IN THE COMPETITION APPEAL TRIBUNAL

Victoria House,
Bloomsbury Place,
London WC1A 2EB

22nd October 2009

Before:
VIVIEN ROSE
(**Chairman**)

THE HON. ANTONY LEWIS
DR ARTHUR PRYOR CB

Sitting as a Tribunal in England and Wales

BETWEEN:

Case No 1098/5/7/08

(1) BCL OLD CO LIMITED
(2) DFL OLD CO LIMITED
(3) PFF OLD CO LIMITED
(4) DEANS FOOD LIMITED Claimants/Applicants

- and -

(1) BASF SE (formerly BASF AG)
(2) BASF PLC
(3) FRANK WRIGHT LIMITED Defendants/Respondents

Case No 1101/5/7/08

BETWEEN:

(1) GRANITE COUNTRY GROUP LTD
(Formerly Grampian Country Food Group Ltd)
(2) GRANITE COUNTRY FEEDS LTD
(3) MARSHALL FOOD GROUP LTD
(4) CYMRU COUNTRY CHICKENS LTD
(5) FAVOUR PARKER LTD
(6) CYMRU COUNTRY FEEDS LTD (PROPOSED) Claimants/Applicants

- and -

(1) SANOFI AVENTIS SA
(2) RHODIA LTD
(3) F. HOFFMAN-LA ROCHE AG
(4) ROCHE PRODUCTS LTD
(5) BASF SE (sued as BASF AG)
(6) BASF PLC
(7) FRANK WRIGHT LIMITED Defendants/Respondents

HEARING

APPEARANCES

Mr. Aidan Robertson QC (instructed by Taylor Vinters) appeared for the Claimants BCL Old Co Limited and (instructed by Maclay Murray & Spens) for the Claimants Grampian Country Food Group Ltd and Others.

Mr. Mark Brealey QC (instructed by Mayer Brown International LLP) appeared for the Defendants BASF AG and Others.

Mr. Thomas De La Mare (instructed by Ashursts) appeared for the Defendants Sanofi-Aventis SA.

Mr. Mark Hoskins QC (instructed by Freshfields) appeared for the Roche Defendants.

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

THE CHAIRMAN: Good morning ladies and gentlemen. Before we start this morning there is just one point on which we would welcome the assistance of the parties – this may be something that can be sorted out over the short adjournment, which is to get clear in our minds more precisely the dates on which the two year period allowed by s.47A starts and finishes in the two different interpretations of that section, namely, the Tribunal's interpretation which was the combination of *Emerson* and the Tribunal's decision in this case, and then the Court of Appeal's decision as to when the time starts and finishes. There seems to be some uncertainty which may be to do with including the two months appeal from the CFI to the ECJ, the 10 days for the postal delay, but it would be useful to know if the parties could agree on the start and end dates of the limitation period (the two year period) on both scenarios. I hope that is clear as to what we want. Mr. De La Mare, you are going to hand me exactly that.

MR. DE LA MARE: (no microphone)I have a chronology which deals with that very point. I have three points. I think there may be some scope for argument as to precisely which day in February 2004 the limitation period expired because the two years, two months and 10 days must be added to the date from which the party at issue notice the relevant decision, that there may be some factual variation between the various parties as to the precise day on which they obtained notice of the relevant Commission decision.

THE CHAIRMAN: That is the addressees of the decision.

MR. DE LA MARE: The addressees, but the date in any event is going to be early February 2004 in each case, I do not think anything hinges in this case on precisely which day in February 2004 it is likely to be.

MR. HOSKINS: Madam, I should say I tried to deal with the second of those in my written submissions which you have no doubt seen. I do not know whether Mr. Robertson agrees with me.

THE CHAIRMAN: As I say, I do not want to take up time now. This chronology you have just handed to me covers a number of other things as well but it would be useful if it was possible just to have on one sheet of paper those four dates, as it were, even if some of them are within a range. One of the parties has also covered in its submissions the question of the limitation period for High Court proceedings, which I think is a simpler matter, the latest date being six years from the publication of the decision.

MR. HOSKINS: Again, I think that is me, and it is six years, but the date I have given assumes that the six year period can be extended for concealment, so that is why I have given what would be the absolutely ultimate date. So yes, that is in my submissions.

THE CHAIRMAN: Thank you. Now, there are a number of parties here, have you agreed amongst yourselves the order in which you are going to be speaking? Mr. Robertson?

MR. ROBERTSON: Madam Chairman, Members of the Tribunal, the simple answer to that is no, we have not, but I assumed it was going to be in the following order. There are two applications before the Tribunal, there is the BCL application in relation to its claim against BASF, there is the Grampian application in relation to its claim against BASF for whom Mr. Brealey appears, Roche for whom Mr. Hoskins appears, and Aventis for whom Mr. De La Mare appears.

As BASF filed a single set of submissions in response to both the BCL and the Grampian claimants' applications I had assumed that the simplest course was for me to make both applications first on behalf of BCL in relation to BASF, secondly in relation to the additional matters that arise in the Grampian application against all three defendants, and then it would seem to me to make sense for Mr. Brealey, Mr. De La Mare and Mr. Hoskins then to respond, and then of course I have a right of reply.

MR. HOSKINS: I think the only caveat, as we have discussed amongst ourselves in the batting order is, as you see, Brealey, Hoskins, De La Mare.

THE CHAIRMAN: That does not cause you any problems, does it, Mr. Robertson?

MR. ROBERTSON: No, it does not.

THE CHAIRMAN: Well everyone seems to agree that you kick off then, so why do you not start?

MR. ROBERTSON: Madam, there are some housekeeping matters. BASF, through Mr. Brealey served a supplementary skeleton yesterday which I assume the Tribunal received.?

THE CHAIRMAN: I am not sure I have seen that.

MR. BREALEY: I thought it was the day before yesterday just to reply to parts of the statement of Mr. Perrott, it should be at tab 5A of volume 1. At volume 1 there should be a tab 5A, and if there is not we will have to put one there.

MR. ROBERTSON: I may have misled the Tribunal by saying it was served yesterday, it was actually faxed through at about 8.40 pm on 20th.

THE CHAIRMAN: In my volume 1 I have 5, which is the second witness statement of Dirk Elvermann, and I have got then 5B which is empty at the moment.

MR. ROBERTSON: Then I think something has gone slightly awry, Madam, I am very sorry about that.

MR. BREALEY: We lodged our first skeleton, we complained that there was no witness statement from the BCL claimants and then the claimants served a witness statement by Mr. Perrott, which is at tab 4, which should be in volume 1.

THE CHAIRMAN: Yes.

MR. BREALEY: Then Mr. Elvermann, who had sworn the first statement for BASF, swore a second statement in reply to some of the comments made by Mr. Perrott in his witness statement. He dealt with the factual matters, and then we lodged a supplemental skeleton which should have been at tab 5A, and we will try and sort that out maybe at the short adjournment. Really what that tries to do is to deal with the legal issues that arise from the statement of Mr. Perrott, which was served after our first skeleton, and that essentially goes through some of the chronology.

THE CHAIRMAN: Do we need that now?

MR. BREALEY: I can hand it up now as long as there are no objections.

THE CHAIRMAN: Let us see if it is somewhere in our system first. Shall we continue?

MR. ROBERTSON: That was the first of the housekeeping matters. The second of the housekeeping matters is just to check the Tribunal has all the requisite bundles. There have been five light blue bundles numbered 1, 2A, 2B, 2C and 3, and then two volumes of authorities.

THE CHAIRMAN: Yes, I think we have those.

MR. ROBERTSON: There is an issue as to the contents – I will just explain what each of the volumes is. Volume 1 is the core bundle, that is the one I will be making principal reference to. Volumes 2A and 2B are essentially the BCL claim, the claim form and then supporting witness expert evidence. 2C is the equivalent file for the Grampian claim. Then volume 3 has got in it various witness statements from the previous BCL claim, which was withdrawn on agreed terms in 2005. We, on the BCL side have a real concern about the appearance of those witness statements in that bundle. Those witness statements are subject to a confidentiality agreement as part of the agreement on which the claims were withdrawn. We do not object to tab 12, a statement from Mr. Gosling, we accept that has been properly disclosed and it is that statement Mr. Brealey makes reference to in his written submissions. The other statements have not been disclosed by the defendants in those proceedings, that is to say Aventis and Roche. We say they have not been disclosed, they have not asked for them to be included in the bundle. They are there at the request of BASF. This came to our attention when we got a draft index for the hearing provided by BASF's solicitors and we saw them listed there. We thought that was somewhat surprising

given that we could not see how they could have been disclosed to BASF or their solicitors, they are subject to a confidentiality agreement with us and Aventis and Roche.

I am not asking the Tribunal to resolve this issue, it is really a question of interpretation of the confidentiality agreement and for us to take up with Aventis and Roche. Roche have placed it on record through their solicitors that they do not believe they are responsible for any breach of confidentiality. What I am asking the Tribunal to do is to have no regard to the contents of file 3, except for, as Mr. Brealey asks you to, Mr. Gosling's statement at tab 12. Unless there is any objection to us proceeding on that basis that is the way I suggest the Tribunal proceeds today. I do not see any objection being made from my learned friends. Maybe I spoke too soon!

MR. BREALEY: Again, I do apologise because this was addressed in the supplemental skeleton which I think should be handed up. We apologise if there has been any breach of confidentiality but there was no doubt that the 2004 statements – as the Tribunal knows they sued Aventis and Roche in 2004 and served various witness statements. In the statement of Mr. Perrott he refers to the 2004 witness statements, so we thought they should be put before the Tribunal, because he has put them in issue as a reason for the delay. We then find out that there is a confidentiality clause. We have asked the other side to agree and they say they are neutral. We say "What does neutral mean?" They do not give us any assistance and that is why, in our supplemental skeleton, we have dealt with it, and I think maybe the Tribunal should have a look at the skeleton and if there is an issue we should argue it before the Tribunal, but I do not agree that it should just be Mr. Gosling's statement that goes in; they are relevant. The claimants have put them in issue.

THE CHAIRMAN: Whose confidential information is included in them?

MR. BREALEY: As I understand it there was no confidential information as such, no business secrets as such, it is just that when the 2004 case was settled or withdrawn, or whatever it was, the claimants and the other two defendants agreed that certain documents would be kept confidential. The Hoffmann have annexed to one of their 2009 statements an earlier 2004 statement which is the Gosling statement, but none of the rest are before the Tribunal. We take the view that the claimants are suing BASF, they have put these 2004 statements in issue, we do not know why they are objecting to them being disclosed, other than they were agreed to be kept confidential between the parties, and having put them in issue we are at a loss to understand why they are not agreeing to disclose them. Just to say: "We are neutral on the matter" does not assist anybody at all. I am deeply apologetic if there has been some breach of confidentiality. I have not referred to them in the supplemental skeleton. They

are in volume 3 because when Ashursts were preparing the bundle there did not seem to be any objection at the time they went in and it was only a few days later that the claimants said: "Well we are concerned", and this is where we are.

THE CHAIRMAN: How did your clients get hold of the ----

MR. BREALEY: That I do not know; I just do not know. I have asked and I do not know. I have asked my instructing solicitors, the previous instructing solicitors ----

THE CHAIRMAN: Are all the parties to the confidentiality agreement here?

MR. BREALEY: Yes. Hoffman and Ashursts have waived any confidentiality in the 2004 statements. There is a 2004 statement annexed to Mr. Lawrence's written statement already, i.e. the Gosling statement. As I say, if you read the claimants' own witness statement they say: "We were preparing in 2003 to lodge in 2004", and so it seemed to be the most natural thing to do to put all the statements in front of the Tribunal and then we get met with: "Well there was a confidentiality clause". So I have not referred to them in open court, I have not referred to them in any skeleton, save to say if the claimants put them in issue they should disclose them.

THE CHAIRMAN: Are they being relied on in any way, Mr. Robertson?

MR. ROBERTSON: Not to any major extent by Mr. Brealey. I think he has inadvertently made reference to two of them in his supplementary skeleton argument. What he has done is he has referred to witness statements served by the same witnesses in the current claim brought by the BCL claimants but in fact if you look at what he relies upon them as saying they are not the witnesses' evidence in these proceedings, they are the witnesses' evidence from the settled proceedings – if I may use the term ----

THE CHAIRMAN: From whom are they supposed to be being kept confidential according to the terms of the agreement?

MR. ROBERTSON: They are governed by the terms of an agreement, it is not simply a case of we can airily waive confidentiality, they are subject to the terms of an agreement. What Mr. Brealey has not explained and apparently is unable to explain, is how his clients came to be in possession of them, because there was a strict confidentiality ring. This Tribunal is familiar with confidentiality rings and that is what was set up between us, Aventis and Roche, and somehow these statements have escaped. Now, if Mr. Brealey is not going to place any reliance upon them in response to today's applications we can leave the matter there; that is why we said in correspondence previously: "We are neutral, get on with preparing the bundles for the hearing", that was the context in which we said we were neutral. We are most certainly not neutral as to what appears to be a blatant breach of

confidentiality and our confidentiality agreement with Aventis and Roche, and we are not happy about that.

THE CHAIRMAN: I am still not quite clear whether you are not happy about the inclusion of the information in the bundles because there is information, figures or business secrets or something in them which then might get out to people who are outside the confidentiality ring in that earlier case?

MR. ROBERTSON: We are unhappy about the fact of breach of confidence. The simple matter is that we have a private law right under that agreement for those statements not to be provided to any other party save in accordance with the terms of the agreement. I do not think it is a matter the Tribunal can resolve because it is a matter of construction of those particular types of agreements.

THE CHAIRMAN: No, what I am trying to find out is whether they are being relied on by any party and if they are whether there is any order we need to make, or should make, in order for them to be available to us and whether there are any steps we need to take to continue to protect their confidentiality from people other than legal advisers who would be in a ring if we were to set up a ring for this case, which no one has asked us to do.

MR. ROBERTSON: There are two issues. One is us pursuing our rights under the agreement with Aventis and Roche and we are continuing to do that. Secondly, there is the issue of what do we do in the Tribunal today where we have a file with these statements in? Our submission is it is a simple practical matter, disregard the statements at tabs 1 to 11, the statement at tab 12, Mr. Gosling, that is fine. Mr. Brealey in his written submissions makes tangential reference to two of those statements and I would invite the Tribunal simply to disregard that paragraph of his supplemental skeleton where he does that – I think it is para. 10 of that supplemental skeleton, so simply put a line through that paragraph, otherwise, Mr. Brealey relies upon Mr. Gosling, Mr. Gosling is legitimately in the bundle. I do not understand why Mr. Brealey is kicking up such a fuss about this.

THE CHAIRMAN: Why do you not proceed with your submissions and we will hear from Mr. Brealey in due course whether he does want to rely on the contentious paragraph and, if so, what we are going to do about these statements.

MR. ROBERTSON: Madam, those were the brief housekeeping matters. As regards timing of this application, I had hoped not to take much longer than an hour in making these applications. To respond first of all to your question, yes, we will certainly agree a note with the defendants' respective counsel on timing. Looking at Mr. De La Mare's note that he handed up, his reference to the expiry of the period being February 2004 and 15th May

2009, those appear to us to be correct, but we can obviously flesh this out in a slightly more detailed note as you indicated.

THE CHAIRMAN: Yes, it is the start dates also.

MR. ROBERTSON: Exactly, it is the start dates that you want, and I shall deal with the point about High Court limitation when I get to that point in my submissions.

Madam, I will deal with the BCL claimants' application for an extension of time and Rule 19(2)(i) first. The background to the application is well known to the Tribunal, I need only summarise it. These claims are brought to recover compensation for the claimants' losses incurred as a result of the vitamins cartel in which BASF participated until the whistle was blown by Aventis, then called Rhone Poulenc. I am using the term "BASF" generically, we are talking about attribution as between these particular members, the corporate group, but when I am talking about BASF I am talking about the defendants currently in front of the Tribunal.

The claimants believed, as is obvious, that we had brought these claims in time and in response to the defendants challenge on this point the Tribunal, differently constituted from today, ruled in favour of us on 25th September 2008 and on 17th October 2008 refused permission to appeal. The defendants obtained permission to appeal from the Court of Appeal on 4th December 2008 and on 22nd May 2009 the Court of Appeal handed down its judgment overruling the decision of this Tribunal.

As a consequence of the Court of Appeal's decision the claimants now seek an extension of time in which to bring their claims, pursuant to Rule 19(2)(i) to the date on which the claim was served which, for the BCL claimants is 13th March 2008.

I should note at this point that the BASF defendants stated at para. 7 of their submissions that no formal application, i.e. for extension of time has been lodged. I do not understand on what basis the defendants object to the alleged lack of a formal application for extension of time. The Tribunal's order of 4th August 2009 recites that the claimants (in both claims) – so there are two orders of that date – they both recite that the claimants have made the application and if there was anything in this point, which there is not, objection should have been made at that time. We have all proceeded on the basis of that order and we have all served our submissions.

Just to give you a road map as to where the submissions are. The submissions for the BCL claimants are in core bundle 1, and disregarding the lettered tabs, they are at tab 1. The Grampian claimants – just switching to the other application for the moment – submissions are at tab 6. The BASF response to both sets of submissions, a single response, is at tab 2.

I will come on to the witness statements in support of those submissions in a moment. The Aventis submissions, which is in the Grampian claim, they are at tab 7, and the Roche submissions are at tab 8. Aventis supported their submissions with a witness statement from a partner in Ashursts, Mr. McDougall, that statement is at tab 10, and Roche support their submissions with a witness statement from a partner in Freshfields, Mr. Lawrence, and that is at tab 11.

Going back to BASF, their submissions were accompanied by a witness statement from their in-house counsel, Dr. Dirk Elvermann, that is at tab 3. That raised certain new points, particularly as to the defendants' apparent policy of destruction of documentary evidence to which the claimants have replied in a witness statement from my instructing solicitor, who is sitting on my left today, Mr. Perrott, which was served on 30th September, and that is at tab 4, and that has various supporting documentary evidence in that tab.

Dr. Elvermann then served a second witness statement and that is to be found I hope at tab 5, starting at p.69.

One other procedural point before I get to the substance of the application. We just want to note that the defendants wrote to the Tribunal, that is the BASF defendants wrote to the Tribunal on 31st July 2009, stating that they do not wish to mount any argument that the claim or claims "should not be allowed to proceed to trial on the grounds of abuse of process" as a separate issue. For the Tribunal's note that letter – I do not think we need to turn it up – is at vol 2C, tab 29, p.994. Aventis wrote on the same day in similar terms 2C tab 28, p.992.

Turning to the substance of the application I will deal first with the existence of the Tribunal's discretion, the existence of a discretion to grant an extension of time under Rule 19(2). I will then address the Tribunal as to the grounds upon which we invite the Tribunal to exercise that discretion and I will then respond to the grounds upon which BASF rely resisting that application.

The Tribunal's discretion under Rule 19(2)(i). This Tribunal considered the nature of limitation periods under the Tribunal rules in its judgment on limitation in our first claim, the BCL/Aventis case. The decision is in the authorities' bundle, I do not think we need turn it up for this proposition, volume 1, tab 7, p. 189. The Tribunal says there at para. 43:

> "The statutory framework concerning the limitation period for claims pursuant to section 47A of the1998 Act is entirely different and distinct from that relevant to the Limitation Act 1980."

We refer to that in our submissions. So the Tribunal has a discrete jurisdiction and the exercise of that jurisdiction must be approached accordingly without, we say, undue regard to procedural rules applicable under other jurisdictions. The Tribunal noted in the judgment to which I have just referred you, at para. 44, that:

> "There are a number of areas of procedure … where the rules and practice of the Tribunal are deliberately very different to the rules in the CPR."

I would ask the BASF defendants to note that we submitted in our submissions at para.7 that the Tribunal should not have undue regard to procedural rules under other jurisdictions, we did not submit the Tribunal should have no regard, that Aunt Sally is put up by Mr. Brealey at para. 14 of his submissions, where he says that no regard can be had to the principles underlying limitation periods generally. We did not say that, we said "no undue regard".

There are a number of different limitation periods applicable in various jurisdictions in the United Kingdom, we noted reference to them at footnote 1 to para. 7 of our submissions. We do also ask the Tribunal to bear in mind that this is, of course, a UK Tribunal and it must be borne in mind that there are different limitation periods in the different jurisdictions within the United Kingdom.

Miss Sarah Hoskins, who is here on my right, from Maclay Murray & Spens, who are acting for the Grampian claimants has informed me, something I did not know previously, that in ordinary civil procedure there are different limitation periods under Scots' law to those applicable in English law. So this Tribunal's jurisdiction needs to be interpreted in a self-standing manner but I am not saying that you are shut out from looking at other relevant decisions elsewhere.

But if you do look at other decisions, then obviously the relevant differences must be borne in mind. We say that the BASF defendants' submissions rather highlight the problems around making references to other types of jurisdiction. They refer in para 12 of their submissions to the Edmund Davies Committee report on personal injury limitation periods, and to the *Bryn Alyn Community* personal injury case at tab 13, and that report, the relevant extracts and that case are in the authorities. That is talking about personal injuries. We are looking at a personal injury case, they are not follow-on actions, there is no prior finding of breach, and part of the purpose of the limitation period in personal injury cases is to encourage claimants to bring claims while witnesses still have accurate recollection of events going to breach. You see that under English law in the Limitation Act 1980, s.11 imposes a three year limitation period for personal injury actions, not the normal six year

period. So you can see why you would have a shorter limitation period in personal injury cases.

Here we are concerned with follow-on actions, where breach has already been established, and where any responsible defendant would ensure that evidence is preserved to deal with follow-on actions. It is difficult, we say, to see what guidance personal injury cases can provide in these rather different circumstances in follow-on actions. Our application is made under Rule 19(2)(i). That provides: "The Tribunal may give directions as to the abridgement or extension of any time limits whether or not expired."

The Tribunal's power to exercise its discretion and to extend the time limit was noted in para. 10 of the judgment of Lord Justice Richards, in the Court of Appeal. The judgment – and I am not asking you to turn it up, because it is a short point – it is in vol. 2C, tab 26, p.983, and at para. 10 Lord Justice Richards said:

> "I should also mention that by rule 19(2)(i), as part of its general case management powers the tribunal has power to extend any time limit, so that failure to apply within the two year time limit laid down by rule 31 is not necessarily fatal to the bringing of a claim under section 47A."

The position before this Tribunal is that I do not understand the defendants to dispute the proposition that the Tribunal has the power to extend time for these claims to be brought under 19(2)(i).

Footnote 4 to para. 9 of the BASF submissions states that the defendant makes no submission and "formally reserves its position" by which I understand the defendants to mean that they reserve the right to advance a case on appeal that the Tribunal does not have the power to extend time. As to that we submit that the position was correctly stated by Lord Justice Richards in the Court of Appeal. I do not recall it being disputed at that hearing by Mr. Brealey before Lord Justice Richards – it was almost the first point Lord Justice Richards raised during oral argumentation, asking for clarification that there was still a rule 19(2)(i) application to be heard, and I gave that clarification and Mr. Brealey did not say "The Tribunal have no power". So we say it is not open to the defendants to dispute it now, that is obviously if this case were to go on appeal that is an argument we would have to have then to make it clear, the defendants do not dispute the proposition before this Tribunal.

As to the principles governing the exercise of discretion, there is some divergence between the parties. Essentially all the defendants are arguing that this is a narrow exceptional jurisdiction. We say that is not the case. The discretion is governed by Rule 44 of the

Tribunal rules and it may be sensible at this point to turn to that rule. If the Tribunal is operating from the Competition Handbook it can be found at p.309, para. 1253 – we are working on the 14th edition which I think is the current edition. Rule 44 is at the bottom: "Case management generally". "(1) In determining claims for damages the Tribunal shall actively exercise …"

- I like the "actively" ----

THE CHAIRMAN: So do we!

MR. ROBERTSON: "… the Tribunal's powers set out in …" and there you see "19 (Directions)", with a view to ensuring that the case is dealt with justly.

Then rule 44(2) what does "justly" mean? "Dealing with a case justly includes, so far as is practicable …" and then you see the factors laid out at A to E, including D – "ensuring that the case is dealt with expeditiously and fairly.

If I were asked to summarise the dispute between the parties it is essentially the defendants say that we have not been expeditious and we say it would not be fair to shut us out.

I will just flag up rule 44(3) –

> "The Tribunal may in particular -
>
> (a) encourage and facilitate the use of alternative dispute resolution".

If we are given permission to continue with these claims, that is something – as in the previous BCL case – we will be raising at a suitable early stage; we did in that case. So those are the principles governing the exercise of discretion. You essentially look at the criteria in rule 44(2) and deal with the case justly.

The defendants seek to narrow down that discretion in two ways. First, BASF argue at para.9 of their submissions that the exercise of the CAT's case management powers are to secure the "just expeditious and economical conduct" of proceedings (conjunctive considerations)", those being the opening words of rule 19(1). That is not the position, as you can see, rule 44(1) makes specific reference to directions under rule 19 for damages' claims. So if you are looking at case management and damages' claims, then the exercise of your discretion is governed by the principles set out in rule 44. In any event, there is no authority to support the limitation placed on the Tribunal's discretion which the defendant seeks that just, expeditious and economical are conjunctive considerations. The normal approach in English law is to interpret "and" disjunctively where the context so requires or permits, you do not have to interpret it conjunctively. But, as we say in any event it does not matter because damages' claims are governed by the specific provisions of rule 44.

THE CHAIRMAN: So you are saying that rule 44 imports the powers that are set out in rule 19 but substitutes for the test in rule 19(1) the test which is set out in rules 44(2) and (3)?

MR. ROBERTSON: Essentially, yes. It is rule 44 exercise that we are concerned with today. Even if it were governed completely by rule 19(1) we say that just, expeditious and economical are factors to be taken into account but they are not, as it were, three thresholds all of which have to be surmounted and does not have to be interpreted as conjunctive. It can be interpreted disjunctively and, of course, in case management there can be features that point in different directions, and it is for the Tribunal to take the matters into account and give then the weight that they see fit in order to reach a just outcome.

While we are on the rule 44 exercise of discretion, the defendants also submit at para. 8 that the Tribunal should only grant an extension of time in an exceptional case. We say there is no justification for reading in some higher threshold of exceptionality into the CAT Rules. There is no presumption against an extension of time, or that it can only be granted if the circumstances are exceptional. We say you can see that Rule 44 does not have an additional requirement of exceptionality when it comes to exercising powers under rule 19 by comparing the provisions of the rules dealing with appeals in rule 8 – these are appeals against decisions, not damages' claims. There you will see in rule 8(2) (p.300) that there is a provision about extension of time in appeals, normally you have two months, rule 8(2):

> "The Tribunal may not extend the time limit provided under paragraph (1) unless it is satisfied that the circumstances are exceptional".

So we say that throws rule 44 into contrast.

THE CHAIRMAN: Well that may be a point that they would want to take in the Court of Appeal as indicating that rule 19 is not supposed to apply to the actual stark commencement of proceedings which, as you say, is not a point that they are going to be taking here.

MR. ROBERTSON: Well that is a point for any subsequent appeal to the Court of Appeal, it is not appoint that they can run here in those terms, the Tribunal does not have the power because t hey do not dispute that proposition before this Tribunal. So we are operating in accordance with the law as Lord Justice Richards thought it was. I accept, of course, it is an *obiter* remark, but it was the first question Lord Richards asked me, or in fact asked the parties at the very outset of the hearing. It was at that point I thought "This is not going to be quite as straight forward as I had hoped" – a strong indication which way the wind was blowing and on this side it was a pretty chilly wind.

We submit that the Tribunal may therefore take all relevant circumstances into account in exercising its discretion, each case should be approached on its own merits. That said, of

course, these two applications are exceptional because they arise in relation to claims that were brought prior to the Court of Appeal's decision setting out authoritatively the interpretation of the s.47A limitation period. So this situation will not arise now for the future, as the Court of Appeal has clearly set out how s.47A----

THE CHAIRMAN: Can I just ask you this, Mr. Robertson, in Rule 19(2)(i) it says: "… the abridgement or extension of any time limits, whether or not expired." Now, you made some submissions to the effect that we must not give undue attention to principles that apply in High Court proceedings but can you just help me as to whether in High Court proceedings there is a difference in the way the court exercises its discretion depending on whether the application to extend time is made before or after the expiry of the time limit and, if so, whether there should be a difference in how we approach the test or whether it is exactly the same test whether the application is made before or after the expiry of the time limit.

MR. ROBERTSON: The short answer is that off the top of my head I cannot assist you with that because I have not done the research on that point; that is something we will look at over the adjournment and I will deal with in reply, and of course my learned friends can then respond to what we say, but we will look at the comparative position in the High Court as best we are able over the short adjournment.

THE CHAIRMAN: Thank you.

MR. ROBERTSON: As I said, these applications are exceptional. We have been caught, as it were, in the transitional period between the Tribunal taking our interpretation and the Court of Appeal taking a different interpretation.

The defendants seek to rely upon the fact that the s.47A time limit is a short one and they say that we have been tardy in bringing our claims. They submit at para. 9 of their submissions that it is difficult to perceive such an application as this one to extend time by over four years could be grounded on grounds of expedition, and they expand upon this topic at length in their supplementary skeleton. I apprehend from Mr. de la Mer's chronology that we are going to hear a lot more about this, that we have shown a lack of expedition.

We are not making this application on grounds of expedition or otherwise, we are making the application on the ground that we made a reasonable mistake as to the interpretation of the s.47A limitation period and the fact that it was a reasonable mistake is borne out by the fact that the Tribunal, differently constituted, agreed with our interpretation. That means that if the Tribunal had not been overturned by the Court of Appeal there would have been no ground of lack of expedition on which the defendants could have objected to the claims

proceeding. They might have sought to argue abuse of process and I will come on to that shortly, but they could not have argued "you are within the time limit but you have not shown due expedition". If we were within the time limit, we were within the time limit and that is it.

The observation of Lord Denning in *Baker v Bowketts Cakes* referred to by Mr. Brealey at footnote 11 to para. 14(c) of his submissions, that we have only ourselves to thank is entirely irrelevant. That was a case where the plaintiff's solicitors were well aware of the time limit for the service of a writ but failed to comply with it; they knew what the time limit was, they did not comply with it, their reasons were problems in obtaining legal aid, that is why Lord Denning said "Tough, you had issued the writ, you should have served it within the time available". We have the application here; we reasonably thought we were within the time period.

As regards the observation "you are four years out of time", bear in mind that two years of that period – half that period – was taken up by BASF's appeal to the Court of First Instance, which we thought had not set time running yet. Obviously the time taken to resolve that appeal was outside our control, outside BASF's control as well, it is just the period of time it takes to prosecute an appeal in front of the Court of First Instance.

I am not seeking to reopen the Court of Appeal's decision, it is obviously not open to me, but I would just draw the attention of the Tribunal to the passage from the speech of Lord Macintosh in the House of Lords. Lord Macintosh was the Minister responsible ----

THE CHAIRMAN: Well that is a difficult point because there is issue of Parliamentary privilege if we are then going to be getting into questioning or impeaching what has been said in the House.

MR. ROBERTSON: I was only making the forensic point that the passage cited by my learned friend talks about Lord Macintosh saying there is a two year time period which is short but it is set running after any appeals have been exhausted in their reference there to any appeals against infringement, etc.

THE CHAIRMAN: It is the same, Mr. Robertson, if you say that then your opponents will want to say it means something different, or it was not right and then we get into very difficult territory so I think you can make your points without referring to that.

MR. ROBERTSON: I will put that to one side and move on to the argument that the claims are four years out of time under s.47A and that therefore automatically equals extreme tardiness. Had the claimants brought their follow on claims in the English High Court they would have had the benefit of a six year limitation period, running at the earliest, and I

emphasise at the earliest from the date of the adoption of the decision, the Vitamins cartel decision was adopted on 21st November 2001 and therefore the limitation period under s.32 of the Limitation Act – Mr. Hoskins has already referred to that this morning – that is the limitation period where there has been deliberate concealment, well, this was a cartel and they only work through deliberate concealment, so that is obviously the limitation period. The six year limitation period in the High Court would not have expired before November 2001 at the earliest.

THE CHAIRMAN: Before six years from November.

MR. ROBERTSON: Yes, so November 2007 would have been the expiry of the six year period, the earliest date on which the six year period in the High Court could have expired. So had we gone down the High Court route, the Limitation Act recognises that there is a six year limitation period and it would not have expired before November 2007. There is an argument that in fact it would only have been set running on the date of publication of the decision in the Official Journal, which was 10th January 2003. It is fair to say Lord Justice Richards did not think much of that in his judgment on the limitation point in this case. He took the view: "Look, there is enough in the press release the European Commission issued to tell you about the decision", but that again is an observation of Lord Justice Richards, and the point is not formally decided.

Just assuming that the limitation period expired at the earliest in the High Court in November 2007, that was only a few months before the BCL claimants brought their claim on 13th March 2008 and the expiry in November 2007 was a year after the BCL claimants first put BASF on notice of the claim, the letter before claim being sent on 16th November 2006. For your note, the letter before claim is in vol.1, tab 4, at p.30.

THE CHAIRMAN: What was the date of that again?

MR. ROBERTSON: 16th November 2006, roughly a year before expiry of the High Court limitation period.

So we say that the Tribunal is not being asked in these applications to make any radical departure from the principles of expedition for claims of this nature applicable in this jurisdiction.

As I said, the grounds on which we make this application are that essentially it would be just for the Tribunal to extend the time limit for the claim because the interpretation of the time bar rules was, prior to the judgment of the Court of Appeal, reasonably open to doubt and it would be unjust to deprive the claimants of their claim on the ground that they had reasonably misinterpreted the limitation rules. I have already made the point that it is a self-

evidently reasonable mistake. The Tribunal did not regard the position as even reasonably open to doubt because the Tribunal refused permission to the defendants on 17th October because the Tribunal had reached a firm conclusion that the defendants would have no realistic prospect of success in the Court of Appeal. The Tribunal, in its judgment, referred to its previous judgment in *Emerson 1* and *Emerson III*, which we do not need to go into but they had said in that judgment "We are further reinforced in the view that we take by the judgments of the Tribunal in *Emerson 1* and *Emerson III*, paras. 38 to 41 of the Tribunal's judgment on limitation in this case.

We say it is indisputably the case that BCL claimants were indirect purchasers of BASF's products over an extended period of time, and we say – but obviously it is for us to prove – that the likelihood is that these claimants paid higher prices than they would otherwise have done for products incorporating vitamins purchased during the period of the vitamins' cartel. The consequence is that our claim is that we have suffered significant loss. Without litigation on the merits of the case, we have no remedy, we submit that is an unjust outcome.

We make one observation as to where the balance of justice lies by reference to the judgment of the former President of the Tribunal, Sir Christopher Bellamy, when refusing an application for security for costs by Aventis and Roche in the previous proceedings. The judgment – it is short passage so I will not ask you to turn it up – is at authorities' bundle 1, tab 8, p.210, it is the BCL security for costs judgment, and at para. 43, and it is in a different context to an application for costs, the then President observed:

> "We consider it just that at this stage of the proceedings the possible risk as to costs should be borne by the Defendants, who are before the Tribunal as infringers of a public law prohibition, rather than by the Claimants in whose favour liability is, at least prima facie, established."

We submit there are no interests of justice to be weighed in BASF's favour. BASF has been guilty of a very serious infringement of Article 81, it has made no reparation or offer of reparation to any of the claimants, the justice of the case lies with us.

Turning to the grounds on which BASF advances in response to us, they are set out at paras. 15 to 20 of their submissions and just to run through them in the order they are set out, and they head this "Mistake of Law". They say we made a mistake of law and that our account of our mistake of law is at odds with what happened. As to that we responded with Mr. Perrott's witness statement, which I would ask you to turn to (bundle 1, tab 4, p.26). In paras. 16 to 18 Mr. Perrott explains why the claim against BASF was not brought at the

same time as the claims against Aventis and Roche. I was acting in that case instructed by Mr. Perrott. We had calculated that because Aventis and Roche were not appealing from the decision the time period expired on 31st January 2004, that is what we calculated, I am not saying it was the correct calculation, but that is what we had calculated at the time.

At para.17 there is consideration given to bringing a claim against BASF. It was discussed with counsel (myself) and we had taken the view that because there were ongoing proceedings in the European Court, then the time had not started running. We were mistaken, but it was a mistake at least I am fortified in that the Tribunal, had we gone, would have thought that correct – the Tribunal in this particular case thought was correct. The legal team concentrated on bringing the claim against Aventis and Roche, that is what happened. That was the mistake and that is what happened.

The limitation point – the point is made by BASF, "Actually you needed permission to bring the claims against Aventis and Roche on the interpretation given by the Tribunal in this case". Yes, but the point was never raised in those proceedings. It was not raised by Aventis and Roche, it was not raised by the Tribunal of its own motion, so we just got on with the case.

The defendants add that we have not explained the delay of two years after the *CFI* judgment in March 2006. Again, we thought we had the benefit of a time limit expiring in May 2008. What we did, as I have already explained, was write a letter before claim in November. That was less than six months after BASF's deadline for appealing the *CFI* judgment had expired. Obviously, as you know, when you put in an appeal to the ECJ notice of it is published in the Official Journal. There is always a time lag. I think the last time I looked at it it was about a month or so between the application going in and notice being in the Official Journal. They had two months and ten days to appeal to the ECJ from the March decision.

We formulated the basis of the claim, wrote a letter before claim, we pursued it in correspondence which is exhibited by Mr. Perrott.

We say this is not an unreasonable delay, this is the way in which one prosecutes a claim. First of all, one attempts to resolve it through correspondence. If it becomes obvious, as it did, that the defendant is not going to make an offer of reparation, then one puts together the claim and serves it. We thought we had a deadline of May 2008 to do that.

BASF contend that the risk of a reasonable error of law should lie with us. We say that is not the test, it is for the Tribunal to do what is just in the circumstances of the case under Rule 44. At para.18 they dispute the relevance of their illegal conduct. They say it is not

relevant that they cannot tell us. We say that is highly relevant, they have committed a serious infringement of Article 81. We make the same observations as to where justice lies as the former President of the Tribunal did in the security for costs judgment in the previous claims against Aventis and Roche.

Similarly, in para.19 of their submissions, they say, "It is not relevant that you would have no remedy of shut out, after all that is what happens with limitation periods". Again, we say, "Yes, if we are shut out we have no remedy, that is a relevant consideration to the overall justice of the case".

They then at para.20 of their submissions go on to expatiate on the impact that these claims would have on the defendants, and it was for that purpose they served a witness statement from Dr. Elvermann, the in house counsel of BASF in Germany. This is in support of a submission that the quality of evidence is a relevant factor to refusing our application. Just as an observation at the outset as to the quality of evidence, yes, some of the evidence in this case goes back 20 years. That is because the defendants were involved in a secret cartel defrauding the world at large from that time. It was only uncovered when Aventis, then in the guise of Rhone Poulenc, finally did the decent thing and confessed to the competition authorities and got immunity. So it is not surprising some of the evidence is rather old, it is because they kept the cartel secret for so long.

We have submitted in our submissions, to which Dr. Elvermann responds, and it is paras.17 to 19 of our submissions, that there would be no adverse effect on BASF in permitting a claim to be brought now because BASF had not identified any adverse effect relating to quality of evidence in correspondence with us. They have said in various items of correspondence that the evidence is rather extensive. That is why we were somewhat taken aback by Dr. Elvermann's first witness statement because he argued at para.4 that the BASF defendants would be prejudiced in defending the claims because "the BASF defendants possessed very little, if any, relevant documentation, since such documentation, hard copy and electronic data, has been destroyed in accordance with a document retention policy introduced in 2004". The reference to the witness statement is volume 1, tab 3, p.17. We were concerned about that.

THE CHAIRMAN: Does he say it was actually destroyed in 2004, or just that that is when the document retention policy was introduced?

MR. ROBERTSON: I think probably the sensible thing is to turn up the witness statement and just see what Dr. Elvermann says. His witness statement begins at p.17 of tab 3, volume 1. It may be sensible for the Tribunal to take time to read this witness statement, it is a

relatively short one, from start to finish, and then we will see what Mr. Perrott says in response.

THE CHAIRMAN: (After a pause) Yes.

MR. ROBERTSON: Can I then invite the Tribunal to read Mr. Perrott's witness statement in response, tab 4. Again it is short, so if you could read from pp.23 to 28, the statement in its entirety but not the exhibits.

THE CHAIRMAN: (After a pause) In the quotation from the letter of 11th April in para.9, it refers to "claims for damages brought by our clients in the Competition Appeal Tribunal, London and in the High Court arising out of the *CFI* judgment", were your clients involved in the High Court litigation?

MR. ROBERTSON: Bear in mind we were not involved in High Court litigation. I think that is ----

THE CHAIRMAN: Is that a reference to the *Devenish* litigation?

MR. ROBERTSON: That is the only High Court litigation it could be a reference to in 2007, because at that point I think the *Devenish* proceedings were on foot. Unless it is a meaningless reference, it is not a reference to anything that we have ---- I am told by Mr. Perrott that it was intended to mean "and brought by others", because we had not brought any claims in the High Court. That is what that is a reference to.

We need to complete the picture by looking at what Dr. Elvermann says in response. His witness statement is to be found at tab 5 beginning at p.69. In fact, the text is pp.69A to C.

THE CHAIRMAN: (After a pause) Yes, thank you.

MR. ROBERTSON: Madam, that is the evidence of ----

THE CHAIRMAN: What Dr. Elvermann does not say is when the US court order was lifted.

MR. ROBERTSON: That is correct, madam. I think the points that we would make, drawing together what we have seen from the evidence, are as follows: firstly, Dr. Elvermann's first witness statement served with BASF's submissions for this hearing was the first occasion on which the defendants had advanced to us an argument that it was destroying, or had destroyed, any part of its documents, despite being on notice of our claims from 16th November 2006. We have already seen reference to the letters extracted in Mr. Perrott's witness statement. They had, on the contrary, told us, and I have made this point, in their letter dated 30th April 2007, that the documentation is rather extensive. If they have been destroying documentation since 2004 then they have been doing so despite the fact that the English High Court limitation period did not expire before, at the earliest, November 2007. Moreover, these defendants continue to be defending equivalent claims

brought by other purchasers in High Court litigation arising out of the vitamins cartel in the *Devenish* case. The *Devenish* claimants, I believe, are companies located both in the Republic of Ireland and in Northern Ireland.

The *Devenish* case went to the Court of Appeal, as the Tribunal will be aware, on the nature of remedies, judgment In October 2008, and we learn from Mr. Lawrence representing Roche, in his witness statement served as part of their submissions that an order dismissing the *Devenish* proceedings was issued on 5th February 2009.

We know that throughout this period BASF were defending High Court claims. They cannot have been going round destroying documentation.

THE CHAIRMAN: The *Devenish* litigation, according to Mr. De La Mare's chronology, started at the end of February 2005 – is that right?

MR. ROBERTSON: Yes. If BASF had sought advice, and they obviously did seek advice, in that they had been involved in the earlier claims in the Chancery Division, so they knew there was High Court litigation. So they would have known that there was a limitation period that, on any reasonable view, would not expire before November 2007. So that really does cause one to ask what were they doing in instituting a document destruction policy?

We are happy to accept Dr. Elvermann's qualification that he advances in his second witness statement where he says, "Look, destruction of documentation was not, as far as I am concerned, under expiry of s.47A time limit in 2004". The short answer to that is rhetorically, so what, there was a High Court limitation period still running, and so they should have been preserving documents, not destroying them.

In his second witness statement Dr. Elvermann then seeks to minimise the document destruction programme because he says at para.8(b) it is only applicable to emails.

Obviously, because we have not yet got to the point of disclosure in this case, we cannot see what significance emails may or may not have played. It is impossible to see on what rational basis a distinction could be drawn between emails and other disclosable documents.

In this era of e-disclosure one knows that disclosure is a rather extensive exercise in this jurisdiction thanks to the volume of electronic communication.

He states in para.8(c) of his second witness statement that hard copy documents were destroyed in 2004. That is half way through the High Court limitation period. He says that they were destroyed simply because of the passage of time. 2004 was no time for the defendants to be destroying potentially relevant documents, it was a time for them to be preserving them.

He does state in his witness statement at 8(d) that BASF did retain electronic aggregated sales data on their system. That sounds like that is potentially relevant to our claims.

At 8(e) he says that there is relevant evidence in relation to the third defendant, that is Frank Wright, a previously independent distributor that they had acquired, and which has since been sold on.

This suggests to us that, contrary to the impression given in Dr. Elvermann's first statement, there is relevant documentary evidence, at least for part of the relevant period.

In so far as documentary evidence has been put beyond the reach of the Tribunal this destruction, English courts take a robust approach to that. Can I hand up another authority, with apologies for burdening the Tribunal with yet another authority, but it is one of only two upon which I rely. (Same handed)

THE CHAIRMAN: As far as Frank Wright is concerned, I am not quite sure how one reconciles para.12(4) of the first statement with 8(e) of the second statement, but it may be that we need to wait to hear from ----

MR. ROBERTSON: It is highly confusing. You can imagine why we were rather taken aback by Dr. Elvermann's first statement. None of this had been put to us in correspondence.

The case that I have just handed up, we do not need to go any more than just p.3 of this. It is a case where one of the parties had been destroying potential relevant evidence. I rely upon this just for the statement set out by Lord Justice Morritt in Court of Appeal in that case. It is not a reported case. It is only available on Lexis, but it has subsequently been cited in reported cases. You will see the third full paragraph on p.3:

> "For Mr. Malhotra reliance was placed on the broad principle expressed in the Latin ..."

and of course we are not allowed to use that any longer –

> "However, it was accepted that the true principle was not as extensive as the maxim would suggest for not everything is to be presumed against the destroyer. Thus the limits to the presumption must be ascertained from the cases in which it has been discussed.
>
> The first is the well-known case *Armory v Delamirie* (1722). In that case a jeweller to whom a chimney sweep had taken a jewel he had found, took the jewel out of the socket and refused to return it. The chimney sweep sued him in trover. On the measure of damages Pratt CJ ruled that:

'unless the defendant did produce the jewel, and shew it not to be of the finest water, they [the jury] should presume the strongest against him, and make the value of the best jewels the measure of their damages ...'

More recently the principle has been stated by Staughton J., as he then was, in *Indian Oil Corporation Ltd. v Greenstone Shipping SA [1988]* ...

'If the wrongdoer prevents the innocent party proving how much of his property has been taken, then the wrongdoer is liable to the greatest extent possible in the circumstances.'"

We rely upon that for the submission that if a party takes steps to destroy relevant evidence and says, "You cannot prove the claim against us because I have destroyed the evidence", then English courts will take a robust attitude to that and presume the worse against the defendants.

Madam, those are the grounds on which we resist the grounds advanced by BASF, and we submit that it would be just for the Tribunal to extend time pursuant to Rule 19(2)(i) to the date on which the claim was served in the *BCL* proceedings, that is 13th March, 2008. We would invite the Tribunal to permit these claims to proceed to trial without further delay with an early case management conference to consider directions.

With that, I turn to the Grampian application. This can be much shorter because I have already covered a lot of the ground in relation to BASF. One point just to flag up about the identity of the Grampian claimants, the Tribunal will be aware that there is a sixth proposed claimant - Cymru Country Feeds. The application to join the sixth claimant had not been dealt with by the Tribunal. We assume that is because we have got to first of all show that we have got a claim to bring before we proceed to join a further claimant. These claims are brought against the first and second defendants (who I will refer to as "Aventis"), the third and fourth defendants (Roche), as well as the fifth to seventh defendants who are the same defendants as in the BCL claims.

Grampian adopts the submissions advanced on behalf of BCL. Obviously factually there are differences because there has not been the same degree of correspondence with BASF. But, insofar as the BCL submissions, as a matter of principle, are applicable to Grampian, then Grampian adopts them.

The only additional point that arises in the Grampian claim is that it does not appear to be disputed by any of the defendants that the Grampian claimants would have been in time against all the defendants had the Tribunal's ruling on the limitation period not been overturned by the Court of Appeal.

I propose only to deal therefore with the additional matters raised by, first, Aventis, and then Roche. I am dealing with them in that order because that is the order in which they appear as defendants. Obviously you have heard from my learned friends that Mr. Hoskins may go before Mr. De La Mare. So there might be a slight inversion of the order. The Aventis defendants' arguments are summarised at Section 1 of their submissions. The first three matters set out there go to the correct legal test and the issue of so-called delay. I have dealt with those in relation to the BCL case. There is a reference to the *Tesco* case before the CAT in which one of the applicants in that case had mis-calculated a time limit and was one day out of time. The Tribunal, in a judgment, said, "Really, that is no excuse".

THE CHAIRMAN: Which tab are we at now?

MR. ROBERTSON: The Aventis submissions are to be found in Volume 1, Tab 7. They are supported by a witness statement from Mr. McDougall, a partner in Ashurst, to be found at Tab 10, p.113. The point I am making about the *Tesco* case – the *Tesco* case is referred to at para. 18 of their submissions. There, as they rightly refer, the President of the Tribunal stressed the importance of adhering strictly to time limits. The Tribunal's rules on time limits in seeking to challenge Competition Commission decisions are clear. There has never been any doubt as to how you calculate the period for bringing a claim in a s.179 application. There is very helpful guidance in the Tribunal's Guidance to Proceedings in the Tribunal. So, they did really only have themselves to blame for mis-calculating the time limits. So, the *Tesco* case is of no relevance.

Turning to the additional points, Aventis say that the Grampian claimants have advanced no good reason for the very substantial delay in making their claim (para. 28). The simple answer to that is that the Grampian claimants objectively could reasonably have considered the claim to be in time. If the Tribunal's interpretation had been upheld, the fact that we were one day within the time limit is neither here, nor there. It could not be argued that we were somehow delaying. There would be no delay objection open to any of the defendants. Aventis make a play at para. 31 of their submissions as to there being no evidence put in by the Grampian claimants of what view was taken of the applicable limitation period between 2002 and 2004 when they could properly have commenced proceedings against the defendants on the basis of the Commission decision. The reason why we have not put in any evidence is that there is no need for it because the position is objectively ascertainable. From 2002 to 2004 -- Well, the position is this: first of all, you could not have brought a claim in the Tribunal until 20th June, 2003 because that was the commencement date for s.47A. So the relevant limitation period from 2002 onwards was until 20th June, 2003

which was the High Court limitation period, expiring no earlier than November 2007. When you have got the choice where to bring a follow-on claim on 20th June, 2003 -- Well, there is an alternative two-year limitation period, and mistaken thought at the time to be on the expiry of the deadline for BASF bringing an appeal against the CFI judgment - in other words, the two years starting from that date. There is no mystery as to any of that. There is no need for a witness statement. We have not called any.

THE CHAIRMAN: Wait a minute. You have introduced a new point there then about the coming into force of ----

MR. ROBERTSON: This is s.47A. The point being made is simply this: they say there is no evidence as to what view we took of the limitation period from 2002 onwards.

THE CHAIRMAN: I understand that. So, the time starting to run on the basis that the Court of Appeal has now said is the right way to interpret these provisions -- It started to run then two months and ten days after the Commission's decision, which would have been January 2002. But, s.47A was not in effect until ----

MR. ROBERTSON: It did not come into force until 20th June, 2003. But, when it came into force it applied to claims that could be brought against decisions prior to that date.

THE CHAIRMAN: So, you did not then get the whole of the two years.

MR. ROBERTSON: No, sadly.

THE CHAIRMAN: You got whatever was left of the two years ----

MR. ROBERTSON: We got whatever the unexpired portion of the two years was, calculated back from the decision, from the Court of Appeal's view.

The Grampian claimants say that what we should have done - and they say this at paras. 32 and 40 -- was to put in what they have described as a 'protective claim'. The short answer to that is that there is no provision under the CAT rules for protective claims. Claims are brought under Rule 32. Rule 32, which is set out on p.307, sets out the materials that must be included with the claim. In particular, Rule 32(4),

> "There should be annexed to the claim form ... (b) as far as practicable a copy of all essential documents on which the claimant relies".

So, that is why when one puts in a claim in accordance with Rule 32, insofar as you are able to you put in your evidence. That is what both sets of claimants in these applications have done. So, this idea that we put in a protective claim -- There is no such animal in the Tribunal. There is either a claim in accordance with Rule 32 or there is no claim.

THE CHAIRMAN: I do not think that is quite what they mean by a protective claim. They mean a claim that sort of holds the position. I do not think it is a point about the level of detail

into which you have to go. The question is what would have happened if you had come along to the Tribunal and said, "Well, there is this question mark about when the time starts to run, both as against people who have not appealed at all, and against somebody who has appealed just on the question of the fine". Whilst a CFI is deliberating on BASF's fine appeal, time may be running or it may not have started. We do not know. If it is not running, then that is fine. But, if it has started running, then we need to bring our proceedings, and we may or may not need your permission to do so. I am sort of thinking through where we would get to with that.

MR. ROBERTSON: Objectively, that is what could have been done. Objectively, what was done was that the claim was put in on the basis of the limitation period as the Tribunal in the BCL case thought it to be. So, we took a view of the interpretation of the limitation period. It was, on any view, a reasonable view. That really is the long and short of it.

The Aventis defendants claim that there is a risk of injustice against them. The risk of injustice that they identify at paras. 42 and 56 of their submissions is the risk of Aventis paying the wrong person and then being sued again. You see that at para. 42, and it is repeated again at para. 56, put slightly differently. We do not understand that because we are not claiming for anybody else's loss other than our own. We have got to prove our case on the balance of probabilities that loss has been incurred by us as indirect purchasers from Aventis. So, we do not see how that risk arises.

THE CHAIRMAN: Is this a passing-on defence point? Are you at different stages in the distribution chain?

MR. ROBERTSON: We are indirect purchasers in the Grampian claim. Obviously we know Aventis are a party to proceedings which have been withdrawn. We do not know on which basis they have done that. But, if they have wrongly paid money to other people, that is, with respect, their problem. Our problem is to prove our case on the balance of probabilities - prove that we have incurred loss as a result of Aventis' activities. So, the risk of injustice referred to there -- that must presumably arise in any litigation where there are a multiplicity of claimants. There is nothing special about this case.

The Aventis defendants argue that it is an abuse of process for us to bring these claims. We responded to that in our submissions by referring to the judgment of Lady Justice Arden in *Walbrook Trustees*. Could I just ask the Tribunal to turn up that particular authority in Volume 2 of the authorities bundle. It is the judgment of the Court of Appeal delivered by Lady Justice Arden and I would invite the Tribunal to read paras. 3 to 6. (After a pause):

Madam, we rely upon that as an authoritative statement of the law as it currently stands, and in particular we rely upon the last two sentences of para. 3,

> "In essence, the court must make a 'broad merits-based judgment' as to whether there is an abuse of process. It is not enough to show that the claim could have been brought in earlier proceedings".

This is the first claim that the Grampian claimants have brought. We say there is quite simply no abuse of process, and that it really lies ill in the mouths of businesses that have engaged in a long-running and highly successful fraud on the world at large to start running arguments based upon abuse of process.

THE CHAIRMAN: Well the point that they are making is that Grampian should joined in the actions brought against Roche and Aventis ----

MR. ROBERTSON: That is what they are arguing. They are arguing that we should have somehow joined in with, say, the Northern Irish producers or the Irish producers in *Devenish*, to which our response is that of the Court of Appeal in *Walbrook Trustees*, namely it is not enough to show that the claim could have been brought in the earlier proceedings. We are entitled to bring our own claim. It is a very significant fetter on s.47A claims if, for example, somebody brings a claim in the High Court and then an argument on abuse of process is going to be run against you should you subsequently bring a claim against the same cartel, but going down a s.47A route in this Tribunal. After all, s.47A was introduced to make it easier for claimants to give an easier right to redress to those who have been injured by cartels. We say that it is just not appropriate to require you to go down the route of whoever chooses which route to go through first. If you stand back and we look at what is happening at the moment in the world of cartel claims in this jurisdiction, most claims are being brought in the High Court. By comparison, relatively few claims are going to be coming down the s.47A route. If that interpretation were correct, it might well close down the s.47A route completely. I appreciate that that is a wide policy consideration, but it does show why their argument on abuse of process cannot be correct. So, we were entitled to vindicate our rights, going down the s.47A route, and if the Tribunal interpretation had been upheld it would not have been open to any of the defendants to argue that a new claim brought within time under s.47A was an abuse of process.

Aventis argues at para. 44 of their submissions that abuse of process also arises where a party re-litigates an issue raised in previous proceedings. We say this argument is not in point. The central issue in the Grampian claimant's claim for damages is for the Grampian claimants to show that they have suffered a loss caused by the defendants' infringement as

established in the Commission's decision. It is just obvious that that issue had not been raised in previous proceedings because we have not brought previous claims. So, this does not amount to re-litigating or an abuse of process.

Aventis argues at para. 50 as to the public interest and finality of litigation. Stopping parties seeking to warehouse litigation -- I am not really sure what that is meant to mean. These applications today are the only claims to which this issue about extending time applies. As I have already said, for the future the Court of Appeal have spoken and this issue is not going to arise again. So, when Mr. McDougall, in his witness statement refers at para. 9 - no doubt in his personal experience - to the spectre of Lloyds-type long tail litigation for ever and a year, that is a million miles away from where we are today. These are two self-standing applications because we have been caught by the sort of transitional change in law.

Finally, Aventis refers at paras. 51 to 61 of its submission and its supporting witness statement to issues relating to the cogency and reliability of evidence. We say that those are matters for the trial of these claims. It is for the Grampian claimants to prove our case on the balance of probabilities. So, they are not issue that go to whether an extension of time should be granted or not.

Similarly, the events which mean that the second defendant no longer trades -- That is referred to at para. 61 of the application. That seems to have happened well before the Commission decision. We do not understand what relevance that has to a claim now. We further point to the fact that Aventis was a defendant to the *Devenish* litigation, settled apparently in February of this year. So, the evidence that was relevant to those proceedings will be relevant, or may be relevant, to these proceedings. Mr. McDougall very fairly acknowledges in his witness statement at paras. 13 to 14 that they do have access to documentary evidence through a third party called Adisseo I do not know anything about Adisseo, but he fairly makes the point that they do have access to that evidence.

Finally, just to respond to Mr. McDougall, he states in para. 6 of his witness statement that the Grampian claimants are seeking to bring this claim in a 'cynical fashion'. It is impossible to discern what advantage the claimants would have in seeking to bring a claim at the end of the limitation period rather than at an earlier time. It cannot have been cynically trying to put Aventis at an evidential disadvantage because throughout this period Aventis had been engaged in litigation about the Vitamins Cartel, and so has taken steps to preserve evidence. So, we refute that allegation of cynicism.

Turning finally to Roche, and there is really very little additional to say about the Roche submissions that has not already been covered in relation to BASF and Aventis. Just to run

through their submissions, the first part, at paras. 3 to 20, is an account of the legal and factual background. They refer to the Tribunal's power to grant an extension of time (paras. 21 to 24). They add some gloss at paras. 25 to 26. But, we have already addressed those issues. The grounds then relied upon at paras. 27 to 42 largely mirror those of the Aventis defendants. We have already dealt with them. The additional points that we can identify are, first of all, the statement at para. 40 that the proposed claimants (the Grampian claimants) have failed to identify any particular prejudice they would suffer if their application were not granted. It strikes us as slightly odd because if the application is not granted, the case is time-barred and we are left without a remedy.

They refer at para. 41 to the Roche defendants' litigation strategy. We find this strange. It seems to fail to acknowledge that they were responsible for this fraud on the general public. So, their litigation strategy, as far as it appears to us, has been to try to hold on to as much of their ill-gotten gains as possible. There has been, as far as the Grampian claimants are aware, no reparation or compensation of strategy as might have been expected by standards of normal commercial decency or morality.

Finally, their reference at para. 42 to the concern about other potential claims, again, we just repeat, these applications are *sui generis*. We have been caught out by the change in the law for the future. The Court of Appeal have spoken.

So, madam, members of the Tribunal, it is submitted by the Grampian claimants that it is just for the Tribunal to extend time pursuant to Rule 19(2)(i) of the CAT Rules to the date on which the Grampian claim was served, 14th May, 2008, and to permit these claims to proceed to trial without further delay and, as with the BCL claimants, we would be seeking an early case management conference to consider directions.

Madam, there is one matter that I have held over to deal with over the short adjournment , which is the comparison with the High Court - the powers in the High Court over extension of time. Save for that, those are our submissions.

THE CHAIRMAN: I have one point. The link between your arguments on the two cases, the claimants are in a slightly different position in that in the BCL claim they did bring the proceedings against Roche and Aventis earlier. The Grampian claimants have not brought any proceedings against anyone until the end of what they thought was the limitation period.

MR. ROBERTSON: That is correct.

THE CHAIRMAN: I do not know whether this arises at all, but if there were a situation where we came to the conclusion that justice favoured allowing one claim to go on, but not another, is there any distinction that we should make, or can make between them? Or,

would you say, “Well, if one goes ahead then there is no prejudice in both going ahead”? Do you see what I am getting at?

MR. ROBERTSON: The underlying principles are the same. We submit that both sets of claimants have been caught out by making a reasonable mistake as to interpretation of limitation periods. The fact that BCL have prosecuted earlier claims whereas Grampian have taken all claims as one does not appear to affect the underlying principle, which is that it is not just to shut them out, given that they made a reasonable mistake as to the interpretation of the s.47A limitation period. That, I think, is as far as one can take it.

THE CHAIRMAN: Thank you very much, Mr. Robertson. Mr. Brealey?

MR. BREALEY: Could I just hand up the supplemental skeleton which you do not have? It should go into Tab 5A. If I could just flag what this skeleton purports to do, and then what I am going to try and do is orally draw some principles together. I am not going to go by reference to the skeleton. This is in response to Mr. Perrott’s statement, and it deals with two issues. The first issue is just above para. 3, which sets out the time periods for the delay; we say there has been an inordinate delay in this matter. When we come to see the evidence, the claimants have been examining whether to bring a case since 1999, and it took them until 2008 to bring their claim. We need to tease out a few of the facts relating to the delay.

Just above para. 23 there is the issue of the 2004 witness statements, and if the Tribunal can perhaps read that over the luncheon adjournment it will be simpler to take a position on it. I will try not to refer to the 2004 witness statements, but apparently I have inadvertently in any event in para. 10. I have tried to work out what I have done in para. 10, and if I have done it, it is my fault. Paragraph 10 is relating to Deans, and I have referred to two witness statements in 2008 – so, they are not the 2004 statements. I will be corrected if I am wrong, but I think what I have done, and this is the bit that Mr. Robertson would want to strike out if he succeeds, I will not read it in court, but seven lines down you see the sentence: “This was ...” and will you put in brackets after ‘brought’ and, again, if you go to the last sentence and put brackets round “again” and “brought” . Again, I will be corrected if I am wrong. It may be that that has slipped in because I get that information from the 2004 statement.

So, we have two skeleton arguments - one at Tab 2 and one hopefully to be inserted at Tab 5A. What I would like to do is to draw some of the principles together and make essentially two key submissions. The two key submissions are these - and these are the two key submissions on the application to extend: first, whether the claimants have offered a good enough reason for an extension at all. So, whether the claimants have offered a good

enough reason for an extension of time at all. On that first key issue I would like to concentrate on the issue of mistake. So, this is Mr. Robertson's big point obviously - the question of mistake.,

Then, turning to the second key issue, this is whether the claimant have offered a good enough reason to extend time by approximately four years. That is the amount of time they want. On this issue what is relevant is the claimant's conduct overall. What explanations have they given for not bringing the claim earlier? There are, as we shall see, certain parts of delay -- So, just looking again at the supplemental skeleton -- I have tried to set it out by reference to certain periods in the claimants' conduct. So, again, if one looks at the supplemental skeleton at para. 5, there is the period 1999 to 2004. It is very important to see what was happening prior to the limitation period expiring. Then it is important to see what was happening (para. 15) from January 2004 to March 2006. What were the claimants doing during that two-year period? The answer is 'nothing'. Then the period (above para. 16) from 2006 to 2007. Again, they took essentially the whole two years after the CFI judgment.

So, what I have tried to do is look at the delay in three periods: one prior to what we now know is the expiry of the limitation period - what were they doing; then, what was happening during the deliberations in the court of first instance and what are the explanations for any delay; and then, why on earth were they delaying for the full two years after the CFI judgment?

THE CHAIRMAN: The significance of the July 2007 date?

MR. BREALEY: The significance of July 2007 is that that was the date which BASF said, "We have given you as much information as we can. There is no more". I put on record now that there was absolutely no decision of destroying documents. I will come on to this. In July 2007 that was the date where BASF said, "Look, we have given you the information that we can. That is it". Yet it took the claimants yet another seven months to bring the proceedings.

So, in the two year period after the CFI judgment there are two periods of seven months where there is radio silence. There is a seven month delay after the judgment, and then seven months after the July 2007 communication.

The thrust of the case on this second issue is that the claimants were preparing the case against BASF in 2000, 2001, 2002, and 2003. They had got the information together and for their own reasons chose not to sue. But, they had the information and they could have brought proceedings immediately after the CFI judgment. They could have continued

preparing the case during the two year deliberation period, but delayed for the full two years. The case law indicates that that delay counts against the claimants.

So, as I say, there are two key issues: one is whether the mistake justifies an extension at all; secondly, whether an extension of four years is justified.

If I can take the first issue - whether the mistake justifies an extension at all - there are three reasons on this first key issue, if I can just summarise them, why we say it does not justify an extension at all. The first reason - and it is not an unimportant point - is that the claimants still have not explained their mistake properly. They have not explained their mistake properly. This is their big ground for an extension and they still have not explained it properly. That is the first point.

The second point is that a mistake about when the time limit period expires - so, a mistake as to when the time expires - is not in law a good reason.

The third point - and this is probably the most important point, although it is the third point the nature of the mistake made in 2004 did not justify delaying in 2004. The third point - and it is probably the most important - is that the nature of the mistake that they say they made in 2004 did not justify delaying in 2004. I will obviously expand on this a little bit, but if I can just flag that third point now?

Mr. Robertson says that there should be an extension of time on the grounds of justice. I have noted it down. “It would be just to extend because interpretation of the time bar rules were reasonably open to doubt.” So, he has said it would be just to extend because the interpretation of the time bar rules were reasonably open to doubt. Well, if they were reasonably open to doubt the first thing that you do - if there is a reasonable open to doubt interpretation of a limitation period - is to protect yourself. You do not shut your eyes and say, “Well, we think it is this. It may be we are time-barred, but we think we are okay”. You protect yourself. What the claimants have done here is gamble. They have gambled on their interpretation. It may be a reasonable interpretation because the Tribunal itself came to that conclusion, though the Court of Appeal disagreed.

So, the third point is not about whether it was a reasonable interpretation. It is about whether the claimants acted reasonably in not protecting themselves, and then delaying for a period of four years when they knew the law was still open to doubt. As I say, it is a golden rule of limitation periods that if you think you are at risk you protect yourself, you do not gamble that your interpretation is right.

If I could quickly go through the first issue here: have they properly explained the mistake? With greatest respect I submit they are playing a bit fast and loose here. I will just refer to

parts where we get their interpretation from and the first is at volume 2C at 937. This is a transcript of the submissions that were made before the Tribunal on the preliminary issue. I do not think this is in contention but I do believe it is important that the Tribunal has the submissions in mind.

What the claimants submitted before the Tribunal and before the Court of Appeal was that the vitamins decision was one global decision. "You do not", Mr. Robertson said, "salami slice up the decision into various individual decisions." Essentially, when t here is one appeal by one party, even against fine, that means that time is suspended for everyone and you need permission across the board. So that was why Mr. Robertson has adopted this decision, it was one decision and as soon as there is one appeal irrespective of whether it is against fine, you need permission to sue any of the cartelists. That is the submission that has been made and that is, as it were, the mistake.

Then we go to the skeleton argument by the BCL claimants, and the Grampian skeleton arguments in the same format. This is at para.12, so if we go back to vol. 1, tab 1, paras. 12 and 13. At 12:

> "The claimants submit that it would be just for the Tribunal to extend the time limit for the claim because the interpretation of the time bar rules was, prior to the judgment of the Court of Appeal, reasonably open to doubt."

Then they get some comfort from the previous Tribunals in *Emerson 1 and III*. So when we were in receipt of this skeleton, knowing what had been submitted before the Tribunal in the Court of Appeal we said that really you are seeking an indulgence here, you are seeking to disapply time limits, and there are public policy reasons why we have limitation periods. You are seeking this indulgence, it is incumbent on you to explain the mistake of law that you say that you made. That is when we get the witness statement of Mr. Perrott at tab 4. We do not get anything from the Granite Grampian, there is absolutely nothing from the Granite Grampian claimants. We get the witness statement from the BCL claimants and this is all we get at 16, 17 and 18. 16 is about preparing the 2004 claims, 18 is about preparing the 2004 claims, and then 17:

> "We considered bringing a claim against BASF at that point. It was discussed with Counsel and the conclusion from these discussions was that we were precluded from bringing the claims until the BASF appeal, about which we knew little, had been decided by the European Court."

So there are various things: they contemplated bringing a claim against BASF at that point in about 2004, but it still does not really explain what the mistake was – is it a mistake on the basis of the *Emerson* judgment, or is it just an appeal as regards BASF.

Then Mr. Robertson, in oral submissions, says that the mistake was that we should have sought permission in 2004 from the Tribunal when the claimants sued Aventis and Roche, and this is what we have been trying to tease out of the claimants because, as I say, we feel they are being fast and loose. If the mistake is, as they submitted to the Court of Appeal and to the Tribunal, they should have obtained permission from the Tribunal to bring the Aventis and Roche claims. The reason we have been trying to tease this out is because it seems to lie ill in their mouth to say: "We made a mistake now against BASF, when we were reasonably sure what the law was in 2004 and still put no one on notice, the Tribunal on notice, that what we (the BCL claimants) were doing needed permission and when it comes to disapplying a limitation period we say this is an indulgence and bears a heavy burden, to come in 2008 and say "Poor us, we made a reasonable mistake, please allow us to sue BASF", we say it lies ill in their mouth to come to the Tribunal saying that when they should have come clean about their reasonable interpretation in 2004, they cannot have it both ways.

THE CHAIRMAN: I am not quite sure I understand your point, Mr. Brealey, are you saying that if they were really making the mistake that they said in their submissions to the Tribunal that you took us to, if they had really made that mistake then they would not have brought the proceedings against Roche and Aventis in 2004 either.

MR. BREALEY: Yes, because when one reads para.17 of the witness statement of Mr. Perrott one would expect a lot more frankness from him if, indeed, that was the mistake. There are two points: first, have they discharged the heavy burden incumbent on them of explaining to this Tribunal the mistake they made, in a witness statement with a statement of truth. One has to piece it together and, if it is the case, that they thought that the law was they needed permission in 2004 one would expect that to be explained there and it cannot be – and I noted it down – in answer to a question by you, madam, Mr. Robertson said: "Yes, we needed permission, it was never raised, we just got on with the case."

That has to be explained in a statement, it cannot be left to the advocate to explain the nature of the mistake to the Tribunal. Again, we are trying to piece it together. If the mistake is the mistake as represented by Mr. Robertson now, so that it was any appeal means you need permission from the Tribunal under Rule 31(3) **, then they should have explained that to the Tribunal – this is the second point really – they should have explained

that to the Tribunal at the time, and it lies ill in their mouth now ... (Interference from recording system)

THE CHAIRMAN: Perhaps that would be a convenient moment for us to adjourn?

MR. HOSKINS: Madam, can I raise one point which does not need to be transcribed, but it can be, which is just timing. I imagine we want to finish today. Mr. De La Mare and I are not going to be very long, but I think we probably think we will be about 30 minutes each. I just wanted to make sure that everyone in the room was happy that we would have a fair allocation of time to finish today. I thought I would raise that now in case it is an issue.

THE CHAIRMAN: Do you think we are going to need to go on longer than 4.30?

MR. HOSKINS: I think we need to ask probably Mr. Brealey and Mr. Robertson. I have said that I am going to be about half an hour and Mr. De La Mare has told he will be about half an hour. I do not know about the others.

THE CHAIRMAN: Mr. Brealey?

MR. BREALEY: Madam, I will be as brief as I can. If they are going to be an hour – I will try and finish in 45 minutes, which gives them an hour and Mr. Robertson some time to reply.

THE CHAIRMAN: It is difficult for you to know at this stage how long you are going to be in reply, Mr. Robertson?

MR. ROBERTSON: I cannot imagine I am going to be very long in reply.

THE CHAIRMAN: We will make some enquiries about whether we can sit slightly later. I think we may need to sit a little bit later in order to finish today.

MR. BREALEY: If I can finish on my first key point.

THE CHAIRMAN: Yes.

MR. BREALEY: I have given three reasons. The first is the need to adequately explain the nature of the mistakes. We say they have not done that in the way that good practice dictates. One would expect more than just para.17 of the witness statement. I ask the Tribunal to note p.143 of the Maclay Murray & Spens letter of 24th August where all they say when pressed to say what the mistake was, "The basis for our client's application is that when the proceedings were commenced they reasonably believed they were within the time bar". In my respectful submission, that is wholly insufficient for an application to disapply the limitation period.

THE CHAIRMAN: Thank you, we will come back at two o'clock.

(Adjourned for a short time)

MR. ROBERTSON: Madam, there was one matter I said I would come back on over the adjournment.

THE CHAIRMAN: Yes, Mr. Robertson.

MR. ROBERTSON: As it were, the analogous rules in the High Court. In the English High Court the position is that limitation periods are fixed under the 1980 Limitation Act, so for a tort claim it is six years, there are different rules for personal injury claims, but that is essentially it. The equivalent rules to, as it were, rule 19, are to be found in the CPR under "The court's general powers of management, Rule 3.1, and in the current version of the White Book it is p.49 of volume 1. You will see there "The court's general powers of Management" 3.1, para. 2 at the top of p.49:

> "Except where these Rules provide otherwise the court will –
>
> (a) extend or shorten the time for compliance with any rule, practice direction or court order (even if an application for extension is made after the time for compliance has expired)."

In relation to service of claim forms then as note 3.1.2 on the following page, p.51 makes clear rule 3.1(2)(a) does not empower the court to extend the time for serving a claim form, and then the explanation is set out there.

The position is it is different to the way in which the CAT rules are structured simply because you have got, as it were, limitation periods fixed in primary legislation. You then have court powers under the Civil Procedure Rules, but they do not allow the court to disapply time limit fixed by primary legislation.

THE CHAIRMAN: Yes, so where is the power to allow a claim out of time then?

MR. ROBERTSON: There is not a power to allow a claim out of time. As the note makes it clear on p.51 it gives you the relevant authority interpreting rule 7.6.3, which is on p.284.

THE CHAIRMAN: Well that rule seems to make a difference between the situation if the application is made before the time has expired and after the time has expired.

MR. ROBERTSON: It sets out a code for dealing with it, so that is why you are not within the general rules. I took you to the general rules because they are the ones that are equivalent, as it were, to the CAT general rules.

Just to complicate matters further, the position may be different in Scotland under the Rules of the Court of Session and, indeed, under the Sheriff Court Rules. We will write to the Tribunal tomorrow ----

THE CHAIRMAN: No, I do not need you to write to us, fascinating though it is. My point was simply a point whether if it appeared from the High Court Rules that there was a difference

between the test to be applied when the application is made before the time expires, different from the test to be applied if the application is made after the time expires, whether that tells us anything about the test that ought to be applied under our rule 19(2)(i)?

MR. ROBERTSON: We would submit it is a bit difficult to interpret UK Tribunal Rules by reference to the rules of the High Court in England and Wales.

THE CHAIRMAN: So what you are saying is they make completely different provision for the time limits for serving proceedings, starting a claim, and they have a particular double test set out and so one cannot draw analogies ----

MR. ROBERTSON: The position may be different in Scotland as well.

THE CHAIRMAN: Well I do not need to know what the position is in Scotland, I think I have what your point is.

MR. ROBERTSON: I shall stand down those sitting on my right hand side then.

THE CHAIRMAN: Thank you. Yes, Mr. Brealey?

MR. BREALEY: That, to a certain extent takes me on to the second reason I highlighted as to why the mistake does not justify. Just to recap on what Mr. Robertson said, the Limitation Act, s.2, which is the cautious provision, as we know does not allow for any extension of time, it is a guillotine, not like personal injury, and we are going to have a look at one case where there is an extension of time in shipping law. But s.2 does not allow for any extension of time and we would say that is because it looks at the public policy reasons for limitation periods and we set them out in the skeleton. There are three in the references to the various Committees. The three public policy considerations are that stale claims are not litigated – that is the first one that is highlighted in the Davis Committee, stale claims not litigated. Secondly, claimants must get on with the litigation; and thirdly, there is a finality for past wrongs. These are public policy considerations.

As I say, in the Limitation Act s.2 for torts – for example in the High Court, breach of Article 81, 82, there is no extension. That is why we say when it comes to the Tribunal's Rules you have to have a look at these public policy considerations and there must be something exceptional in order to grant the claimants' extension of time. It is not just a question of extending time within a properly brought case when it is disapplying certain important considerations. With that, could I turn to the authorities' bundle vol.1, at tab 1, which is the *Al Tabnith* case, which is referred to in our skeleton. Obviously a mistake as to when a limitation period runs normally for economic torts does not arise, because you do not get an extension, there is no application for an extension.

This case is relevant for the Tribunal's purposes because before I go to the headnote, if I could just ask the Tribunal to go to p.3, which is in the judgment of Lord Justice Hirst, this contains s.8 of the Maritime Conventions Act 1911 and, as one sees from that section, the time limit is two years from the date when the damage was caused and, unlike s.2 of the Limitation Act, the Maritime Convention Act does provide for a proviso set out there:

> "Provided that any court having jurisdiction to deal with an action as to which this section relates may … extend any such period, to such extent and on such conditions as it thinks fit."

So in other words, there is a broad discretion to extend time in these sorts of matters and by analogy on the present view of the law, so does the Tribunal have the power to extend the limitation period provided certain circumstances are met. The reason that I have referred to this case is because when it came to the question whether the time period should be extended the judge at first instance, Mr. Justice Sheen, and the Court of Appeal held that a mistake by the claimant was not a good enough reason.

THE CHAIRMAN: The mistake was that he wrote the wrong date on the folder.

MR. BREALEY: He did. There was a collision, as one sees from the headnote, there was an agreed extension of time. If we go back to the headnote so we know exactly what is going on, on p.1. The first paragraph: on the morning of August 20, 1990 there was a collision at sea. The incident was then reported to the P&I Club. Then Mr. Dawson of the Steamship Mutual – he looms large in this – he takes conduct of the case. There is then an extension of six months to February 20th and then we see for some reason Mr. Dawson mistakenly noted the extension was up to March 20th, 1993, he wrote "March 20th" rather than February 20th , so it was an innocent mistake, he did not know why he had done it. The defendants then informed the plaintiffs that they were out of time. The plaintiffs then immediately issued their writ, March 9th, so a matter of days after the limitation period had expired, and then we get what the judge at first instance in the Court of Appeal held. There are some other points in this I would like to refer to but the big point that we get from this is that when it comes to a discretion to override these public policy considerations in limitation periods, a mistake by the claimant as to when time expires is not a good enough reason.

Obviously this is an important case from our perspective ,and if I can just highlight the main points. Continuing with the headnote, two-thirds of the way down we have what Mr. Justice Sheen held. Note, in holding (2) there was no conduct on the part of the defendants which caused the mistake. Then (4) "… there was good reason to extend the normal period of limitation had to show that their failure was not merely due to their own mistake; it could

not be a good reason for extending the time limit that defendants are unable to show that there would be any specific prejudice to them in conducting their defence."

The plaintiffs appealed and the Court of Appeal, Lord Justices Russell, Hirst and Rose dismissed the appeal.

If I could just highlight, because I know I am under a time pressure, some of the important points I hope the Tribunal will get from this judgment. As I say at p.3, if one is looking for an Act which is analogous to the present situation where there is a limitation period and a broad extension to extend time, one can see the Maritime Conventions Act, that is at p.3.

Over the page, p.4 this is something that is stated throughout the judgment. There is no explanation by the claimants for their general delay, and one sees this in various passages. The delay is not only about the 17 days, the delay is about why, when there was a two year period you were doing nothing anyway, and we say we draw some analogy with that, what on earth were the claimants doing during the two years while the CFI were deliberating.

The passage at p.5, half way down is the part in italics which the Court of Appeal has highlighted. This is the judgment from Mr. Justice Sheen:

> "It seems to me that plaintiffs who seek to establish that there is good reason to extend the normal period of limitation must show that their failure was not merely due to their own mistake."

Again, one is balancing the considerations here, and the protection afforded by a limitation period. Then, at p.8 ----

THE CHAIRMAN: What you are really looking at is the third of those paragraphs:

> "A person who decides not to issue a writ until shortly before a period of limitation will expire, takes the risk that for some unexpected reason he will fail to issue the writ in time."

MR. BREALEY: You are absolutely right, madam. There are four paragraphs from Mr. Justice Sheen's judgment. I obviously rely on the third one and so does the Court of Appeal.

THE CHAIRMAN: But it is a separate point.

MR. BREALEY: It is a separate point. This is the two year period after the CFI's judgment. If you have got your case together, you are waiting for the judgment against fine to be delivered, and then you do not bring your case a few days after that, or at least inform the defendants, but you wait for the full two years, you have to explain those two years. Those two years where you think you have got time, but you have not, have to be explained. If you leave it to the last moment and you get it wrong then the delay will count against you. Not only will it count against you but the Court of Appeal will say "You have to explain it."

THE CHAIRMAN: The big difference between that case and our case is that of course if you have a collision if you are very quick you an issue your proceedings the next day if you want to, you do not have to wait for any of the time to expire. Whereas here we have this odd situation that actually they thought they could not bring proceedings, whereas in fact all along the time was running. The legislation here is very clear, proceedings may not be started until the process through the European Courts has been completed, unless you get the Tribunal's permission and that seems to me to be an important distinction between this case and other cases, because in this case we are in the slightly odd situation that even before they thought the time started to run it had in fact already run and expired quite considerably.

MR. BREALEY: First, the mistake is the same point. This case and the present case, if you have made a mistake as to when time runs it matters not. The fourth paragraph up in that is actually picked up, if I can just complete the picture on p.8, right at the bottom:

> "This is a case where I consider that a valid explanation for the failure to issue a protective writ was imperative."

- and I come back to, okay, one cannot issue a protective writ as such, but what you can do is when the claimants are suing Aventis and Roche in 2004, knowing as Mr. Robertson as explained now, they needed the permission of the Tribunal and they did not seek it, they were not up front, they could have at the same time sought permission from the Tribunal to have BASF joined, and then the whole matter could have been sorted out, aired, whether the time limit was running, BASF was put on notice, but they did not do that. The analogy with failing to issue a protective writ is failing to seek permission in 2004 to join BASF knowing that there was a risk that the limitation period was about to expire.

THE CHAIRMAN: Because at that time, it was before the later decisions of the Tribunal where permission was refused in the *Emerson* case, permission was refused in relation to the defendant who had appealed.

MR. BREALEY: Absolutely, in 2004 the interpretation was reasonably in doubt – to use Mr. Robertson's words – "was reasonably in doubt". As you say, they had comfort from the *Emerson* judgments, but the *Emerson* judgments were October 2007 and April 2008. As I said before the luncheon adjournment, what they did in 2004 they took a gamble. They took a gamble that their interpretation of the law was correct. What the Court of Appeal is doing in this case is saying on the second point, which is about the protective writ point – not the mistake point, the mistake point is the same in my submission – the failure to issue a protective writ, or at least when it comes to seek an extension to explain yourself, which is

what Lord Justice Hirst is doing on p.8, the failure to explain themselves, and the failure to issue a protective writ should be held against the claimants.

THE CHAIRMAN: Mr. Lewis was drawing to my attention the final paragraph in Lord Justice Russell's judgment, which seems to point to the two hurdle nature of the test, but also describing the lapse in this case as a "mere forgetfulness". I am not sure whether he is saying that every mistake is ---- Do you say there is any distinction between the mistakes?

MR. BREALEY: If one goes to Lord Justice Rose on p.9, with which Lord Justice Russell says, "I also agree", he says at 2, which is two-thirds of the way down:

> "Mistakes on the part of those representing the plaintiffs as to when the limitation period expired is the sort of fault or carelessness which is unlikely to give rise to good reason."

So there I emphasise the word "fault". I do not read this judgment as being limited to mistakes which are forgetfulness, but even if the Tribunal were to go down that road and if, in answer to my second point, the mistake is a good reason because it was a reasonable one to make, it does not excuse what I regard as the important third reason on this first key issue, which is that the interpretation was reasonably open to doubt. If you are litigating and you are thinking about suing a defendant, and you take the view that the limitation period is reasonably open to doubt, you protect yourself.

THE CHAIRMAN: That is the point, is it not, whether the fact that what you have to do to protect yourself in this instance is rather more than in the ordinary High Court litigation both, I think Mr. Robertson would say, in terms of what you have to do in order to get your claim off the ground and also because you would have to come to the Tribunal to get permission. I suppose the question for us is whether that makes any difference.

MR. BREALEY: My answer to that is twofold: yes, if you were in doubt you should come to the Tribunal and you should be upfront, seek permission, and if the Tribunal says, no, then you are protected. The Tribunal may grant you permission but stay it.

THE CHAIRMAN: In what sense are you protected if the Tribunal says no, if the Tribunal refuses you permission?

MR. BREALEY: It may well be that you would have to appeal or, if it came to an extension of time, the refusal by the Tribunal would be a valid reason.

What you do not do, and this is what happened in this case, is the claimants were preparing their case in the year 2000, and they kept absolutely silent about their intentions. They never put BASF on notice of anything until 16th November. They could have acted, as they did with Aventis and Roche and sued BASF, knowing that they needed permission, and

they would have got all three together. They acted against Aventis and Roche knowing they needed permission and yet they said that no one took the point. They knew they needed permission to sue those two. On any interpretation of the law they either should have sued BASF at the same time or sought permission. They could have protected themselves.

Given the time, I think the Tribunal has now my three points as to why the mistake does not get them home. The first is it is still, notwithstanding Mr. Robertson's submissions, not properly articulated, particularly from the Grampian claimants who have radio silence. Secondly, by analogy with this sort of case, a mistake is not a good reason. In my submission, it is not permissible to reduce the out of bounds to this case to mere forgetfulness. The third is we would say that we are in an even stronger case because it was not mere forgetfulness, it was a calculated risk. If you are in the business of taking calculated risks and you lose the Tribunal's Rules are not there to assist you, again always remembering what the public policy considerations are.

I would ask the Tribunal also – and I will not go through it because of the time – just to consider the *Baker v Bowketts* case, which is tab 4.

Could I then just turn to my second key point, which is that even if the Tribunal does consider that the mistake justifies an extension, my submission is that it does not justify an extension of four years. If I, to a certain extent, rush this, it is set out in the supplemental skeleton. We begin with the witness statement of Mr. Perrott at tab 4 of volume 1, paras.16, 17 and 18. What Mr. Perrott is doing here is saying, "We had lots to do prior to 2004, there was a standing start in less than two months". That is the last sentence of para.18:

> "This was done from a standing start in less than two months, which included the Christmas and New Year break."

Again, with the greatest respect, we say that is not a full and frank statement to the Tribunal. The reason we say that is because he does not refer to the witness statement of Charles Gosling and that is at volume 2B, tab 15. The reality is that they were preparing the cases from 1999 onwards, or at least considering the cases from 1999 onwards.

MR. ROBERTSON: Madam, I think my learned friend has omitted to emphasise an important point, which is Taylor Vinters, Mr. Perrott's firm, were not instructed until late 2003. The events to which he is now taking you are not events when Taylor Vinters was instructed by the relevant claimant. I just make that clear, madam.

MR. BREALEY: That is, with the greatest respect, a very poor excuse for not referring ----

MR. ROBERTSON: Madam, when my learned friend says Mr. Perrott is not being full and frank in his statement, that is a direct criticism of my instructing solicitor and it is totally unwarranted.

MR. BREALEY: It is meant to be because we do take exception to para.18 giving the impression that the two claims needed enormous efforts to bring together the retrieval of records, obtaining considerable amounts of ----

THE CHAIRMAN: He is trying to explain why it was that they limited their claim to the claim against Roche and Aventis, and it seems he is making two points, the first that they were advised that they could not bring the claim against BASF; and the second point that they, as solicitors, had enough to do getting together the two claims without adding a third. It is not really a point about what the clients were doing or had prepared.

MR. BREALEY: The clients, as we see from this witness statement of Mr. Gosling, had prepared all the information as far as we can see for the case against all three defendants, and this is what Mr. Gosling actually says.

THE CHAIRMAN: Where is Mr. Gosling's statement?

MR. BREALEY: It is tab 15 of bundle 2B. It may well be that he did it from a standing start, but certainly with the benefit of a lot of work from his clients for the three years previous. Mr. Gosling, who was the finance director – I have set out the relevant paragraphs in the skeleton argument – sets out who he is, and this is the same Mr. Gosling who has sworn the 2004 statement that Mr. Robertson does not object to, which is attached to Mr. Jonathan Lawrence's statement. Then at para.6 he sets out the background of the claimants and how the businesses were going to be sold, but at the time the businesses were sold, 2000/2001, they knew that they had claims to be brought. At para.9 he says:

> "At the time when these [sale] agreements were made I was aware of the claims that Premier, Buxted and Daylay potentially had for losses ..."

Paragraph 9 is important for the extra reason, as one sees over the page:

> "At a meeting held at the Belfry Hotel in North Warwickshire on Tuesday, 19 October 1999 which was attended by representatives of Grampian ..."

So there is a key fact which shows that Grampian was considering a claim in 1999. Subsequently, during 2000/2001 the final group which was considering bringing proceedings, Dalgety, Grampian, poultry producers, had discussions with various lawyers. It goes on:

> "... I believe; and after that the possibility of pursuing the claims on a group basis was not pursued. Instead the Poultry Division ..."

That is the BCL first and third claimants –

> ... decided to take the matter forward on their own ..."

Then he says at 11:

> "I took over responsibility for dealing with the claims for the Poultry Division companies from Shirley Duke in August 2003. Up to the sale to 2Sisters in November 2000, Shirley Duke was company secretary ..."

He goes on, and I will not read it, to say that she was preparing the numbers for this claim. That is the claim against BASF and the other two, Aventis and Roche:

> "In August 2003 I took on direct responsibility for the claims and took over all files and papers from her."

He goes on over the page to explain how they were constructing their claim, they did not really have invoices of purchases of vitamins because they are indirect purchases, they are not direct purchases.

Just as an aside, that is when, in November 2006, the claimants asked for a mass of information relating to sales information for a period of 11 years. Most of it is relating to sales to direct purchasers, and why on earth is that relevant? Here we see what they were actually doing. They were constructing – they did not have invoices relating to direct purchases of vitamins and they were constructing the claim by reference to the various mixes, and that is what they are trying to do here.

Then at para.13 he says:

> "The investigation and pursuit of the claims by Poultry Division continued ..."

So there he refers again to Shirley Duke who apparently was paid to continue her work, even though the businesses had been sold.

We can pick it up at the end of the witness statement, para.39, where he sets out the tasks that he asked various people to do, who have now sworn witness statements, emphasises the fact that they are indirect purchases. Then at 45 and 46 he says:

> "All data has been provided to me by Stewart Easdon, Andrew Fothergill (who was Premier Poultry's nutritionist) and former Accounts Department employees ... In the case of Premier Poultry much of this data was prepared between the end of 1999 and the sale of the [business in 2001]. The data for Buxted and Daylay was prepared in 2002/03. The figures for the Buxted volumes were downloaded in November 2002 ..."

This is not a superficial submission. This is directly going to the fact that the BCL claimants were preparing a claim against all three defendants during this period of time, and

could have brought proceedings against BASF in 2004. It is incorrect, I would suggest, to give the impression that they had to concentrate on Aventis and Roche and somehow had to leave over BASF, because this shows that that is not correct.

That is the period 1999 and 2004.

THE CHAIRMAN: 1999 being the end of the cartel?

MR. BREALEY: When they met in the Belfry in Warwickshire and discussed ---- 1999, I put the end of the cartel, but also the Belfry meeting. From that time they decide that they are going to prepare the claim.

THE CHAIRMAN: And 2004 being the bringing of the ----

MR. BREALEY: Aventis and Roche and the expiry of the limitation period. At no time, although we see from Mr. Perrott's statement that they intended to bring proceedings against BASF, did they ever send a letter before action saying, "We are going to bring proceedings, but we are going to wait until the *CFI* judgment".

BASF's appeal was on fine, as we know, and so the next period is the two year period, para.15 of the supplemental skeleton. I rely on the comments of the Court of Appeal in the *Al Tabnith* case. Where is an explanation from the claimants as to what they were doing as regards the BASF claim in this period? This is January 2004 to March 2006. There is none in the statements. There is certainly nothing from Granite. They do not think it is necessary to explain anything. It appears that the claim just went to sleep, even though they had the same information as to time, they are retained against Aventis and Roche. They just went to sleep. There is no explanation as to why it went to sleep. Again, I still come back to an important point. This is in the context of them still not being certain that the time limit is running their favour. For them there is a real doubt. If there was a real doubt, the sensible thing to have done, which is now the third period, para.16, the *CFI* judgment, March 2006, what should they do? They should bring their claim – the appeal is over, give notice and bring their claim, which they had basically prepared in the early 2000s, as we have just seen.

Mr. Robertson made criticism about BASF and its document retention policy. As a matter of law, that is not relevant to the good reason for extending time. It may be relevant to the prejudice to BASF, but when it comes to good reason the documents that BASF have got are irrelevant. Either a mistake is a good reason or not. But the point is that November 2006 was the first time that my clients had been put on notice of a claim. The claimants could have written in January 2004 saying ----

THE CHAIRMAN: Either the BCL or the Grampian?

MR. BREALEY: Grampian is even worse. Grampian was May 2008. (Pause): We have copies, but it was May 2008. So, November 2006 for the BCL claimants. If they really made the mistake, "Well, we do not think that we can sue you" because they could have written in 2003/2004 saying, "We are going to bring proceedings against you", or "We are going to bring proceedings against you once the CFI has delivered judgment", but they never do. There is an e-mail. There is a change of policy at BSAF about e-mails in 2004, most companies e-mail retention policy these days, that there is an automatic deletion of e-mails. All that Mr. Elvermann is referring to is with the passage of time, if you do not know there is a case against you, documents will not consciously be destroyed, but they will just -- You cannot keep documents for ever. As I say, BASF were never put on notice of any claim. It might be a different story if they had been put on notice in 2003, saying, "We are going to bring proceedings against you", but there is absolutely no contact. I think that has to be fed into some objectivity in BASF's state of mind.

Mr. Robertson referred to Dr. Elvermann talking about extensive documents. When one looks at the correspondence that is extensive documents that BASF retained relating to the Commission investigation. It has retained those, but it has told the claimants that there is no information in the documents retained relating to the investigation relating to sales information. It is about meetings. Actually, sales of vitamins to direct purchasers are not part of the Commission's file. That was exactly same statement that Dr. Elvermann said in the *Devenish* case. I can give the Tribunal his disclosure document in the *Devenish* case if the Tribunal wishes. But, he has essentially made the same disclosure statement in these proceedings as he has made in the *Devenish* proceedings - that with the passage of time, not being on notice of anything, documents do not get preserved. As I have already said, most of that is irrelevant.

I come to the period July 2007/March 2008 (paras. 18 and 19 of the supplemental skeleton). This is the second period where there is radio silence. Again, just as with the first seven month period delay (March to November/July to March 2008), there is no explanation from the claimants why they did not get on with the case. Why is this relevant? It is relevant because they are seeking an extension of time. One of the considerations of the extension of time is whether it is just. Another is whether it is expeditious. Expeditious is in Rule 44(2). It is in Rule 19. It is a consideration. We would disagree with Mr. Robertson's construction of Rule 44. It refers to powers, and the powers to be exercised under Rule 19 carry with it those three considerations. But, whichever way you look at it, the justness and the need for expedition is relevant to the exercise of the Tribunal's extension of time. At

the end of the day the question has to be asked: Have the claimants acted with the requisite speed and efficiency to justify the Tribunal overturning dis-applying a limitation period? We say, 'Clearly not'.

That, essentially, is the essence of my second key submission which is that even if the Tribunal considers that a reasonable mistake is a good reason, does that mistake justify an extension of four years, particularly given the fact that they were investigating and collecting what we can see is most of the evidence in the case in 2000/2001/2002 and 2003. Radio silence during the two-year period of the CFI proceedings. A seven-month delay after the CFI's proceedings. A short period of request for what could only be described as mostly irrelevant information, and then another seven month delay. I have not referred to the 2004 statements, but I think the Tribunal gets a picture of our complaint - which is that the claimants come to the Tribunal saying, "We made a reasonable mistake", but when you actually scratch beneath the surface there is far more to it than that.

Those are our submissions, madam.

THE CHAIRMAN: Thank you very much, Mr. Brealey. Mr. Hoskins?

MR. HOSKINS: Madam, I have prepared a speaking note which I intend to hand up. Hopefully that will speed matters up. (Same handed): Can I begin by stating the obvious? We are now dealing with the Grampian case, and the Grampian case alone because, for obvious reasons, the two have been intermingled by Mr. Robertson and Mr. Brealey. We have not actually heard very much about the Grampian case at all yet.

We say it is vital to separate the Grampian and BCL claims because there are important differences between the cases. I will come to some of them as I go through. Certainly in response to your question, madam - Should the Tribunal look at them separately? - the answer is a resounding, 'Yes'. It is perfectly possible on the particular facts of Grampian that you will come to the conclusion of no extension, but in relation to BCL, yes, extension, or vice versa. That necessarily follows from the fact that one has to look at all the circumstances of a particular case. There is no legal or logical link which says that if you grant an extension in relation to one case, you have to grant it in relation to the other.

I am a fan of simplicity. We say the question in the Grampian case is a simple one. I have set it out at para. 2. "Should the Tribunal exercise its discretion to grant the Grampian claimants an extension of time to bring their claims [you might want to add] on the facts of the particular case?", given the point I have just made.

The nature of the extension sought. You have had the chronology that we have in our submissions. Can I just give you four principal dates? I have set them out there:

Commission decision - November 2001; limitation period for the Tribunal - 31st January, 2004; High Court at best - 21st November, 2007. Mr. Robertson's suggestion of ' it could have been from the date of publication in the Official Journal' is, with all due respect, hopeless because of the Gosling witness statement. Grampian had been discussing the possibility of a claim since 1999. So, it cannot be said that they only came on notice when the Official Journal was published. Finally, we know that this claim was lodged on 14th May, 2008. That was more than four years after the expiry of the relevant limitation period - a very important fact it is easy to overlook.

Madam, you asked for four dates. What were the periods within which claims could be brought on the Court of Appeal's view and on the now incorrect view? I have circulated these to my learned friends. There is agreement. It may well be that there is a day out here because the Rules are before a certain date or on a certain date. But, we believe that the correct dates are, on the correct view: 31st January, 2002 to 31st January, 2004. The reasoning that underpins that is in my skeleton argument at paras. 3 to 20 (Bundle 1, Tab 8, p.94).

THE CHAIRMAN: Yes - although, as Mr. Robertson said this morning, you cannot actually bring the claim before s.47(a) comes into effect, which was -- Remind me what date that was?

MR. ROBERTSON: 20th June, 2003.

THE CHAIRMAN: Yes. So, that is on the correct view.

MR. HOSKINS: The incorrect view is 25th May, 2006 to 25th May, 2008. The reasoning behind that one finds in the claimants' submissions in Grampian at footnote 2 of their written submissions - though they actually do themselves down a bit because they do not add the ten days' delay for distance. So, that is why the date is 25th rather than 15th. The claim was brought on 14th, obviously, because they overlooked the ten days then as well.

So, those are the four dates which I think you wanted us to provide.

I would like to turn then to the nature of the discretion. The Tribunal has a discretion. It is couched in broad terms. One important point is that the rule that is relied upon - Rule 19(2)(i) is a case management power which applies across the board. So, we are not talking about a power that expressly applies to extending limitation periods. It can apply to any run-of-the-mill direction witness statements, replies, directions, whatever. So, when Mr. Robertson, for the claimants, suggests, "Well, there is no presumption against an extension of time", I do not want to enter into the battle of, "Is there a legal presumption, or not?" I do not think it is really going to take us anywhere - presumptions rarely do at the end of the

day. But, the point is that where a party is seeking to rely on Rule 19(2)(i) to extend a limitation period for four years retrospectively, then clearly they are going to carry a heavier burden to convince the Tribunal than if they were simply applying for a ten day extension to a time for serving a witness statement.

THE CHAIRMAN: Yes. You keep stressing the four years, but the four years, of course, was because it took the CFI four years to decide BASF's appeal. If it had taken one year or two years, then we would have been one year or two years.

MR. HOSKINS: Madam, I will come on to this, and it ties in with Mr. Brealey's submission about taking a risk, but they chose to take a risk and the bare fact is that having taken that risk and got it wrong, they are four years out of time. Again, I will come back to this, but when, for example, one is looking at the effect on my clients, when one is looking at the effect of the administration of justice, then four years is the relevant date. I will come back to that. But, that is the choice they took. They took a risk. They are four years out of time. That is an unarguable fact. (Pause): Mr. Brealey is pointing out that the CFI took two years to decide the BASF appeal.

THE CHAIRMAN: No. I think the appeal was lodged in 2002.

MR. HOSKINS: Mr. Brealey should deal with this. I fear the messenger is being shot. That is the point I make about presumptions, etc. Do not worry about presumptions. But, there is clearly a heavy burden because of the context of this case.

The relevant objectives. Mr. Robertson referred you to Rule 44(1) and (2). 'Justly' which includes 'expeditiously' and 'fairly'. I just point out - because you might not have known it from Mr. Robertson's submissions - that the notions of justice and fairness apply just as much to my clients as they do to Mr. Robertson's clients in the context of procedural rules. Equally, 'expeditiously' does as well. It is there for the protection of defendants as well. It is clear that the grant of any extension of time will, to a certain extent, lengthen the conduct of proceedings and undermine the notion of 'expeditious', but you have my point about the four years. I make no apology for labouring it.

If I come then to the factors which are relevant to the exercise of the discretion -- Again, I am not going to get hide-bound by, "Are you bound by any particular rules, presumptions, etc.?" and what you can and cannot look at. You have a general discretion. I suggest you will find it useful to look at CPR Rule 3.1.2(a), but also 3.9 which sets out the criteria which the High Court has to have reference to when granting extensions of time in complex cases and the linkage between 3.1.2(a) and Rule 3.9 as explained in the note to the White Book at 3.1.2. I have given you the reference. Some of my headings reflect the relevant factors in

Rule 3.9, but it does not really matter at the end of the day. You might find them useful. I expect you will, because someone else has already thought about what factors might be relevant.

So, let me go to the factors that we say are relevant. First of all the length of extension sought. You have the four years point. It is also the retrospective point as well. You asked the question about what was the position in the High Court and you had an answer. But, clearly, just as a matter of the Tribunal's general discretion, the fact that someone applies retrospectively rather than in good time before a period expires is relevant. That, in a sense, is reflected by the CPR rules, but it is a matter you can apply as a matter of your own discretion.

The second factor is the behaviour of the claimants. I want to distinguish two aspects of behaviour. First of all, delay in bringing the claim; secondly, the manner in which the application for an extension has been brought. So, two aspects.

First of all, delay in bringing the claim. The first point is that as Mr. Brealey showed you from the Gosling statement he referred you to - and we have put an equivalent one -- It is actually a different witness statement, but he says exactly the same in the same terms -- the Grampian claimants were involved in the meeting at the Belfry hotel in October 1999. So, they had been aware of the circumstances giving rise to potential claims since at least 1999.

THE CHAIRMAN: Do I get that from Mr. Gosling's statement?

MR. HOSKINS: I refer to 'our Gosling statement', if you like, and I have given the reference at para. 15 of the speaking note. We can go to it now, madam, if that is helpful?

THE CHAIRMAN: No, I can check that.

MR. HOSKINS: The other point which you may have seen from the statement is that the meeting was addressed by a lawyer - Vincent Smith - in a previous incarnation in private practice. So, right from the start there was an access to legal advice. It was not simply a one-off - October 1999. Mr. Gosling says that these groups considered whether to bring an action together through 2000 and 2001 and they met and discussed the possibility with a number of solicitors. You have seen the household names who they had discussions with.

So, that is one aspect. It is not simply that late in the day - for example, when the decision was adopted, or when the OJ was published -- They knew it even before the decision was adopted of the possibility of a claim. That is very clear form Mr. Gosling's statement.

The second point is that even on the erroneous view - which Mr. Robertson says his clients adopt - and I will come back to that as a piece of evidence - time expired on 25th March, 2008 and they waited to the end of that period ----

THE CHAIRMAN: 25th May, I think.

MR. HOSKINS: 25th May. That is correct. I am sorry. They waited until the very end of that period before bringing their claim. They brought this claim on 14th May, 2008. It appears that it was only brought eleven days before because they did not notice the ten day for distance. That was being brought on the day before it expired. But, that is another relevant factor. They waited until the very last minute - even on their own erroneous view. Talk about taking a punt. This was a 100:1 shot at this stage.

The other point - and you will have seen it from the evidence of Mr. Lawrence - is that it is not as if there was a complete legal vacuum during this period. There had been three sets of claims.

THE CHAIRMAN: Before you get on to that point, this point about waiting until the very end. Of course, if they were right, the fact that they wait until the very end makes life difficult for your clients, it may make their own lives more difficult, but there would not be anything you could do to stop them bringing the claim, but nonetheless you say given that they turned out to be wrong it is a relevant fact they did wait until the end of the period.

MR. HOSKINS: That is right. Mr. Brealey has taken you to judicial dictum to that effect, but that is precisely right. If you choose to wait until the last day when you think limitation expires and you get it right, nothing happens. If you choose to wait until what you think is the last day and you have got it wrong then, as Mr. Brealey has shown you from the case law, that is a relevant factor, it goes to the degree of risk taking if you like. It is not just that these claimants took a risk, as I said they took a very substantial risk, even on their own assessment, so yes, that is a relevant factor.

THE CHAIRMAN: But the point which I put to him which is that they did not think that could obviate that risk by bringing their claim early because as we have seen from the dates you have just given us the time actually expired on 31st January 2004, whereas they thought it only started to run on 25th May 2006. I just want to hear your answers ----

MR. HOSKINS: Madam, with respect ----

THE CHAIRMAN: -- it was different from running down case when you can issue your writ whenever you ----

MR. HOSKINS: I am going to come to the evidence in this case, because that comes out of Mr. Perrott's witness statement in BCL, which we do not have the equivalent of in Grampian, where he said he thought we were precluded. With respect that simply cannot be correct because the Tribunal rules do not preclude you from bringing a claim before a CFI appeal has been determined, it simply requires you to ask for permission to bring an early claim,

and I will come to the significance of permission. But the suggestion that they were precluded from bringing a claim is legally incorrect. One has simply to read the Tribunal rules to know that it is not correct; there is no preclusion.

It may be helpful to go to the Rules, it is rule 31(3) of the Tribunal rules, p.307 of the Purple Book, and perhaps one has to read that with (2) as well.

THE CHAIRMAN: Yes, this comes from s.47A itself, which is on p.48, which is perhaps expressed in slightly stronger terms.

MR. HOSKINS: Madam, I am not sure there is any real dispute about this, because Mr . Robertson accepted in his submissions in response to a question from you – his exact words, I think he said: "objectively we could have done that", i.e. applied for permission. Indeed, we know from the *Emerson* cases it was possible, because permission was granted in *Emerson I* to bring a claim against *Morgan Crucible* whilst there were outstanding appeals before the CFI.

THE CHAIRMAN: Yes.

MR. HOSKINS: So there is no question of being precluded, you would simply have to ask for permission, and I will come back and deal with that, as to whether that is a factor that should have any weight at all. But here I am dealing with the conduct of the claimants, I am dealing with the delay in bringing the claim. I was just about to make the point that this was not happening in a legal vacuum, that there were other proceedings going on in relation to the same cartel, two High Court proceedings, one set of CAT proceedings. Given the commonality of legal representation involved in those cases, given the specialisation of the lawyers on the other side, it cannot be credibly suggested, and it has not been suggested, that the claimants were not aware that other people were acting.

It is not necessary to say they could have joined the existing claims, they could have done, they could have issued their own claims, and they could have asked for consolidation, there could have been effective case management, whatever. But there is a simpler point, which is they saw everyone else bringing actions, and they were sitting there thinking we will just sit on our hands until the very last moment. I will come back to that because that is a really important part of this case. That is part of the important colour – other people were getting on with it.

The final point on their delay, and again this is a very important contra-distinction with the BCL case, is that the first pre-action letter sent by these claimants to my clients – it may well be the same date for the other defendants, I do not know – was 7th May 2008. Again,

they did not even begin pre-action correspondence until the last moment again – we have copies in court.

THE CHAIRMAN: What was the date again?

MR. HOSKINS: 7th May 2008. I can hand the letters up correspondence if need be at the end, I can see if Mr. Robertson would like me to do so.

THE CHAIRMAN: That was seven days before they issued proceedings.

MR. HOSKINS: I will hand them up and then you have them on the record, that is probably the simplest thing – I will hand them up at the end of my submissions. That is one aspect of the claimant's behaviour.

The other aspect is the manner in which this particular application has been brought. Their application, by which I mean the written submissions, which are at CB 1 tab 6. If one is being fair, it could probably be described as "thin", there are other adjectives one might use, but I will settle for "thin" it is pejorative enough.

If this was an application in the High Court you would have had to have a witness statement, I have given a reference to that and, with respect, one would expect the same of an application to the Tribunal, because what we have is a written document by lawyers without even a statement of truth attached to it. Again, in contra distinction with BCL, where there is a witness statement from Mr. Perrott which sets out reasons for delay, etc. It really is quite extraordinary to come to this Tribunal and ask for a limitation period to be extended without condescending to be providing a witness statement explaining what the position is.

There is a further point which is that the claimants decided not to give the Tribunal all the relevant facts, there has not been full and frank disclosure in spite of the fact they were invited to do so; I will make that good. If we can go to core bundle 1, tab 11, please. That is the first witness statement of John Lawrence, my instructing solicitor. If I could ask you to turn through to p.141 and if I could ask you to read that letter and the letter that follows on p.143, please. (After a pause) Our letter was clearly prompted by our knowledge of what was in the Gosling witness statement, the response comes back saying it is not relevant. I hardly need to make the submission that the fact they knew of the circumstances giving rise to this claim as long ago as October 1999 was something at the very least the Tribunal would want to be appraised of.

So the conduct in relation to bringing this application is shoddy at best. If I can move on to the next heading, para.24 of the speaking note, the explanation that has been given for failure to comply with the relevant limitation period. Again we are in thin territory.

This morning Mr. Robertson submitted that the Grampian claimants had made a reasonable mistake. In the absence of any witness statement, with respect, it is not open to Mr. Robertson to give evidence, so the only basis we have for the reason for the delay is to be found in the claimants' written submissions I have referred to. If we can turn those up, bundle 1, tab 6. There are two relevant paragraphs. First, para. 10 at p.72, where they state what is an incontrovertible fact, namely, that the interpretation of the time bar rules was reasonably open to doubt, nobody is going to gainsay that. Then para. 21, and this is the best explanation we get in the Grampian case of the mistake made.

> "Grampian genuinely and reasonably misinterpreted the limitation provisions for section 47A claims."

It is important to see what they are not saying. They are not saying: "We believed that it was clear that the rules meant one thing and we proceeded on that basis." They accept, as they must because it would be incredible to suggest otherwise, when one looks at the rule it is open to doubt.

So their case is that in the face of a rule that is reasonably open to doubt they adopted a particular view and they stuck with it knowing that there was a reasonable prospect they were wrong because it was reasonably open to doubt. That is the gamble that Mr. Brealey referred to, that was the gamble that they took.

You have had the point what does a party do faced with a limitation period which is open to reasonable doubt? Does one sit on one's hands until the last moment on the punt one has taken, or does one issue proceedings, which are called 'protective proceedings'? Contrary to what Mr. Robertson suggests there is no magic, there is not a special document called protective proceeding, it is simply that you issue the claim to protect yourself, that is precisely what the claimants did in the *Emerson* case. In the *Emerson* case the claimants did not know because of the reasonable doubt about the law whether they were too early or too late. So they went to the Tribunal to find out. That is what a reasonable claimant does, and one sees that, the *Emerson* judgment we do not need to turn it up, it is authorities bundle 1, tab 16. One protects one's position that way and at the worst if, for example, the Tribunal had got the position wrong you go to the Court of Appeal. If the Court of Appeal gets it wrong and they tell you you are too early or whatever, you come back and get your extension and nobody is going to blink an eye because you have protected yourself; that is what a reasonable claimant does.

Madam, you asked whether the need for permission in the Tribunal rules and the need to provide up front evidence under rule 32 should have any bearing, and we submit the answer

is clearly not. That is simply what the Tribunal rules require to bring a claim. You have to get permission in the relevant period, you have to provide the evidence. What is the alternative? Let us think of the opposite. The alternative to actually complying with the Tribunal rules and bringing a protective claim is to do nothing. It is to take the risk, the knowing risk, of the limitation period expiring and coming along in this instance four years later and saying: "Our gamble did not pay off, help us out". The truth is, if one wants to take the benefit of the special procedure provided by s.47A of the Competition Act and the Tribunal Rules, you cannot just have the benefit of it, for example, the power to extend a limitation period, you have to accept the burden; the burden is applying for permission to protect yourself, the burden is having to put in evidence, but you cannot pick and choose and say: "These bits of the Tribunal Rules help us, and those bits are bad, and therefore the bad bits must be weighed in the discretion when giving us an extension of a limitation period. It is simply an unacceptable approach.

The third point on this is we have an explanation of why we missed the limitation period, they took a gamble. We have no explanation whatsoever of why they waited. They thought they had longer but what were they doing with the time. If one had a witness statement one might see – who knows – "we needed the time to prepare"; unlikely in this case given they had known about the possibilities of a claim since October 1999. We might get a claim saying "We were impecunious, we could not afford the financial risk of bringing a claim, we were trying to get some form of insurance ----"

THE CHAIRMAN: Are you talking here about the time between the CFI's judgment and the time they served their ----

MR. HOSKINS: Yes. On their view of the limitation period why did they wait to the last minute, no explanation whatsoever, and this is not an invitation to Mr. Robertson to fill the gap by giving evidence, there is no evidence. The Tribunal has to decide this case on the basis that they have given no explanation whatsoever for why they chose to sit on their hands, and therefore one has to conclude there was no good reason.

The next factor relates to the interest in the administration of justice, because limitation periods are there for a reason. Can we look at the Law Commission's documents on this – I can take it very quickly.

The first one is the Law Commission's Consultation paper under formula law of limitation, that is authorities' bundle 2, tab 38. Unfortunately we do not have the front page to these documents, but the formal reference to this document is in our skeleton at footnote 16. If I

could ask you please to read paras. 1.22 and 1.23 (After a pause): And then the first sentence of 1.25: "This continues to be an important justification for limitation periods." Two points come out of that. First, limitation of actions is necessary in the interest of defendants and of the State. Secondly, deterioration of evidence is one of the essential reasons why one has limitation periods. Mr. Robertson submitted that the deterioration of evidence was irrelevant to the exercise of your discretion. On the contrary it is fundamental because it is inevitable that evidence will deteriorate over time and it is one of the fundamental reasons why one has limitation periods both in the interests of the defendant and in the interests of the State.

If you turn over the page and if I can ask you to read 1.27 and 1.28. (After a pause) Mr. Robertson, for understandable reasons, makes a great play of the fact that the respective clients you have here are "dirty dogs", who have been found guilty of a serious cartel infringement. The point is, however iniquitous the defendant may or may not be, it does not mean that they do not get the protection of a limitation period, because even the iniquitous are entitled to an end to chastisement. That is what a limitation period does.

Finally, in this document, para.1.31 sets out the interests of the State, which may raise some considerations dear to the Tribunal's heart if they ever have to hear these claims.

The final report, that is over in the next tab, 39, makes similar points. We deal with it more briefly. The question is whether there should be a general discretion in statute to extend limitation periods and the Law Commission has then defined the pros and the cons. The con I am interested in is at 3.158:

> "First, defendants can never have the certainty that, after the expiry of a fixed period of time, no claim can be brought in respect of a past event. They must face potential liability for an indefinite period, with all the associated costs (such as the cost of maintaining indemnity insurance for a prolonged period and retaining records)."

Even "dirty dogs" eventually can sleep at night.

THE CHAIRMAN: The passage of time in this situation is a flexible period, is it not, because suppose there had been a lot of appeals on liabilities from the vitamin cartels case, as there are from these cartel cases, and some people even pursue them then from the Court of First Instance to the Court of Justice. We know that the Court of Justice is currently handing down appeals from cartel decisions and sometimes they are quashed and the Commission then re-adopts the decision years later and that then goes on appeal. So there may well be

cases under s.47A where the two year period only starts many years after the events have occurred.

MR. HOSKINS: Madam, you look at the facts of each particular case. Here there was a four year delay. They missed the limitation period by four years. We are happy to accept that that is the relevant period. We do not up to a point, like Mr. Brealey does in BCL, say we specifically did something, i.e. there was not a document, an email on the destruction policy, whatever the neutral term is, a non-retention policy. We do not put it as highly as that. You will have seen that in Mr. Lawrence's statement. We simply say that the Law Commission recognises that evidence will deteriorate over time and that a four year delay will increase the risk of deterioration.

THE CHAIRMAN: Is that a prejudice point you are making? Are you saying that because of that you will be prejudiced even though you are not pointing at some particular moment at which you have not retained the documents?

MR. HOSKINS: Madam, it is a point we make. If it were my only point I would not win on it, but it is a factor which is clearly relevant to the discretion.

If the extension is granted in this case then those public policy interests will be undermined to a greater or lesser extent.

The next heading, and I am near the end now, "Effects on Grampian if an extension is refused". Here the point is that if you do not give us an extension we will not be able to bring our claim, we will not have a remedy. With respect, that is not relevant prejudice. The barring of a potentially valid claim is precisely what a limitation period does. The application of a limitation period does not take account of the merits of the claim or of the good or bad character of the potential defendants. If that is right it must follow that the merits of the claim and/or the good or bad character of the defendant are irrelevant to an application to extend the limitation period. So I am afraid the continual reference to the "dirty dogs" gets Mr. Robertson nowhere because it must logically and legally be irrelevant.

Somewhat sniffily it was said that in our submissions we said the Grampian claimants have not said they will suffer or suggest they will suffer any particular prejudice. The point is a good one, because what they have not said, they have not put in any evidence, is, for example, that our companies are suffering financially, we need these claims to stay afloat. Again, that is something one might see in evidence. This is not an invitation to Mr. Robertson to fill the gap by giving evidence himself. That is what we mean when we say they have not pointed to any particular prejudice. They have put forward the fact that we could not bring our claim. I have explained why that is irrelevant. There is nothing on

top of that which should attract the Tribunal's sympathy. Indeed, one could imagine if the claims were fundamental financially to the claimants they would have been brought years ago. They would not have sat on them. If they needed the money they would not have sat on them. So all this is, if you like, is a cherry on the cake, it will go at the end of their balance sheet. It is not going to cause them any harm if they do not get it. It is just something that they potentially could have had if they had not taken a gamble, but because they have taken a gamble they have lost it.

The final point is the effect on Roche if the extension is granted. You have my point about evidence deteriorating over time. Evidence will be necessary in this case. In the context of his submissions, Mr. Robertson said, "This is a follow on damages action, therefore breach is established", but you still need evidence for quantum. That is quite clear from their own expert's report. I will give you the reference. It is the Veljanovski report at para.10, where he says he has had reference to draft witness statements from the claimants in order to do his report. It is bundle 2C, tab 22, p.870, para.10. There is going to be a lot of evidence in relation to quantum.

The second point, and again it was somewhat sniffily batted aside by Mr. Robertson, the fact that Roche has based its general litigation strategy. With respect, Roche, because it was found to be a cartelist, was facing a multitude of claims in all sorts of jurisdictions. Clearly, when one plans to defend one's interests – just because one is a "dirty dog" does not mean one has to take a kicking, one can still defend one's interests – one comes up with a litigation strategy. One of the strategies, one of the parts of the strategy, was that we would keep an eye on when limitation periods expire, and that will dictate some of the choices that are made in defending one's interests. Mr. Lawrence's statement is quite clear that we relied on what we believed, and we got it right, was the expiry of the limitation period in conducting ourselves and defending our interests. There is nothing wrong with that.

THE CHAIRMAN: I do not want to press you for more details because obviously that is very confidential to your clients, but I am just trying to envisage the ways in which someone in your client's position might take that into account, whether it would be in relation to whether you decide to settle or fight or whether you put aside a pot of money and you divvy it up amongst the people who you know have come forward and therefore you have to find more money.

MR. HOSKINS: Let me remove the ----

THE CHAIRMAN: You make the point – I am just trying to see what is the point exactly.

MR. HOSKINS: The point that Mr. Lawrence makes is that one of the aspects of the litigation strategy and the relevant limitation periods was deciding when to settle claims. If one settles a claim very early in one of these potential multiple claimant cases, if the settlement is public immediately all the potential claimants appear at your door saying, "We will have the same, thank you". Even if one settles on a confidential basis there is a risk that chatter in the industry gets out. So inevitably, anyone in this situation who is faced with a multitude of claims will take account of the potential exposure in settling at a particular stage in terms of encouraging other claims. That is what Mr. Lawrence says that Roche did.

THE CHAIRMAN: You were involved in both the *Provimi* and the *Devenish* cases?

MR. HOSKINS: Me, personally?

THE CHAIRMAN: No, your clients?

MR. HOSKINS: My clients, yes.

THE CHAIRMAN: It is a point. How far it goes ----

MR. HOSKINS: I understand. You will see why it is the last point in my submissions. In a sense, the burden here is on the claimants. For the reasons I have described, the way in which they have conducted themselves falls way below what one would expect of any reasonable claimant. With respect, there is absolutely no good reason why the Tribunal should extend and simply give an extension.

I finish with a statement that a court hears often. I say that if the Tribunal were to grant an extension of time in this case it would be difficult to see when you would ever refuse an extension of time. I actually mean it. The facts here are extraordinary.

Unless I can be of any further assistance, those are my submissions.

THE CHAIRMAN: The point that you make, and I just want to be clear in my own mind about this, "they could have joined in the other litigation". We had correspondence which made it clear that you are not taking an abuse of process point, but you still say that it is a factor in our general discretion. They could have somehow linked themselves into those cases if they had wanted to.

MR. HOSKINS: Madam, the way I put it is this: a relevant factor is the behaviour of the claimants. A relevant aspect of that is delay in bringing the claim. When other claimants are coming forward throughout the period then it is relevant to say, "Why didn't these claimants do the same?" I do not pin it on specifically saying, "Well, if they came forward and joined, all these cases could have been dealt with at once". That is one possibility. They could have come forward, there could have been some consolidation. There could have been a particular case sent forward for trial and the others would be guided it. There is

also just a simple point: why did they sit on their hands while everyone else was moving forward?

THE CHAIRMAN: Yes, thank you.

MR. HOSKINS: Thank you very much.

THE CHAIRMAN: Thank you, Mr. Hoskins. Mr. De La Mare?

MR. DE LA MARE: Madam, I will be as quick as I can be in the circumstances. The first point I wish to address is the question of witness statements which Mr. Robertson raised at the outset. The only reason my solicitors have not gone on record in the same way that Mr. Hoskins' solicitors have to confirm that we are not aware of any breach of confidentiality on our part and we do not understand how BASF have obtained the statements is because we only received Taylor Vinters letter of the night before last last night due to a mix up, but our reply is, in substance, identical to that of Freshfields and their clients.

Secondly, Mr. Robertson seems to suggest that we were content to waive confidentiality. I should emphasise that is only if the other parties to the confidentiality agreement, that is Taylor Vinters' clients, are content for that waiver to occur as well.

There is, I think we are all agreed, reason for this matter to be resolved now, so I am not going to say anything further about it.

The second topic I want to address, which is elaborated on by Mr. Hoskins, is the factual differences between this case and the facts of Grampian. Our case is that they are really, on any view, quite fundamental, not least because there never were any parallel Grampian proceedings against other participants in the Vitamins cartel. Grampian has taken the conscious choice, even though it knew it had claims since May or October 1999 – they have not gone on witness statement to specify exactly when – it has taken the conscious step not to prosecute its case until sending us a letter before action on 7th May 2008. It is a bizarre letter before action and I will hand it up at the end. It is expressed to be without prejudice by way of a notification of a claim and it invites a response within two working days of the receipt of the letter. It smacks somewhat of desperation to be writing a letter before action in those circumstances concluding with the phrase, "Given the narrow timescale for bringing a claim, I would be grateful if you could respond by two days later". There is more than a whiff of afterthought about that.

The evidential distinction goes substantially beyond that because we have evidential differences between this case and the BCL case because, given that there were no parallel claims against other claimants, we do not have the situation where, for instance, in January 2004 BCL is having to decide who it is going to proceed against and taking a conscious

decision to proceed against some and not others. We do not know whether and when the Grampian's corporate mind was specifically addressed in this situation. Did they think about it in January 2004, did they think about it in 2005, 2006, 2007, 2008, we simply do not know. We have no evidence on that subject whatsoever. Indeed, we have no evidence as to whether or not there was a conscious decision taken on the benefit of legal advice that this question was open to reasonable doubt, a conscious decision taken on the basis of categoric legal advice that there was no problem with limitation, or simply proceeding blithely along not caring until some later point in time. I entirely endorse what Mr. Hoskins says about the way Mr. Robertson's skeleton argument is to be read. It seems to be accepted at least that the point about the construction of the Limitation Rules was reasonably open to doubt.

The last material factual difference is this: because of the absence of the letter before action there is no notice, not only to the parties but to the court, whether directly or indirectly, of the potential for this litigation to arise. That is relevant for this reason: one of the objects of Rule 31(3) and the power to case manage on an application of a party is exactly that. It is to manage cases in full knowledge of what is out there or may not be out there and give appropriate directions to interlinked litigation. The vice of what has happened in this case and the vice of Grampian never sticking its head above the parapet until the very last minute is that the Tribunal has been deprived of the ability to manage this litigation as a whole, and it is a litigation saga, in a fashion that pays due attention to the demands on the Tribunal, and the resources it is reasonable for claimants to ask the Tribunal to dedicate to the management of these s.47A claims. These are not the only demands upon the Tribunal's time. It is, I would suggest, and I will come on to develop why, unsatisfactory for substantially the same dispute, or at least substantially the same dispute in certain core facets, overcharge, pass on, conduct between 1991 and 1999, to come before this and other courts on a recurrent basis, and for a party knowing it has a claim to sit idly by while the same issue is litigated and relitigated and relitigated. It is not a great factual matrix against which to make an application for an extension of time.

Mr. Robertson says there is no mystery about Grampian's case. Against that backdrop I would suggest that it is not a matter that withstands serious scrutiny. We just simply do not know more about the decision making process undertaken by Grampian as to when to bring proceedings.

My clients make the point that there is only one inference as to why they have sat on their hands in these circumstances, why they have sat on their hands knowing there to be a

reasonably arguable contrary interpretation of the limitation rules. It is because they are seeking to free-ride upon the earlier litigation. That is why I have used the term "warehousing". The only sensible, commercial or tactical interpretation of what Grampian has done in the circumstances is that it has sat back so as not to incur a potential costs liability or to incur costs in the hope that brave old BCL or brave old Devenish or brave old Provimi will go into court and establish a figure, an overcharge figure, establish haw pass-on had worked in the industry, and then bring on a super follow-on claim, if you like. These points having been established they will seek to bring the various defendants to the table off the back of others' hard work. As a litigation strategy so as to not invoke costs that makes sense, but it is a litigation strategy that suits the interests of one party and one party alone, that is the claimant. It is not a litigation strategy that suits the court, it is not a sensible case management strategy in relation to cases like this, and it is also not a case management strategy that in any way suits the defendants who have to recurrently defend very similar cases. That is what I mean by "warehousing", that they are seeking to wait until the very last moment in the hope that somebody else will establish something that makes the presentation of their case more easy.

When you look at the chronology I have prepared it really does jump out at you. There were other cases going through the courts and it is only when it becomes apparent in May 2008, when the most generous potential time limit in the CAT is expiring, and the *Devenish* case has not yet produced a judgment upon which they can rely, that they issue proceedings effectively to keep their potential case alive.

That is the general backdrop.

Can I address the threshold to be applied? I say there is a threshold. It is a threshold set by a previous case at this Tribunal. A good reason is required to extend time. There is one case you have not been taken to in any detail - that is, the BCL limitation decision which is the authorities bundle at Tab 7. The factual backdrop of this dispute was as follows: BCL, in its action against Aventis and Hoffman-La-Roche in which BASF had been omitted. BCL and a number of other companies - Deans Food Ltd. (that is DFL) and Premier Poultry Farms - had each brought claims against the Aventis group and the Hoffman-La-Roche group. The issue of those claims was as a result of the seeming assignment or transfer of their businesses under the relevant business sale agreements or purchase agreement, depending upon the perspective with which you looked at it. It was unclear who had retained the right to sue. The defendants - Mr. Hoskins' clients and my clients were making the argument that the wrong parties were in court and that there could not be joinder of the various

purchaser companies - that was, 2 Sisters and various other companies, represented by Mr. Peretz - because the limitation period had expired. The issue was put by the Tribunal as follows at p.179 of the bundle (p.6 of the document), para. 19.

> "The only issue the parties have asked the Tribunal to decide at this stage is whether, on the true interpretation of the Tribunal's rules concerning the addition or substitution of parties, it is open to the Tribunal to add the purchasers as parties after the end of the limitation period of actions under s.47A of the 1998 Act".

The case that was being made for Hoffman-La-Roche and for my clients was that there was no power to amend or add. The case being made by Mr. Robertson, on behalf of Taylor Vintners, for BCL in that case was that Rule 35 provided a general power to amend even after limitation had expired. So, the working premise of this case was that by 2004 - or certainly by 1st January -- or, 28th January, 2005 limitation had expired. The parties were working on the premise, therefore, that what we now know as the Court of Appeal's interpretation of the rules was the proper approach to limitation. Having decided that Rules 31 and 35 can be construed in such a way as to give the Tribunal power to extend time, effectively to add four more defendants to the case - not new claimants, not new claims, but defendants who would complete claims already before the Tribunal, the Tribunal said this at p.190,

> "We have not, however, been persuaded that the contrary position is equally 'extreme'. The third and fourth defendants submitted that if they were wrong as to the construction of rule 35 [the addition of new parties], the Tribunal would have an 'unfettered' discretion to add parties to an action before it, at any time which, in their submission, was a position so extreme that it simply could not be the case. In our view, rule 35 does not give the Tribunal discretion to add parties to an action before it after the expiry of the period in rule 31. However, the Tribunal's discretion must be exercised judicially. It would not be an appropriate exercise of that discretion to allow a patty to be added after the end of the limitation period without good reason".

You then immediately see the tying-in to the case law cogently cited by Mr. Brealey dealing with another analogous good reason for extension provision.

The particular facts of this case were unusual. The civil limitation period had not yet expired. That, in my submission, is a very important background consideration for the decision as to whether or not to grant an extension, because obviously if there is potential to bring civil claims in the Chancery Division or the Commercial Court, that throws a very

different light on a situation where the delay is such that even the civil limitation period has expired. So, they could have brought civil claims had the Tribunal not granted permission. What is more, they were being asked to amend not so as to create new claims, but so as to perfect existing claims. So, it was a much more modest exercise.

Two points follow from that. The first is the jurisdictional one - or the points as to how the Tribunal should exercise its discretion and what threshold they should set. My submission is that it must require a good reason for the very reason that the Tribunal identified in that case.

But, the second is how this case fits into the factual matrix, because it is not a factual matrix, as has been suggested to you, where we proceed from a position of ambiguity, as at January 2004, because there is an ambiguity in the Tribunal's rules, straight into the Tribunal's interpretation in *Emerson,* which is only then reversed by the Court of Appeal. In the interim, by 20th January, 2005, the Tribunal are saying, in a case in which Mr. Robertson and his clients are involved, and a case one assumes that Grampian are well aware of, that the approach they are adopting at that stage is that limitation has expired.

If there is force in the submissions we make - that protective proceedings should be brought - that point, I would suggest, is put beyond doubt by this ruling. If it was reasonable - and I do not accept it was - to simply allow 31st January, 2004 deadline to pass, as and when this judgment becomes public knowledge, and the approach - as it transpires the correct approach - of the Tribunal is made known by its publication, any properly and reasonably advised party should have brought protective proceedings as soon as it could after these proceedings - as soon as it could - because the Tribunal is saying, "Time has expired. There needs to be a good reason for an extension of time". Instead, that does not happen. Instead we get the parties - Grampian and BCL and -- well, Grampian is the relevant focus for the present purposes - sitting on their hands for a further three and a bit years.

So, the factual matrix is, I would suggest, very much stronger than even Mr. Brealey portrayed it.

With those general remarks, can I also address very quickly the question of the various factors that go to this question of whether or not there is good reason. I accept without hesitation, equivocation or adaptation – I am not sure that is the right 'Just a Minute' tag – but I accept everything that Mr. Hoskins has said, and merely wish to add to it. I start with the points that the period of time for which extension is being sought is the first point of inquiry - four years. I add to that that the expiry of conventional limitation itself is a relevant factor. It is relevant because the BCL case shows us it is. You would adopt a

different approach if they could simply issue somewhere else; that takes you into technical disorder, but it is relevant the other way round too, because conventional limitation in s.32 is based upon knowledge and provides a very generous limitation period in combination with knowledge. It sets parliamentary policy as to what it is reasonable to expect a party to do when confronted with a fraud. So, it is a complete answer, in many ways, to Mr. Robertson's "dirty dogs" point. Parliament's considered concealment is considered fraud, and it is giving guidance - not directly applicable - as to the type of criteria that should apply. Here we know that knowledge had been in place since either May 1999 or October 1999. I do not accept that the relevant limitation period runs from publication of the decision. Read Mr. Gosling's witness statement. Read the New York Times article exhibited to it. There is a better copy in the Bundle 2C version (the version in Bundle 1A is somewhat illegible). There is full detail of the cartel and how it operated. Compare that with the test of knowledge under s.32. The time period expires six years after knowledge. So, some time in 2005. That is obviously highly material because in effect the extension Mr. Robertson is seeking is a three and a bit year extension from the civil limitation period. It is also relevant for this reason: yes, there has been a qualification of the ordinary civil rules by the special regime set up by the two year limitation period to bring follow-on claims in this Tribunal. But, it does not follow that simply because the two year period affects some qualification of the limitation regime, that when you come to the Tribunal and ask for the Tribunal's assistance and seek to say that, "There is a good reason for me to be extended time", that those limitation considerations fall out of consideration. They do not. What they speak to about legal certainty in the way that Mr. Hoskins has explained by reference to those underlying documents comes in with full vigour at that point in time, and those considerations, the interest of the state, the interest of legal certainty, are relevant at that junction. So, limitation is long gone - limitation in the strict civil sense.

Then we have the question of delay and prejudice to the defendant. Mr. Hoskins has covered this very fully. We agree that Mr. McDougall has explained the type of prejudice on a factual basis that the Aventis defendants find themselves faced with. They have sold their businesses. They will have real difficulty in locating relevant witnesses and relevant documents. They are not saying it is impossible. They are not saying that the efforts they made in previous litigation do not go some way to qualifying the burden, but there is prejudice nevertheless. I do not wish to over-emphasise it, but it is real. It is no answer, as Mr. Robertson sought to portray it, to say, "Well, this is all your fault. You are evil cartelists. You have hidden all of this". That argument, so far as it has any juice, runs out in

1999. By 1999 you know that there has been a cartel; you cannot then blame the cartelists for everything thereafter. So far as you sit on your hands with knowledge, that argument wanes away.

What steps have been taken to mitigate that prejudice? That is a relevant consideration. Has the claimant done anything to stop matters becoming plain? The main way you do that is by writing to tell someone that you intend to bring a case, at which point legal processes and consequences follow. If you get a letter before action telling you that you are going to be sued by someone, you dig out the relevant documents, you approach the relevant witnesses, you investigate the matter. That is where the absence of a letter before action kicks in because the claimants are taking no steps to mitigate the prejudice of their actions in not suing.

THE CHAIRMAN: Can we see the letter before action that you are referring to?

MR. DE LA MARE: Certainly.

MR. HOSKINS: I do not think we can because it is without prejudice. We can tell you the date. Certainly the Freshfields version I cannot.

MR. DE LA MARE: In my submission you can see it because in substance it is not without prejudice. I will obviously let Mr. Robertson decide the point. In order to be without prejudice a document has to contain an offer to settle. There is no offer to settle in this document.

MR. ROBERTSON: We do not object to the Tribunal seeing it.

MR. DE LA MARE: Very well. I am afraid I only have one copy. There is the letter and my client's response to it. (Same handed)

THE CHAIRMAN: Yes. I think I made a mistake earlier when I said this was only seven days before they issued proceedings. Of course, it was a year and seven days.

MR. DE LA MARE: No. It was seven days. The true position is that we were sent it on 7th May, 2008. I have corrected my chronology. It is my error. I originally included 2009 in that in the way you always include the current year. When it sorted the dates automatically it produced that surprising result. I substituted that with a version I did over lunch.

The relevant date at which the claim was presented was 14th May - that is, a week after the letter before action. It was clearly presented on that date under the mis-apprehension that limitation would run out the next day, 15th May, because the solicitors in question had not taken due account of the ten extra days for distance that would apply to any appeal from the CFI decision. So, that is why in my revised chronology I included 7th May, 14th, 15th, and 25th. Those are the relevant dates in the matrix. I hope that clears that up.

They had done nothing to give us a chance in that nine year period when they have been contemplating claims to address the type of prejudice that arises from this late-presented case.

Then we come on to the relevance, if any, of the abuse of process type considerations. Since my clients are the ones who are raising the issues, let me explain what I see in relation to that. This is not a case in which I am making a direct abuse of process argument. Instead, I say that there is a burden of proof upon Mr. Robertson to identify a good reason. Many of the factors that the court takes into account when a party is itself seeking to strike out for abuse of process must necessarily be relevant in considering whether or not there is a good reason. If you like, the onus is changed between the two circumstances. The matters conventionally take into account - like, unconscionable and inordinate delay, an old-fashioned basis for abuse of process, or repeatedly re-litigating matters – matters of those kinds will be of direct relevance. Our case is simply this: in circumstances where it was perfectly open - indeed, sensible, but for the cost risk entailed - to join prior litigation covering very substantially the same matters: the issues of over-charge and pass-on between direct and indirect purchasers are common issues throughout all four ways of litigation. You can join this litigation at any stage. The only reason they chose not to was to suit their own tactical imperatives. They pay no attention at all to the requirement for the defendants to be able to defend proceedings economically (the Tribunal's consideration), and they pay no attention to the Tribunal's probable desire to wish to sensibly case manage cases of this kind. Cast your mind back to 2004. Had they stuck their heads above the parapet at that stage, would the Tribunal have said, "Well, we are simply going to ignore all these downstream cases", or would the Tribunal have given case management directions for all of this look-alike case to conduct them in an efficient way? The answer to that question is obvious. The consequence of that is that the claimants would have been at cost risk from that point onwards.

Then ask yourselves, "Is it in those circumstances unfair –oppressive even to re-litigate the matter in this way after the expiry of limitation period?" To that end I do ask the Tribunal to look at some general remarks about the importance of case management in this context, made by Lord Justice Thomas in the *Aldi Stores* case, which was inserted into the bundles. I hope you can find it at Tab 41. It was referred to, with approval, at para. 6 of the Walbrook case which Mr. Robertson took you to earlier. The comments of Lord Justice Thomas in that judgment, with which the other two judges expressly agreed with some considerable vigour, were effectively this: the factual backdrop of this case is very

complicated. It was multi-party litigation with contribution claims, etc. Aldi had not sued on a contribution one of the parties it subsequently brought proceedings against. The complaint is that the potential for this subsequent case to arise was never brought to the court's attention such that the court did not exercise its case management powers. At para. 30 Lord Justice Thomas says

> "Parties are sometimes faced with the issue of wishing to pursue other proceedings whilst reserving a right in existing proceedings. Often no problem arises; in this case Aldi et al each in truth knew at one time or another between August 2003 and the settlement of the original action in January 2004 that there was a potential problem, but it was never raised with the court. I have already expressed the view that it should have been. The court would, at the very least, be able to express its views as to the proper use of its resources and on the efficient and economical conduct of the litigation. It may have seen if a way could have been found to determine the issues applicable to Aldi in a manner proportionate to the size of Aldi's claim and without the very large expenditure that would have been necessary if Aldi had to participate in the trial of the actions …"

- and so on and so forth.

Then paragraph 31:

> "However, for the future, if a similar issues arises in complex commercial multi-party litigation, it must be referred to the court seized of the proceedings. It is plainly not only in the interest of the parties, but also in the public interest and in the interest of the efficient use of court resources that this was done. There can be no excuse for failure to do so in the future."

When you tie that into the criteria in Rule 44(2)(c) about how the Tribunal uses its resources to allocate matters, it is obviously a factor of real relevance that the Tribunal, after the expiry of limitation is being asked to go over the very same ground that was being covered in *Deans Food*, that was covered by the Chancery Division in the *Devenish* litigation and was covered by the Commercial Court in *Provimi*. It is not a determinative factor, none of these, with respect, are determinative factors, they are cumulative factors.

THE CHAIRMAN: My only concern really was that these cases all say that the question of abuse of process is not a matter for the court's discretion, the court has to take in a large number of factors but there is a right and a wrong answer, it is not a discretion matter, and the Court of Appeal deals with it on that basis, whereas what I think you are saying is, you are not saying this is a right and wrong answer, you are saying that these are factors which, within

the discretion that we have to deal with the extension of time these are part of the factors. It was that point that I was concerned about.

MR. DE LA MARE: What I do say is that the factors lead to a conclusion that is either right or wrong. None of these factors are necessarily determinative in any one case according to its factual matrix it may apply with or less vigour, but when you apply the various factors that you should take into account there is only one right or wrong conclusion at the end of that. There either is a good reason or there is not, and the Tribunal does not have a discretion to say "Maybe there is a good reason, and we are sufficiently concerned that there might be good reason."

THE CHAIRMAN: In terms of our decision whether to extend time?

MR. DE LA MARE: Yes, there is a right or wrong answer to that question, just as there is in other Tribunals having parallel jurisdiction, it is a problem that occurs most obviously in the context of employment law where there is a parallel jurisdiction to extend the very strict statutory time limits on grounds that it is just and equitable to do so. Tribunals apply that in a very rigorous manner, but it is treated as being ultimately a question of law – is it just and equitable to do so or not – it is often a matter of an appeal and the points that have been raised here are often raised.

THE CHAIRMAN: I am not saying that if it is a question of our discretion that it is not a question of law, not at all.

MR. DE LA MARE: I appreciate that.

THE CHAIRMAN: What I am saying is that the courts in abuse of process cases seem to be drawing a distinction between cases where the Court of First Instance is exercising a discretion and abuse of process cases.

MR. DE LA MARE: Much of Lord Justice Thomas's judgment in *Aldi Stores* is concerned with this very distinction and the point he makes is that where you are dealing with factors of this kind that are equally comprehensible to an appeal court it is not a basis on which to say that the trial judge gets some special measure of discretion because the point is just as capable of re-argument and being understood by the Tribunal or Court of Appeal with exactly the same evidence, so it is very much in that context the point is raised: is there some super hurdle to be crossed in order to succeed on appeal, and I say it is precisely the same approach at the end of the day.

As against that, what does the claimant say other than it is a mistake afterwards? First, they complain of prejudice to the claimants, they say the prejudice to the claimants is they will not be able to bring the case.

With the best will in the world that is a classic 'bootstraps' argument. If that were an answer to a case of this kind it would be an answer in every limitation case. But in fact, the argument is even weaker than that because we do not even know if it is true. It is question begging. We do not actually know whether or not Grampian has suffered loss, that is the very issue the Tribunal is being asked to determine.

Secondly, there is only really one of two things that can go on here. Either Grampian pursue the very risky strategy of not issuing proceedings earlier to cover the risk of potential earlier limitation defences, because it did not want to take on the cost risk, because it wanted to take a free ride, in which case it does not deserve a remedy. Or, alternatively, they were advised that they had no ability to bring the claims earlier, in which case they had been incorrectly advised and their remedy lies with their lawyers, but neither of those circumstances calls out for this Tribunal somehow to massage the rules on limitation so as to provide them with a remedy.

Then we come to the last criterion of expedition, and you have heard a lot from the other advocates, I will not repeat again what they have said. The overarching point is that at no point have they sought to explain why it is that they have waited until the very end of the limitation period. They have explained they have made a mistake, so they say, based on a reasonable interpretation. What they have come nowhere close to addressing is why they sat on their hands, hence the case I make of inference. The only inference you can make in circumstances where they refuse categorically to go on evidence to explain their position is that they cannot give evidence without saying things that are deeply unattractive to their position and as to the merits as to whether or not to grant an extension of time. They have been asked in every conceivable way to explain why they have behaved as they have, and you can only assume there is no good answer to not joining the other litigation, to not issuing promptly after the CFI decision when they had everything prepared and ready to go, not issuing after the BCL judgment where they are told the Tribunal is working to an approach of limitation on the Court of Appeal matter. It is tactics at the end of the day and tactics are no proper reason to find that there is a good reason for extending time. It is not like your lawyer has been struck ill such that the petition cannot be presented, or that your key witness is in a coma, or there is some other type of impediment to you acting earlier. They are ready to go at all stages and are choosing not to do so.

My cumulative submission is that there is unconscionable delay, an absence of prudence, they should have brought protective proceedings. With respect the Tribunal's interpretation of the point I was seeking to make is completely right, there is not some special animal that

you have to show that is in play, you simply take your case to the court and ask for appropriate directions to cover your position and explore its possibility. In circumstances where it is driven by tactics it not prudent and not taking account of the interests of the other parties and there is no good reason to extend time.

Unless the Tribunal have any questions, those are my submissions.

THE CHAIRMAN: Thank you very much. Mr. Robertson?

MR. ROBERTSON: I intend this to be a short reply, madam. I will deal first of all with the reply in the BCL application. Mr. Brealey's criticisms of delay, we have already made the point that they are beside the point; none of them would have been made if the Tribunal's ruling had stood.

Secondly, his question: what were we doing for the seven months from July 2007 onwards when his client made it clear to us that as far as they were concerned the pre-action correspondence was at an end. The answer to that is self-evident.

THE CHAIRMAN: Is that from July 2007?

MR. ROBERTSON: July 2007, he says there is another seven months' delay until the March serving of the proceedings. The answer is self-evident, you have it in files 2A and 2B before you, the claim was being put together in the light of the evidence so the Tribunal can see what was done. Why was it not done with in the two months that we managed to do it in the first BCL claims? Well, we did have the comfort during this period of the *Emerson 1* and *Emerson III* Tribunal decisions in October 2007 and April 2008. They indicated that the view we had taken when the window for bringing these – I use the phrase "window" I have not used it before – as your question rightly pointed out in fact these are windows for bringing proceedings and we got the wrong window frame. Yes, you can ask for the window to be opened in advance and here we are asking for the window to be re-opened after it has been slammed down on our fingers. But we were self-evidently putting in those claims before we thought the window was being closed.

The third point in reply: we are told by Mr. Brealey that Dr. Elvermann has given the same disclosure statement in the *Devenish* case as he would give in this case, so his clients do not seem to be in any worse position on disclosure than they were in the *Devenish* High Court proceedings.

The fourth point: Mr. Brealey places weight on the *Al Tabnith* case. This case, we say, is analogous to the *Tesco* case where there was a clear deadline. Tesco, the association seeking to bring the application miscalculated the deadline but the deadline was clear. In the *Al Tabnith* case the unfortunate gentleman in question just made a wrong note of it.

That is not the situation we are in here; we acted reasonably, the Tribunal agreed with us, and that really brings me on to the reply that we make in the Grampian claim. Mr. Hoskins keeps on referring to us as "taking a punt", and "100-1 shot" ... was a reasonable interpretation of when the window opened and shut, supported by *Emerson I*, *Emerson III* supported by the Tribunal, that is the situation. It is not fair to describe us as taking a substantial risk.

He says it is extraordinary for us to come without witness evidence. The position is as set out in our submissions for this hearing to which my instructing solicitor, Miss Catriona Munro, has put her name, there has been correspondence to which you have been taken in vol.1, pp.141 to 143 where her firm are asked to give witness evidence and she just gives the explanation, which is the explanation that we give today. We had been working on the basis that the window closed when the Tribunal said it would close; that is it. This does not call for great amounts of witness evidence from Grampian, so I do not accept Mr. Hoskins' description of our application as "shoddy", it is succinct and to the point.

Mr. Hoskins pleads for an end to chastisement of his "dirty dogs" and again, this is as Mr. McDougall raised the spectre of "long tail litigation". This is not the case here, and this is not going to open, I think Mr. Hoskins was trying to avoid using the term "floodgates" but that is what he meant, at the end of his submissions. These are two applications arising out of exceptional circumstances. As I said, the test is not exceptionality, but if it were we would meet it. So there are only two more kicks of the "dirty dogs".

To pick Mr. Hoskins up on his very helpful speaking note, one point at para.31, he makes this point: "The claims relate to losses allegedly suffered between 1989 and 1999", well, yes, they do that is when the cartel was fraudulently operated, between 10 and 20 years ago. "These claims, if successful, would simply be an addition to the claimants' current balance sheets." Well, it is just like saying: "It's okay, I picked your pocket several years ago, I don't have to give it back". What fraudulent cartelist could not make that argument, it is crazy. As I said in opening our case, they are sitting there on ill-gotten gains, and they are seeking to defend them, and all we are seeking to do is to get reparation for losses that undoubtedly, we say – which we have to prove on the balance of probability – that we have suffered.

The final point of Mr. Hoskins' submissions – this really arises out of your question, madam, to him about could we have joined another litigation? Just to make the point that none of those other cases were group litigation cases, for example that was not a group

litigation order. In any event, any claim that we bring would have been a separate claim as it is.

Turning to Mr. De La Mare, the additional points he makes – I think there are two that require a response. First, he says that the High Court limitation period under s.32 was set running by an article in the "New York Times" a copy of which is exhibited by Mr. Lawrence. When the Tribunal looks at the article you see it makes general reference to the ongoing investigation by the US authorities. I would invite the Tribunal to compare that with the European Commission's Press release issued on 21st November 2001 when the decision was adopted, and you just see there is a completely different level of detail as to what vitamins were the subjects of the cartels and over what periods. The New York Times' article makes area references – vitamins A, D and E and others.

THE CHAIRMAN: But you do accept, do you, that by the March 2008 the High Court litigation limitation period had expired?

MR. ROBERTSON: We say that at the earliest it expired in November 2007. There is an argument that those of us bringing claims – you only have the Press release to go on in November 2001 and it was not until January 2003 that you got the "full Monty", you got the full decision published in the Official Journal. The European Commission's practice now is to publish an unofficial version of the decision for information purposes only as soon as it can do on its website. I think one of the reasons it does that now is because it was quite roundly criticised for having waited about a year and a quarter to publish in the Official Journal in Vitamins. So there is an argument which says that actually, the level of detail of knowledge did not start running until the decision was published in the Official Journal. I am just raising that to show there is an argument; I am not advancing our case on that basis. I am advancing our case on the basis that time started running at the earliest in November 2001 when the decision was adopted and a Press release was published by the European Commission, so the time expired in the High Court ----

THE CHAIRMAN: If time only ran from the publication in the Official Journal, then that would take us to January 2009.

MR. ROBERTSON: Correct.

MR. HOSKINS: I am sorry to interrupt, but I understood Mr. Robertson to say he was not putting his case on that basis. I am just slightly concerned if it is allowed to go forward on that basis.

MR. ROBERTSON: I was not, I was quite clear; I am not putting my case on that basis, but in response to a question from Madam Chairman ----

THE CHAIRMAN: Well what is the answer to my question? Do you accept, for the purposes of this application, that by March 2008 you could no longer have brought proceedings in the High Court?

MR. ROBERTSON: If we had sought to bring proceedings in the High Court after March 2008 we would have faced an uphill struggle in convincing the court that in fact the limitation period ran from the date of publication of the decision in the Official Journal, not the date of publication of the Press release.

THE CHAIRMAN: Thank you.

MR. ROBERTSON: The final point of reply to Mr. De La Mare relates to his references to case management. We just do not understand this issue of argument on issues of overlap and so on. The Grampian claimants have not brought other claims, this is the only claim they have brought. Infringement is established by the decision so its causation of loss to these Grampian claimants and the quantum of that loss; it is a separate, self-standing claim. A lot of the evidence in relation to it will have been preserved by these defendants, or ought to have been preserved by these defendants because of the other litigation they were involved in. The fact that, for example in *Devenish Nutrition*, a group of producers in Northern Ireland and the Republic of Ireland are bringing claims for loss caused to them and the quantum of that loss to them, we do not see how that really has any overlap with the loss of the claims that we are bringing.

THE CHAIRMAN: In the *Devenish* proceedings the parties all (or some)of them have chicken-related names. So, it may be the same three vitamins as we are talking about here. But, in *Provimi*, I am not sure that the judgment does say what they ----

MR. DE LA MARE: They manufactured feed for chicken producers. They are upstream suppliers. All of the people in these various industries have been involved in the glorious chicken business in one way or another.

THE CHAIRMAN: So, is it still A, E and B2?

MR. DE LA MARE: Yes. Provimi and Aventis were direct purchasers in the Deans Food litigation. They are all indirect purchasers in the *Devenish* litigation. They were all indirect purchasers barring Devonish. This case concerns exclusively indirect purchasers, all in the chicken business or taking feed for the chicken business, or selling feed to the chicken business.

THE CHAIRMAN: It is which vitamins which are involved ----

MR. ROBERTSON: I do not think we have got that information before the Tribunal.

Madam, unless I can assist the Tribunal further, those are our submissions.

THE CHAIRMAN: Thank you very much.

MR. BREALEY: It is just a point that Mr. Robertson has made in reply. It is the point which relates to the seven month period after July 2007. He said the answer was, "It was self-evident. Look at the witness statement". It is a sensitive matter, and I do not want to end the proceedings today how we started. But, it is not self-evident at all, and it is not for Mr. Robertson to give evidence as to whether what they were doing preparing the case, or whatever. That was for the claimants' witness statements to sort that out. It is inconsistent with Mr. Gosling's statement. I would ask the Tribunal to treat it with some caution, particularly given the claimant's approach to the witness statements in this case generally. I put it no further than that. But, it is not self-evident that they were preparing the case post-2007. It is quite inappropriate, in my submission, for the claimants in a reply, on essentially the law, to make that statement, particularly when there have been some issues on the 2004 statements and it is inconsistent with Mr. Gosling's statement. I simply ask the Tribunal to treat that statement with a degree of caution.

THE CHAIRMAN: Mr. Robertson, can you point to anything specific on which you rely in relation to those seven months?

MR. ROBERTSON: There is no evidence before the Tribunal on a sort of timesheet basis. I was just making the point that this is a substantial claim. We did not prepare the claim and have it ready two months after the time for BASF appealing from the decision of the CFI expired and then sit on it for four or five months. That is confirmed by my instructing solicitor.

THE CHAIRMAN: I do not think we can take the matter any further, Mr. Brealey.

Thank you very much to everybody for your written submissions and for your very helpful oral submissions today. We will now go away and think about what we are going to do and let you know in due course.