

1 to keep the existing trial date. We do not want to see that moved, nor do we wish to see these
2 proceedings placed in jeopardy by avoidable procedural issues, or manoeuvrings. So we are
3 working to the existing trial date and we, the Tribunal, have in place (and we can use)
4 procedures to make sure that any necessary directions' hearings are held at short notice and as
5 quickly as possible so that the trial date can be maintained. So that is where we, the Tribunal,
6 are at the moment.

7 It is probably desirable before we go on if I just go around the various legal
8 representatives just to see if that, as it were, plan for the day is an acceptable plan for the day or
9 whether there are other points the parties wish to draw to our attention at this stage.

10 The claimants first, I think, Mr. Leggatt Yes, good morning?

11 MR. LEGGATT: That is wholly acceptable, Sir.

12 THE PRESIDENT: Thank you very much. The Defendants – does that sound an appropriate plan,
13 Mr. Hoskins?

14 MR. HOSKINS: Sir, absolutely. I think there will be an issue on assignment as to what exactly we
15 can and should be doing today, and I know Mr. Peretz has concerns about that, but obviously
16 we can deal with that when we come to that first issue of the day but, absolutely, the scheme
17 seems workable.

18 THE PRESIDENT: Yes. Mr. Kennelly, what do you say?

19 MR. KENNELLY: Sir, yes, except in relation to the time estimate. Mr. Hoskins and I discussed how
20 we would divide the time between ourselves.

21 THE PRESIDENT: I see, yes, quite.

22 MR. KENNELLY: It may not be exactly 50:50, I am prepared to give some of my time to
23 Mr. Hoskins.

24 THE PRESIDENT: No, fine. If you have reached an agreement between yourselves which keeps
25 within the overall limit that is, of course, acceptable.

26 MR. KENNELLY: Indeed, Sir. Also we were told yesterday by the Tribunal that you would not
27 receive any more paper – quite understandably – from us. I have a further bundle containing
28 a witness statement that may be useful for the security for costs application that you may want
29 to consider this side of lunch, and it may be useful to give that to the Tribunal now as a
30 housekeeping matter.

31 THE PRESIDENT: We will, for everybody's comfort including our own, have some break between
32 the assignment issue and the security for costs issue, so if whatever it is you want to give us is
33 lodged with the Registry we will try and look at it over the break at least to get a first
34 impression of what it is all about.

1 MR. KENNELLY: I am very grateful.

2 THE PRESIDENT: Yes, Mr. Peretz?

3 MR. PERETZ: All I wanted to say is, first of all, I am going to have to apologise because I am
4 trying to speak through a very heavy cold; and secondly, the difficulty with determining the
5 assignment issue today is that with it is wrapped up an issue of estoppel which involve certain
6 questions of fact and our submission will be that the Tribunal simply is not in a position to
7 determine that issue today.

8 THE PRESIDENT: Well, I think what we would like to do is to at least hear the argument and then
9 see where we are on the submission that you make about that. What I mean when I talk about
10 the “assignment issue” is basically the issue that arises under s.136 of the 1925 Act and
11 whether we are dealing with a legal assignment or an equitable assignment rather than broader
12 points, I think, at this stage. Very well – so far so good. Are we then in a position to address
13 the assignment issue, Mr. Hoskins?

14 MR. HOSKINS: I am, yes, Sir.

15 THE PRESIDENT: Very good. Well so long as you are, I am not sure if we are – we will see
16 whether we are as time unfolds!

17 MR. HOSKINS: I think it might be helpful obviously, as Mr. Peretz has pointed out, first of all to
18 clarify what I think the issues are ----

19 THE PRESIDENT: Yes, that is very helpful indeed, yes, thank you.

20 MR. HOSKINS: -- and what is there embedded in that. First, there is the question, on the proper
21 construction of the Agreements, was the right to sue transferred from the claimants to the
22 purchasers? I must admit, I had not intended to address the Tribunal on that today, given the
23 indication we had had from the Tribunal, but you have had written submissions on that.

24 THE PRESIDENT: Yes.

25 MR. HOSKINS: The next question logically I think is if, on the proper construction of the
26 agreements there was a transfer of the right to sue, are the purchasers nonetheless estopped
27 from claiming the right to sue?

28 THE PRESIDENT: Yes.

29 MR. HOSKINS: The third issue, on its proper construction, does Rule 35 of the Tribunal Rules
30 permit the addition or substitution of a party after expiry of the limitation period set out in Rule
31 31? The fourth and final issue is has express notice in writing been given to the defendants
32 pursuant to s.136(1) of the Law of Property Act and, if so, there will have been a statutory
33 assignment, and the claimants will no longer have the right to sue and, if not, there will have

1 been an equitable assignment and both the claimants and the purchasers must be parties to the
2 proceedings.

3 I should point out that whatever the type of assignment, whether it is statutory or
4 equitable, means that the claimants will have no rights to the fruits of the action. So, if they
5 lose on the construction point, and lose on the estoppel point, they will be chasing nothing,
6 because the fruits automatically will go to the purchasers.

7 In terms of the issues which can and should be dealt with today – construction – the
8 Tribunal has said – leave on one side.

9 THE PRESIDENT: Yes.

10 MR. HOSKINS: Estoppel, for reasons Mr. Peretz indicated in the skeleton, has to be left to one side,
11 so we are left with the limitation issues, and the express notice in writing point.

12 THE PRESIDENT: Yes.

13 MR. HOSKINS: The limitation issue first. I think it is sensible that is decided definitively today
14 because if it is decided against us then it means all the purchasers come in and are joined, and
15 that is what should happen if we lose, so I think it is a very short point and it should be decided
16 today. I do not mean to take long on it because the position is very clearly set out in the
17 skeleton arguments. But just to summarise the position taken by the parties. Our position is set
18 out in paras. 18 to 21 of our supplemental “Right to Sue” skeleton. In short, what we say is
19 take the relevant CPR Rules – there is a general rule for addition and substitution of parties,
20 and there is a specific rule for addition or substitution of parties after expiry of the relevant
21 time limit.

22 Take the Tribunal Rules. There is only one rule, Rule 35, which is couched in general
23 terms, dealing with the addition or substitution of parties. There is also a limitation rule, Rule
24 31, and what we say is that given the contrast with the CPR, where an express provision was
25 required to deal with addition or substitution after expiry of the limitation period, it cannot be
26 the case that Rule 35 was intended to give the Tribunal an unfettered discretion to add or
27 substitute parties after the expiry of the limitation period in whatever circumstances. We say
28 that the draftsman of the Tribunal Rules must have had the CPR Rules in mind and, if the
29 intention had been to give the Tribunal a power to add or substitute parties after the limitation
30 period it would have been set down in the Tribunal Rules.

31 It is worth noting that under the CPR Rules an equitable assignee may only be joined
32 after the limitation period has expired, pursuant to CPR 19.5(3)(b). That is where a party is
33 a necessary party to the action. So there is no general rule of practice that permits joinder of
34 equitable assignees. That position is also provided for in the CPR. So, if this were a High Court

1 case everything to do with addition or substitution would be bound by that CPR Rule, and that
2 is why we say that is a correct comparison.

3 THE PRESIDENT: Do you say we have no discretion, or we have some discretion and this is not
4 a case where we should exercise it, or what?

5 MR. HOSKINS: I think the way we are putting the case it has to be there is no discretion.

6 THE PRESIDENT: No discretion.

7 MR. HOSKINS: I think the oddity then is that the Tribunal is left with a very extreme position
8 because either it has complete discretion or it has no discretion.

9 THE PRESIDENT: Well any discretion we had would need to be judicially exercised, and we would
10 have to see on what principles similar discretion was exercised in the High Court context and
11 so forth and so on.

12 MR. HOSKINS: But that is the way I put the case. On the other side, we have the claimants'
13 position which is set out at paragraphs 26 to 29 of its skeleton argument for the CMC. Again, I
14 hope I do not do undue violence to their position but, in summary, what they say is because
15 Rule 35 of the Tribunal Rules is expressed in general terms it does give the Tribunal an
16 unfettered discretion to add or substitute parties after the end of the limitation period. We say
17 that that is an extreme position and it cannot be right, given the contrast with the CPR. I do not
18 think there is any point in taking the issue further. It has been developed in the writing ----

19 THE PRESIDENT: No, I think the issue is very clear, Mr. Hoskins, yes, thank you very much.

20 MR. HOSKINS: Yes, and it is there for the Tribunal to decide.

21 THE PRESIDENT: Yes.

22 MR. HOSKINS: On the question of whether there has been a legal or equitable assignment, there
23 are a number of very difficult issues involved in this, and I must admit that my primary
24 submission would probably have been that if right to sue issues are going to be left over, for
25 example, the estoppel issue and the construction issue, then this also should be left over,
26 because, for example – certainly in our original skeleton argument for the right to sue we
27 pointed out certain case law about whether notice can be given before or after proceedings
28 have started. We also pointed out case law which related to whether documents given in the
29 context of disclosure could constitute express notice in writing.

30 But the way the point has been tee-ed up today by the claimants, they have not gone
31 into any of those issues in their skeleton for today. It is almost like a summary Judgment
32 application, because what they have said is that regardless of any of the other arguments
33 relating to legal assignment, they have invited the Tribunal to find that there has not, on any
34 view, been a legal assignment, because there has not been express notice in writing within the

1 meaning of s.136(1) of the LPA. So it is like a summary Judgment application, they focused on
2 one issue relating to statutory assignment and they have tried to deal a knock-out blow on that.
3 I am in the Tribunal's hands, having made that point I am perfectly willing and capable of
4 dealing with the specific issue that has been raised on express notice, if that is helpful, or
5 whether it is better to leave all the issues on statutory assignment to be dealt with at the same
6 time, because one of the other issues which is raised is when are the assignment issues going to
7 be dealt with – before or after the substantive hearing? Those are the two remaining things –
8 certainly I need to deal with the latter one today, I am simply in the Tribunal's hands, I can
9 make submissions on the notice point, if you so wish?

10 (The Tribunal confer)

11 MISS SIMMONS: Are you suggesting that we do not need to decide the assignment issue if we
12 decide what you call the limitation issue, because if we decide the limitation issue on the basis,
13 for example, that the parties are joined, and the purchasers, or the relevant purchasers are
14 joined, then this case proceeds on that basis and the assignment issue can be left to whenever it
15 is, and you would be content with that?

16 MR. HOSKINS: That is my understanding of the legal position, yes.

17 MISS SIMMONS: Is everybody content with that?

18 MR. HOSKINS: Well I am simply reacting. It was the claimants who suggested that today they
19 wanted to deal with that particular aspect, etc., which is why I have come prepared to deal with
20 it, but it is probably a question for Mr. Leggatt.

21 MISS SIMMONS: Yes. Mr. Leggatt, would you be happy on that basis?

22 MR. LEGGATT: I would, yes, in view of what Mr. Hoskins has said, that if he is wrong about the
23 limitation argument that he makes, he accepts that there would then be no bar to joining the
24 purchasers as additional parties to the action, and that the matter could be dealt with then at
25 a later stage. Since he accepts that position then I agree with him that it is not necessary to
26 decide further assignment issues today.

27 MISS SIMMONS: Yes, that sounds sensible. Does it depend on the purchasers as well?

28 MR. LEGGATT: It does depend on them as well.

29 MR. PERETZ: I take the same view. I am happy with that.

30 MISS SIMMONS: You are happy with that.

31 MR. KENNELLY: As are we.

32 THE PRESIDENT: Right, well that sounds like a bit of progress. But we still have to decide the
33 Rule 35 point.

1 MR. HOSKINS: Absolutely, yes. Sir, if that is where we all are, then the only question remaining
2 on the right to sue issues – well, there are a number of subsidiary points, let me just take them
3 in turn. First, there is the question of the joinder of the purchasers, and we say if we lose on the
4 limitation point, yes, they should all be joined.

5 We do say that both Deans and Broomco 2524 Limited should also be joined. Those
6 are the companies that have reassigned any right to sue that passed to them back to the
7 Claimants. The reason why we say they should be joined is that it makes it absolutely clear that
8 they are going to be bound at the end of the day by the Judgments. We are not suggesting they
9 have to take any active part in the proceedings, in fact, one can imagine they will not want to.
10 The only issue that might arise is that if third party disclosure issues come up there might be
11 a difference as to whether they were standing outside the action as non-parties, or in the action
12 as parties, but the Tribunal is aware of that situation, it should not make any difference if
13 a disclosure application has to be made that they are in or out in those circumstances – either
14 we meet disclosure or we do not. So subject to that, we just suggest that they are joined, but we
15 do not expect them to play an active role.

16 MISS SIMMONS: Are they not represented today?

17 MR. HOSKINS: Well Deans are – in their own action.

18 MISS SIMMONS: Yes.

19 MR. HOSKINS: Broomco 2524 have re-assigned the matter back, I do not believe that they are
20 represented.

21 MISS SIMMONS: Nobody has turned up for Broomco today?

22 MR. HOSKINS: Nobody has turned up for them, no.

23 MR. RANDOLPH: Madam, can I just say that in terms of the assignment issue Mr. Leggatt is
24 dealing with that for Deans as well as for BCL, but in terms of all the other matters I shall be
25 representing Deans.

26 THE PRESIDENT: Thank you, Mr. Randolph.

27 MISS SIMMONS: Is Mr. Leggatt representing Broomco 2524 for this purpose?

28 MR. LEGGATT: No, he is not. I think they have written a letter to the Tribunal. I cannot
29 immediately put my hands on it, but I will find it, saying that they have re-assigned any rights
30 that they might have to my clients and that, in view of that, they intend to take no part in the
31 proceedings, and without any disrespect to the Tribunal have therefore not attended today.
32 They know, of course, that there may be an order made joining them today, but they have
33 made it clear that if there is they do not intend to do anything.

34 THE PRESIDENT: They have had their chance to turn up.

1 themselves do not contain that provision. One would imagine, following the statutory
2 framework in Part 2, Schedule 4, there would be in Rule 31, which contains the time bar,
3 express provision for the extension of time as one finds in the CPR, and one would imagine
4 that following the statute upon which the rules are based.

5 Mr. Peretz seeks to find in the Tribunal's Rules such provision, and he refers to Rule
6 19(2)(I) which the Tribunal has already seen.

7 THE PRESIDENT: Yes.

8 MR. KENNELLY: But as I would submit is obvious those rules are the case management rules for
9 the Tribunal and are modelled, certainly drafted with part 3 of the CPR in mind, and the list of
10 matters in relation to which the Tribunal may give directions is based with Rule 3.1.2 of the
11 CPR in mind. They are not drafted on exactly the same terms, but I think it is going too far to
12 say that the Tribunal's Rules when drafted in Rule 19(2)(I) was intended to be the express
13 power in the Tribunal to extend time, and to extend time under Rule 31, to alter the time by
14 Rule 31. One would not see it in 19(2)(I), that relates to ordinary case management time limits
15 for orders, directions and so forth, and cannot be read to cover Rule 31 of the Tribunal's Rules.
16 I can see what Mr. Peretz is trying to find, but it is impossible in my submission.

17 THE PRESIDENT: It is not there.

18 MR. KENNELLY: Yes. I have nothing further.

19 THE PRESIDENT: Yes, thank you.

20 MR. LEGGATT: Sir, may I very briefly reply on the Enterprise Act, as it is a new point?

21 THE PRESIDENT: Yes, it is a new point of law, I suppose.

22 MR. LEGGATT: May I just say, in our submission, the question that has been raised about
23 extending the time for bringing proceedings is something of a red herring, because there is no
24 application before the Tribunal to extend time for bringing proceedings. The proceedings were
25 brought in time, nobody is asking to extend that time, nobody is asking to make new claim
26 after the time limit has expired. All we are concerned about is adding additional parties to the
27 proceedings. That is dealt with, I see, in a different part of the Part 2 Enterprise Act Schedule at
28 the end, para.24 which is what provides that:

29 "Tribunal Rules may make provision –

30 (a) for a person who is not a party to be joined in any proceedings."

31 We would simply make the point that that is in general and uncircumscribed terms (as is the
32 rule made under it), and we are dealing here with a quite different regime from that which
33 I showed the Tribunal under s.35 of the Limitation Act and the rules of court which are made
34 pursuant to that.

1 Thank you.

2 THE PRESIDENT: Thank you very much. The Tribunal will rise now for at least 15 minutes.

3
4 (The hearing adjourned at 12.12 p.m. and resumed at 12.35 p.m.)

5
6 THE PRESIDENT: The Tribunal has heard argument on a number of procedural issues that arise in
7 this Case Management Conference. We do not propose to take time now in giving our full
8 reasons which we will give at a later date. What we propose to do is simply indicate what our
9 Decision is on the various points that have been argued.

10 The first question is whether various persons should be added as defendants to these
11 proceedings. The persons in questions are purchasers who have bought the relevant businesses
12 from the claimants. In other words, the claimants have sold on the businesses concerned to
13 subsequent purchasers. In relation to that, it is submitted that the Tribunal has no power under
14 Rule 35 of the Tribunal's Rules to add those purchasers as defendants to the proceedings in
15 circumstances where the limitation period has already expired.

16 Without going into detail, our judgment on this issue is that Rule 35 is expressed in
17 broad terms and we are not persuaded that we should cut down or limit the Tribunal's
18 jurisdiction to grant permission for one or more parties to be joined in the proceedings of that
19 rule. In our judgment that discretion exists and since it has not been suggested in this case that
20 there is any reason for us not to exercise the discretion (assuming it to exist) our judgment is
21 that we should allow those relevant purchasers to be joined as defendants in the proceedings. I
22 think it follows from that that 2 Sisters, P.D. Hook, Deans and Broomco 2524 will be joined as
23 defendants in the proceedings.

24 The next issue is what the Tribunal should do about certain sub-purchasers to whom 2
25 Sisters has apparently sold, namely the East Wretham and Flixborough businesses. In that
26 regard we think the best course, although it is perhaps showing a certain amount of caution, is
27 for the Tribunal to write to the sub-purchasers in question, simply drawing their attention to the
28 existence of the proceedings and probably the transcript of today's hearing, and invite them to
29 state within an appropriately short time limit whether there are any submissions they wish to
30 make to the Tribunal. That will ensure that all relevant parties are at least on notice.

31 The last matter we need to decide is at what stage of these proceedings outstanding
32 issues as between the claimants and the purchasers (now joined as defendants) need to be
33 decided? There is an issue as to the construction of the relevant sale agreements. There is a
34 possible issue as to estoppel, and there may be an issue as to whether the relevant assignments

1 THE PRESIDENT: It does sound a slightly modest figure.

2 MR. HOSKINS: I would be sweating myself at that stage! [Laughter]

3 THE PRESIDENT: There is another figure a bit later on.

4 MR. HOSKINS: The one I am looking at has £839,255.

5 THE PRESIDENT: It has a grand total of £839,255, and a figure for what are called “costs to date”
6 of the order of half a million pounds.

7 MR. HOSKINS: That is correct. Sir, what we are asking for is simply £250,000 and we say in the
8 context of those costs £250,000 is very reasonable.

9 THE PRESIDENT: I just want to understand what is going on. There is the sum that you say has
10 been incurred up to now, then there is an estimate of future minimum estimated costs which
11 break down into effectively Freshfield’s costs and disbursements.

12 MR. HOSKINS: That is correct, Sir, yes.

13 THE PRESIDENT: And that adds up to the final figure we have just mentioned.

14 MR. HOSKINS: That is correct. So the headline figures, if you like, are on p.4. Costs to date are
15 £517,000-odd, then £300,000-odd, giving the total of £800,000-odd.

16 THE PRESIDENT: Yes.

17 MR. HOSKINS: What we are seeking is £250,000 which we say is very reasonable in the light of
18 those costs.

19 THE PRESIDENT: And you are seeking that on what basis exactly? On what legal basis are you
20 seeking it?

21 MR. HOSKINS: Well there is a power in the rules to provide security for costs, and in this particular
22 case ----

23 THE PRESIDENT: And we should exercise it because?

24 MR. HOSKINS: The reasons why are these: the claimants are shell companies which do not have
25 any assets against which a costs’ order should be enforced, and secondly the claimants’
26 ultimate parent company, which is the company that would be giving the guarantee, is a FTSE
27 250 listed company and on the information we have been able to find for the six months to 3rd
28 July 2004 it had a turnover of £425.8 million for those six months, and an operating profit of
29 £31.2 million.

30 THE PRESIDENT: We have all that in our papers, Mr. Hoskins?

31 MR. HOSKINS: That is why I referred you to Mr. Lawrence’s second witness statement.

32 THE PRESIDENT: Yes, absolutely.

33 MR. HOSKINS: Obviously I am happy to take you to it but I gave you the reference.

34 THE PRESIDENT: Yes, you did.

1 MR. HOSKINS: What we say in short is that it would be wholly wrong to allow the Claimants to
2 protect themselves from potential costs' liability by hiding behind corporate personality. It is
3 a standard situation in which security can be granted when the Claimant does not have the funds
4 to meet any potential costs' order.

5 THE PRESIDENT: Yes.

6 MR. HOSKINS: And no point has been taken, obviously we have put in the evidence in second
7 Lawrence, it has not been suggested to us that they do have funds that we are not aware of, nor
8 has it been suggested that the parent company is not in a position to give a guarantee in the sum
9 we seek, so there does not seem to be any dispute in relation to that.

10 The only real point I think that has been made against us is to complain about the
11 amount of our costs. They say they are excessive. We, of course, say they are not excessive.
12 We say that figures are wholly reasonable given the detailed nature of the case. It is a complex
13 damages claim, it is brought by indirect purchasers, it relates to the period from 1989 to 1999
14 and the current time estimate for trial is three weeks. Given the nature of the claim we say our
15 costs are reasonable, but in any event we say the argument that our costs are not reasonable is
16 a red herring because all we are seeking, as I have said, is £250,000 out of the total that we
17 think we will spend, and what we are actually looking for, as I have said, is a parent company
18 guarantee. So there will be no need for the Claimants or for the ultimate parents to actually
19 produce any money ----

20 THE PRESIDENT: They are not going to actually lodge money anyway?

21 MR. HOSKINS: Exactly. The only time they will be required to produce money is when and if we
22 have been awarded costs and when those costs have been agreed or assessed, and we say that in
23 the context of our assessed likelihood of costs if we were to win then £250,000 is very
24 reasonable, but there is no jeopardy at this stage. We will only claim under the guarantee what
25 we are entitled to because it has been agreed, or because the Tribunal has assessed them. So
26 that really is a red herring, it does not help anyone to say "These are terribly high". That does
27 not take us anywhere.

28 The other points that are made, again it is a similar sort of point, it is said that we are
29 throwing money at the litigation. But again, with respect we would say what we have actually
30 endeavoured to do is to be as focused as possible throughout this, that is why it was us who
31 suggested disclosure by category of documents rather than just an all encompassing disclosure
32 exercise. You have also seen that we intend to instruct our experts jointly with the other
33 defendants to save costs, so it is simply this is how much these sorts of actions cost. We have
34 not conducted this action in anything other than a focused and reasonable way.

1 The other point that is made is that s.47(a) of the Competition Act was introduced to
2 facilitate private enforcement of Article 81 damages. That is correct, but what s.47(a) clearly
3 does not do is to excuse a Claimant from the burden of proving his actual loss. It is not a
4 shortcut, it is a jurisdictional power, but it is not a shortcut. The purpose of s.47(a) is to permit
5 the Tribunal to hear damages claims, but it does not override the fact that a claim such as the
6 present one does raise highly complex issues of, for example, causation and calculation of
7 quantum. So those meet the specific points made against us, but the bottom line is the one
8 I have made. We think we are going to spend over £800,000. We are only asking for £250,000
9 and we are asking it by way of parent company guarantee.

10 THE PRESIDENT: The costs to date, it is very helpful to have them, perhaps understandably do not
11 really break things down between the various different things we have had to consider, such as
12 the assignment point, the overall preparation of the case, the joining of further parties, and so
13 on and so forth.

14 MR. HOSKINS: We did not feel that it would be helpful or cost efficient to have pages and pages.
15 The point is at the moment there are no costs' orders on either side. The only costs'
16 applications that are outstanding are actually our costs' applications. Again, it is security for
17 costs by way of guarantee. We will only get costs that we are entitled to at the end of the day.

18 THE PRESIDENT: Yes.

19 MISS SIMMONS: Can you just remind me, under the CPR there are rules about how you do these
20 costs' schedules in relation to determining costs. I know this is a security for costs application
21 and I am not sure that there are not rules about that. Is this done in accordance with that, or is
22 there supposed to be a greater breakdown about costs already incurred at least?

23 MR. HOSKINS: This is simply prepared for the purpose of the hearing. I don't think it has been
24 done with an eye on particular CPR Rules. We took the view, as I said, for reasons of cost
25 effectiveness it would not actually be particularly useful – I am sorry if we were wrong – to
26 produce a 10 page document with everything itemised.

27 THE PRESIDENT: No one is suggesting that, we are just seeking to understand it, Mr. Hoskins.

28 MR. HOSKINS: Sir, unless I can help you any further?

29 THE PRESIDENT: No. Thank you very much.

30 MR. HOSKINS: That is the application.

31 THE PRESIDENT: Yes, Mr. Kennelly?

32 MR. KENNELLY: Thank you, Sir. Just to add that in addition to those points the point has been
33 also raised against Aventis and Rhodia that we have been disproportionate in our expenditure

1 on this case, and the Tribunal has seen the letter sent arguing that our costs are wholly
2 disproportionate.

3 THE PRESIDENT: Can you very kindly just take us to where we find your costs?

4 MR. KENNELLY: Yes. The evidence setting out our costs to date, are in the second witness
5 statement of Mr. McDougall behind tab 3, near the very beginning of file 2 of the
6 supplementary bundles – that is the one on the spine which says “bundle for hearing and CMC
7 on 8 December 2004, file 2, that may be the easiest way to find it.

8 THE PRESIDENT: Just a moment. Sorry, what page did you say?

9 MR. KENNELLY: First of all, just to establish, Sir, that you have the correct bundle, because it is
10 confusing, it should say on the spine simply “Bundle for hearing and CMC on 8 December
11 2004 file 2”.

12 THE PRESIDENT: That is what it seems to say.

13 MR. KENNELLY: Very good. It is behind tab 3 near the beginning, at p.290.

14 THE PRESIDENT: Yes.

15 MR. KENNELLY: That is the second witness statement of Mr. McDougall, and you can see over
16 the page at 291, para.6 that Aventis and Rhodia’s costs up to including 7th December are
17 estimated to amount to around £229,500.

18 THE PRESIDENT: Yes.

19 MR. KENNELLY: Mr. McDougall stresses in that statement, and it is my submission before you
20 today, that the Aventis and Rhodia defendants have really tried as hard as possible to be very
21 proportionate in their expenditure on this litigation. We have sought not to duplicate the work
22 that has been done by Freshfields and as the Tribunal has seen we have not instructed leading
23 counsel, on the contrary they have instructed me, and I am very far from being leading counsel,
24 and we have tried not to duplicate in our written or in our oral submissions the points made by
25 Mr. Hoskins, and that is for two reasons. First, the Tribunal must not forget the value of the
26 claims made against Aventis and Rhodia which, in comparison to the ones made against
27 Roche, are relatively small. Also, it is in our interests as well to be as sparing and careful with
28 our expenditure on this case. It cannot be said against us that our expenditure has been
29 disproportionate. The Tribunal has seen our application notice, which is in the same bundle
30 behind tab 1, and the draft order is behind tab 2.

31 THE PRESIDENT: So you are asking for 195?

32 MR. KENNELLY: Sir, yes. In relation to the comments made by the Claimants generally, the
33 Tribunal I hope should take some heart from the comparison between the various sets of costs
34 that are placed before you to be satisfied in your own minds that Aventis and Rhodia have tried

1 to be as careful as possible in their expenditure on this – as Mr. Hoskins said, and we agree –
2 very complex litigation.

3 I have nothing further.

4 THE PRESIDENT: Thank you.

5 MR. LEGGATT: I have a few submissions that may take a little while, and it may be more
6 convenient if I started

7 THE PRESIDENT: Yes, thank you for drawing my attention to that. Shall we start again at 2
8 o'clock?

9 MR. LEGGATT: ... rather than do it in two parts.

10 THE PRESIDENT: I am sure that is a good idea. Thank you very much indeed. 2 o'clock.

11 (Short Adjournment)

12 MR. KENNELLY: Sir, Mr. Leggatt has very kindly agreed to allow me just to check if the Tribunal
13 has the bundles that we handed up at the break, the short bundles – these are the ones
14 I mentioned this morning – containing the further witness statement of Mr. McDougall? In that
15 the fourth witness statement of Mr. McDougall behind tab 6 also relates to the security for
16 costs application, and the fact that it is a parent guarantee. It has also been sought by the
17 Aventis defendants.

18 THE PRESIDENT: I have to say, Mr. Kennelly – I was going to say a little bit at the end – but all
19 this stuff has come in very late.

20 MR. KENNELLY: I understand, Sir, yes.

21 THE PRESIDENT: We really cannot get on top of things at this late stage. I know the date was
22 moved by one day but it has been in the list for quite a while.

23 MR. KENNELLY: I understand, Sir, and I apologise in relation to the security issue, but in relation
24 to disclosure we were waiting for responses from the Claimants and rather than trouble the
25 Tribunal with further evidence, we were hoping to resolve it in the correspondence, that is why
26 that was late.

27 THE PRESIDENT: Thank you. Yes, Mr. Leggatt?

28 MR. LEGGATT: Sir, the jurisdiction of the Tribunal to order security is under the Tribunal Rules,
29 Rule 45. Just to remind the Tribunal it is sub-rule 4 is the starting point:

30 (4) The Tribunal may make an order for security for costs under this rule if -

31 (a) it is satisfied, having regard to all the circumstances of the case, that it is
32 just to make such an order; and

33 (b) one or more of the conditions in paragraph 5 applies.”

1 Now we accept that one of the conditions in para.5 applies, so that condition is met. The
2 question is whether it is therefore just in all the circumstances of the case to make an order and,
3 if so, in what amount, and for the amount we go back to para.3 on the previous page:

4 “(3) Where the Tribunal makes an order for security for costs, it shall -

5 (a) determine the amount of security;”

6 and we submit what would appear must be intended that in setting the amount as well the
7 Tribunal should have regard to all the circumstances and set such amount as is just.

8 THE PRESIDENT: Yes.

9 MR. LEGGATT: The Tribunal is aware that £60,000 has already been provided by way of security
10 and that occurred following the first Case Management Conference, £30,000 to each
11 Defendant.

12 THE PRESIDENT: By way of ----

13 MR. LEGGATT: By way of guarantee. The brief history of that is that the Claimants offered
14 £30,000 to each Defendant to cover the period up to the date of this Case Management
15 Conference. That appeared to be accepted, at least by Ashurst. Freshfields (for Roche) said
16 that the £30,000 should only go to the end of the period of time for discovery, which was in
17 September. There was then an agreement which resolved that dispute at the hearing outside
18 court on the first Case Management Conference. Unfortunately, there is a disagreement of
19 recollection as to what was agreed, but Mr. Lawrence of Freshfields is adamant that it was
20 agreed to decide all questions at this Case Management Conference and therefore there was
21 effectively no agreement – or nothing more than an interim agreement and the Tribunal, I hope,
22 has seen a short statement from Mr. Peretz in which he says that although he has a different
23 recollection, in view of the difference he does not wish to press the point, and therefore we
24 accept that for today’s purposes the Tribunal can determine matters afresh.

25 THE PRESIDENT: Yes.

26 MR. LEGGATT: But we do say that nevertheless those sums that were provided already are
27 indicative of the sorts of amounts of security that are appropriate in this case and were
28 reasonable amounts in respect of the period up to today, and the Defendants at that stage were
29 taking a reasonable and realistic approach towards the sorts of sums that should be provided by
30 way of security which they now appear to have lost sight of.

31 The amounts that they now claim, in our submission, are wholly unreasonable and
32 excessive amounts, and there are seven points that I wish briefly to make – and I can make
33 them shortly – that we ask the Tribunal to take into account in fixing an appropriate amount for
34 security. The first point is that this is, of course, a quantum only trial that is to take place,

1 liability already being established by the European Commission Decision. We accept, of
2 course, that there is a legitimate dispute over quantum, but it is an unlikely result we would
3 respectfully suggest that the result will be that no loss whatever has been incurred.

4 Secondly, and this has to be seen in conjunction with the first point, the Defendants
5 have made no payments to settle under the Tribunal Rule 43 that we were looking at this
6 morning, and we would therefore suggest that it is an unlikely outcome that there will be orders
7 in their favour, or orders certainly for the whole of the costs in their favour at the end of the
8 day.

9 Thirdly, we say that the Tribunal can (and should) take into account the possibility
10 that this case may not go all the way to trial because ADR is contemplated and it may be
11 settled, and not all those costs may be incurred.

12 Fourthly, and this is a point on which we attach great emphasis, we submit that the
13 costs which have been incurred by the Defendants, and particularly by the Roche Defendants,
14 are wholly disproportionate in the context of this claim. The Freshfields' bill that has been put
15 before the Tribunal, which leads to a figure of "Total costs to date and future estimated costs
16 £839,000", it is almost as large as the principal sum claimed by the Claimants in this case,
17 which on the highest figure in the Claimants' expert report is £900,000. If one adds the
18 Ashurst's costs to date they have not given an estimate for their future costs but that is another
19 229. One has already eclipsed in costs the sums that are being claimed.

20 So that the Tribunal has a further comparison, I can tell you on instructions what the
21 Claimants' costs to date are. They are approximately £200,000 of which £130,000 is the cost of
22 lawyers, that is solicitors and counsel (including myself) and £70,000 is the costs of experts.
23 Another remarkable feature of the Freshfield's bill which has been put before the Tribunal is
24 that you may have noticed that costs of over £500,000 to date in that bill include no amount for
25 experts. That is entirely lawyers' costs, and that sum must be compared on the Claimants' side
26 with costs of proceedings against both sets of Defendants of £130,000 for actual legal costs to
27 date. The costs, I calculate from the Freshfield's bill to the end of December, which is just after
28 disclosure took place on 20th September, and so it is a figure that is useful to compare with the
29 £30,000 which Roche Defendants were prepared to agree to accept as security until disclosure
30 – that was their offer which did not actually result in an agreement, but in July they were
31 prepared to accept that. That compares with a figure of costs that they claim now to have
32 incurred to the end of September of some £284,000.

33 Mr. Hoskins suggests that it is a red herring to look at the actual costs that are being
34 incurred by the Defendants, but we submit that it is not at all red herring, and it is very much to

1 the point because the sums that the Tribunal is being asked to order by way of security have to
2 take as their starting point some estimate of what is a reasonable amount of costs to incur in the
3 conduct of these proceedings, and it is our submission that the amounts that the Roche
4 Defendants are incurring bear no reasonable relationship to an appropriate, or recoverable set
5 of costs in the proceedings, and should not form the starting point on which the Tribunal
6 assesses security.

7 There is a further point – and this is the fifth point of the seven that I ask the Tribunal
8 to consider – which is that the Defendants have chosen to be represented by two different firms
9 of City solicitors in this case. We are not aware that there is any reason why that should be
10 necessary, their interests are certainly not conflicting. There is no contribution claims against
11 the other. Of course, it is their privilege to be represented by different solicitors if they choose
12 to, but we do submit that there is no reason in justice why the Claimants should be compelled
13 to provide security for that privilege by providing security in double, as it were. We have no
14 objection of course, if the Defendants agree that this is appropriate, for the overall amount of
15 security to be divided in two between them, but it should not, we submit, as a matter of justice
16 be greater than the amount that would have been appropriate had they not chosen to be
17 separately represented. There should, in other words, be a single set of defence costs and
18 security assessed by reference to those costs however the Defendants choose to allocate it
19 between them.

20 The sixth point is that the Roche Defendants are being very frank in their evidence
21 about the reasons why they have been spending money at the rate they have on legal costs in
22 this litigation. They set it out in a letter of 22nd November, and they have quoted the letter in
23 full in the witness statement of Mr. Lawrence that they rely upon, and I would just ask the
24 Tribunal to look at that quotation in file 1, at p.134.

25 THE PRESIDENT: Yes. If the Tribunal has p.134 Mr. Lawrence is there quoting a letter of 22nd
26 November (in italics) and it is the first paragraph where he is setting out the position from his
27 client's perspective. If we look down about half way down that paragraph:

28 “Our clients do not accept as a matter of general principle that any losses were
29 suffered. There are important issues principle at stake (some of which are novel) and
30 you are well aware of our client's potential exposure to future claims in the UK and
31 elsewhere in Europe if encouragement were to be given to those in the Claimants'
32 position. In these circumstances our clients are entitled to seek to defend themselves
33 properly.”

1 THE PRESIDENT: Well we were trying to get a little closer when Mr. Hoskins was addressing us
2 as to exactly how all this money had been spent. We have not yet got very far with that.

3 MR. LEGGATT: Yes, that is right, Sir, but what you are told by Mr. Lawrence is that they are
4 unconstrained, as it were in their attitude to spending simply by the amount that is at stake in
5 this litigation because they see this potentially as the tip of an iceberg, and one of their express
6 objects in this litigation is to discourage others from suing them, either here or in Europe.

7 THE PRESIDENT: You say it is a “money no object” type of exercise we are embarked on here?

8 MR. LEGGATT: Exactly, so far as they are concerned, and of course it is their privileged to spend
9 as much money as they like on the litigation, the Tribunal has no power to stop them spending
10 whatever sums they think appropriate to discourage other people from suing them, but the
11 point I make is that it is wrong that that attitude to expenditure, driven by broader
12 considerations should be visited on the Claimants by being reflected in the amounts that the
13 Claimants are required to provide by way of security. I should make it clear that the Claimants
14 have no wider interests at stake in this litigation, their only interest is in the sums of £900,000
15 plus interest which are the amounts of their claims.

16 The last point we make, the seventh point, is that there is a point, we would
17 respectfully submit, about access to justice to this Tribunal at stake here, because security for
18 costs is always a weapon in a Defendant’s armoury, and if large sums are required before a
19 Claimant can have his case heard before the Tribunal, even in a case like this where liability
20 and illegal conduct that went on over many years, has already been established, then the result
21 can only be to deter litigants, unless they have very large claims, from bringing their claims
22 before the Tribunal because it simply will not be cost effective to do so. We do not object to
23 providing security in principle, but we do submit that it should be moderate and reasonable in
24 amount. We submit that the amount of £60,000, which has already been provided, was an
25 appropriate sum to cover the period up to this Case Management Conference, and we suggest
26 that a further sum of £60,000 would be appropriate for the remaining period of this litigation,
27 making £120,000 of security in all, and we are quite content to divide that between the
28 Defendants however ----

29 THE PRESIDENT: I am sorry, there is 60 on the table at the moment?

30 MR. LEGGATT: 60 has already been put up. Our submission is that that 60 is adequate to cover the
31 costs up to today.

32 THE PRESIDENT: Yes, I see, so 60 plus 60.

33 MR. LEGGATT: 60 plus 60, 120, divided equally between them if that is how they wish, or
34 available to both of them jointly if they prefer.

1 but it is really not a very relevant consideration, when one is looking at the question of
2 security.

3 The fourth point said that our costs are disproportionate. We obviously disagree with
4 that, but I do not have to go into the detail of the costs. It is interesting, Mr. Leggatt, on
5 instructions, says that the Claimants to date are £200,000, so one can imagine that by trial they
6 are going to be in the region of, let us guess, £300,000, and what sum are we asking for by way
7 of security? £250,000. So in terms of whether we are asking for a reasonable sum in terms of
8 security the costs that the claimants themselves have incurred show that the figure we have
9 asked for is entirely reasonable.

10 The fifth point was the Defendants have chosen to be represented by two sets of
11 solicitors. These companies are competitors. I think eyebrows would probably have been raised
12 if they had been represented by the same set of solicitors because of the possible passage of
13 information between them as to strategy, costs, etc. Indeed, one can imagine settlement
14 discussions might have been quite interesting if one set of solicitors is acting for both parties –
15 you can see the problem for conflict. The conflict exists, in fact, on the Claimant’s side as
16 well, because yes, the Claimants have one set of solicitors, but as we pointed out to them early
17 on they cannot have one solicitor dealing with both actions because there are conflict issues,
18 and confidentiality issues as between the actions. Although they have instructed one set of
19 solicitors, those solicitors have two distinct teams, so it is a non-point. The claimants have
20 instructed one set of solicitors but need two teams. We have instructed two sets of solicitors
21 precisely for the same reason – there are confidentiality issues, and potential conflict issues. So
22 that really is another non-point.

23 The sixth point was that we have said this was an important point of principle for us.
24 It is because it may well be that other claims, both in the UK and Europe-wide, might arise out
25 of precisely the same circumstances. Sir, you made a comment it is a “money no object” case.
26 I come back to the point that we are only asking for £250,000 and if the claimants’ costs are
27 going to be of the same order there is nothing unreasonable in the amount sought, and that is
28 why the amount actually spent is a red herring.

29 The seventh and final point was the access to justice point, the security for costs was
30 described as a “weapon”, but again – and I am sorry to go over old ground – the parent
31 company guarantee we are seeking is from a company that is in the FTSE 250. There is no
32 suggestion that it cannot financially give that guarantee. As I have said before the guarantee
33 will only cover the reasonable costs that we may win up to and including a total of £250,000.
34 So there is no suggestion of denying access to justice to these claimants because they had not

1 suggested that they cannot, for financial reasons, give that guarantee. It has not been put
2 forward.

3 The final point was the point raised by the Tribunal which is effectively if, at the end
4 of the day, we are to succeed is it possible that the Tribunal would say we should nonetheless
5 have no costs because we infringed the competition rules. I hope I summarised the position
6 correctly – it is perhaps a crude way of putting it, but I think that is what it comes down to. In
7 our submission one cannot say that people who infringe the competition rules can never have
8 security for costs. That is precisely because that the rule that provides for security for costs,
9 Rule 45, appears in Part 4 of the Competition Appeal Tribunal Rules, and Part 4 deals with
10 claims for damages against parties who have infringed the competition rules. So it is expressly
11 envisaged by the CAT Rules that security for costs will be available to the parties who have
12 infringed the competition rules. So once one sees that we say it is inappropriate to then look
13 forward and say “What if, at the end of the trial, we say because you have infringed you are not
14 allowed any costs”? That is not an appropriate analysis, we submit.

15 THE PRESIDENT: Mr. Hoskins, what does trouble me a bit about this whole application is that we
16 do know that there is a Decision against your clients establishing very serious infringements of
17 the competition rules. At first sight that would give rise to a situation in which your clients
18 would be liable to pay damages to third parties. The principal point that you seek to argue in
19 order to stave that off, and you are perfectly entitled to argue it, is the passing on Defence as it
20 were. But taking into account all the circumstances of the case, as we are required to under
21 Rule 45(4) should the Tribunal in a sense lend its aid and the power of the court to a Defendant
22 in that position by ordering security for costs in a case where, there has been no application to
23 strike it out as frivolous or vexatious, it is a perfectly respectable case and it is being brought
24 by parties who have, at first sight, a respectable claim. There is perhaps underneath it a point
25 of principle there that we ought to at least reflect on as part of this developing jurisdiction.

26 MR. HOSKINS: Sir, with respect, that is the point of principle that I am trying to address. By
27 definition any damages claim that comes before you under s.47(a) will be against a party who
28 has already been found to have infringed the competition rules, because that is how your
29 jurisdiction works. One of the ways you have jurisdiction under s.47(a) is once the
30 infringement has been found, but it has to have been found. Then if one looks at the rules – as
31 I say, the rule for security for costs comes generally in the section relating to damages claims.
32 It would be extraordinary, in my submission, for the Tribunal to side step what is the clear
33 intent of the Rules, which is that a party who is subject to a damages claim, who has been
34 found to infringe, is entitled to security for costs protection.

1 THE PRESIDENT: We may find cases in this jurisdiction, there may be cases that are obviously
2 dubious or obvious try-ons where, for one reason or another, the Tribunal is satisfied that its
3 leg is being pulled or the wool is being pulled over its eyes or whatever, but that is not this
4 case. This is, on the face of it at least, a perfectly respectable case being brought under
5 a specially created jurisdiction. Should we just apply the High Court Rules without making any
6 allowance for the particular circumstances of this jurisdiction.

7 MR. HOSKINS: Sir, can I make three points in relation to that? First, you say this is not obviously
8 a frivolous case, but in almost all instances you will not be able to tell a frivolous case from
9 a non-frivolous case in this context. Infringement has been found and then someone will plead
10 quantum and until you have actually had the thing pleaded out and seen the evidence, the
11 Tribunal is not going to be able to make that distinction.

12 The second point is that Rule 45 – you say, Sir, should the Tribunal follow the normal
13 High Court Rules? My submission is that what the Tribunal has to do is follow Rule 45, and
14 rule 45 says that the Tribunal has jurisdiction in a case such as this where the Claimant has no
15 funds, which could meet an order as to costs. So the person who drafted the Tribunal Rules has
16 not said “Security for costs can only be granted in this sort of situation where the Tribunal has
17 reasonable grounds to believe that the claim is frivolous” – far from it. What has been done is,
18 in effect, that the High Court rules have been transposed into the Tribunal. So that is why we
19 say it would be wrong for the Tribunal to read into the scheme and the rules some notion of
20 “only in frivolous cases”. That would be going against the intention of the drafter of the rules
21 in this case, and we say that is quite clear.

22 The third point does relate to the issue of settlement, because if it is right that a party
23 in my client’s position can never get security for costs, the incentive to actually try and settle
24 the case becomes a lot less, because the whole point about making payments is the stick if you
25 like – the carrot and stick is we make an offer to you, if you do not accept it and if you do not
26 beat us at trial you will be liable for our costs. Now in a case like this ----

27 THE PRESIDENT: Well you can turn that argument on the head and say that if this is a jurisdiction
28 in which it is very difficult for a claimant in your client’s position to get costs or security for
29 costs then that in itself might assist the settlement process rather than otherwise – it is just to
30 encourage people to make sensible offers to settle.

31 MR. HOSKINS: The whole thesis which underlies settlement in the High Court is the carrot and
32 stick approach of having the costs there. The security for costs is necessary in this case because
33 the claimants are men of straw. If you take away the possible security for costs in this case, you
34 are taking away one of the recognised incentives for settling.

1 Sir, the point of principle was the important one, I agree, but in our submission, if the
2 Tribunal is to read in something to Rule 45 that says that cartelers can never get costs, or only
3 in frivolous cases then ----

4 THE PRESIDENT: No, it is simply trying to grapple with what we are supposed to have regard to in
5 relation to, quote, “all the circumstances of the case and the justice of the order”, that is what
6 we are grappling with.

7 MR. HOSKINS: Sir, my point is that the fact that we have been found to have partaken in a cartel is
8 certainly not a trump card and is not something which should rank very highly. Of far more
9 importance is, for example, the strength of the case and we have said “you have not seen our
10 expert evidence yet”.

11 THE PRESIDENT: How can we assess the strength of the case at this stage?

12 MR. HOSKINS: Well that is my point. What you are faced with is security of costs going forward.
13 You say there is a reasonable case on one side from the Claimants. We say we have a perfectly
14 respectable case, and it is based on passing on. There is no magic in passing on, of course it is
15 a defence that is raised in these cases. Indeed, passing on is particularly relevant when you
16 have indirect purchasers, because there is a chain. They have to show not only that they did not
17 pass on to the customers, they will also have to establish that the overcharge was passed on to
18 them because they did not buy direct from my clients. So if you are going to give the benefit of
19 the doubt to the Claimants and say “It is reasonable”, then at this stage you have to say it is
20 reasonable for us to raise this defence, and that it is a reasonable defence. It would be unfair
21 otherwise. But at the heart of this is: are you going to say cartelers can never get security, and
22 our submission is that is wholly inappropriate given the nature of the Rules.

23 I do not think I can add anything else.

24 THE PRESIDENT: Thank you.

25 MR. HOSKINS: Thank you very much.

26 THE PRESIDENT: Yes, Mr. Kennelly?

27 MR. KENNELLY: Thank you, Sir. On just a couple of Mr. Leggatt’s points, under ADR he made
28 the point that future costs before trial may not actually be incurred if the claim is settled. Of
29 course, the Tribunal will be aware that our application for security is only up until the 7th as
30 you said in the original application notice. Obviously we may have to apply for further security
31 ----

32 THE PRESIDENT: I am sorry, you are therefore slightly different from Roche, is that right?

33 MR. KENNELLY: That is correct, Sir, yes. They are claiming for security up until trial.

34 THE PRESIDENT: Thank you for reminding me of that, yes.

1 In Premier there are four issues. The first one is the same as the first one in Deans, it
2 is disclosure of documents in categories 3 and 6. So again those have already been agreed.

3 THE PRESIDENT: You said 3 and 7 I think earlier.

4 MR. HOSKINS: They are different, each case has a different set of disclosure ----

5 THE PRESIDENT: But it is the same documents, they are just numbered differently?

6 MR. HOSKINS: Precisely the same category of documents, it is just that the numbers are different.

7 I should say that the reason why those categories are in as far as we are concerned is primarily
8 to deal with downstream passing on. It is to do with the setting of prices by the Claimants, and
9 how they dealt with their own customers, etc. So it all goes to the issue of downstream passing
10 on.

11 The second issue in relation to Premier are the disclosure of Mr. Morrell's audit files,
12 and these last three are short points. The reason why that is significant we say is that
13 Mr. Morrell surprisingly actually gives some factual evidence in his expert report and he
14 recognises as such that it is factual evidence, and we would like to be able to test that factual
15 evidence by seeing the information which underlies it, because he says he obtained information
16 in his capacity as auditor of two of the Claimants.

17 The third and fourth issue in relation to Premier are matters that have arisen very
18 recently, because we have asked the questions of the Claimants because there are certain
19 documents, which I will show you, which indicate that there may have been inter-group
20 dealings, so I am afraid it is a matter of, query – whether the Claimants are the right Claimants?
21 We are not at this stage saying “Fight it all out”, but we are trying to get to the bottom of it and
22 we would like some help from the Claimants to tell us what the position is, and that is as far as
23 I want to take that today, but I can take that point quite briefly.

24 So that would go to the question of whether the Claimants are actually the ones within
25 the Group who suffered the loss, or whether there should be other companies in the Group who
26 are parties ----

27 THE PRESIDENT: Well it is just other subsidiaries of the same group, you mean?

28 MR. HOSKINS: They are all within the same group, yes.

29 THE PRESIDENT: They are all in the same group?

30 MR. HOSKINS: They all within the same group, yes. They are all within the Premier Group, as far
31 as we understand.

32 THE PRESIDENT: Yes, I see.

33 MR. HOSKINS: So it is not a right to sue issue in the sense of “Have they been sold on?” etc., it is
34 simply “Have they got the right corporate claimants.

1 THE PRESIDENT: So it was movement in price and determination of price?
2 MR. HOSKINS: Yes.
3 THE PRESIDENT: Yes.
4 MR. HOSKINS: And in the list of documents originally provided, which is at tab 2, there was no
5 disclosure given under categories 3 or 7. We were told that the reason why there was no
6 disclosure was either because they did not exist and/or because they were irrelevant. We
7 pursued that matter in correspondence over a long period. I will not bore you with all the
8 correspondence, but the bottom line is, the punch line is that Taylor Vinters provided some
9 further disclosure on 25th November 2004 and substantial further disclosure on 6th December
10 2004, and they produced a further list of documents on 7th December ----
11 THE PRESIDENT: Which is yesterday.
12 MR. HOSKINS: -- which is yesterday, and they provided copies of the documents to us this
13 morning.
14 THE PRESIDENT: Yes.
15 MR. HOSKINS: They also provided yesterday a witness statement setting out what steps had been
16 taken in respect of searching for categories 3 and 7.
17 THE PRESIDENT: Yes.
18 MR. HOSKINS: Those two things are what we have been pushing for since September – “Tell us
19 what you have done to search, and give us anything you have found.” We got the documents
20 this morning. An initial glimpse at them looks as if they are going to be relevant to passing on.
21 It might be useful if I hand up just one document.
22 THE PRESIDENT: Are you beginning to tell us that most of it has now been resolved under the
23 pressure of the hearing date, or are there still outstanding ----
24 MR. HOSKINS: Again, the punch line is we have just been given a large amount of substantial
25 disclosure. We need to review internally with the experts, and I am just asking that when we
26 come to setting timetables, etc., we need to take account of the fact we have only just received
27 material that looks as if it will ----
28 THE PRESIDENT: But you are not asking as of today, now this afternoon, for any further order
29 from the Tribunal in relation to those matters?
30 MR. HOSKINS: No, Sir, I was explaining to you what has happened.
31 THE PRESIDENT: Good, well that is very helpful. What is then the situation regarding Premier?
32 MR. HOSKINS: Well there is the Mr. Morrell computer records point – would you rather I finished
33 Deans first or go on to Premier?
34 THE PRESIDENT: All right, well what is left on Deans then?

1 MR. HOSKINS: The Mr. Morrell underlying information.
2 THE PRESIDENT: The Mr. Morrell underlying information – okay.
3 MR. HOSKINS: Perhaps it is better if I show you Mr. Morrell’s report – I will show you the way
4 this arises.
5 THE PRESIDENT: This is the only point on Deans, and it is the same point on Premier, is it?
6 MR. HOSKINS: No, it is a different point.
7 THE PRESIDENT: Different on Premier.
8 MR. HOSKINS: It is the audit files on Premier.
9 THE PRESIDENT: But they both go to Morrell.
10 MR. HOSKINS: They both go to Morrell.
11 THE PRESIDENT: Yes.
12 MR. HOSKINS: I will just get the reference for the Morrell Report. (After a pause) It is the Deans’
13 supplementary bundle for hearing, and it is at p.906.
14 THE PRESIDENT: Yes.
15 MISS SIMMONS: It is behind the big divider 3.
16 MR. HOSKINS: It is behind big divider 3, and then small divider 1. If I can ask you to turn through
17 to p.914. It is para.3.2.2. of the report:
18 “Bob Firth, the Claimants’ systems analyst and Christopher Sanders, the Claimants’
19 divisional accountant, have extracted from the Claimants’ computer record database
20 the feed consumed by the layer farmers into an Excel spreadsheet. From this
21 Mr. Sanders calculated the tonnage of feed consumed by mill by year.”
22 At footnote 16, “Witness statement of Colin Wright”. So it appears that Mr. Morrell was
23 provided with some sort of extract or summary of the underlying information. Where that
24 information comes into the case, if you like, is in Mr. Wright’s witness statement – I will get
25 you the reference for that.
26 MR. RANDOLPH: If I can assist, Sir, it is in the first file entitled “Deans Food Limited” and it is at
27 big 3A5 and that is at pages 160 to 164.
28 THE PRESIDENT: Yes.
29 MR. HOSKINS: You see it is a very short witness statement from Colin Wright in which he
30 describes the exercise of extracting information from the Deans computer archives, particularly
31 at para.2.1.
32 THE PRESIDENT: So what is it that you are seeking, Mr. Hoskins?
33 MR. HOSKINS: What we are asking for is an order that the Claimant discloses all of the
34 information extracted by Bob Firth from the Deans Computer archives as referred to in the

1 witness statement of Colin Wright made on 29th January 2004. We would like to see the
2 underlying information – or rather our experts would like to see the underlying information.

3 THE PRESIDENT: You have the results of the exercise and the accompanying spreadsheets, is that
4 right?

5 MR. HOSKINS: All we have is the spreadsheet at exhibit CW1, and our experts have said that they
6 would like to see the underlying information.

7 THE PRESIDENT: For the purpose of doing what exactly?

8 MR. HOSKINS: Well they do not necessarily accept the accuracy of the spreadsheet, is the first
9 point. They must have been working through this material in some detail, and this is a specific
10 thing that our experts have asked us to arrange. They would like to check the figures.

11 MISS SIMMONS: Do we know why they consider that the figures may not be accurate, or is this
12 putting icing on the cake?

13 MR. HOSKINS: Certainly, I think we do know the reason but I will just check so that I express it
14 the right way?

15 THE PRESIDENT: Do we have any evidence about it, Mr. Hoskins? Do we have a witness
16 statement or anything?

17 MR. HOSKINS: Sorry, Sir?

18 THE PRESIDENT: Do we have a witness statement setting out why you need this particular
19 information?

20 MR. HOSKINS: It is dealt with in Mr. Lawrence's witness statement I have shown to you. It does
21 not go into the detailed terms of the question that I have just been asked, Sir, no. What the
22 experts have told us is that when working through they have spotted what they believe may be
23 inconsistencies, or uncertainties, but today I cannot tell you specifically what those are, we
24 have not gone into that in that level of detail with the experts. It is simply they have flagged
25 this up that this is a matter that they would like to see the underlying material on. Sorry, I think
26 somebody has had chance to speak to the experts. Specifically as well they want to check – we
27 have been told that external sales of feed have been excluded from the claim, and our experts
28 believe that that may not be the case and they believe that that question may be answered by
29 seeing the underlying material.

30 THE PRESIDENT: Well there are various ways of thinking about problems like this, Mr. Hoskins.
31 One is the Tribunal's general reluctance in other parts of its jurisdiction to go on ordering
32 discovery upon discovery upon discovery so that yet a further layer of verification can be
33 verified, and I have in mind the kinds of principles of proportionality discussed in *Claymore*
34 and other cases – that is one problem.

1 Secondly, if your experts at some specific stage have a particular question or strike
2 a particular issue, it may very well be easier to sort it out by simply writing a letter saying
3 “What is the answer to the question?” or putting the experts together and getting a great deal of
4 extra discovery which is, by its nature, a somewhat cumbersome way of solving problems and
5 may sometimes be a bit of a sledge hammer to crack a nut.

6 MR. HOSKINS: Sir, I understand that. In relation to correspondence, we have pursued it in
7 correspondence, the only reason I am making the application now is because we have not got
8 anywhere. In terms of the experts meeting obviously that is something that we envisage will
9 happen, but it is difficult for our experts – our experts, I imagine, will probably want to see the
10 information in order to have a meaningful dialogue, because otherwise Mr. Morrell did not
11 actually do the exercise of going through the underlying information, he was just given the
12 spreadsheet, so I am not sure how there can be a meaningful dialogue if neither of the experts
13 has seen the information.

14 THE PRESIDENT: Please correct me if I am wrong – this information at the end of the day goes to
15 the quantification of the loss?

16 MR. HOSKINS: Precisely, Sir, yes.

17 THE PRESIDENT: Which is a stage that we reach a little bit down the line if this case follows
18 orthodox procedure – after one has established liability there is then the question of quantum.
19 Is that right?

20 MR. HOSKINS: Well except that there is not a liability issue here.

21 THE PRESIDENT: When I say “liability”, I mean there is not a liability issue there is a quantum
22 issue, but within the quantum issue there is the whole passing on question, but we need to
23 resolve that before we get to **this**. Is that right?

24 MR. HOSKINS: At the trial the main issues will be passing on, upstream and downstream ----

25 THE PRESIDENT: Yes.

26 MR. HOSKINS: -- and calculation of an appropriate figure, so those I think will be the three main
27 issues at the trial.

28 MISS SIMMONS: Does this information go to the passing on upstream and downstream, or does it
29 go to the third limb.

30 MR. HOSKINS: It goes to the third. What I ask for is that our experts see the information so that
31 they can consider it, but the nature of disclosure, of course, we do not know what it is going to
32 say, but the point is our experts have said they think it would be helpful for them to see it.
33 They will look at it and if needs be obviously there will be a meeting of experts, they will
34 discuss it with Mr. Morrell, but at this stage we are being asked simply to accept a spreadsheet

1 which our own experts have concerns about, because we simply want to be able to see that
2 information and it must exist because we are told that that is what Mr. Firth did. It is not that
3 we are asking them to go and search for new material, or to make something up. It is “What did
4 Mr. Firth produce?” and it must be somewhere. One presumes that given Mr. Wright bases his
5 witness statement on it and a summary is produced on the basis of it, it seems a question of
6 saying to Mr. Firth “Can we have the information you produced? It is not an onerous exercise.

7 THE PRESIDENT: Yes, I was just searching to see if I could put my hands on Mr. Lawrence’s
8 statement in support of this particular application.

9 MR. HOSKINS: It is in the specific disclosure bundle, 4D.

10 MISS SIMMONS: Is this para.32?

11 MR. HOSKINS: That is what we looked at before, yes.

12 MISS SIMMONS: The same paragraph?

13 MR. HOSKINS: That is right, correct, yes. Documents underlying Mr. Morrell’s evidence, paras.32
14 to 34, and we looked at para.33, the extract from the letter which asked for the material
15 underlying Mr. Wright’s witness statement.

16 MISS SIMMONS: From here it appears the response is “You have had it” or “You have everything
17 that we have”.

18 MR.RANDOLPH: Not quite, madam. That was the response we made to the application with
19 regard to categories 3 and 7, and that is set out in Miss Stabler’s witness statement which, for
20 the Tribunal’s benefit, is in the new supplemental bundle that was served, I think, this morning,
21 at p.897.

22 THE PRESIDENT: That is all sorting itself out?

23 MR. RANDOLPH: That is sorting itself out, but it is also dealing with the Morrell point. My learned
24 friend, Mr. Hoskins – sorry, am I interrupting ----

25 THE PRESIDENT: Well we have probably reached the stage where it is useful to see what light the
26 Claimants can throw on the situation from the practical point of view.

27 MR. RANDOLPH: Exactly. I am grateful, Sir. With regard to Mr. Morrell the position has always
28 been understood by my clients that they were seeking the underlying records of the computer
29 database because that is what they thought Mr. Morrell had looked at in order to come to his
30 expert opinion set out in his witness statement. That is how we understood it, and that is how
31 we addressed it in our correspondence, and then our responsive witness statement of yesterday,
32 which responded to Mr. Lawrence’s witness statement of Monday. We tried to do it as fast as
33 possible, and we set out what the position is at paras.14 to 17 of Miss Stabler’s ----

34 THE PRESIDENT: Where do we find that?

1 MR. RANDOLPH: Where we find that is in the most recent supplemental bundle – there are many
2 supplemental bundles apparently before the court, but this is the most recent one – which is
3 entitled “Deans Food and Roche & Ors. Supplemental bundle for hearing.” If the Tribunal is
4 confused as between supplemental bundles, if you look at the first page it should start with
5 “1. Skeleton Arguments and outline submissions.”

6 MISS SIMMONS: And where do we find it in that one?

7 MR. RANDOLPH: And where we find it in that, madam, is at 2(vi) page 897. Just if I may make
8 a passing remark about the bundles, we have found it somewhat difficult to navigate through
9 them, not least because there are so many numbers. Just throwing it out – normally the
10 Claimants do the bundles, and we would be delighted to do the bundles, because I think we do
11 it slightly differently, but if the bundle job is to remain with Freshfields (who produced this
12 bundle) and we are very grateful that they have produced this bundle, maybe it would be
13 helpful not to tab every single individual letter, because that does lead to a plethora of different
14 numbers, but anyway that is my little whinge out of the way, Sir.

15 MR. HOSKINS: The claimants can do all the future bundles – they are very welcome to the job!

16 [Laughter]

17 MR. RANDOLPH: Good.

18 MR. ROBERTSON: Sir, if I can add a serious point on bundling, one of the things that is quite
19 useful for the Tribunal is that you number all the bundles as they come in sequentially. If there
20 is some way of liaising with the parties so that we were all operating on the same numbering
21 system, then we would not have this problem whoever did the bundles.

22 THE PRESIDENT: One of the problems with the present case is that a huge number of bundles
23 arrived this morning at a stage where it was not possible for the Tribunal to absorb them, and
24 we came within a whisker of sending the whole lot back and simply adjourning this matter to
25 another day, and I am not at all sure that is not what we should not do now, but let us press on
26 for a few more minutes.

27 MR. RANDOLPH: Well, Sir, let us see how we go.

28 MR. HOSKINS: Sir, I do have to say in Freshfield’s defence again, there were people up all night
29 doing these bundles.

30 THE PRESIDENT: I am sure they were. I am sure everyone is trying to do their best.

31 MR. HOSKINS: I know the people behind me put heart and soul into this.

32 THE PRESIDENT: I know, I am sure they have. I do not mean to be critical, but it is very, very
33 difficult for you and particularly for us to take all this in at very short notice and make useful
34 orders, especially if underlying issues are very important.

1 MR. RANDOLPH: Indeed, Sir, and that is why I in particular applied for permission, very gratefully
2 received, for an extension of time for my skeleton, because obviously it is more helpful for the
3 Tribunal if skeletons can refer to documents in the bundle properly paginated.

4 THE PRESIDENT: Well we need to read the skeletons, we need to circulate them all over the
5 Country – one member of the Tribunal lives in Scotland, etc. etc. but nobody lives in London.

6 MR. RANDOLPH: No, apart from counsel.

7 THE PRESIDENT: Well, you may live in London, we do not all live in London [Laughter]

8 MR. RANDOLPH: Well there or thereabouts. The position on Mr. Morrell is set out at paras.14 to
9 17 of Miss Stabler’s evidence, and you can see what is said: “All the documentation was
10 provided to Mr. Morrell for the purpose of the preparation ... has been disclosed.” So the
11 question was right to that extent, and effectively at 17 we deal with what the defendants are
12 seeking in terms of underlying records of the computer database. Miss Stabler says she is not
13 entirely clear what precisely is sought.

14 “Mr. Morrell had limited time, two weeks prior to the expiry of the limitation period.
15 Mr. Morrell did not have access to Deans’ IT system for the preparation of his report
16 and, as indicated above, all the documentation provided to Mr. Morrell for the
17 preparation of his report has been disclosed.”

18 On instructions I can say that what he looked at in this context was that spreadsheet that we
19 looked at earlier attached to ----

20 THE PRESIDENT: So that is what he based himself ----

21 MR. RANDOLPH: That is what he – and it was on the basis of that is how the application was put
22 effectively, insofar as we were concerned the correspondence leading up to it, the way that
23 Mr. Lawrence put it in his supportive witness statement was: “Look, Mr. Morrell has had
24 a look at this, we want to see what he has seen, because he is the expert and you can effectively
25 ...”

26 THE PRESIDENT: So he says “When I saw the spreadsheet ...”

27 MR. RANDOLPH: Exactly, if we have seen the spreadsheet, absolutely no way you should be able
28 to go beyond that. Today is the first time, as far as I am aware, that the point has been made
29 that the reason why this documentation is sought is because the experts of Roche are concerned
30 about the figures in this spreadsheet at page 164, and in particular that external sale feeds have
31 not been excluded from the claim. So we just simply have not been able to deal with that,
32 because that has not been raised before.

33 MR. HOSKINS: This is para.34.

1 MR. RANDOLPH: I am grateful. (After a pause) Yes, absolutely. For a corroboration of the
2 Claimants' position, para.34 of Mr. Lawrence's witness statement, which is the same bundle,
3 supplemental bundle, at 849, sets out that they wanted the relevant computer records, agree that
4 it says they were needed by the experts for corroboration of the Claimants' position, but it does
5 not set out - no, I do apologise - "that amounts of feed sold externally have been excluded
6 from claim." I do apologise, and I take that point back. But in any event, it does not assist, we
7 say, because they have seen what was seen by Mr. Morrell, and that is all that they are entitled
8 to see.

9 We say they cannot just go swanning through all the documentation willy-nilly. We
10 would also point out that if this application is pursued then we would be making a submission
11 on the law that insofar as the procedures of this Tribunal are akin to, or the same as the
12 procedures for disclosure relating to expert evidence in the High Court then there is authority
13 from the Court of Appeal which we say would support our position

14 (The Tribunal confer)

15 THE PRESIDENT: Sorry, Mr. Randolph, you were just saying there is authority?

16 MR. RANDOLPH: There is authority in the Court of Appeal and I gave my learned friend,
17 Mr. Hoskins, a copy of this authority last night. It is *Lucas v Barking, Havering and Redbridge*
18 *Hospital NHS Trust* 2003 EWCA Civ. 1102 which we say supports our point insofar as
19 disclosure of materials looked at by experts are concerned and, effectively what they say there
20 is that it is a relatively restricted rule and Lord Justice Waller and Lord Justice Laws in that
21 case made it clear that only in certain specific circumstances should material that has been
22 looked at by an expert for the purpose of making that report be actually discloseable and we
23 say the relevant criteria have not been met in this particular case. But that is by the by in the
24 main because at the end of the day we have disclosed what Mr. Morrell looked at, and had
25 reference to when coming to his opinion, and that really should be the end of that. If the Roche
26 wishes to make the point that this spreadsheet is simply not relevant they can do it by way of
27 cross-examination, but to seek to simply drag down or investigate vast areas of database which
28 may or may not be relevant for this purpose we simply say is not proportionate. They have
29 seen what has been relied on and that is all that they should see.

30 THE PRESIDENT: Mr. Hoskins, I, for myself, feel that this is not a point that we particularly want
31 to rule on tonight. With the best will in the world from all concerned, we are suffering from an
32 avalanche of paper. There may be some quite difficult issues relating to the disclosure of
33 underlying material which experts have seen and it occurs to me there are at least two
34 possibilities. One is that a further effort is made to sort this out in correspondence, and it may

1 very well be that if your experts have particular questions that they want answered the easiest
2 way is simply to ask the questions and I am sure the claimants will do their best to answer
3 them. It is in the claimants' interest to have all their cards on the table as much as possible –
4 that is the first possibility. The second possibility is that if it is not sorted out, and cannot be
5 sorted out by correspondence, then the Tribunal, which I think in this case would be a Tribunal
6 consisting of Miss Simmons sitting alone for this purpose, as she is authorised to do under our
7 Rules, can convene next week if necessary to have a special hearing on a specific issue like this
8 to decide whether specific disclosure of these documents is appropriate, rather than at this hour
9 trying to struggle through all these interesting, well presented but somewhat overwhelming
10 bundles, in order to try and make a ruling tonight.

11 MR. HOSKINS: Sir, our concern is that there is a trial date set in February ----

12 THE PRESIDENT: Yes, I appreciate the concern, I appreciate all that.

13 MR. HOSKINS: We are working as hard as possible to make sure that could be done. Our experts
14 need the information, if we have to take time ----

15 THE PRESIDENT: Well you say the experts need the information but we are not at all clear on
16 what point it is the experts have in mind on which they do need the information.

17 MR. HOSKINS: Sir, if it is to be that we are to have further hearings so be it, but in our submission
18 that is going to make it very difficult for us all to prepare for a trial in February.

19 THE PRESIDENT: Well, it can be done if necessary by a written application, you do not have to
20 come along, or you can ask us to decide it on the papers that we have already got, but at the
21 moment I am very hazy as to what point it is that the experts wish to resolve by this disclosure,
22 and whether disclosure is the right means of resolving it.

23 MR. HOSKINS: Sir, I have expressed my side and you have explained where we are and that is
24 where we are.

25 THE PRESIDENT: That is where we are.

26 MR. HOSKINS: Precisely.

27 THE PRESIDENT: And it is not always in this case that disclosure is the best way of sorting these
28 sorts of things out.

29 MISS SIMMONS: I would just add that what was said before, it is important that the expert says
30 why he needs this information. I am not clear why he needs it. He may need part of it. You
31 need to find out from him whether he just said well he has not got the information and it would
32 be interesting to check it, or whether he has seen something which means there are some
33 discrepancies which need to be investigated.

34 MR. HOSKINS: Madam, we will do that.

1 MISS SIMMONS: Because it does seem to me – and I do not know about the *Lucas* case – it is one
2 thing to go behind what an expert says, but just for the purposes of checking you should be
3 able to rely on the expert and if he has done a proper audit of the information then that is fine,
4 but if there is a reason to go behind it because – I will put it in accountancy terms – the audit
5 criteria have been wrongly selected, or because you can see that there is a problem, then we
6 need to know what that problem is and on that basis then, I do not know, but the *Lucas* case
7 may say something different.

8 MR. HOSKINS: For the record, ... says Mr. Morrell has not audited this information. The actual
9 cross-examination would be of Mr. Wright in this instance.

10 MISS SIMMONS: Sorry, I used the word “audit” and I said that I was using it in an accountancy
11 way but I understand that is not what happened here.

12 MR. HOSKINS: So those are all the issues on Deans.

13 THE PRESIDENT: Right, yes. So that takes us to Premier.

14 MR. HOSKINS: Sir, there are four categories in relation to Premier. The first relates to disclosure of
15 documents in categories 3 and 6 which are the equivalent of 3 and 7 in Deans and, as I have
16 explained, it has already been agreed that they are relevant because that is why we had that
17 category in the order and, in particular, we say they are relevant in exploring the downstream
18 passing on issue.

19 THE PRESIDENT: Yes.

20 MR. HOSKINS: In relation to this matter, again it has been pursued in correspondence.

21 THE PRESIDENT: Has there been a last minute ----

22 MR. HOSKINS: There has not been a last minute in this case, I am afraid, Sir.

23 THE PRESIDENT: Right – hope springs eternal, Mr. Hoskins.

24 MR. HOSKINS: Absolutely. Unless Mr. Robertson is about to say otherwise. I think I do need to
25 quickly show you the correspondence. There is a “BCL application for specific disclosure
26 bundle”.

27 THE PRESIDENT: File 15, yes.

28 MR. HOSKINS: At the front you should have the application notice and you will see categories 3
29 and 6 and then the audit files, which are different Mr. Morrell issues.

30 THE PRESIDENT: Which we are coming to in a moment?

31 MR. HOSKINS: Yes. Then there is Mr. Lawrence’s third witness statement. It would be quicker for
32 me to take you through the points that go through that. If I could ask you first of all to look at
33 tab 27?

34 THE PRESIDENT: Yes.

1 MR. HOSKINS: Because this was the disclosure that was provided pursuant to the order. You will
2 see down the side there is 1, 2, 3, 4, 5 etc. those are the numbers that relate to the numbers in
3 the annex to the order. So we are concerned with numbers 3 and 7. In relation to 3 what was
4 said was the best records under this category are the management accounts, which are set out in
5 the attached list. So it seems to suggest there were other documents within category 3, but they
6 were only going to give us what they considered to be the best records.

7 THE PRESIDENT: Then in relation to category 7: “Our clients do not have any documents to
8 disclose”. I am sorry it is category 6 here: “See category 3 above, so they are saying again the
9 best records are the management reports. It seems there may be other documents, or there are
10 other documents in category 3.

11 “Insofar as any additional information exists, our clients believe this information will
12 have been passed on to the various purchasers of the businesses and is not therefore
13 in the claimants’ possession or custody.”

14 So they say there it looks as if there is other information, it has been passed on to the
15 purchasers of the businesses. So they have given us the best records ----

16 THE PRESIDENT: On the categories we are concerned with, which are prices charged, and
17 movement in prices, and how the prices were determined, what we have is these management
18 accounts.

19 MR. HOSKINS: And that is it, yes. You see the list of documents is over the page, the category 3
20 lists management accounts of various firms in the group, and category 6 says:

21 “See category 3 above. Such documents as fall in this category are no longer within
22 the Claimants’ possession or custody”

23 – presumably because they have been passed to the purchasers.

24 THE PRESIDENT: Yes.

25 MR. HOSKINS: And then on 21st September Freshfields wrote a letter arising out of that disclosure.
26 That is the first document behind tab 28 – I should say, Sir, we have concerns about many of
27 the categories of disclosure but what we have tried to do is focus on what we consider to be the
28 most important, certainly for our case, and that is why we are pursuing this disclosure, but it
29 has been done in a focused way, we are not just picking up every point we could – far from it.
30 Freshfields wrote on 21st September raising a number of problems, and in relation to categories
31 3 and 6 one finds that on the second page of the letter – page 2 at the bottom of the bundle.
32 Paragraph 6 – “In relation to categories 3 and 6”. Perhaps I will just ask you to read that very
33 quickly.

34 THE PRESIDENT: Yes. (After a pause) Yes, we have read that.

1 MR. HOSKINS: You see at the bottom:

2 “Please also confirm that your clients have no rights of access to any of these
3 documents under the relevant sale and purchase agreements.”

4 That is very important, and I will come back to that. There are a couple of chasing letters, but
5 the next substantive letter is from Taylor Vinters on 2nd November, and that is at p.8.

6 “The Claimants have no storage facilities of their own. When the business of each
7 company was sold such of the documents under the disclosure categories as may then
8 have existed were passed to the purchasers.”

9 So again we see that point. Then over the page at the bottom in relation to categories 4, 5, and
10 6:

11 “In short, the Claimants do not know, and nor are they easily able to ascertain what
12 documents still exist in categories 1,3, and 6. Insofar as the claimant had any
13 documents relevant to these categories they will have parted with possession of them
14 at the time the businesses were sold.”

15 So again we say they have “passed them on”, if I can use that phrase. Freshfield’s letter of 10th
16 November 2004. Freshfields say:

17 “... not happy that you have complied with obligations. We are going to focus on
18 category 6. Potentially important issue about passing on. Category 6 documents go to
19 this issue.”

20 And then in the middle of p.12 they ask for an explanation, as one would expect in a disclosure
21 statement of an identification of what documents have been passed on to third parties, and
22 which documents have been destroyed, which has not happened, or had not happened and so
23 ask for that to be rectified, and 4 again say:

24 “Please could you also explain the extent to which the Claimants, or any of them, has
25 a right of access to relevant documents now in the possession of the purchasers of
26 their business.”

27 So again chasing those points.

28 Next, 17th November, we get a disclosure statement finally from Taylor Vinters. The
29 disclosure statement tells us what steps were taken, and there is nothing in the disclosure
30 statement to indicate that an attempt was made to obtain documents from the purchasers. I will
31 explain the significance of that in a minute.

32 29th November Freshfield’s letter, paras. 4 to 6 again. It is the same questions from
33 Freshfields because they still have not had an answer, and again in 6, at the bottom of the page:

1 “We now need an urgent explanation of whether your clients have any rights to
2 access relevant documents in the possession of the purchasers of your clients
3 businesses under the relevant sale agreements, i.e. do you have power to get these
4 documents?”

5 You will see that that question has been asked on a number of occasions.

6 THE PRESIDENT: Yes.

7 MR. HOSKINS: Taylor Vinters’ response 1st December at p.27, and we have for the first time an
8 attempt to explain what category 6 documents the Claimants may have had and what may have
9 happened to them. So we have price lists, they say it was overwritten on the computer system.
10 2 and 3, in relation to discounts:

11 “Ledgers and memoranda passed between Premier and Buxted and their customers.
12 These were negotiations and discounts and documents arising from those
13 negotiations. These were documents relating to the business and were passed on to
14 the purchaser.”

15 That is important, Sir, because it shows that there were relevant documents, or that there were
16 relevant documents, and they were passed on to the purchasers, so there is something relevant
17 to the passing on issue there.

18 “3. Records of negotiations, see 2 above.” So that is the same point, there are relevant
19 documents, they have been passed on to the purchasers.

20 THE PRESIDENT: Yes.

21 MR. HOSKINS: “4. Internal strategy papers. It does not say whether there are or are not such
22 papers, but ask what we mean by that. Item 5 “Audited financial statements” says “May be
23 available and investigations have been made.” So these are category 3 and 6 documents that
24 should have been disclosed and have not been at this stage.

25 The next part of the chain is 3rd December. There is a Freshfield’s chasing letter in the
26 middle, 2nd December, I think you have probably got the gist of where they are coming from.
27 3rd December is at p.34 – I am sorry, that is Freshfield’s letter, it is p.33 I am sorry.

28 THE PRESIDENT: There is something on p.33.

29 MR. HOSKINS: It is, it is the Taylor Vinters’ letter, 3rd December, it is p.33. Here we have for the
30 first time an indication of an attempt to get documents from one of the purchasers.

31 “It is our understanding that the position in respect of Daly is that the only documents
32 at now exist are unlikely to be found following a reasonable and proportionate search”
33 – query what that means.

1 “...limited documents held by Deans Foods Ltd., the purchaser of one of the
2 businesses...”

3 and then they set out what they are, but it is very minimal. Finally a Freshfield’s letter, it is
4 the one at p.34, and this is very important because it goes to the question of whether the
5 claimants have the ability to require the purchasers to provide documents and you have seen
6 that question was asked on a number of occasions and no response was given. So Freshfields
7 write the letter, and if I can pick it up, perhaps, at para.4.

8 THE PRESIDENT: Yes.

9 MR. HOSKINS: The bottom of p.34:

10 “‘We draw your attention to the sale agreements listed below.’ It lists them, and then
11 para.5: ‘In each of the agreements listed above ...’”

12 THE PRESIDENT: We have the point. You say that under the agreements they could have called
13 for the documents?

14 MR. HOSKINS: Yes, I am sorry to take such a long time, it is the only way I can manage to get this
15 information ----

16 THE PRESIDENT: We have managed to hold on to your coat tails, I think, thank you.

17 MR. HOSKINS: So the point is, the punch line again is the Claimants have documents in their
18 control, and I use that in the technical sense relating to categories 3 and 6 which they have not
19 even searched for, by which I mean approached the purchasers, let alone disclosed. These are
20 documents which relate to passing on which I think we can all accept would be a central issue
21 in the case. That is why we are looking for an order that they now take steps to search for those
22 documents and disclose them.

23 THE PRESIDENT: Yes, thank you.

24 MR. HOSKINS: And that is the basis of that application. It is probably better for me to sit down at
25 this stage and deal with that issue.

26 THE PRESIDENT: Yes, absolutely.

27 MR. ROBERTSON: Sir, I think the fundamental problem that we have in locating category 3 and
28 category 6 documents is that they are with the purchasers. They were transferred on the sale of
29 the businesses. We have taken some steps, and I apologise this has not been set out in
30 correspondence before, but I have made inquiries, we have taken some steps to carry out
31 searches for those documents. The problem is that those documents have not been archived in
32 any systematic form.

33 THE PRESIDENT: Are you talking about documents that you still have or documents that are with
34 the purchasers?

1 MR. ROBERTSON: With the purchasers. This was referred to in the disclosure letter of 20th
2 September, actually in relation to categories 1 and 2, but it is illustrative of a more general
3 problem with the documents. In that letter, which is the first letter that appears under exhibit
4 JAL27, it is said: In relation to BCL and PFF [Buxted and Premier]:

5 “No system of recording historic invoices and other documents relevant to this
6 category was employed by either company. Such documents as may exist have not
7 been stored in any organised way. This means a manual search through each and
8 every document, the vast majority of which are irrelevant. By way of further
9 illustration, such purchase invoice as have been located for Premier for an arbitrary
10 period, October 1997 to July 1998 are stored in 36 boxes which contain at least
11 43,000 invoices.”

12 That is illustrative of a more general problem. Those instructing me did visit the Premises
13 occupied by 2 Sisters, one of the 2 Sisters companies, in an attempt to find documents. They
14 were confronted with, they estimated, some 300-500 bankers’ boxes containing documents
15 including some documents which would have been relevant to one of the Premier companies,
16 but it is not apparent from the outside of the boxes where those documents are to be located.
17 They are mixed up with other 2 Sisters documents we understand.

18 THE PRESIDENT: Yes.

19 MR. ROBERTSON: And that is the problem that we have encountered in trying to track down the
20 documents. Yes, if money was no object one could trawl through all of those documents, but it
21 is a huge, huge task and we have attempted to approach this claim in a reasonable targeted,
22 focused proportionate way. As the Tribunal will be aware, under the Civil Procedure Rules,
23 rule 31.7 you are under an obligation when carrying out disclosure to carry out a reasonable
24 search, and disproportionate searches are not reasonable under that rule.

25 THE PRESIDENT: And your essential position is, is it, that technically speaking these documents
26 may be under your “control”, as a result in the provision in the purchase agreement, but in
27 practical terms any sensible effort to find and disclose these documents is to all intents and
28 purposes hopeless, because of the chaos reigning as regards their storage and retrieval?

29 MR. ROBERTSON: Yes. I cannot make that submission for all the purchasers. This was just
30 2 Sisters. There is another company, I do not recall which one of the other purchasers it is off
31 the top of my head, where the documents were literally shovelled into what was described as
32 an “outhouse”, not even in bankers’ boxes. I am reminded by those instructing me that we
33 have drawn this to Freshfield’s attention, both the sets of Defence attention, in a letter of 10th
34 September, which I shall just read out – it is the one that is cross-referred to in the letter of 20th

1 September. It is p.406 of the first supplementary bundle for the hearing, a letter from Taylor
2 Vinters to both sets of Defendants on 10th September referring to the Tribunal's order for
3 disclosure.

4 THE PRESIDENT: I am not quite sure what we are on. I have a supplementary bundle to the
5 supplementary bundle.

6 MR. ROBERTSON: It is not that, it is the original supplementary bundle – precisely what it is
7 supplementary to I am not sure. Sir, if I just read the passage.

8 THE PRESIDENT: Just read the passage, I am just waiting for someone to give it to me.

9 MR. ROBERTSON: We refer to the order of the Tribunal, 26th July 2004 and to the categories of
10 documents for disclosure.

11 “What our searches have revealed is that buried amongst a vast number of old
12 invoices for the Premier companies, are an almost insignificant number of invoices
13 from the Vitamins companies. It took two senior two people two hours to trawl
14 through the invoices relating to March 1998. There were some 3500 invoices and of
15 these only 10 appeared potentially relevant. Consequently it appears that the process
16 could be wholly disproportionate in respect of those companies which still have the
17 old invoices. There is no automated record within our clients' control so far as we
18 are aware which can identify these purchases.”

19 THE PRESIDENT: And that is 10th September?

20 MR. ROBERTSON: Yes.

21 THE PRESIDENT: Basically no change since then?

22 MR. ROBERTSON: There has been no change. We are happy to clarify the position in relation to
23 each of the purchasers who are joined to the action and check. The Tribunal has seen the letter
24 from Birketts acting on behalf of one of the Broomco companies saying it does not believe it
25 has any documents which are relevant to the action, so that our basic problem is that to produce
26 more documents in relation to categories 3 and 6 is just going to involve plainly
27 disproportionate expenditure of time and money and that is the fundamental problem. It was set
28 out in the letter of 10th September, where we thought that the Defendants had appreciated that
29 was the fundamental problem. If we have not been sufficiently clear about that then my
30 apologies, but that is the fundamental problem we have in relation to categories 3 and 6.

31 THE PRESIDENT: Yes, thank you. Yes, Mr. Peretz, at last ----

32 MR. PERETZ: I get the opportunity to say something.

33 THE PRESIDENT: Yes.

1 MR. PERETZ: Our position is I have been spending today running to keep up on disclosure. I am
2 pretty sure it is the case that this is the first time that we have seen certainly all of the
3 correspondence relating to categories 3 and 6 passing between Taylor Vinters and the
4 Defendants' solicitors, so I have been trying to run to keep up with what has been happening.

5 Our position is simply that we may have some records. We did take delivery of
6 computers from the business when we bought them, as well as documents. The relevant staff
7 of my clients who were involved with those records have since left and we are now in some
8 difficulty in ascertaining what we have. In fact, today was the first, I am afraid, that we had
9 heard of the visit paid by Taylor Vinters to our client's premises – it may be because it has
10 been going on at a level beneath the level of those instructing us, and so we are running to try
11 and keep up. What I can say is that in principle, and subject to proportionality issues we are
12 happy to do our best to provide what we have got. It is correct that under the purchase
13 agreements, as I understand it, the relevant provision as far as I can see is clause 17.2 of the
14 Sale Agreement. The vendors, that is to say, Mr. Robertson's clients have a right to access our
15 documents and they are obviously entitled to that, but we are in some difficulty in knowing
16 exactly what we have got, and there are obviously issues, particularly relating to computer
17 systems that may take a little bit of time to work out what we have, and what can be recovered
18 now. I think all we can promise is to do our reasonable best.

19 THE PRESIDENT: Yes, thank you. Well we have a practical problem, I think, Mr. Hoskins, have
20 we not? I do not know quite how we go about solving it. There is not a great deal of point
21 in ----

22 MR. HOSKINS: Can I suggest something?

23 THE PRESIDENT: Please do.

24 MR. HOSKINS: Mr. Peretz has very kindly said they are prepared to do their best. It seems to us the
25 best thing we can do is for us to liaise with 2 Sisters to indicate with as much specificity as
26 possible the types of documents we are looking for, and it is particularly useful, because
27 obviously we have had documents from Deans recently, and if we can liaise with them, and if
28 2 Sisters are happy to liaise with us in that way I think that is the way to take this forward.

29 THE PRESIDENT: I think that is probably a sensible suggestion. It may not be that you are going to
30 get very far, but I suspect that it is just a practical situation. We are not going to order
31 disclosure of 43,000 invoices in some shed somewhere.

32 MR. HOSKINS: I do not think we would want 43,000 invoices.

1 THE PRESIDENT: And you would not be able to make head nor tail of them even if we did. If they
2 have not got the documents that may go or may help them to prove their case that is too bad for
3 them. There it is, we just have to do the best we can I think without the documents.

4 MR. HOSKINS: Our concern is that we have the documents that we have in relation to passing on.

5 THE PRESIDENT: I understand entirely your concern, but the various concerns and interests just
6 hit the practical situation here. If you can make some progress with Mr. Peretz so much the
7 better, and I think probably the only thing we can do is just leave it on that basis.

8 MR. HOSKINS: That is why I make the suggestion.

9 THE PRESIDENT: Thank you, well we accept the suggestion.

10 MR. PERETZ: I simply rise to say that Mr. Hoskins mis-paraphrased me in one respect. I said
11 “reasonable” best, not necessarily our best, there may be a distinction between the two.

12 THE PRESIDENT: No, no, reasonable best. It may be that nothing comes of it but I think that is all
13 we can really do in practical terms.

14 MR. PERETZ: Yes, and a second point, I simply reserve our position on this, it is a point as to the
15 costs of the exercise. We would submit there is no difference in principle in this respect
16 between our position as of today having been joined, and the position of a non-party who
17 would usually expect to receive some assurances to the costs of undertaking an exercise such
18 as this.

19 THE PRESIDENT: Well if that is as far as we can get with categories 3 and 6, that leaves
20 Mr. Morrell’s audit files. Is that right, Mr. Hoskins?

21 MR. HOSKINS: It does, Sir, yes. There are two other issues I want to flag up, but I am sure they
22 will be dealt with in the same way, because they have arisen recently we will have to deal with
23 them between the parties as best we can.

24 THE PRESIDENT: Yes.

25 MR. PERETZ: That may mean that I can now go?

26 THE PRESIDENT: I am sorry you have had to spend the time. Thank you for your help.

27 *(Mr. Peretz withdrew)*

28 THE PRESIDENT: Yes, Mr. Morrell’s audit file. The Tribunal, for various reasons, is a bit reluctant
29 to sit much after 4.30 tonight.

30 MR. HOSKINS: Well I am in your hands, Sir.

31 THE PRESIDENT: Yes, well let us go on and see what we can do.

32 MR. HOSKINS: In his expert’s report Mr. Morrell gives actual evidence, and he expressly
33 recognises it as such relating to passing on, and he says that he obtained that information in his

1 In relation to Mr. Peretz's point I simply want to make it clear that of course the
2 purchasers which are now joined as parties to these proceedings must be also subject to this
3 order of 26th July. They must have the ordinary disclosure obligations ----

4 THE PRESIDENT: Well we can always amend, qualify, modify or adapt our orders, depending on
5 circumstances.

6 MR. KENNELLY: That is correct, Sir, but as a matter of principle, and in order to resolve this case
7 we would say fairly and justly, the purchasers must also be subject to this order. We sought to
8 narrow the disclosure issues as much as possible, that was the point of the categories set out,
9 and the purchasers must be subject also ----

10 THE PRESIDENT: But we have simply joined the purchasers for reasons of procedural economy
11 and safety so that there is no subsequent argument as to who the money eventually goes to and
12 no double jeopardy from the point of view of the defendants. I am not sure we have joined the
13 purchasers in order to expose them to discovery applications.

14 MR. KENNELLY: Well, Sir, just two points. First, we ought to remember the purchasers may well
15 be the beneficiaries of the claim ----

16 THE PRESIDENT: We have not made any order yet, we have not drawn the order yet, but if there is
17 a trap we are about to fall into we had better be alerted to it.

18 MR. KENNELLY: Well they seek the benefits of the claim, potentially and in those circumstances
19 they ought to be subject ----

20 THE PRESIDENT: It is not their claim, it is the Claimants' claim, it is not the purchasers' claim.

21 MR. KENNELLY: It is open, there is a possibility that they may be the ultimate beneficiary to the
22 claims and in circumstances where they themselves admit, as Mr. Peretz said, they hold
23 documents which are relevant to the issues before you. It would be extraordinary if the
24 purchasers were not subject to the same disclosure obligations. It is crystal clear that they hold
25 relevant documents, and the simplest thing to do would be to make them subject to the 26th
26 July order, and that in my submission would also be proportionate.

27 THE PRESIDENT: Well at this stage I am not at all sure. What had been going through my mind
28 was that we would be making a formal order joining the purchasers as Defendants to solve
29 a procedural problem which related to, among other things to whom the benefit of the claim
30 inured, to get round the problem of the equitable legal assignment. The Tribunal has not so far
31 seen this as opening up a second front, as it were, of litigation, involving all kinds of discover
32 applications against the purchasers.

33 MR. KENNELLY: I have some sympathy with the Tribunal's position because of the lateness of
34 some of the documents that were placed before you.

1 THE PRESIDENT: The existing order does not, on its face, apply to the purchasers because it was
2 made at a time before the purchasers were a party to the action, so to make any order for
3 disclosure against the purchasers you have to make some new order and tonight would not be
4 the time to do it anyway.

5 MR. KENNELLY: Sir, I agree. Could I simply ask, because I realise a great deal of material has
6 been put before you, that the Tribunal consider the witness statements and the correspondence
7 contained, at least to Mr. McDougall's statement.

8 THE PRESIDENT: Which one is it?

9 MR. KENNELLY: It is in the slim blue bundle.

10 THE PRESIDENT: Is it the fourth witness statement?

11 MR. KENNELLY: It is the third witness statement of Mr. McDougall, and the correspondence is
12 behind tab 4.

13 THE PRESIDENT: The third witness statement which was on 7th December.

14 MISS SIMMONS: Behind tab 3.

15 THE PRESIDENT: And then the fourth witness statement also on 7th December, and yet a fifth
16 witness statement presumably on the same date, also yesterday, yes.

17 MR. KENNELLY: I should say, and I understand the Tribunal's concern, but in Mr. McDougall's
18 defence, as you will see this follows a chain of correspondence where the clients were put on
19 notice. We sought as much as possible to deal with this between ourselves, and it is a last resort
20 we come before the Tribunal for this order. But if the Tribunal could consider the
21 correspondence, and hopefully then realise the importance obtaining these crucial documents
22 which the purchasers themselves hold in the interests of justice to ourselves and to the
23 Claimants. It is in everyone's interest to get relevant documents out as quickly as possible.

24 THE PRESIDENT: Well you have heard Mr. Peretz say that he will do his best.

25 MR. KENNELLY: His "reasonable" best, Sir.

26 THE PRESIDENT: Sorry?

27 MR. KENNELLY: His "reasonable" best.

28 THE PRESIDENT: No doubt proportionate as well! [Laughter] We have one purchaser who is
29 sitting on the sidelines, who does not seem to want to have anything much to do with the case,
30 but is not quite prepared to say that he wants nothing to do with the case, but anyway is not
31 here today; and we have the two others who have been joined for rather roundabout, formal
32 reasons. I would have thought still that your principal avenue is still directly against the
33 Claimants and if it is right that such documents as the purchasers hold are in the state that has

1 been described to us it is not going to be a fruitful exercise trying to get discovery of all those
2 by now rather moth eaten and mouldy documents in sheds.

3 MR. KENNELLY: I will not pursue the point any further. I ask only that the Tribunal consider the
4 documents before it.

5 THE PRESIDENT: We will note it and we will read the material carefully.

6 MR. KENNELLY: Finally then – and this is my last point – in relation to what I mentioned this
7 morning about my potential application for permission to amend. We have had a discussion
8 with Deans, and I heard Mr. Leggatt today say ----

9 THE PRESIDENT: This is on the compromise point?

10 MR. KENNELLY: The compromise point. Mr. Leggatt said that contrary he had from the
11 correspondence, Deans disavowed any interest at all in the BCL Old Co. claim. Having spoken
12 to Mr. Randolph, if he could clarify and re-state that point for the record it will not be
13 necessary for me to seek permission to amend, and the issue of the compromise maybe, it
14 seems, successfully resolved between solicitors, and I need not trouble the Tribunal further on
15 that point. But what I need from Mr. Randolph to put this to bed is a clear statement that Deans
16 have disavowed any interest in any present/future claim in the BCL Old Co. action.

17 MR. RANDOLPH: I am surprised at what Mr. Leggatt said was not sufficient, and I am perfectly
18 happy to recite what has already been said in correspondence – I am surprised that it is being
19 said that contrary to the impression given in correspondence – and that is this:

20 “Deans does not assert that DFL’s right to sue in this action has been assigned to it.
21 Any rights of action that may have been acquired inadvertently have, in any event,
22 been re-assigned to Daly as a result of an agreement entered into by Deans, which
23 expressly disavows any claim to be the assignee of the relevant right.”

24 That seems to cover the point, and that was set out in writing on 3rd December. So I would
25 hope that that would draw a line under this particular point and then we could have
26 successfully compromised this particular part of the claim which will impact on how the trial
27 goes forward in a positive fashion, in other words, there will not be that claim to deal with.
28 I hope that that will be sufficient.

29 THE PRESIDENT: Does that deal with it, Mr. Kennelly?

30 MR. KENNELLY: If Mr. Randolph agrees that what he has just said is the same as what I have just
31 said then it does. But I must stress that that was not -----

32 THE PRESIDENT: You can see why these compromises fail at the last minute.

33 MR. KENNELLY: Yes, it is all the lawyers’ fault. But if he gives us that assurance, it should be
34 very straight forward since I think he is saying it is the same thing.

