

This Transcript has not been proof read or corrected. It is a working tool for the Tribunal for use in preparing its judgment. It will be placed on the Tribunal Website for readers to see how matters were conducted at the public hearing of these proceedings and is not to be relied on or cited in the context of any other proceedings. The Tribunal's judgment in this matter will be the final and definitive record.

IN THE COMPETITION
APPEAL TRIBUNAL

Case no. 1028/5/7/04

Victoria House,
Bloomsbury Place,
London WC1A 2EB

2nd February 2005

Before:
MARION SIMMONS QC
(The Chairman)

Sitting as a Tribunal in England and Wales

BETWEEN:

BCL OLD CO LIMITED & OTHERS Claimants

and

AVENTIS S.A. & OTHERS Defendants

AND

DEANS FOODS & OTHERS Claimants

and

ROCHE PRODUCTS LIMITED & OTHERS Defendants

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

Mr Thomas de la Mare (instructed by Ashurst) appeared for the Defendants Aventis & Rhodia.

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

Mr Jonathan Lawrence (of Freshfield Bruckhaus Deringer) appeared for the Defendants Hoffman –La Roche and Roche Products Limited.

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

CASE MANAGEMENT CONFERENCE

1 THE CHAIRMAN: Can I just begin by saying where I think you have got to – that is usually quite
2 a useful way of dealing with matters? First, I am very pleased to see the progress made
3 yesterday relating to disclosure. There appeared to be left only one substantial issue which is
4 whether tax experts should be instructed and then there is a small issue on timing as to whether
5 matters are to be dealt with by 10 a.m. or 5 p.m. on Monday (7 February). I hope that all the
6 other matters have been resolved but I will hear submissions. They have – right.

7 I also note that Mr McDougall and I think Mr de la Mare are here today.

8 MR DE LA MARE: That is correct, madam.

9 THE CHAIRMAN: As to the question of tax experts, for my part – without hearing you further and
10 I am of course going to hear you – I do not understand why evidence in that form is required.
11 Tax is a matter which is normally dealt with by legal submissions. I am not clear as to whom
12 Mr Willcox and Mr Bamford are, or what their qualifications are, although I think they are tax
13 managers and I assume that they are going to give factual evidence about the tax position of
14 the relevant companies. The authorities as far as I see, and subject to further submissions,
15 suggest that a pragmatic approach needs to be taken when considering the tax implications of
16 damages. Subject to hearing any submissions, I would suggest that the information being
17 provided by the claimants, including the witness statements, needs first to be considered –
18 hopefully it will be uncontroversial. Any tax issues can then be dealt with at the hearing by
19 legal submissions. If it transpires unfortunately that the information and the witness statements
20 do not provide the necessary evidence, which I hope will not be the case, then the application
21 can be renewed – possibly next Thursday afternoon or otherwise on Friday.

22 The Tribunal is, at the moment, anticipating hearing the Claimants' applications to
23 incorporate the restitution and exemplary damages claims on Thursday afternoon (10th
24 February) and at the moment it is anticipated - although I cannot confirm this - that the whole
25 Tribunal will sit. At the same time the Tribunal anticipates formally handing down the
26 Judgments which you have on limitation and security for costs. You will be receiving formal
27 letters from the Registry in relation to that. I hope that helps putting us into context.

28 MR LAWRENCE: Madam, thank you, it does. Can I extend the customary thanks to the Tribunal
29 for accommodating us on short notice this morning? I am pleased to say that the parties have
30 reached agreement on all of the substantive issues that remained outstanding in the
31 correspondence as of yesterday evening. I think it might be helpful ----

32 THE CHAIRMAN: Does that mean they have agreed on experts as well?

33 MR LAWRENCE: Indeed. For that reason I think it might be helpful if I were to hand up the letter
34 that we sent yesterday evening – it was copied to you ----

1 THE CHAIRMAN: I have seen it. I was actually here when it came.

2 MR LAWRENCE: Excellent. What I was proposing to do was to run through briefly the items that
3 have been agreed between the parties, because as between the parties the only issue appears to
4 be one of timetabling. Indeed, I do not even think there is an issue between the parties as to
5 timetabling, it is really an issue that we wish the Tribunal to address in terms of the conduct of
6 the trial and the amount of time allowed for cross-examination and re-examination.

7 The reason these applications arose, as you know, was because through Mr Morrell's
8 responses ----

9 THE CHAIRMAN: It was Mr Forbes, actually.

10 MR LAWRENCE: Mr Forbes has raised a criticism of Mr Morrell in terms of his not dealing with
11 the tax issue as part of his methodology criticism.

12 THE CHAIRMAN: The catalyst was Mr Forbes.

13 MR LAWRENCE: The catalyst may well have been Mr Forbes. That is the catalyst for the tax issue,
14 but Mr Morrell also on a number of occasions in his report introduces new factual evidence
15 based on information that he has been provided by a number of witnesses. So to illustrate,
16 Mr Easdon, Mr Gosling, Mr Halligan, Mr Wright, Mr Scragg, Mr Langford and Mr Willcox
17 have all provided Mr Morrell with new information which he has not audited or verified and
18 which is information entirely within the claimant's knowledge. The Roche defendants have
19 reacted by asking, where appropriate, for that information to be embodied in witness
20 statements, in other words, individuals who had provided new information who had not given
21 witness statements, and secondly we had asked for disclosure to be given on a Part 31.6 basis,
22 namely documents supporting and also documents detracting from the information given. My
23 understanding is both in the Premier and in the Deans' actions it is now agreed that witness
24 statements, where appropriate, and disclosure should be given by 5 p.m. on Monday 7th
25 February.

26 THE CHAIRMAN: So that is non-tax issues.

27 MR LAWRENCE: Those are tax and non-tax issues relating to witness statements of fact, and
28 disclosure of documents. If I could ask you, madam, to turn to the letter of 1st February, and
29 what my learned friends have agreed is that we try to agree an order resulting from our
30 discussions this morning that effectively embodied the agreement on these issues and provide
31 that to the Tribunal for its consideration.

32 As regards para.1 under "Tax Issues", we had asked for witness statements from
33 Mr Willcox and Mr Bamford, because those are the individuals referred to by Mr Morrell,
34 who provided him with information. I am told that Mr Wilcox may not be the appropriate

1 person to provide the information and we would be content to accept a witness statement from
2 the appropriate individual.

3 THE CHAIRMAN: But who is the appropriate individual?

4 MR LAWRENCE: I will have to look to my learned friend.

5 THE CHAIRMAN: I do not mean named, I mean qualifications.

6 MR RANDOLPH: Good morning, madam. As far as I am aware these are going to be factual
7 witness statements. Effectively, as far as I understand it, Mr Bamford is an in-house
8 accountant for BCL Premier.

9 THE CHAIRMAN: A Chartered accountant?

10 MR RANDOLPH: I have no idea whether that is Mr Bamford.

11 THE CHAIRMAN: Is he a qualified accountant? Saying somebody is an accountant does not mean
12 they are qualified. They may be very experienced, but they may not be qualified.

13 MR ROBERTSON: His title is "Tax Manager", we do not know whether he is a Chartered
14 accountant, or not.

15 THE CHAIRMAN: The only thing that is crossing my mind about it is that if the witness statements
16 are made by somebody who is a regulated accountant, if I can put it that way, then they have
17 duties in relation to their position and therefore it is more difficult to challenge it and therefore
18 it seemed to me that if these are done by that quality of person, then it is more likely that they
19 are going to be uncontroversial.

20 MR RANDOLPH: It may be, madam, that we are looking at it from a similar perspective, but
21 slightly different. In light of what you said earlier it may be that we can be more flexible on
22 this but we were envisaging factual witness statements from the people in the companies
23 themselves just saying "Look, what is set out in Mr Morrell's report is actually right" – fact –
24 and then moving on to the expert, as you say, a Chartered Accountant, who can say "I have
25 looked at that and that is right", or the position is X.

26 THE CHAIRMAN: Can we just explore this a bit because of what I said before. Whatever the tax
27 position was at the time is fact, and one cannot challenge their way of dealing with the tax and
28 getting into the whole scheme of whether they do their tax correctly or not, that is not what this
29 case is about. So one has pure fact, and that fact is very complicated in one sense because it has
30 all the tax elements in it. What is happening today is known by the auditors or the person
31 responsible in the auditors for the tax computations, etc. That is also effectively fact it is not
32 really opinion. Getting an independent person to verify all that, is that really necessary?

1 MR RANDOLPH: Well obviously it is for my learned friend, Mr Lawrence to pick that up, but I was
2 just trying to respond to your point, madam, about the fact it would be useful to get some
3 Chartered Accountant you mentioned, or someone ----

4 THE CHAIRMAN: Somebody who is regulated.

5 MR RANDOLPH: The problem is if there was someone who was not involved in the relevant
6 auditing at the time, and is just giving professional advice, that is where one would be ----

7 THE CHAIRMAN: So he is an expert and not ----

8 MR RANDOLPH: That would be an expert rather than a factual witness.

9 THE CHAIRMAN: I see.

10 MR RANDOLPH: That is the only point.

11 THE CHAIRMAN: All he is doing – it is not an expert in an opinion way, it is an expert saying that
12 “I have looked at the facts”.

13 MR RANDOLPH: I think it would be an expert, with respect in an opinion way, because he or she
14 would be an expert in tax law and rules, and would say: “I have looked at the facts, as set out
15 in the relevant witness statements and, as far as I am concerned, that has the following legal or
16 tax consequences.”

17 THE CHAIRMAN: Is that actually what you want? Is it not somebody who says “I have looked at
18 the audited accounts and the tax computations and that is what was paid, and this is how it is
19 paid”?

20 MR RANDOLPH: Maybe Madam it is not for me to address you as to why we want tax evidence,
21 because as you rightly pointed out earlier this arose from Mr Forbes, and the original request
22 was from Freshfields.

23 THE CHAIRMAN: It may increase your damages.

24 MR RANDOLPH: It may do, but equally it could in the short term increase one’s costs and one is
25 very keen on keeping those down, so maybe it is for Mr Lawrence to just address you as to
26 why they think it would be a good idea to have it and the rationale for having this additional
27 evidence is.

28 THE CHAIRMAN: What do they mean by a tax expert?

29 MR RANDOLPH: Exactly.

30 MR LAWRENCE: Madam, perhaps I could address this by taking you to s.7 of Mr Morrell’s
31 response, which is at tab 3A.

32 THE CHAIRMAN: I have actually made myself a little bundle.

33 MR LAWRENCE: I am looking at the response in the BCL action, which is the more complex of
34 the two.

1 THE CHAIRMAN: I am looking at the BCL one as well.

2 MR LAWRENCE: The Deans' one does not have the added complexity that we have in the BCL
3 action.

4 THE CHAIRMAN: Hillside Holdings.

5 MR LAWRENCE: Hillside Holdings and the ACT surplus issue, if I can call it that.

6 THE CHAIRMAN: Yes.

7 MR LAWRENCE: If we look at s.7.2, Mr Morrell in para.7.2.1 says:
8 "I have discussed the tax affairs of the Claimants with the tax manager of Premier
9 Foods. He was previously employed by Hillside Holdings."

10 THE CHAIRMAN: Is that one of these gentlemen?

11 MR LAWRENCE: My understanding, but I will corrected, is that that is Mr. Bamford, and that
12 Mr Bamford has agreed, or it has been agreed on his behalf that he will provide the witness
13 statements sought in para.1.

14 THE CHAIRMAN: Was he there at all times?

15 MR LAWRENCE: He was employed from 1987 by Hillside Holdings.

16 MR ROBERTSON: I believe he was there at all material times.

17 MR LAWRENCE: Over the page at para.7.3.2 Mr Morrell comments as follows:
18 "I understand that, at least since 1992 (and possibly before) the group (of which the
19 claimants were part) had a surplus of ACT (in each year) which could not be utilised
20 consequently this surplus ACT would have been offset against the tax on any additional
21 profits earned by the Claimants (had the Claimants not been overcharged for vitamins).
22 Therefore, the marginal rate of tax suffered by the Claimants would have varied
23 between 8% and 13% (being the difference ..."

24 Now, I note to start that Mr Morrell gives a band of percentages that might have been
25 applicable. He then goes on to say this, importantly, at 7.3.3:
26 "I understand that on two occasions when Hillside did surrender ACT to the
27 claimants..."

28 THE CHAIRMAN: Can I just stop you at 7.3.2 "the band" – is that because of the years?

29 MR LAWRENCE: We do not know. I look to my learned friend for help on that one.

30 THE CHAIRMAN: They probably do not know either, but I suspect that is the reason.

31 MR LAWRENCE: It is possible. I can only add that these things are ----

32 THE CHAIRMAN: It is the years, is it not? Yes.

33 MR LAWRENCE: That is my understanding.

34 THE CHAIRMAN: Because it shows you in table 5, that is easily explicable.

1 MR LAWRENCE: That may be easily explicable. In 7.3.3 Mr Morrell says:

2 "I understand that on two occasions when Hillsgdown Holdings did surrender ACT to
3 the Claimants, the Claimants paid Hillsgdown Holdings for this ACT. The payments
4 were discretionary. The surplus ACT asset had no current value to Hillsgdown
5 Holdings, the company, and it has now been written off in the financial statements of
6 Premier."

7 Now the consequences of the payments by the Claimants to Hillsgdown are explained by
8 Mr Morrell at 7.6.4 – the financial impact means that he produces a range of figures which are
9 affected by his tax assumptions.

10 THE CHAIRMAN: But is the problem footnote 79?

11 MR LAWRENCE: I do not think so. I think, madam, but again Mr Robertson will correct me if I am
12 wrong, the band depends on whether the Claimants would have paid Hillsgdown for the ACT.
13 That, in my submission, requires the exercise of a judgment, and therefore an expression of
14 opinion on whether the Claimants would have paid Hillsgdown Holding for the ACT. In other
15 words ----

16 THE CHAIRMAN: You mean, assuming if there is extra money – right?

17 MR LAWRENCE: Yes.

18 THE CHAIRMAN: If they had had this extra profit, how would they have used this extra profit?
19 Would it have been offset or not?

20 MR LAWRENCE: What would have happened within the Group? What would the tax advice have
21 been within the Group, and we need a full exploration of those two occasions when Hillsgdown
22 did surrender ACT, and we require to know from the Hillsgdown Group and the relevant
23 individuals what happened with other Group companies to whom ACT was surrendered, so
24 that the Tribunal can determine what would have happened had surplus ACT been surrendered.

25 THE CHAIRMAN: I see.

26 MR LAWRENCE: That is where expert evidence is required. I would add this ----

27 THE CHAIRMAN: That is very difficult. It may be very simple, and it maybe very difficult. It is
28 not expert being independent evidence because it needs subjective knowledge of how their tax
29 affairs worked, and really what it is is the people who have dealt with that saying that this is
30 what they would have done if they had had a bit more profit.

31 MR LAWRENCE: That may well be right, madam, but it assumes that we will have all the relevant
32 people before the Tribunal.

33 THE CHAIRMAN: It does seem Mr Bamford is the same person, but I do not know how senior he
34 is.

1 MR ROBERTSON: Madam, I cannot tell you how senior he is. Unfortunately, the partner
2 responsible for this action is away this week so I cannot take detailed instructions, but I do
3 know that inquiries were made and it was determined that Mr Bamford was the appropriate
4 witness to speak to these issues.

5 THE CHAIRMAN: But would he be able to speak to this issue?

6 MR ROBERTSON: Yes.

7 THE CHAIRMAN: Then he must be quite senior?

8 MR ROBERTSON: That is my inference, madam, but I cannot answer your exact question as to
9 exactly how senior he is.

10 THE CHAIRMAN: I am concerned about getting into the realms of looking into the crystal ball as
11 to what would happen, because I do not really think that that is what the cases have indicated
12 should be done in this area. It is a very “newish” area to go into in damages.

13 MR LAWRENCE: It is madam. Our submission on that is that the impact on this particular claim,
14 as illustrated by the figures at 7.6.4 show that the impact of the ACT surplus being paid to
15 Hillsdown by the Claimants or not, has an impact of – I am giving rough figures here –
16 between 15 and 25 per cent. of the total principal of the claim, and that the authorities *BTC v*
17 *Gourley* and the subsequent cases leading to the *Amstrad v Seagate* case, suggest that it is only
18 where there would be a disproportionate amount of effort relative to the amount of the claim
19 that you should not deal in detail with the tax issues.

20 THE CHAIRMAN: They did not have to deal in this sort of detail – it was not speculation that they
21 were looking at in those cases?

22 MR LAWRENCE: That is correct, although I am not sure if an issue of speculation as to what
23 would have happened had arisen, the approach would have been different. In this case, the
24 Tribunal will be asked by the Claimants and the Defendants to determine what would have
25 happened had surplus ACT been available. That has a material impact on the potential loss
26 recoverable.

27 THE CHAIRMAN: I can see the point. I really want to make sure that we get the right sort of
28 evidence and not really highly speculative evidence. It is all really based on somebody
29 internally saying “This is how we used to operate and these are our policies.”

30 MR LAWRENCE: Yes. On this side, madam, we would in any event need either tax counsel, or an
31 accountant qualified on tax issues to advise us as to whether the evidence that we are receiving
32 from the Claimants is credible and reasonable, and so in any event from the Defendants’
33 perspective ----

34 THE CHAIRMAN: But that may not be the court ordering a tax expert.

1 MR LAWRENCE: Indeed.

2 THE CHAIRMAN: Until we get the evidence, until you have seen that evidence, you may not know
3 what to do with it, and until you have spoken to somebody who has looked at it and said “Yes
4 that is in accordance, and is a sensible way of dealing with it”, or “no” that is not what they
5 would ever have done.

6 MR LAWRENCE: I can see the force of that. What we are concerned about is that if we are left
7 with a fluid timetable, with 12 working days to trial ----

8 THE CHAIRMAN: I appreciate that.

9 MR LAWRENCE: -- and to renew an application when we get the evidence next week, we may run
10 into further timing difficulties.

11 THE CHAIRMAN: I am concerned about making an order which lets everybody go off and do a lot
12 of work and a lot of experts, and then it turns out that in fact either one is going into the realms
13 of crystal ball gazing, which is not necessary, or if the whole thing was actually unnecessary
14 because had the evidence been produced and had been looked at by either tax counsel or your
15 tax department, or your tax advisers, they would have said “No, that is actually how it would
16 have been done”, and there is not a dispute. To go off and have a whole lot of orders about
17 experts at this stage – I appreciate where this stage is – but could be going down a road that is
18 unnecessary. On the other hand – I understand the point now – I quite appreciate why there is
19 an expert issue there and I can see why you have agreed that.

20 MR RANDOLPH: This all seems to be in connection with BCL, because the ACT does not arise so
21 far as Deans is concerned.

22 THE CHAIRMAN: Let us do BCL first. In relation to BCL I can understand the point, but the right
23 thing to do is to look at the evidence, do your “expert looking at it” to see whether or not one
24 needs expert evidence. But the concern which I am sure everybody has, not only me, that one
25 does not want to go off in to the realms of crystal ball gazing and speculation and double
26 guessing.

27 MR LAWRENCE: I would be content for the Roche defendants to hold over the application pending
28 receipt and review of the disclosure of witness statements.

29 THE CHAIRMAN: You are going to have the material by Monday?

30 MR LAWRENCE: By close of business, or 5 p.m. on Monday.

31 THE CHAIRMAN: So you have Tuesday and Wednesday to look at it? It is going to take you a
32 couple of days to look at it probably?

33 MR LAWRENCE: Indeed.

1 THE CHAIRMAN: Then if you need the evidence we can either deal with it on Thursday afternoon
2 – I can sit because I know about it all and nobody else does, and probably I could sit after that
3 hearing to deal with it – or otherwise on Friday. That does not seem to be delaying anything.

4 MR LAWRENCE: That would have no particular consequences for my clients. The timetable that
5 had been agreed with Mr Robertson and Mr Randolph was that their expert would, if
6 permission were granted, give his report to us on 14th, the following Monday.

7 THE CHAIRMAN: We will need to think about that, but it depends who Mr Bamford is really as to
8 whether they need to put an expert's report in at the same time on Tuesday, or something,
9 depending on whether Mr Bamford is giving the evidence and your expert was just thinking of
10 supporting it; or whether actually there is some other expert evidence there which needs to be
11 given. I still think it is more factual, although it has an opinion base. "These are the facts and
12 had we had those facts this is what we would have done – I understand that this is what we
13 would have done in the realms of expertise."

14 MR ROBERTSON: I agree with that analysis and I think for the time being we ought to hold over
15 any application to apply for expert evidence in support of Mr Bamford. I think Mr Bamford
16 will probably stand its own feet.

17 THE CHAIRMAN: What I do not want to happen is that it turns out that Mr Bamford does not stand
18 on his own feet obviously – it is obvious to any of us that he does not stand – and then you
19 have not done the next bit which is necessary and we are four days late.

20 MR ROBERTSON: Madam, we are concerned not to lose any time out of it and we will take away
21 from this morning's hearing the comments that you have made about the appropriate level of
22 expertise to be expected to support evidence of this nature. We will consider whether it is
23 necessary to back up Mr Bamford's evidence of fact of what took place at the time with
24 additional expert evidence and, if necessary we would make an application then to apply for
25 leave to serve an additional expert report.

26 THE CHAIRMAN: But the expert report being on the table at that point so we know exactly where
27 we are and the defendants knowing where they are?

28 MR ROBERTSON: Yes.

29 THE CHAIRMAN: Not that I should make the order so that you go off and get the expert.

30 MR ROBERTSON: No, we are not going to do it in a reactive way like that, madam. We will get
31 on with the exercise now as part of the exercise of settling Mr Bamford's witness statement.

32 THE CHAIRMAN: In other words, if you think that an expert is needed then you produce the
33 expert's report – we will discuss when – so that on Thursday afternoon this can all be sorted
34 out and that does not delay the timetable.

1 MR ROBERTSON: Madam, in that connection can I just make one observation about Thursday
2 afternoon, which is that I have a three day trial starting on Tuesday, so applications after
3 5 o'clock on Thursday afternoon I might be available for, but I cannot guarantee being
4 available on Thursday afternoon at this stage.

5 THE CHAIRMAN: I can tell you, as you know, the diary is very full.

6 MR ROBERTSON: I appreciate that.

7 THE CHAIRMAN: And Thursday afternoon is the only day the President at the moment can do.

8 MR ROBERTSON: Well in that case we will have to make arrangements accordingly.

9 THE CHAIRMAN: There is within the auditors the partner who was in charge of the tax
10 computations, he would have been in charge of looking at how you do it within the group and
11 all of that, and whether he is the right man or not I do not know, but I think that needs to be
12 explored.

13 MR ROBERTSON: I would have thought the obvious person for an expert report would be the tax
14 partner. Obviously I do not know the availability of the individuals concerned and all those
15 sorts of issues, but that at first blush would appear to be the appropriate person to give expert
16 evidence in support of Mr Bamford. As I say, it is only at first blush, I have not been able to
17 take instructions on that.

18 THE CHAIRMAN: I do not know if it is the same financial director, but it would need to be
19 explored.

20 MR ROBERTSON: Yes.

21 THE CHAIRMAN: Yes. I think we have probably resolved that, have we?

22 MR LAWRENCE: Yes, we have, although I wonder whether I could just supplement with one
23 observation on para.3 of the letter of 1st February, it overlaps. Paragraph 3 of our letter of
24 1st February asked for the information about who it was who had made the decisions about the
25 Claimants paying Hilldown for the ACT and it may well be ----

26 THE CHAIRMAN: Hopefully we have sorted that out.

27 MR LAWRENCE: -- that this will now be sorted through Mr Robertson's offer to provide either
28 expert or factual evidence that covers the point.

29 THE CHAIRMAN: You heard that, that does sound as though that sort of evidence may be relevant.

30 MR ROBERTSON: Yes, we have heard that and I think in principle we are in agreement.

31 THE CHAIRMAN: Hopefully that will be sorted out, and that will be provided in some form.

32 MR LAWRENCE: I wonder if now is an appropriate point just to go back to the letter?

33 THE CHAIRMAN: Do we need to deal with Deans?

34 MR RANDOLPH: Yes, please.

1 THE CHAIRMAN: Because they have not got the Hillsdown problem, so that is not the tax problem
2 that they have.

3 MR LAWRENCE: That is right, and I think the force of madam's comments earlier is taken in
4 relation to Deans, so it might well be that expert evidence for Deans is not required, our
5 concerns relate, I believe, to Premier.

6 THE CHAIRMAN: Right, then how are we going to deal with Deans?

7 MR RANDOLPH: We would be very content to go down the first part of the path, which is our
8 finance director – Mr Willcox or someone suitable, but I think it is probably going to be
9 Mr Willcox – will do what he has been asked to do at point 1 of the ----

10 THE CHAIRMAN: He is finance director?

11 MR RANDOLPH: He is finance director of Deans – that is set out in Mr Morrell's rebuttal evidence
12 at 7.2.1 – “Mr Chris Willcox, the finance director of the Claimant” – that is p.115 of
13 Freshfields' bundle. So he could do that by 5 p.m. on Monday.

14 THE CHAIRMAN: Right.

15 MR RANDOLPH: Then I am very grateful to hear what Mr Lawrence has said and hopefully that
16 can be that insofar as our evidence on the tax issue goes, hopefully we will not need to go
17 further and do what BCL are doing – we would be very happy not to go further. Then
18 effectively the parties join, or do not join issue on certain issues.

19 THE CHAIRMAN: Hopefully it is the sort of evidence which is factual and is very difficult to
20 challenge.

21 MR RANDOLPH: Exactly.

22 THE CHAIRMAN: And as long as it is given by the appropriate person ----

23 MR RANDOLPH: Well he is the finance director and, as Madam said, then it is a matter of legal
24 submission.

25 THE CHAIRMAN: Yes. I am not trying to stop you going somewhere that you want to go, I am just
26 trying to work out the most feasible way of doing it.

27 MR LAWRENCE: I am very content to go where we have ended up. I did not expect the Deans'
28 evidence to be contentious in the same way as the Premier evidence.

29 THE CHAIRMAN: And are you happy with the way that we are dealing with the BCL evidence?

30 MR LAWRENCE: I have concerns generally that we are trying to fit an awful lot into the pint pot,
31 but I am prepared to accept that the solution proposed is a practical one as it appears now.

32 THE CHAIRMAN: Right, thank you.

33 MR LAWRENCE: Alongside Mr Willcox and Mr Bamford's witness statements, the Claimants
34 have agreed in both the Premier and the Deans' action to provide disclosure on the basis set out

1 in CPR Rule 31.6 in relation to the tax issues by 5 p.m. on Monday 7th February, and so we
2 will receive documents and witness statements together.

3 THE CHAIRMAN: Has that been agreed?

4 MR LAWRENCE: It has.

5 MR RANDOLPH: He will receive documents insofar as there are documents, obviously.

6 THE CHAIRMAN: Yes, because one does not want a complete fishing exercise into the tax of these
7 companies.

8 MR LAWRENCE: That is understood. The search needs to be a proportionate search, however.

9 What we are concerned to avoid, both in relation to the tax issues and also the other assertions
10 of fact on which Mr Morrell relies is that individuals put forward recollections without having
11 considered appropriately whether there are documents that either support or detract from their
12 recollections.

13 THE CHAIRMAN: They should look at the documents before they speak.

14 MR LAWRENCE: They should at least conduct a proportionate search. That, I think, deals with
15 paras. 1 to 3 under the “Tax” heading. Paragraph 4 deals with the cross-examination schedules.
16 What we were proposing to do was to ask for permission that under the existing order cross-
17 examination schedules should be completed by 11th February. We would ask the Tribunal’s
18 permission that those cross-examination schedules to be submitted on 11th be still regarded as
19 provisional and that we update them in light of information.

20 THE CHAIRMAN: Yes – we certainly cannot update them now because we do not know whether
21 there will be cross-examination of these matters. It may be that it will all be accepted.

22 MR LAWRENCE: Indeed.

23 THE CHAIRMAN: What date are we doing that?

24 MR LAWRENCE: 11th February remains the date for cross-examination schedules, but the cross-
25 examination schedules will be provisional rather than final.

26 THE CHAIRMAN: That can go over to the pre-trial review.

27 MR RANDOLPH: The PTR, yes.

28 THE CHAIRMAN: Yes.

29 MR LAWRENCE: On 14th.

30 THE CHAIRMAN: That is Monday 14th before 21st, so that we can work that out and see that we
31 have that all timetabled properly.

32 MR LAWRENCE: Expert evidence is para.5 which we have dealt with, and I think para.6 also falls
33 into abeyance, which is the opportunity for Mr Forbes and Mr Morrell to reconsider their final
34 numbers in light of the further evidence and/or expert evidence.

1 THE CHAIRMAN: Yes, well either they will need to or they will not, and that will have to be done.
2 MR LAWRENCE: Indeed.
3 THE CHAIRMAN: If it needs to be done it does not need an order before it is done
4 MR LAWRENCE: Indeed. That deals with the tax issue. There are then two or three items to touch
5 on. There is the other factual evidence which has been introduced from the gentlemen that
6 I referred to earlier, Mr Eason, Mr Wright, Mr Gosling, and so on. There are also two other
7 individuals, Miss Joret and Mr Saunders. We received yesterday afternoon short witness
8 statements from those individuals ----
9 THE CHAIRMAN: They are one paragraph?
10 MR RANDOLPH: Yes.
11 MR LAWRENCE: My understanding is that it is agreed between the parties, subject to the Tribunal
12 giving permission to adduce the further witness statements, that those individuals would then
13 be available at trial to be cross-examined and that they will also conduct a proportionate search
14 for documents on a Part 31.6 basis.
15 THE CHAIRMAN: That has been agreed?
16 MR RANDOLPH: That has been agreed.
17 THE CHAIRMAN: Is there any reason why I should not be giving permission for those witness
18 statements?
19 MR LAWRENCE: The Roche defendants' position is that we are not opposing the application, but
20 the net effect of the introduction of the new evidence is that there will be three or four new
21 factual witnesses and potentially one or more expert witnesses which may fall by the wayside.
22 The question therefore for the Tribunal is whether the existing timetable at trial is sufficiently
23 flexible to accommodate the additional witness evidence.
24 THE CHAIRMAN: We will know that by 14th, will we not, and we can deal with it on 14th?
25 MR LAWRENCE: We will certainly have a better perspective by 14th.
26 THE CHAIRMAN: I am hoping – and I am sure the Tribunal is hoping – that some of this evidence
27 is not controversial and therefore, although at the moment you may not have considered it it is
28 factual and will be part of the agreed facts.
29 MR LAWRENCE: One of the difficulties is that, as I understand the way it is put, is all of the
30 evidence, all of the new facts, are based solely on memory without a shred of paper to support
31 them, and some of the new facts introduced may have significant impact on the underlying
32 calculations of alleged loss. Therefore, while it would be our hope to try to agree as much as
33 possible, it is difficult if there is nothing other than memory to support the allegation.
34 THE CHAIRMAN: I do not want you to answer this really, but how are you going to challenge it?

1 MR LAWRENCE: That remains to be seen when ----

2 THE CHAIRMAN: Absolutely.

3 MR LAWRENCE: -- at the moment we have not had any disclosure at all in relation to these facts.

4 It may be and this is the position taken by the Claimants, that documents have either been lost

5 or did not exist, or have been passed to third party purchasers or were destroyed. How we deal

6 with that at trial is probably left for another day, but it is a real concern on the Defendants part

7 that they are faced with numerous allegations of fact based solely on memory without any

8 supporting documentation.

9 THE CHAIRMAN: It raises an interesting issue, does it not, because it is the weight of the evidence

10 and comment about those witnesses and the question is whether they need to be called or

11 whether that can be done without calling them.

12 MR LAWRENCE: That is exactly the point.

13 THE CHAIRMAN: I think it is something you are going to have to consider in the next week or so.

14 MR LAWRENCE: In the period between now and trial we will be reflecting very carefully on the

15 significance of the evidence of particular individuals to the underlying calculations. Clearly if

16 the evidence has a *de minimis* impact on ultimate quantum, there will be little merit in calling

17 the individuals, but at the moment I am not in a position to say which evidence ----

18 THE CHAIRMAN: No, so I think we are premature at looking at the cross-examination timetable

19 because we do not know at the moment whether you actually do want to cross-examine or not.

20 MR LAWRENCE: I make no observation at all, other than the Tribunal needs to be satisfied in my

21 submission that the trial timetable is sufficiently flexible. It would be unfortunate if we had the

22 trial and there were not sufficient time to cross-examine.

23 THE CHAIRMAN: By the 14th you will have a better idea of how you propose to deal with it.

24 MR LAWRENCE: Certainly.

25 THE CHAIRMAN: And therefore we can look at the trial timetable and see how flexible we can be.

26 MR LAWRENCE: I am obliged.

27 THE CHAIRMAN: Is that all right? I think it is premature to do anything now.

28 MR RANDOLPH: So Madam on that basis can we have permission to adduce the evidence from

29 Miss Joret and Mr Saunders?

30 THE CHAIRMAN: It is not opposed.

31 MR RANDOLPH: But I formally have to make the application.

32 THE CHAIRMAN: All right, so I give you permission.

33 MR RANDOLPH: Thank you very much.

34 THE CHAIRMAN: Is that all right?

1 MR LAWRENCE: That is fine, thank you. That leaves the “Morrell Model” issue in para.9 of the
2 letter where it has been agreed that this will be delivered in Excel format, which was the
3 difference between the parties, by 5 p.m. tomorrow, 3rd February, and that then concludes the
4 issues of substance and I think in light of your observations earlier the timetabling at trial gets
5 left over until 14th February.

6 THE CHAIRMAN: I think that is sensible.

7 MR LAWRENCE: I agree.

8 THE CHAIRMAN: We need a complete review on the 14th and see actually where we are going,
9 how we are doing this.

10 MR LAWRENCE: The only issue which might arise next week on this problem is the question of
11 expert evidence. We will know that by Thursday. You have three day trial – Wednesday,
12 Thursday and Friday?

13 MR ROBERTSON: No madam, Tuesday to Thursday.

14 THE CHAIRMAN: So we can either, depending, deal with it after the hearing on Thursday, or on
15 Friday, if necessary.

16 MR ROBERTSON: If necessary I prefer Friday.

17 THE CHAIRMAN: I can see that. I think we would as well, because we have the hearing on
18 Thursday and I have a hearing in the morning as well, so Thursday is not a very good day.

19 MR ROBERTSON: There is a tightness for everyone, madam.

20 THE CHAIRMAN: Yes, because that may not be able to be left over until Monday, but hopefully it
21 will get resolved, because if it is obvious you can go ahead and do it.

22 MR LAWRENCE: You may be able to deal with the application on paper, if it was obvious.

23 THE CHAIRMAN: That was the other thing I was thinking.

24 MR ROBERTSON: That would be satisfactory for us as well.

25 THE CHAIRMAN: Yes, because we know what the problem is now.

26 MR ROBERTSON: Yes.

27 THE CHAIRMAN: So if it can be made clear on paper then one can deal with it like that.

28 MR ROBERTSON: We would be happy with that, madam.

29 MR LAWRENCE: I have nothing left other than to ask that costs be reserved for today’s application
30 because I suspect that any other application will be met with disdain.

31 THE CHAIRMAN: I am happy to make an order that costs are reserved.

32 MR DE LA MARE: Madam, can I just say a couple of things? First, the Aventis Defendants fully
33 support the position Mr Lawrence has adumbrated about experts, we have exactly the same

1 concerns about ACT in the BCL action, and we will be reviewing the situation very carefully
2 once we have seen the disclosure that will arrive next Monday.

3 THE CHAIRMAN: You are effectively piggy-backing?

4 MR DE LA MARE: We are piggy-backing, we are in exactly the same situation.

5 THE CHAIRMAN: So you want service on you as well as ----

6 MR DE LA MARE: Indeed.

7 THE CHAIRMAN: Are you part of the consent order?

8 MR DE LA MARE: I think we should be.

9 THE CHAIRMAN: Yes, I mean you are here now.

10 MR DE LA MARE: I am here, I am entirely content on behalf of my clients with everything that has
11 been discussed.

12 THE CHAIRMAN: Is there any objection to that?

13 MR RANDOLPH: Well the only point is that we do not have an issue between us.

14 THE CHAIRMAN: You are not part of that consent order, no.

15 MR RANDOLPH: Yes.

16 MR DE LA MARE: The second point, madam, is really to give you what I think our American
17 friends call a “heads up”, there is another issue in the pipeline, and that is in relation to Two
18 Sisters. You will remember from the CMCs last December there was an agreement on the part
19 of Two Sisters that they would use reasonable endeavours – or words to that effect – to give us
20 access to disclosure of relevant documents that were passed to them on the business sale to
21 them. I am sad to say that little or no progress has been made on that front, and a letter with a
22 deadline that is expiring today has been sent by my clients, I believe supported by the Roche
23 defendants as well, saying that we are very far from content with the situation. We have not
24 seen a shred of documents, we have not been given any access in circumstances where the
25 correspondence has revealed that Taylor Vinters (or their clients) have had unrestricted access
26 to the documentation in question. For that reason, unless we get similar access, or something
27 that satisfies our concerns, we will be making an application to the Tribunal to compel
28 disclosure, and so the issue that was parked last December will become live.

29 THE CHAIRMAN: How urgent is that application now?

30 MR DE LA MARE: It is extremely urgent, madam, particularly because the focus of that application
31 will be on the downstream passing-on documentation. That has a very significant bearing
32 upon this case. As you know, the expert evidence varies between saying “complete pass on”,
33 and that is Mr Burrows’ analysis, through to some other unspecified position on the Claimants’
34 part, and that is likely to be a pivotal issue at trial and for that reason we need that application

1 on soon. We need to have access to the disclosure soon if it is to be ordered, and time to
2 analyse, digest and draw the implications from any disclosure documents.

3 I appreciate that your position, madam, is that you do not have a great deal of
4 availability. It may be that ----

5 THE CHAIRMAN: I personally am sitting elsewhere tomorrow doing something else professionally
6 on Friday and at a Judicial Studies Seminar on Monday, Tuesday and Wednesday, which you
7 probably heard there is a three line whip on them so I cannot get out of that. So there is no way
8 between today and next Thursday.

9 MR DE LA MARE: I very much suspected that might be the position, that is why I felt it necessary
10 to give you that warning because it may be another issue that is drawn together on the hearing
11 for Thursday.

12 THE CHAIRMAN: I do not think there is any flexibility in the President's diary either. (After
13 a pause) No, there is not.

14 MR DE LA MARE: Well I very much hope it is an issue that can be resolved. We have written
15 a number of times to Two Sisters, and I am afraid we have not really had anything that can be
16 called a substantive response, and for that reason I fear we will be back before you.

17 THE CHAIRMAN: Do we have an order? Is there an order against ----

18 MR DE LA MARE: No.

19 THE CHAIRMAN: They agreed?

20 MR DE LA MARE: They agreed to use reasonable endeavours to provide us with disclosure within
21 certain of the disclosure categories, I think it was downstream pass on documentation.

22 THE CHAIRMAN: Was there a term in the sale agreement that they were to provide that?

23 MR DE LA MARE: Yes, there is a binding provision in the relevant sale agreements whereby the
24 claimants can compel access to the documentation in question.

25 THE CHAIRMAN: And you been writing to Taylor Vinters as well as ----

26 MR ROBERTSON: I think there is some confusion here. The undertaking to give reasonable access
27 was given by counsel for Two Sisters, Mr Peretz.

28 THE CHAIRMAN: Yes. I understand that.

29 MR DE LA MARE: There is no confusion at all. It would be against Two Sisters that we would be
30 seeking the order.

31 MR ROBERTSON: Exactly, as far as one can see Aventis seem to have taken their time about
32 following that up.

1 MR DE LA MARE: Mr Robertson will doubtless be able to read all the correspondence, I think
2 when he has he will see that that is very far from being the case. There has been persistent
3 chasing and we are obviously most reluctant to come back to the Tribunal unless we need to.

4 THE CHAIRMAN: All that was going through my mind – and that is why I was making the
5 comment, not that the order was against you, or that you had given the undertaking – was that
6 if there is a provision in the agreement between you and Two Sisters that access is to be given
7 to you then because of this action it may be that you can co-operate with Aventis in order to
8 get access under that agreement which would be easier than having to come back here and get
9 an order against Two Sisters.

10 MR DE LA MARE: Madam, that is precisely what we asked for in December, and that was the
11 issue that was parked in the way ----

12 THE CHAIRMAN: I thought that is what was going to happen.

13 MR DE LA MARE: Indeed, and it has not, and that is the problem. The problem is, as Two Sisters
14 confirmed, in a letter I think of 16th December, Taylor Vinters' clients have had "unrestricted
15 access" – that is the wording used – to the documentation, a matter I should point out that does
16 not appear anywhere in Mr Leech's disclosure statements, but that is an issue for another day.
17 All we want is the same right of access to review what is, on any view, accepted by everyone –
18 Mr Morrell's report indicates all over it how that documentation has passed on to Two Sisters.
19 We simply want the same rights of access to it. There are two bases it can be ordered, either
20 on the basis that Two Sisters is a party, which it clearly is, claiming an interest in whatever
21 eventual pot the Tribunal may or may not order, or it can be ordered against the Claimants to
22 exercise their contractual rights to compel access. There are ample powers in the Tribunal
23 therefore, to do that.

24 MR ROBERTSON: Madam, we have certainly listened to your comments, and we have listened to
25 Mr de la Mare's comments and it would have been a little bit more helpful if Mr de la Mare or
26 his clients had indicated their intention to raise this point so I could have taken instructions for
27 this morning.

28 THE CHAIRMAN: You have heard what has been said, and a convenient way of resolving –
29 hopefully – the problem would be for you to assist in Aventis getting access to the documents
30 rather than having to come back here and argue whether or not it is appropriate for an order
31 directly against Two Sisters. It may be more appropriate for an order against you rather than
32 against Two Sisters who are only here for the assignment issue. But those documents are in
33 your power.

1 MR ROBERTSON: I imagine that Aventis will find access to those documents as unilluminating as
2 we found them.

3 THE CHAIRMAN: Well they may do, but they want the opportunity. and they are in your power
4 under the agreement and therefore at the moment, and without hearing everybody's
5 submissions, I would be more minded to make an order against you than to make it against
6 Two Sisters and to have to have the cost of Two Sisters coming here to deal with that, whereas
7 we can make the order against you. So shall we leave it over and see whether you can get
8 access.

9 MR ROBERTSON: Let us leave it over, and I think the last thing anybody wants is yet more
10 satellite hearings in this matter.

11 THE CHAIRMAN: Absolutely, because otherwise we have a complicated issue, we have to get
12 everybody back; I would have thought that I would be more minded just to deal with it against
13 you. Is that helpful?

14 MR DE LA MARE: That is very helpful indeed, madam.

15 THE CHAIRMAN: Let us see whether this can be resolved in everybody's offices.

16 MR DE LA MARE: The only other matter I again thought it relevant to flag at this point in time is
17 in relation to the amendments. Obviously we are going to have the hearing a week on Thursday
18 as to whether or not ----

19 THE CHAIRMAN: Hopefully.

20 MR DE LA MARE: Hopefully – as to whether or not what I would like to call the “restitution
21 amendment” whether or not that will go ahead. Our current stance in relation to the exemplary
22 damages amendment is we are content to argue that at trial.

23 THE CHAIRMAN: Yes, I have seen that. You are also content on the exemplary damages?

24 MR LAWRENCE: Yes, we are.

25 MR DE LA MARE: All I can say, madam, is this, it is absolutely certain that the exemplary
26 damages side of things is likely to add pretty substantially to legal argument. If the accounting
27 restitutionary amendment goes ahead to trial that too is likely to add very substantially to legal
28 argument. Having done an accounting case recently in the Chancery Division I can tell you
29 I am well up to speed with how complex the law is in this area.

30 THE CHAIRMAN: The restitution area?

31 MR DE LA MARE: Well all of the relevant legal arguments in connection with whether or not an
32 account should be ordered, against whom, how, etc. if one wants to go down that line it is
33 likely to be a very substantial area of legal argument. I just felt it right to mention that at this

1 point because again it impacts upon the concerns that Mr Lawrence has already expressed that
2 you will doubtless revisit at the case management conference on 14th.

3 THE CHAIRMAN: Yes, but we have to decide on the 10th.

4 MR DE LA MARE: You will decide on the 10th but my point is this, it will have implications
5 for ----

6 THE CHAIRMAN: Well you had better raise that on the 10th.

7 MR DE LA MARE: I will.

8 THE CHAIRMAN: Much of that I legal argument, and much of that will be done in writing?

9 MR DE LA MARE: Much of it will be legal argument.

10 THE CHAIRMAN: And can be done in writing?

11 MR DE LA MARE: Yes.

12 THE CHAIRMAN: So the timetable in **here** actually with oral submissions, although it will increase
13 it a bit it is the impact on everybody sitting down and doing the work, and the time taken to do
14 that.

15 MR DE LA MARE: It is the impact on the work that must be done prior to trial, at trial and
16 including oral submissions because I anticipate the written submissions will be complex, and
17 therefore they will need explanation.

18 THE CHAIRMAN: Right. Is that all? The only thing that I would mention now, only because we
19 have heard from Mr Robertson that he is not available on Thursday afternoon, does everybody
20 know that they would be available on Thursday afternoon.

21 MR DE LA MARE: I have checked and I am available all day Thursday, madam.

22 THE CHAIRMAN: I have a hearing in the morning, so I cannot do it in the morning.

23 MR LAWRENCE: I am likely to be speaking for Mr Hoskins here, and my understanding is he
24 should be available. I cannot guarantee.

25 MR RANDOLPH: Madam, as I am going to be effectively here for the Claimants on Thursday
26 afternoon I think I am available – I have not checked, I did not know about the proposed
27 timetable ----

28 THE CHAIRMAN: No, I am afraid we have had tremendous difficulty with timetable.

29 MR RANDOLPH: No, we are very grateful that the whole Tribunal is able to sit ----

30 THE CHAIRMAN: We are not sure the whole Tribunal can sit at the moment.

31 MR RANDOLPH: Yes, well we are very hopeful that that can be done. I will certainly confirm with
32 the Registry my available, because it would be slightly unfortunate if no one from the
33 Claimants were available to put the case for the Claimant – unless of course the Tribunal is
34 convinced of our position by way of our note and submissions! No, I will check when I get

1 back to chambers and if there is a problem I will endeavour to move that problem so that I can
2 accommodate that particular timetable.

3 THE CHAIRMAN: There is Mr Leggatt.

4 MR RANDOLPH: There is Mr Leggatt – “madam, you say “there is Mr Leggatt” – Mr Leggatt was
5 really here for the assignment issue, I am not quite sure whether he is going to be here for the
6 restitution point.

7 THE CHAIRMAN: I am just saying he is somebody who does know about the case.

8 MR RANDOLPH: Yes, well I can tell Mr Leggatt, as he happens to be ----

9 THE CHAIRMAN: I think it is a matter for your solicitors, but if neither of you can do it there is
10 somebody else -----

11 MR RANDOLPH: Oh indeed.

12 THE CHAIRMAN: The difficulty is that at the moment that was the only time that appeared to be
13 available and I am not promising that it is available.

14 MR RANDOLPH: We will do everything – bend every sinew – to be here one way or t’other, and
15 obviously it is helpful that my learned friend Mr de la Mare and Mr Lawrence making it clear
16 that they are not going to be opposing the exemplary at this stage – obviously they will be
17 addressing argument to the Tribunal on the point, but they are not going to be opposing the
18 amendment *per se*, so we need deal only with restitution.

19 THE CHAIRMAN: Yes.

20 MR RANDOLPH: So hopefully that should shorten matters.

21 THE CHAIRMAN: But it is a significant matter.

22 MR RANDOLPH: Well indeed, absolutely, madam, absolutely.

23 THE CHAIRMAN: And at this late stage.

24 MR RANDOLPH: And at this comparatively late stage, yes.

25 MR DE LA MARE: Madam, the only other suggestion I would make, hopefully with your blessing,
26 is that perhaps the Claimants might serve a skeleton argument in response to our skeleton
27 argument substantially in advance of the hearing. The way that the matter has developed, there
28 has been effectively a short letter of, I think, one and a half pages setting out their position. We
29 filed a detailed skeleton argument of about 10 pages, supported by equivalent documents from
30 Freshfields which you have seen. It would be helpful if, say, by close of business on Monday
31 or Tuesday ----

32 THE CHAIRMAN: That would, would it not?

33 MR DE LA MARE: -- that there should be a detailed skeleton argument in response, and that way
34 the issues will be crystallised for the CAT.

1 THE CHAIRMAN: That would actually be very useful.

2 MR RANDOLPH: I would be very content to do that, not least because it focuses own mind on what
3 one is doing. Tuesday, I think, would be sensible. It is an interesting and focal point. I know
4 madam; you are at the Judicial Studies Board and obviously your time will be taken up.

5 THE CHAIRMAN: Absolutely.

6 MR RANDOLPH: But if other members of the Tribunal are able to ----

7 THE CHAIRMAN: I think we are all in very difficult ----

8 MR RANDOLPH: Doing other things.

9 THE CHAIRMAN: Yes. But it would be helpful if we could read something, but the urgency of it
10 I cannot say it is going to make any difference if it is Monday or Tuesday.

11 MR RANDOLPH: Absolutely, well for us ----

12 THE CHAIRMAN: You think it will be prepared for Tuesday afternoon?

13 MR RANDOLPH: Yes.

14 MR DE LA MARE: Can I just ask for 2 o'clock on Tuesday, just to have a little time to consider it
15 at our end. There is likely to be a reasonable amount of exchange of authority, etc. and I just
16 think ----

17 THE CHAIRMAN: Are we having an authorities' bundle?

18 MR DE LA MARE: Well there will need to be, I am sure.

19 THE CHAIRMAN: Do you think we ought to just think about exactly what we need for this
20 hearing.

21 MR DE LA MARE: I can think of about five authorities off the top of my head we are going to
22 need.

23 THE CHAIRMAN: Can we have an agreed authorities bundle by Wednesday afternoon?

24 MR RANDOLPH: Yes, I do not see any problem with that because by that stage Mr de la Mare will
25 have read and thought over our submissions and obviously he will be able to pick up the
26 authorities from there.

27 THE CHAIRMAN: (After a pause): I was just trying to ascertain in here where our timetable would
28 be so that we can be properly prepared for the hearing as well. The earlier the better for our
29 part. Wednesday is very difficult to do any work in here, so if it was possible to have the
30 authorities' bundle because you will know what authorities you are citing, even if you have not
31 finalised the submissions, and you know what authorities you are citing because you have
32 indicated. So could we have an authorities' bundle by, say, Tuesday morning?

33 MR RANDOLPH: I do not see any problem with that.

34 THE CHAIRMAN: An agreed authorities' bundle – yes?

1 MR DE LA MARE: Yes, if there are one or two cases to supplement later, so be it.

2 THE CHAIRMAN: So be it, right, but if we could have an authorities' bundle by Tuesday morning,
3 and if we could have your submissions by lunch time on Tuesday.

4 MR RANDOLPH: Could we say 2 o'clock, madam?

5 THE CHAIRMAN: 2 o'clock.

6 MR RANDOLPH: Thank you.

7 THE CHAIRMAN: But can we try not to have slippage.

8 MR RANDOLPH: No, absolutely.

9 THE CHAIRMAN: Because that is going to cause problems.

10 MR RANDOLPH: Absolutely, and we will be particularly vigilant with regard to the authorities
11 bundle – did we say the morning of Tuesday?

12 THE CHAIRMAN: The authorities' bundle first thing in the morning?

13 MR RANDOLPH: 9 o'clock or ----

14 THE CHAIRMAN: 9 or 9.30, something like that so that we can start looking at the authorities'
15 bundle internally.

16 MR RANDOLPH: Yes.

17 THE CHAIRMAN: Then if we have the submissions by Tuesday at 2 o'clock – if you can do them
18 earlier, that would be helpful but that is the latest.

19 MR RANDOLPH: Indeed, I am grateful.

20 MR DE LA MARE: One consequential matter that follows on from all of this, madam. You can see
21 how much else there is going on at the moment and to what extent substantial issues in the trial
22 are up in the air. As you know, in the main case management order you made, you directed that
23 there should be opening submissions lodged by 11th – that is para.13 of that order. I think the
24 position is probably agreed between all of the parties that that is no longer either realistic or
25 sensible in the light of the issues.

26 THE CHAIRMAN: 11th is Friday.

27 MR DE LA MARE: Indeed, it is the day after the Case Management Conference. In view of all the
28 issues that are up in the air at the moment, there is no way that that could be effective. I think
29 the position is also agreed – we had a quick exchange – that 16th would be a date that the
30 parties think is realistic to substitute.

31 THE CHAIRMAN: 16th is Wednesday. I can see that there is a problem. Shall we say the 16th? If it
32 could be earlier it would be helpful to us.

33 MR RANDOLPH: Can I just agree wholly with Mr de la Mare on this. Obviously, if we are going to
34 assist both ourselves and the Tribunal, the opening submissions which are meant to be full for

1 the obvious reasons we have a very tight timetable, they have to be full and they have to be
2 detailed, and realistically we are not going to get round to doing much of that prior to these
3 prior issues being dealt with. There are also issues of trial bundles.

4 THE CHAIRMAN: I hope you will get round to doing much of it!

5 MR RANDOLPH: No, absolutely, but it just has to be done properly.

6 THE CHAIRMAN: I can see that they cannot be finalised ----

7 MR RANDOLPH: No.

8 THE CHAIRMAN: -- and it may not just be dotting the "i's" and crossing the "t's" by the 14, all
9 right so shall we say 16th?

10 MR RANDOLPH: 16th yes, I am grateful.

11 THE CHAIRMAN: Is that 5 o'clock on the 16th or is that earlier on the 16th?

12 MR DE LA MARE: 5 o'clock please, madam.

13 THE CHAIRMAN: 5 o'clock. Anything else? (After a pause) I do hope that the Two Sisters'
14 disclosure problem is going to get resolved. At least I am in London tomorrow. You are not,
15 I know, but it is not you, it is your solicitors, is it not?

16 MR ROBERTSON: My solicitors will be available tomorrow.

17 THE CHAIRMAN: Absolutely, therefore if it can be dealt with and we could have an update
18 tomorrow as to what has happened.

19 MR ROBERTSON: Madam, we will attempt to resolve the matter in correspondence and we will
20 deal with it as a matter of urgency.

21 THE CHAIRMAN: All right, thank you very much.

22 (The hearing adjourned at 11.45 a.m.)