunal down.

MR. VAJDA: That was a thought that was going through my mind because in the Employment Tribunal quite often there is power to do that. I have not actually looked in the Rules. Do you have power to do that?

THE CHAIRMAN: I have power and I have done it. That is how we did the *Vitamins* case, quite a lot of the CMCs. It depends whether there are substantive points to decide or procedural points to decide. I am assured by Professor Bain and Mr. Mather that they are happy for me to do those on my own, and I think we will take a decision as to the way we do it when we know what is in issue, but everything is in everybody's diary so that they are available. Certainly the first one I think we will have us all here because we are going to have matters of disclosure, et cetera, which is useful for everybody.

If there are other CMCs that have to go in because of some application that is not at the moment anticipated then I am normally available on short notice, but of course we cannot get the Tribunal down on short notice unless we are very lucky.

MR. VAJDA: If there is some disputed issue of disclosure that cropped up unexpectedly, it is the sort of matter you would deal with.

THE CHAIRMAN: I would deal with it.

MR. VAJDA: That is very useful to know.

THE CHAIRMAN: We take a general approach as to whether we think it is something it is something all the Tribunal ought to deal with or whether I can deal with it by myself. Sometimes that has to be a bit pragmatic because of the question of who is available.

MR. VAJDA: I see that, that is very useful to know.

THE CHAIRMAN: I am, subject to the diary, usually available on short notice.

MR. VAJDA: Hopefully we would have to trouble you to do it during normal court hours, not out of hours!

THE CHAIRMAN: You have heard about that, have you! Is there anything else?

MR. BREALEY: No, I do not think so.

THE CHAIRMAN: Thank you very much. I think Mr. Bowsher will produce an agreed order.

MR. VAJDA: The one thing that will not appear on the transcript is the expression on Mr. Bowsher's face when you made that remark! We will leave the readers of the transcript to speculate what the expression was on his face!

THE CHAIRMAN: Then we can have a look at it. I am sure he will have incorporated our ideas. We will then have a look at it.

MR. VAJDA: Yes, certainly.

THE CHAIRMAN: Thank you.

(The court adjourned)