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IN THE COMPETITION
APPEAL TRIBUNAL

Case No. 1016/1/1/03

Victoria House,
Bloomsbury Place,
London WC1A 2EB

17th September, 2004

Before:
SIR CHRISTOPHER BELLAMY
(The President)
PROFESSOR PETER GRINYER
MR GRAHAM MATHER

Sitting as a Tribunal in England and Wales

BETWEEN:

GENZYME LIMITED

Applicants

and

THE OFFICE OF FAIR TRADING

Respondent

and

HEALTHCARE AT HOME

Intervener

Mr David Vaughan CBE QC and Mr Christopher Vajda QC (instructed by Messrs. Taylor Vinters) appeared for the Applicants

Mr Rhodri Thompson QC (instructed by the Director of Legal Services, Office of Fair Trading) appeared for the Respondents.

Mr Euan Burrows (instructed by Messrs. Ashurst) appeared for the Intervener.

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CASE MANAGEMENT CONFERENCE

1 THE PRESIDENT: Good morning, ladies and gentlemen. I do not think we have a specific
2 agenda for this hearing today, but I think I can indicate how the Tribunal is provisionally
3 seeing the development of this matter from here onwards subject, of course, to any views
4 the parties wish to express. First, it is obviously a matter of regret that it has not been
5 possible to reach a settlement in this case. It is also, as far as we are concerned, a matter of
6 regret that a certain litigious flavour seems to be creeping back into these proceedings at a
7 time when we would hope that things would be conducted more amicably and positively.

8 We, the Tribunal, have now received quite a lot of information, but a lot of it has
9 been received fairly recently and we have not yet had a chance to get as on top of it as a
10 Tribunal as we would wish. So further work on our side needs to be done before we can see
11 very clearly where we are. We are not at the moment minded to allow this ping-pong match
12 to go on indefinitely. There must be closure on this case at some point and it is not at the
13 moment clear to us that in order to make up our minds (which apparently we have to do
14 since the parties have not managed to settle it) that we actually need any more information
15 than we already have.

16 Our present thinking – and I put it in terms of “thinking” so that you can
17 comment on it – is that we should keep the hearing date that is set for 13th October, but that
18 instead of having an adversarial hearing on that day we should have what would, in effect,
19 be a discussion in the presence of the parties’ experts and advisers between the principal
20 parties, the Tribunal and the experts, in order to identify whether and to what extent there
21 are unbridgeable issues between the parties and whether we really need more information
22 than we have already in order to resolve those issues, or whether in fact anybody who is a
23 party needs more information than they have already in order to present their case. We are
24 not in the present circumstances particularly keen on making any particular orders today, we
25 would rather allow the matter to unfold on 13th October in the way that I have indicated.
26 That, broadly speaking, is where we are.

27 I think from the point of view of the order of events today what we would like to
28 do first is to go around the table, starting I think with the OFT and then going to Genzyme
29 and then to Healthcare At Home, to see in a little more detail what the position of the parties
30 is and whether there are matters that we need to decide today that are seen as critical to the
31 future development of the case. That, broadly speaking, is where the Tribunal is at the
32 moment. Mr. Thompson?

33 MR. THOMPSON: I am grateful for that indication. I would propose to keep my submissions
34 reasonably short in the light of that indication. The Tribunal will, I hope, have seen two
35 reports from the Office of Fair Trading, dated 23rd July, and one more recently, I think, 10th

1 September. The background to that is, you will recall, is that in the Judgment the Tribunal
2 invited the parties, and I think not simply the OFT but in particular the commercial interests
3 affected by the margin squeeze that was bound to have existed to attempt to negotiate a
4 settlement.

5 THE PRESIDENT: Yes.

6 MR. THOMPSON: In the light of that Genzyme undertook various steps and then approached the
7 Office of Fair Trading on the basis that it had carried out its own analysis of what
8 elimination of the margin would require in I think the report of Professor Appleyard. The
9 OFT was therefore drawn in in attempting to assess whether or not this assessment was
10 correct and effectively to produce further information to assist the Tribunal or to assist the
11 possible settlement, and those two reports have been produced on that basis. The position is
12 therefore quite different from the situation that prevailed before 11th March 2004 in that this
13 is not a process where Genzyme is the defendant to a prosecution in broad terms. It is a
14 situation where it has been found to have abused its dominant position and the question is
15 really one of remedy or sentence where quite different considerations apply even under the
16 criminal law from those that apply where you have an accused.

17 THE PRESIDENT: I think “remedy” is a better word than “sentence”, Mr. Thompson.

18 MR. THOMPSON: Indeed. But insofar as Mr. Vaughan is relying on issues analogous to that of
19 a criminal defendant in seeking disclosure, I think that issue is relevant to be taken into
20 account. We are not making any accusations of criminal conduct, it is simply a question of
21 the degree of procedural protection to which they are entitled.

22 THE PRESIDENT: Yes.

23 MR. THOMPSON: The Office of Fair Trading in carrying out its task, I think at the last hearing I
24 was present at in May, indicated that in the light of communications with the Tribunal it
25 would seek to obtain relatively broad commercial indications from parties active in the
26 market about the degree of profit that they would expect to achieve as part of preparing their
27 report. In doing that they have indeed received, essentially on a voluntary basis, and subject
28 to the confidentiality regime that the Tribunal set up, some such information from Clinovia,
29 Central and indeed Healthcare At Home.

30 THE PRESIDENT: Yes.

31 MR. THOMPSON: It is a matter of considerable concern to the Office of Fair Trading if, having
32 embarked on this process those parties might be confronted with a broad application for
33 disclosure of that material so they would find, having entered to what they thought was a
34 voluntary regime, effectively to assist the Tribunal in determining a particular question, a

1 party who had been found to have abused its dominant position in this very market might
2 have access to confidential information which had been provided for a very narrow purpose
3 and subject to a confidentiality regime put in place by the Tribunal. In the light of that, the
4 Office of Fair Trading would be very seriously concerned if the Tribunal were
5 contemplating additional disclosure on that basis and, it seems to the Office, it would raise
6 quite considerable difficulties – both for the Tribunal and for the Office of Fair Trading in
7 relation to companies such as Central and Clinovia, if they were to be subject to such orders
8 without even being represented and without even being represented and really with only the
9 most passing connection to the case. That is by way of background to welcoming the
10 indications from the Tribunal that no such orders are likely to be made today and obviously
11 if Mr. Vaughan or Mr. Vajda seek to persuade you to the contrary then the Office may wish
12 to make further representations on the issue. I think that is probably sufficient for present
13 purposes to indicate our general stance.

14 THE PRESIDENT: Mr. Thompson, I can see what you say in relation to the companies such as
15 Clinovia and Central Homecare, who you say have been voluntarily drawn into these
16 proceedings but, from the point of view of the OFT you are not engaged in a total
17 “voluntary” exercise to help the Tribunal. At the end of the day the OFT has to take a view
18 on what remedy is appropriate to solve the margin squeeze, does it not? The OFT is the
19 competition authority – we could send it all back to the OFT and say “make up your mind,
20 make an order”.

21 MR. THOMPSON: It is true that the report that we have produced gives some indication of the
22 Office of Fair Trading’s assessment of the evidence that it has received since March, and no
23 doubt that might be borne in mind if one were considering what the outcome would be if the
24 matter went back to the Office of Fair Trading. At the moment, as I understand it, the Office
25 has been seeking to follow indications from the Tribunal, both in the Judgment and at the
26 two hearings since then as to the type of information that would assist the Tribunal, if it was
27 necessary for the Tribunal to determine the matter, as sadly now appears will be the case.

28 THE PRESIDENT: Yes, I just caught a slight flavour of the idea that you were just helping the
29 Tribunal and not as the competition authority yourselves taking a view on what the answer
30 was. I may have misunderstood it.

31 MR. THOMPSON: If I am missing any nuances – I will take instructions to see. (After a pause):
32 I suspect it goes essentially to this question of the margin itself, the profit margin in that in
33 previous administrative cases, as indeed I think both the parties recognise, the Office has
34 entered into a substantial commercial analysis, for example, in relation to BSkyB.

1 THE PRESIDENT: Yes.

2 MR. THOMPSON: And with a blank sheet it was simply looking at the question of margin
3 squeeze. I think that is the Office of Fair Trading's policy and the fact that it has not done so
4 in this case reflects two factors. One, an indication from the Tribunal about the level of
5 detail that they wanted the parties to go into; and secondly, practical questions about how
6 easy it would be in practice to derive such information from Healthcare At Home or indeed
7 its competitors, without really quite intrusive investigations of parties who, after all, were
8 not directly involved in this procedure.

9 THE PRESIDENT: Yes, thank you. Yes, Mr. Vaughan?

10 MR. VAUGHAN: I think where one really starts from is the fact that we and the Office of Fair
11 Trading appear to agree that the appropriate remedy is to take such measure as would
12 remove the abuse. Healthcare At Home take a different position and they, as the
13 observations of the OFT here make clear, that they are based on the historical amount and
14 they are claiming something like 9.5 per cent. i.e. that would meant that for the future and
15 no doubt for the past there should be assumption that the terminated agreement should
16 continue, and that they should be paid on the basis that we objected to and terminated the
17 agreement because of that - obviously that is an issue. But as between us and the Office of
18 Fair Trading the basis upon which the calculation, the basic concept is not at stake.
19 The issue really is fact, and this is one of the problems, whether we meet it now or on 13th,
20 will become apparent because the facts we have to work on are pretty few and far between.
21 We have tried to set out, as it were, our note on difficulties which is annexed to our
22 supplemental submission, some of the problems that arise mainly because Healthcare At
23 Home has not been prepared to offer proper information and verifiable information to the
24 Office of Fair Trading. Moreover, as we will develop in our next pleading, their case keeps
25 changing on critical issues, on nurses, on visits, on how many visits have to be done at the
26 time. You will see, for example, annex 1, Healthcare At Home did not give to the Office of
27 Fair Trading any idea of the cost of capital attributable to the work. That in our view is
28 something that could easily have been done and was not done. That forced the Office of
29 Fair Trading to try and arrive at some alternative method of doing these things.

30 Further on down there are nursing costs and all sorts of figures which they have
31 given which are included in either the Report or the substantial Report which we will show
32 you in our further pleading is entirely inconsistent with what they have previously said.
33 Underlying the dispute is fact on nursing, delivery and also on the third issue of profitability
34 of this matter, though it is not the essential facts, in order to carry out what we would say,

1 and our experts will say is a proper exercise. We can obviously do a considerable amount
2 of work without further disclosure. We have seen various times, Healthcare At Home has
3 put its case on various matters and we have seen a certain amount which comes out from the
4 reports indicating either the absence of figures or figures in this matter.

5 To be clear, we did apply at the last CMC in July for disclosure, and then it was
6 decided to put that over until we got further, because there were various meetings to be
7 held, so it is not something we have suddenly asked for. I think almost certainly on 13th we
8 will be pursuing that application, or may well be pursuing that application at that stage in
9 order really to see exactly what has been said. Healthcare At Home has now produced some
10 of its submissions in its latest document to us. It has produced this memorandum of 12th
11 July, which is annex 1 to that.

12 THE PRESIDENT: I am sorry – annex 1 to what, Mr. Vaughan?

13 MR. VAUGHAN: The Healthcare At Home submissions and comments on the Report, the
14 response of Healthcare At Home to the Margin Squeeze Report. It was sent on 15th
15 September.

16 THE PRESIDENT: I have the response – have I got annexes to it?

17 MR. VAUGHAN: It just seems to run on.

18 THE PRESIDENT: Yes, I have it. Thank you.

19 MR. VAUGHAN: If one looks at those annexes, we have seen 14th July, and we have seen annex
20 2 is a note of 3rd September, and then we have seen a relevant point at annex 3 – the paper
21 by Charles Walsh, which our clients cannot see because it is protected by confidentiality,
22 about the negotiations in 1998 – I will come back to that in a moment – that is protected by
23 confidentiality. We would say that you cannot take that into account unless our clients can
24 see it and respond to it.

25 THE PRESIDENT: What is the basis of the confidentiality for that document?

26 MR. VAUGHAN: I think that is protected, well the paper is protected but it would be helpful if
27 Mr. Burrows could deal with that and accept that the lay clients, as it were, concede that
28 point.

29 THE PRESIDENT: Just help me, Mr. Vaughan, find my way about. That particular document is
30 referred to where?

31 MR. VAUGHAN: That is at the last few pages. There is a document dated 15th September – you
32 have that?

33 THE PRESIDENT: I have that, yes.

34 MR. VAUGHAN: It is not paginated?

1 THE PRESIDENT: No, it has a number of annexes.

2 MR. VAUGHAN: But it has a number of annexes and the little annex is called "Relevant Points"
3 in connection with the tender, and it is a report of Charles Walsh dated 3rd September 2004.

4 THE PRESIDENT: Yes, I have that.

5 MR. VAUGHAN: Then annex 3 is the fourth response, dated 24th August from Healthcare At
6 Home. So we have seen about half of their stuff about these matters. We have not seen the
7 remaining parts. I think it would be very helpful at least to see what they have said in their
8 other responses. You can see which the other responses are from our note of order, draft
9 order at p.7.

10 THE PRESIDENT: Yes.

11 MR. VAUGHAN: These were the other matters. They show, as it were, the considerable amount
12 of matters they had put in to the OFT in order to justify their figures and their position, and
13 it is important for us to see what they had been saying, what basis they had been saying and
14 the inconsistencies between what they have been saying at different times. So even if full
15 discovery is not ordered we would like to see at this stage, if we could, at least the
16 Healthcare At Home documents that they have sent to the OFT. We have now got some but
17 not all of those matters.

18 The other critical matter of considerable importance is that the tenders submitted
19 by Healthcare At Home for this sort of work, we have seen one which is for people with
20 haemophilia, which they say is not typical. Our understanding is, and indeed the OFT report
21 says they were shown a number of tenders, and we would like to see those tenders, because
22 our belief is those tenders will all show a price significantly below the nursing visit price
23 which they are intended for in this matter. That is one of the big differences between
24 Professor Yarrow, and the Office of Fair Trading on this matter.

25 Basically, even if you did not make a full order for discovery, we would ask at
26 least we should see within the protected circle the submissions – all the submissions, not
27 merely a selection of them – prepared by Healthcare At Home to the Office of Fair Trading
28 – if you put in some you have to put them all in. They have put in some and we say we
29 ought to see them all in that respect.

30 THE PRESIDENT: Is it suggested that if it were done at all it would be done on a reciprocal
31 basis in which they would see all your stuff?

32 MR. VAUGHAN: Yes, we have no problem with anything we do at all.

33 THE PRESIDENT: Please correct me if I am wrong, but I am not sure your case actually refers
34 to your actual costs as distinct from what Professor Yarrow calculates as being the costs.

1 MR. VAUGHAN: I think that is probably right, because obviously we are working on the basis
2 of their costs, as it were competitor costs. In fact, Mr. Vajda reminds me that we were told
3 that our costs were not an appropriate indicator of what the other costs should be.

4 THE PRESIDENT: Told by whom?

5 MR. VAUGHAN: By the Office of Fair Trading. But of course it would only go to the small
6 circle of that, but there are two other matters. One is that there are two documents of
7 extreme importance ----

8 THE PRESIDENT: Just a moment, let us see what we have so far. We have the note on the
9 original negotiations.

10 MR. VAUGHAN: Our request is that that should go to our clients so they can see it and comment
11 on it. There is the other submissions they made to the Office of Fair Trading on the basis
12 they have disclosed some and therefore we need to see them all to get an idea of what was
13 happening. Then there is the information of tenders that they have submitted for this or
14 equivalent services, for nursing and/or delivery in that respect. At the moment, Mr. Walsh
15 has made two witness statements which are not available to be seen by our experts because
16 the wider circle was not created at that time, so it only went to lawyers at that stage. Some
17 of the figures have gone into the reports, but they need to see those in order to be able to
18 form a view as to how this matter has happened. If that was available to us it would make it
19 very much easier to be made available. We can make most of our points on what they have
20 said and also comment as appropriate when they have not produced documents to back up
21 anything they have said. We can probably make most of our points on that basis. On that
22 basis we are very keen – as we made clear last time – to have a strict timetable and indeed,
23 it was our timetable which was effectively adopted at the last CMC. That would include our
24 observations by next Friday, OFT's and Healthcare At Home's the Friday afterwards, and
25 our responses by then. We would anticipate putting in our witness statements from our
26 experts at the first opportunity – next Friday – from Professor Yarrow and other experts.

27 THE PRESIDENT: That is 24th?

28 MR. VAUGHAN: 24th, yes, and we all put them in then. Whether they can deal with everything
29 then will depend on how much we are able to see of other things. We may want to put in
30 other evidence on tenders. We are doing what we can to find out what tender prices were
31 obtained for this sort of matter. It is a very important point in this case as to what is the
32 current rate for this sort of work, because what you decide is going to be the position for the
33 future. That is what you will be looking at and that is in the newer situation.

34 We indicated in our submissions that we are actively considering unbundling

1 everything. We are still considering that, it is quite complicated to work out if we do
2 unbundled what the unbundled price would be, and so a lot of work is being done at the
3 same time on that issue.

4 THE PRESIDENT: Are you able to elaborate a little on that, Mr. Vaughan?

5 MR. VAUGHAN: Not really. A lot of thought is going in to the pros and cons of unbundling if
6 we do, and if so what would be the unbundled price, but we are thinking very seriously of
7 that. Our understanding is ----

8 THE PRESIDENT: To what timetable are you broadly working, do you know?

9 MR. VAUGHAN: We are trying to work to next Friday. This would be before 13th ----

10 THE PRESIDENT: For a decision on this point?

11 MR. VAUGHAN: Yes, because our understanding is the Health Service would like an unbundled
12 price, basically – they buy the drug and pay for the services. So we are not financing other
13 people's provision of services. They would rather know where they are in these things. It is
14 quite a complicated issue to ensure that we do not fall out of one trap into another trap, and
15 have another case against us on the unbundled price, so it is taking quite a time to do that,
16 because I assure you it is not the intention of the company to go from one elephant trap to
17 another elephant trap in that respect. So it is taking some time to work it out. But we hope
18 either by this Friday – more likely by the time of our reply – we would be able to let you
19 know what is the decision. If we cannot make up our minds by then you would have to
20 assume we are not in the short term unbundling in that way. You probably saw from the
21 observations that the Office of Fair Trading would be very happy if we were able to do that
22 because it would meet the point they always wanted, they say.

23 THE PRESIDENT: I think we left it open, or we pointed out in our Judgment that there are a
24 number of potential ways of solving this particular case.

25 MR. VAUGHAN: Absolutely, yes, and we are certainly looking very hard at this.

26 THE PRESIDENT: And subject to the Tribunal's approval we would be obviously pleased to
27 look at whatever you can come up with.

28 MR. VAUGHAN: And obviously we would tell you the basis, so that ----

29 THE PRESIDENT: It would be important to make sure, as you rightly say, that one had not
30 fallen out of one basket into another basket.

31 MR. VAUGHAN: Absolutely.

32 THE PRESIDENT: I think probably, collectively, between us we can probably avoid that.

33 MR. VAUGHAN: If we can get that area of documents we think there is a real prospect that we
34 could make most of the points we want to make on that basis for the 13th (or 14th) and it

1 may be at that stage it would be possible to reach more finality than otherwise, because
2 otherwise – it depends on what decision you made – we could be applying again for more
3 documents. But it is a fairly restricted class now, not the wide class we were going for.

4 Is it possible to have a five minute break at this stage just to make sure I am
5 saying what the team wants, as it were.

6 THE PRESIDENT: Of course, why not, if that will help matters along. We will rise until 10 past.

7 MR. VAUGHAN: Thank you very much indeed.

8 (The hearing adjourned at 11.05 a.m. and resumed at 11.15 a.m.)

9 MR. VAUGHAN: Thank you very much indeed, that was very helpful. Basically, the only
10 additional matter is the question of these tenders. If you look at the draft order, and para.22
11 of our original submissions for today – perhaps look at para.22 first:

12 “The tender documentation should also be required to be provided by NHS
13 bodies which have procured Homecare services delivery.”

14 We have seen a lot of invitations to tender in the unofficial journal. The Office of Fair
15 Trading told us that it was seeking information about Sheffield, but either they did so and
16 did not get an answer – they certainly have not relied upon it in their reply. There is also
17 one from Birmingham as well. If one goes to the draft order of the day, which we have
18 prepared, we would seek an order from the Tribunal that Sheffield do produce these tenders
19 received in respect of those reference numbers, and Birmingham Children’s’ Hospital.

20 THE PRESIDENT: I am sorry, I am looking at the wrong page.

21 MR. VAUGHAN: It is the draft order, p.3, annex 1, at the bottom. We know there are four
22 tenders from Sheffield which are relevant to this question and one from Birmingham, and
23 we believe these show considerably lower sums for the competitive sums than the sum
24 mentioned in the OFT report, but we have no way of knowing what it is. That will be the
25 best idea of what is the current competitive price. We would either seek an order that they
26 be produced to the Tribunal and to the parties within the confidentiality ring, and
27 alternatively that Healthcare At Home produce their attendance for these contracts. If
28 Healthcare says it is not prepared to produce them we will seek an order. It would be helpful
29 if Mr. Burrows could deal with that because our experts have the view that that would
30 probably give the best idea of what is the competitive market price for performing these sort
31 of functions.

32 THE PRESIDENT: It is quite difficult for us to order discovery of documents in the hands of
33 parties that are not before the Tribunal that relate to documents that have been produced by
34 still other parties containing confidential information ----

1 MR. VAUGHAN: Healthcare At Home won both these contracts and it may be that the answer is
2 to ask that for all these contracts Healthcare At Home produce all these documents, or at
3 least indicate a price in these matters.

4 THE PRESIDENT: This is on nursing, is it?

5 MR. VAUGHAN: Nursing and/or delivery.

6 THE PRESIDENT: Yes.

7 MR. VAUGHAN: These are the awards from the – if I can hand in – Birmingham
8 Pharmaceuticals. For example, the Birmingham one, if I can hand that in for the Tribunal.
9 [Document handed to the Tribunal] Healthcare At Home won the award. An alternative
10 way of getting to this solution, if we went the other way saying Healthcare At Home must
11 produce, or should produce these sort of figures in its reply, the trouble is our experts will
12 not know it until we see it from that. We would seek an order may be as against Healthcare
13 At Home. They give us details of the tender of these matters, because it is clear ----

14 THE PRESIDENT: On the restricted basis?

15 MR. VAUGHAN: On the restricted basis, the circle, because it is clear that Sheffield were asked
16 by the OFT and either did produce and it was not relied on, or did not produce it, we do not
17 know what the answer is. The Office of Fair Trading, we told them about this one and they
18 said they were going to make inquiries, but nothing comes into the report from it at all.
19 Obviously, it would be very helpful and make our job much easier if we could see these
20 tenders if our experts produced their original report in that way. No doubt Mr. Burrows can
21 deal with that when he makes his points. Subject to that, and subject to the other matters I
22 have already adumbrated we would be prepared, or we would see a great deal of sense in
23 the way you are proposing to go. Certainly, our experts very much like the idea of what in
24 arbitration terms is called “hot tubbing”, which is putting all the experts together ----

25 THE PRESIDENT: Yes.

26 MR. VAUGHAN: -- and get the lawyers out of the way and see if you can reach some sort of
27 solution. We are quite happy with that basis. If we see these other documents it is going to
28 mean that next Friday's written observations is much more complete and much more
29 valuable, we hope, and will also indicate much more clearly what our case position is –
30 what we agree with and what we disagree with in these matters. Obviously, it is not very
31 difficult to see that potentially there are very big sums involved in this, whether for the past
32 or the future, and it is a matter of the greatest concern to get it right in this matter.

33 Thank you very much, Sir.

34 THE PRESIDENT: Mr. Vaughan, before you sit down, just on the other possibility that you

1 raised about unbundling. In some ways unbundling would (or might) resolve quite a number
2 of difficult points.

3 MR. VAUGHAN: Absolutely.

4 THE PRESIDENT: It would clearly be somewhat perverse if the way that one unbundled did
5 result in a total price that was higher in some way than the existing price, but I cannot
6 believe that anyone would suggest anything of the kind. From our point of view I think it
7 would be useful to know a little bit along the following lines. If you reach a decision in
8 principle to unbundled that in itself I think is an interesting development in the case.

9 MR. VAUGHAN: Yes.

10 THE PRESIDENT: If you reach a decision not to unbundled, then I think from our point of view
11 and in fairness to you we would be quite glad to understand your process of reasoning as to
12 why it is difficult, what the disadvantages are and why you have decided to down that
13 particular commercial route, so you can really understand or get to the heart of your
14 thinking.

15 MR. VAUGHAN: Obviously we will develop this a bit later, but basically our understanding is
16 talking to everyone now is the hospital want a drug and they want a service, and they want
17 to keep them entirely separate so they can do it in hospital, through District Nurses, or
18 however they want to do it, so it is clean, and that is our understanding of the way everyone
19 would want it, and also they could tender without the tender for each part in that way.

20 THE PRESIDENT: Well they can do various things, mix and match and leave it a bit more open.

21 MR. VAUGHAN: Yes, the original dream of the composite service, as it were, does not exist any
22 more, the hope of having a composite service, which was the original concept.

23 THE PRESIDENT: By "composite" service, you mean the drug ----

24 MR. VAUGHAN: The drug and the service all in one. Right in the early days when Healthcare
25 At Home or Clinovia before were doing the work and nobody had to pay any extra for that.
26 I think the basic idea is that is what the customer wants and that is what the customer will
27 get in the longer term, so we might as well bite the bullet now.

28 THE PRESIDENT: Well it sounds sensible.

29 MR. VAUGHAN: But anyhow, thank you very much for those remarks, it is helpful.

30 THE PRESIDENT: Thank you. Yes, Mr. Burrows?

31 MR. BURROWS: Thank you, Sir. Could I deal with a quick point of housekeeping first?

32 THE PRESIDENT: Yes.

33 MR. BURROWS: First, to thank you for producing the order so quickly this week to enable us to
34 disclose our response. Secondly, it is still the case that I am outside the confidentiality ring.

1 THE PRESIDENT: You, personally?

2 MR. BURROWS: Yes.

3 THE PRESIDENT: Yes.

4 MR. BURROWS: And I was wondering whether any of the parties would object if I was to apply
5 to be included, and obviously we will have to submit the relevant engrossments. So that is
6 myself and also Ben Tidswell who is a Partner in Ashurst, and you may remember from the
7 interim relief proceedings. We will write formally to you on that point, but I do not think
8 there should be any objection, but I obviously raise the point.

9 There is quite a long list of things that are thrown up. I had prepared a short
10 speaking note for this morning. I do not think there is any need to go through that. However,
11 I might just hand it up so you have at least got it.

12 THE PRESIDENT: From what I have picked up so far, Mr. Burrows, the main points that are
13 floating around that affect you are some of these documents that we have been talking
14 about?

15 MR. BURROWS: Yes, I am planning to get to those, Sir. First, the status of our response which
16 we have put in. Genzyme have asked today whether they might be able to give this
17 document in its entirety to their client. I do not know whether you have a copy, Sir.

18 THE PRESIDENT: I think the first question is the experts.

19 MR. VAUGHAN: Mr. Walsh is 1 and 2. The document which is Mr. Walsh's statement about
20 the 1998 negotiations with Genzyme generally, but I think the clients do need to see at least
21 a redacted copy of Mr. Burrows's note, because at the moment they cannot see anything. I
22 would be grateful if he could at least give us a redacted copy of that.

23 THE PRESIDENT: When you say "Mr. Burrows's note"?

24 MR. VAUGHAN: Sorry, this is the whole response to the note, to the Margin Squeeze Report,
25 that is not available at the moment to our clients.

26 THE PRESIDENT: Is it available to your experts?

27 MR. VAUGHAN: It is available to our experts, but the clients have no idea what it says insofar
28 as they are listening now.

29 THE PRESIDENT: Yes.

30 MR. VAUGHAN: And we are quite content that that document as it is can go to our experts.
31 What we would like to see is a redacted version of that plus the acceptance that Mr. Johnson
32 and others can see the relevant points in connection with the tender 1998, which deals with
33 his negotiations with my clients.

34 THE PRESIDENT: Yes, Mr. Burrows.

1 MR. BURROWS: Thank you, Sir. I think I had understood Mr. Vaughan correctly. This is the
2 document, that is what it looks like. There have been some references to a note from me, I
3 am not aware that I have submitted a note. We have the formal response from Healthcare
4 At Home (at the front) to the Margin Squeeze Report, which essentially sets out their
5 position.

6 At annex 1 we have a memorandum that was submitted on 14th July which
7 essentially sets out their position in respect of dealing with the substantive Judgment and the
8 potential remedies envisaged by the Tribunal at that stage. Then at annex 2 we have this
9 note, which is the note from Charles Walsh at Healthcare At Home. At annex 3 we have
10 what is called the fourth response of Healthcare At Home to the OFT's questions. To cut
11 matters short I do not think there will be any objection to providing Mr. Vaughan's clients
12 with a redacted version of this document and, indeed, I think the document that is of
13 particular interest is the note from Charles Walsh regarding the 1998 negotiations which
14 were with Genzyme and clearly matters that were discussed with Genzyme at the time
15 cannot be confidential from Genzyme. So we will take that approach.

16 THE PRESIDENT: So that note can go to Genzyme in its entirety?

17 MR. BURROWS: I think it would be sensible, because it does refer on the first page to minimum
18 net margins that Healthcare At Home's chemist in particular was dealing with, and we will
19 just have to check some little points like that just to make absolutely sure nothing is passed
20 on, but I think the majority of it can go.

21 THE PRESIDENT: Some of this early stuff is historical anyway, is it not?

22 MR. BURROWS: Yes.

23 THE PRESIDENT: Strictly speaking it may not still be covered by the business secrecy regime
24 under the Act, and it is too old to worry about.

25 MR. BURROWS: Yes. We will not adopt a fussy position in respect of this document, Sir.

26 THE PRESIDENT: That would be helpful, and on the basis that more that can be disclosed the
27 more everybody is happy obviously.

28 MR. BURROWS: Yes, we understand that.

29 THE PRESIDENT: So on the first few points, Mr. Vaughan, I think you have already made some
30 progress.

31 MR. VAUGHAN: Yes.

32 THE PRESIDENT: You get the notes and you get a redacted version of the rest of it.

33 MR. BURROWS: We are seeking to make progress, Sir.

34 THE PRESIDENT: Yes, thank you, Mr. Burrows.

1 MR. BURROWS: We have also heard reference today to some other documents – I think five in
2 total. Mr. Vaughan I think is advancing a sort of trimmed down disclosure application in
3 respect of those, and I will treat it as such. I think before we turn to those five documents if
4 you could just take up the speaking note. We make some general points about the legal
5 approach, which Mr. Thomas has already touched up on in terms of *Solvay* and whether that
6 really applies here. We then make some points about necessity and again we say it is all
7 down to context, but I think it is point 3 in terms of disclosure to the confidentiality ring that
8 I wish you just to have a look at. As I say there, we do reject the assumption that the
9 disclosures to the confidentiality ring alone is completely uncontroversial. That is not to
10 cast an personal aspersions, but we make two principal points.

11 First, it is the case, of course, that Professor Yarrow – and I am quoting here from
12 Genzyme’s Notice of Appeal:

13 “...is regularly called upon to discuss procurement issues with the PPRS and
14 reimbursement issues with the Department of Health, including Mr. Brownlee
15 and his colleagues.”

16 I think it is uncontroversial that they are on occasion important customers of Healthcare At
17 Home and we clearly would not want to limit Professor Yarrow’s future involvement, and
18 indeed for him to be embarrassed in what essentially seems to be a major part of this work.
19 We are also not clear the extent to which he might advise other pharmaceutical contractors
20 when conducting such negotiations and again if he essentially receives material which lifts
21 the skirt on our business that might well embarrass him.

22 Secondly, it is never the case I think that a confidentiality ring is watertight, and I
23 point out there we have already certainly had two inadvertent leaks of confidential
24 information in this case already, and I have flagged up the relevant correspondence.

25 THE PRESIDENT: If you are submitting to us, Mr. Burrows, that in this sort of case we should
26 limit disclosure to things that are absolutely necessary and not impose on the confidentiality
27 ring a weight that it might not be able to bear then we are broadly with you on that
28 submission as a matter of principle.

29 MR. BURROWS: Yes, that is the point and it is not a new one for the Tribunal, I think. So that
30 is the background. At 3.4 of the note you will also see the more general point which is, of
31 course, that all the material provided by HH was submitted to the OFT under a voluntary --

32 THE PRESIDENT: Under a broad confidentiality umbrella.

33 MR. BURROWS: Exactly, and it was not with a mind that it would simply be passed on unless
34 absolutely necessary, in exceptional circumstances we would say.

1 Turning to the five categories of documents that have been asked for. The first
2 one I had was on the note on the original negotiations in 1998 which dealt with that. I will
3 leave the second until last. The third is the other two witness statements of Mr. Walsh. We
4 will have no objection to those being included within the terms of the confidentiality ring. I
5 think they were the first and second witness statements submitted in the context of the
6 interim relief proceedings.

7 The fourth and fifth relate to information on tenders, and then the fifth was
8 probably the same category, but it was a more specific request for tender information, as I
9 understood it a tender to Sheffield.

10 THE PRESIDENT: As we, by implication, boiled it down in the course of discussion, I think
11 what Mr. Vaughan is seeking – formally, at least – is your tender to Sheffield, and I think
12 there are two others that you have apparently succeeded in.

13 MR. BURROWS: Sir, I apologise if I am slightly unclear. I have Sheffield, Birmingham.

14 MR. VAUGHAN: Four at Sheffield and one at Birmingham.

15 MR. BURROWS: Dealing with that on the hoof, so to speak, the point that immediately comes to
16 mind is, of course, that both of those documents may contain materials that is not just
17 confidential to HH, but also confidential to the two hospitals. It is, of course, the case, that
18 in the modern system the hospitals to some extent compete to procure services against each
19 other, and we simply cannot release those. I would suggest that the sensible way to deal
20 with those two documents is for the OFT to recontact the relevant Authorities.

21 THE PRESIDENT: What Genzyme is trying to get at, apparently, are the nursing and delivery
22 costs and they say there is information in those documents that is relevant to that, or could
23 be. We, the Tribunal, as of today have no position as to whether we need further
24 information on those matters, we just have no position. It may be that there are other ways
25 of resolving this particular aspect other than disclosure of these tender documents, I just do
26 not know. I have not discussed it with colleagues yet, but certainly as of today I would not
27 myself be particularly minded to make a disclosure order in relation to these documents.

28 MR. BURROWS: I am very grateful for that indication. Then we turn to the last point which
29 was point number 2, which was generally the other submissions given by HAH to the OFT.
30 I think, broadly speaking, there are four submissions or responses to questions. Genzyme
31 have already had the fourth.

32 THE PRESIDENT: That is annex 3, is that?

33 MR. BURROWS: Correct, yes. As you will see, the majority of that document which very much
34 came at the end of the process is really submission on the part of Healthcare At Home's

1 part, and there is not really an issue of too much confidential in there. That is very different
2 to the first three responses, and I think there are two points to make there.

3 First, Genzyme have already had some of the material. I do not have the benefit
4 of having all of the annexes to the OFT's first and supplementary report because some of
5 those were confidential from us. But my understanding is that perhaps the key piece of
6 information, which is something called the complexity quotient, which is what HH used
7 essentially to allocate its costs across its business for the purpose of providing an estimate to
8 the OFT of Cerezyme costs, and that includes all of the products supplied by the business
9 across the entirety of the business's operations. The complexity quotient has been disclosed
10 to the ring. What have not been disclosed are the subsequent comments and the use, if you
11 like, that HH makes from that complexity quotient, i.e. it says that this broadly is how you
12 allocate costs, and essentially that is carried through and the consequences, using HH's
13 knowledge of its own business, are brought out for the OFT's benefit.

14 THE PRESIDENT: So they know the principle, but they do not know how you have actually
15 applied the principle.

16 MR. BURROWS: Absolutely, so there is a distinction to be drawn there. What they also have –
17 and we would say this is the important part – is a table which includes the OFT's adjusted
18 complexity quotient, if you like, so they can see what the OFT has accepted or rejected,
19 which as an aside I think is a useful indication of the robust nature that they have adopted
20 generally to the material that has been supplied to them. They have not just accepted it.
21 What they also have, of course, is the conclusions that the OFT have drawn contained in the
22 report. We would say that they already have the substance, certainly, so far as the OFT
23 have used it, but they do not have the very particular information that essentially indicates
24 how we have used it. That, we would say, is confidential, it remains confidential and is not
25 something that we would wish to be disclosed in particular – and again this is not a personal
26 comment – to Professor Yarrow, simply by the nature of his work.

27 Sir, that is where we stand. I hope that has been helpful. We are trying to assist
28 what we always had assumed was going to be a conciliatory process. In s.4 of the note we
29 make the point which I hope is a point fairly made which is that there has been a degree of
30 slippage in this process from what was originally intended, and your comments this
31 morning were very welcome indeed, but hopefully we are going to get it back on track
32 insofar as Healthcare At Home would see it.

33 I do not know if it would be of assistance at this stage to talk about whether we
34 are going to put in another document or not. It might, perhaps, be better to leave that for the

1 moment – I think Mr. Thompson might wish to come back on the revised disclosure
2 application.

3 THE PRESIDENT: I think let us just park it there for the moment, thank you, Mr. Burrows.

4 (The Tribunal confer)

5 THE PRESIDENT: Mr. Vaughan, I think you have got a certain amount out of what Mr. Burrows
6 said.

7 MR. VAUGHAN: Yes.

8 THE PRESIDENT: I do not think we are in a position to make any further disclosure orders
9 beyond that today. I think it would have to be very fully argued. We are not quite ready to
10 say that it is absolutely necessary to your case – it may be desirable, but is it absolutely
11 necessary. It is very sensitive from their point of view. You would be potentially getting a
12 lot of their costs, but there is no two way street, as it were. So I think that is too difficult to
13 tackle in the context of this morning.

14 MR. VAUGHAN: The big point I would like to revert to is the tender point. At the moment the
15 market the OFT has defined as this narrow market, there is no indication of what the price is
16 at all for the services being given in this market, other than the drug price, and somebody
17 has to try and solve that issue. The complexity quotient is basically comparing Cerezyme
18 with Zomacton, saying one is relatively complex and the other is relatively simple, that is
19 the quotient as far as we can see – the first page of annex 9 to the original report – and that
20 is what we understand that to be. It is a pretty uninspiring document as to what it does.

21 I would like, if possible, to go back to the tender point, because that is the only
22 indication that we have of what is the price. We can approach it from different ways. We
23 can approach it from nursing costs and try to work it out that way. There are alternative
24 ways of doing it, but basically that is going to be the best one. Professor Yarrow and Dr.
25 Appleyard if they do not have that will have to make a lot of assumptions in their positions.
26 I think probably it is clearly much easier if they do not have to make a large number of
27 assumptions when, in fact, the real prices are there. We would be quite happy if we could
28 just have a figure on this matter. What is the product? What is the service being provided
29 and what is the figure. If we got those it would make it very much easier, just three figures
30 for the four contracts with Sheffield, and the one with Birmingham. Even if we did not get
31 more than that, it would at least give us an indication of whether we are talking about 210 or
32 140 or 80 – whatever the figure might be – because that builds on in quite dramatic terms
33 later on into the whole question, so if you are 200 per cent. out on the basic cost you are
34 going to be at least 200 per cent. out later in the calculations. So if they can provide us with

1 that it would be quite helpful, and anything else they feel would help explain it if they
2 wanted to. Otherwise we are going to have to make a lot of assumptions.

3 THE PRESIDENT: Yes, we have the point you make. I think perhaps we ought to see whether
4 the OFT has a position on any of this, particularly about this tender document.

5 MR. THOMPSON: Can I make two short general points. One, we would not accept that this was
6 primarily issues of fact which were dividing the party and I think you have our initial
7 submission the points that we say are really dividing the parties, which we say are points of
8 principle of how you allocate costs – the right approach to delivery, issues of that kind.

9 THE PRESIDENT: You say once you have sorted out the principles the answer presents itself.

10 MR. THOMPSON: It will narrow the issue very considerably. The second point is we are
11 slightly concerned at the possibility you might be leaving this over until 13th October. We
12 do think it would be desirable to know now what the procedure is going to be for resolving
13 this matter in the hope that we can actually resolve it on 13th October.

14 THE PRESIDENT: When you say “this matter” you say the disclosure issue or the issue as a
15 whole?

16 MR. THOMPSON: The issue as a whole, because it would be unfortunate if we came back on
17 13th October, had some hot tubbing and then discovered that we wanted another piece of
18 information and had to get out of the tub and come back again in November or December.
19 We think it would be desirable to know what the procedure is going to be and to work
20 towards resolving it on 13th October.

21 THE PRESIDENT: Yes.

22 MR. THOMPSON: In relation to the specific issue of tenders, my understanding is that the OFT
23 does not actually hold this information or these documents. We have made requests, but we
24 have not received answers. I understand from Mr. Vaughan that Genzyme has not actually
25 asked Sheffield or Birmingham for any of this information and so we are in a slightly
26 difficult position, we have asked but have not been given the information.

27 THE PRESIDENT: You have asked the hospitals, you mean?

28 MR. THOMPSON: As I understand it, yes. So essentially Healthcare At Home is the only
29 person here who actually has this document information so we are essentially an observer at
30 this stage.

31 I do not know if it is appropriate for me to say it now but as I am on my feet I
32 will, we do have some concern about Mr. Burrows entering the confidentiality regime
33 simply on behalf of Central Homecare and Clinovia, because of course Healthcare At Home
34 is their direct competitor across the whole homecare services market and we have no

1 indication from them as to whether or not they would be happy for even the legal
2 representatives of Healthcare At Home to be part of a confidentiality ring which they
3 entered into on a different basis.

4 THE PRESIDENT: You mean in relation to information supplied by them?

5 MR. THOMPSON: In particular, yes, and insofar as that appears, for example, in our report.
6 Those are the only points I had to make.

7 THE PRESIDENT: Yes, thank you. As far as the question of the utility of 13th October is
8 concerned, I think what we would try and envisage is to let the parties know as soon as we
9 could whether there was anything further that we needed for that date. We are not in a
10 position to do so today simply because a lot of this stuff has only come in in the last couple
11 of days and it takes time to absorb it and we have not yet met as a Tribunal to discuss it.
12 My overall impression is that there is a great deal in the papers now – a great deal of
13 material that we did not have before – and I would have thought that on 13th October we can
14 still have a pretty useful discussion with a view to seeing whether a solution is in sight or
15 not, on the basis very largely of what we have at the moment, or there may still be one or
16 two other things that we do in fact need. I think that is as far as we can take it at the
17 moment.

18 (The Tribunal confer)

19 MR. THOMPSON: I do not know whether it would assist – I think part of the problem here is
20 that the OFT obviously has its general status in relation to investigation but at this particular
21 stage we are essentially in the position simply of a litigant and we go and ask people for
22 things but if they do not give them to us we have no power to enforce it, and so in a sense if
23 the Tribunal wants a particular piece of information in the end one comes to the undesirable
24 situation----

25 THE PRESIDENT: We may have to make an order.

26 MR. THOMPSON: -- of saying to Sheffield “We want this piece of information” and we are
27 unfortunately unable to help.

28 THE PRESIDENT: I cannot at the moment quite envisage getting information from third parties
29 that are not before the Tribunal directly from those third parties rather than going through
30 someone who is before the Tribunal. That is to say, in relation to Sheffield the information
31 is apparently in Healthcare At Home – if we wanted it we would ask them, I would have
32 thought.

33 As far as the confidentiality ring is concerned, and Mr. Burrows’ personal
34 position – it is nothing personal, Mr. Burrows ----

1 MR. BURROWS: Could I just make one point on that, Sir?

2 THE PRESIDENT: Yes.

3 MR. BURROWS: It is of course the case that Genzyme Homecare are if not an actual competitor
4 then a potential competitor of both Caremark and Clinovia. So I am not sure that the point
5 is a specific one.

6 THE PRESIDENT: If they have been given it on a restricted business then there is no reason why
7 you should not be given it.

8 MR. BURROWS: Yes, and of course, without the material we are going to be materially
9 prejudiced in playing any part in these proceedings. That point is there. I have no wish to
10 see any material that is not relevant to the OFT's final report, so if that would help matters.

11 THE PRESIDENT: Yes, thank you, Mr. Burrows. Mr. Thompson, do you have any observation
12 on that last point made by Mr. Burrows that after all this Central Homecare and Clinovia
13 information had been supplied to Genzyme on a restricted basis so why not Healthcare At
14 Home?

15 MR. THOMPSON: I have two points. One, Healthcare At Home is an actual competitor of those
16 two companies across the board, whereas in fact Genzyme Homecare is not actually – partly
17 for reasons linked to this case – an actual competitor, I think, of either of them at all. The
18 second is that the information was given to the OFT on the basis of the confidentiality ring
19 that had been already ordered and was explained to them. So to vary that ring in a way that
20 prejudiced them after they had given the information in my submission does raise quite
21 distinct procedural issues which they ought to be heard on before that is done. It is also put
22 to me that it is not clear to us exactly what Healthcare at Home would gain from seeing the
23 specific figures in relation to Clinovia and Central Homecare, because at the moment, as I
24 understand it, it is not intended to go out to the client or to any experts on behalf of
25 Healthcare At Home and apart from feeling that they were part of the exercise, in our
26 submission it is not entirely clear to us what Mr Burrows, for example, could bring to the
27 party by seeing those figures.

28 THE PRESIDENT: Mr. Burrows, it sounds to me as if the best solution, or the safest solution, at
29 this stage is for you to have this information but without the Central Homecare and Clinovia
30 parts.

31 MR. BURROWS: Sir, just on the last point, and I wonder whether this might be a compromise,
32 the information that is of particular interest relates to the profit margin because, as you may
33 have read, that has been adjusted down on the basis of estimates supplied by Clinovia and
34 Central Homecare. Without knowing even how much it has been adjusted down we are at

1 somewhat of a loss to make submissions on that point. We are not looking for any
2 underlying detail, merely the conclusion reached in the report.

3 THE PRESIDENT: I think on a point such as this the Tribunal's position is that it would be very
4 difficult to disclose this information on a basis that changed the basis upon which the
5 information was originally provided without hearing the parties concerned. I think at least
6 for the moment you will have to get along without this. If you want to pursue it we may
7 have to have a separate procedure for seeing whether there are, in fact, objections from
8 Clinovia and Central Homecare, but in the absence of hearing those parties, or giving them
9 any opportunity to make their point I do not think we can safely release their information
10 beyond the ring that we already have.

11 MR. BURROWS: I am grateful, Sir. Would you have any objection if we were to take the point
12 up with the OFT and ask them to perhaps contact – I make that against the background that
13 when the confidentiality ring was originally formed we did write in express terms and make
14 it clear that we might well be making an application to join it at a later stage.

15 THE PRESIDENT: We cannot stop you writing to the OFT but you just take it forward as you
16 feel.

17 MR. BURROWS: I am grateful.

18 THE PRESIDENT: Mr. Vaughan, in relation to the Sheffield tender, again this is potentially
19 sensitive commercial information. We understand the points you make but we need to be
20 satisfied that it would be necessary to disclose this document. We are not in a position as of
21 today to say that it is necessary so I think we will make no order on that application as of
22 today, but we keep it under review.

23 MR. VAUGHAN: Thank you for that, Sir, it is most helpful. Obviously Professor Yarrow will
24 deal with it as necessary.

25 THE PRESIDENT: You will just have to do the best you can for the time being.

26 MR. VAUGHAN: Yes, thank you very much indeed.

27 THE PRESIDENT: Very well. I think we have more or less got as far as we can today. We have
28 already I think set a timetable for submissions.

29 MR. VAUGHAN: Yes, us Friday and then the OFT and Healthcare At Home the Friday
30 afterwards.

31 THE PRESIDENT: We will stick to that timetable, and we will try and let the parties know in
32 reasonable time a framework for the 13th so we all have a slightly clearer idea of what we
33 have in our heads, and where we want to get to by the end of that day.

1 MR. VAUGHAN: Yes, and certainly our experts pretty much welcome a discussion rather than
2 advocacy in cross-examination, I think.

3 THE PRESIDENT: Well if we are going to have a “hot tub” we need to work out how we are
4 going to do it.

5 MR. VAUGHAN: Who is to be in it.

6 THE PRESIDENT: Who is to be in it and how hot the water is to be, and where the changing
7 rooms are and all the rest of it.

8 MR. BURROWS: Sir, might I interrupt? Just imagining the picture of the hot tub and whether I
9 am going to be allowed to get in it? [Laughter]

10 THE PRESIDENT: As far as I am concerned, subject to the point about Central Homecare and
11 Clinovia for the time being, I think you are in the confidentiality ring to the exclusion of
12 information relating to those two companies.

13 MR. BURROWS: Yes, I am grateful.

14 THE PRESIDENT: We need to make an order to that effect. So to that extent it sounds as if it is a
15 bit more than a toe in the tub.

16 Very well, is there any other point anyone wishes to raise at the moment? (After a
17 pause) Thank you all very much indeed.

18 (The hearing adjourned until Wednesday, 13th October 2004)