[2023] EWHC 3276 (Pat)

Case No: HP-2022-000029; HP-2022-000032;
HP-2022-000034; HP-2023-000005;
HP-2023-000006; HP-2023-000017

IN THE HIGH COURTS OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INTELLECTUAL PROPERLY LIST (CHD)
PATENTS COURT

The Rolls Building,
7 Rolls Buildings,
Fetter Lane,
London, EC4A 1NL

Date: 08/12/2023

Before:

SIR ANTHONY MANN

- -

Between:

(1) SANDOZ AG **(2) SANDOZ LIMITED** **(3) ACCORD HEALTHCARE LIMITED**	**Claimants/ Part 20 Defendants**
- and -	
BAYER INTELLECTUAL PROPERTY GMBH	**Defendant/Part 20 Claimant**

And between:

(1) TEVA PHARMACUETICAL INDUSTRIES LIMITED
(2) TEVA UK LIMITED
- and -
BAYER INTELLECTUAL PROPERTY GMBH

And between:

(1) CIPLA LIMITED
(2) CIPLA (EU) LIMITED
- and -
BAYER INTELLECTUAL PROPERTY GMBH

And between:

(1) AMAROX LIMITED
(2) HETERO LABS LIMITED
- and -
BAYER INTELLECTUAL PROPERTY GMBH

- -

- -

And between:

(1) GENERICS (UK) LIMITED
(2) VIATRIS HEALTHCARE LIMITED
- and -
BAYER INTELLECTUAL PROPERTY GMBH

And between:

(1) STADA ARZNEIMITTEL AG
(2) THORNTON & ROSS LIMITED
(3) GENUS PHARMACEUTICALS LIMITED
- and -
BAYER INTELLECTUAL PROPERTY GMBH

- -

Ms ANNA EDWARDS-STUART AND MR. ADAM GAMSA (instructed by **Bristows LLP** for Teva; **Pinsent Masons LLP** for Sandoz & Accord; **Taylor Wessing LLP** for Viatris**; Penningtons Manches Cooper LLP** for Cipla; **HGF Law LLP** for Amarox; **Pinsent Masons LLP** for STADA; **Bristows LLP**) for the **Claimant.**
MS. ALICE HART (instructed by **Allen & Overy LLP**) for the **Defendants.**

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APPROVED JUDGMENT

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SIR ANTHONY MANN:

1. This is an application by the one of the claimants in this managed litigation (Teva) against the defendant, Bayer, for the production of a document which it is inferred exists in the form of presentation slides, acetates and/or handouts said to have been used for the purposes of a presentation at an American conference of scientists, the ACS Conference, which took place from 22-26 August 2004. Bayer does not deny that the document exists, though it has not admitted either. It does not claim that it does not have it, or cannot easily get it, or that it is confidential, although one of Bayer's main points is that it is not probative of any issue in the case and therefore irrelevant. It would seem that the production of this document would easily be achieved, but rather than take the simple cost-effective course of producing it, Bayer has chosen to spend £39,000 by way of costs in resisting the application. Its evidence reveals that it seeks to stand on some point of principle. I return to this attitude below, but in the light of Bayer's resistance, I therefore have to decide the point.
2. The application is brought within this present action, which is one of several actions, managed together as I understand it, in which various generic drug manufacturers challenge a patent of Bayer with the number EP UK 1845961B. They are all claimants, and as I understand it Teva is the particular claimant put up to make this application which, if successful, will operate for the benefit of all of them. The patent relates to a drug, which is now known as rivaroxaban and claims a particular dosage regime. Its priority date is 31st January 2005. The actual chemical compound in the drug was disclosed publicly in an earlier patent in 2001, but that patent said nothing, or nothing relevant, about a dosage regime. The actual compound is identified below and

at this stage I need say no more about it than to observe that the drug is an antithrombotic drug and seems to be accepted as being a blockbuster drug; hence the interest of the generics and the great importance of this action, or these actions, to the parties.

3. One of the grounds on which revocation of the patent is sought is obviousness, stemming from one piece of prior art, which is a poster publication known as Harder. This poster, published by individuals, some whom were Bayer employees, refers to a compound known to be a Bayer antithrombotic compound, but identified in that poster only by the code BAY 59-7939. The poster contains what can be described as the start of the journey by the skilled addressee, which requires the identification of the BAY 59-7939 compound by the nature of its chemical structure. The chemical structure was not apparent from the poster. However, at the presentation in question, a Bayer scientist, Dr. Roehrig, apparently identified the compound known as BAY 59-7939 by reference to and identifying its chemical structure. That much is admitted by Bayer.

4. That is not entirely sufficient for the entirety of the claimant's obviousness attack. The claimant does not stop at that identification. Its obviousness case, or part of it, depends on it being able to establish that if Bayer, or Dr. Roehrig, if asked herself, were asked before or even after the presentation what the chemical structure of BAY 59-7939 was, then Bayer (or Dr Roerhig) would have told it. This point, so far as a pleading about what Bayer would have done, is a pleaded point, and this has been met in the evidence. The point about asking Dr. Roehrig specifically is not pleaded.

5. This train of inquiry point is a live point at the forthcoming trial, which is fixed for January of next year. It might be thought that if Bayer had given its product a code name in the Harder poster, it would be unwilling to disclose the chemical structure of BAY 59-7939 at the time, but that is a point for the trial. However, it is accepted by Bayer that at the ACS conference, Dr. Roehrig, in terms, identified the BAY 59-7939 chemical compound as being the Bayer compound previously disclosed in 2001, and now, but not then, known as rivaroxaban.
6. Despite that, Bayer pleads that it denies "that this factor is not otherwise treated as confidential." In other words, it seems to be averring that the identification of the chemical structure of BAY 59-7939 at the conference was still confidential, notwithstanding the apparent publication of that identity by one of its own employees at the conference. Whether that is a justifiable stance is again a matter for the trial.
7. The confidentiality point goes to the question of whether Bayer would have disclosed to an enquirer what the identity of BAY 59-7939 was if asked, which, as I indicated, is one of the questions arising on the pathway (or one of the pathways) to obviousness. The likelihood of that is plainly a question which arises in the proceedings and which Bayer has addressed in a particular witness statement, as will appear shortly. It is to that likelihood that the disputed document is said to go, potentially.
8. Precisely what was disclosed in the presentation, and how, is not known from third party evidence. The reason that Teva seeks the presentation documents is because it says they are capable of going to just how confidentially Bayer was then treating the identity of BAY 59-7939. It is said, by way of example,

that if the slides contain the pictorial description of the compound as a sort of logo or freeform backdrop then that will support the case that Bayer had by then dropped any notion of confidentiality, which in turn would go to the likelihood of Bayer telling an enquirer what the chemical structure of the compound was, if asked. In other words, the manner of the presentation, judged by the physical material shown or presented, will bear on the question of the likelihood of Bayer disclosing the identity again. It is also suggested that if, as is said to be at least possible if not likely, the presentation invited post presentation questions to be addressed to Dr. Roehrig by e-mail or paper mail, then that would go to the same question.

9. One of the things I have to decide is whether or not the document is relevant to any issue at all, or is likely to be probative, a test suggested by Ms. Hart, who appeared for Bayer. The chain of reasoning to which it is said to relate is clearly pleaded and is clearly an issue. There is a dispute as to whether the pleadings allow reliance on putative requests of Dr. Roehrig, as opposed to Bayer generally, but that is not an issue I have to decide. There is at least a pleaded issue to which the document might go so far as the Bayer question/answer is concerned. Then there is the question of whether this document, whose contents are obviously not known to Teva at the moment, is likely to be probative on that issue. I consider the likelihood to be thin, but not in the realms of pure speculation, or at least not so far into those realms that disclosure of the document should not be ordered on the grounds of lack of probative value if it would otherwise be ordered.

10. It will be convenient to deal at this point with another point made by Ms. Hart, which is that the existence of the document as a matter of inference is purely

speculative and its existence is not supported by any evidence. This submission plainly fails. Many entirely proper applications for disclosure relate to documents which the seeking party does not actually know to exist for certain, but which it is reasonable to infer to exist. That is commonplace.

11. In the context of this particular document, there is no difficulty in an inference that the document is likely to exist. The presentation is known to have been entitled "Discovery of the novel antithrombotic agent BAY 59-7939, an orally active Direct Factor Xa inhibitor" and was apparently a serious presentation intended for serious chemists. It is highly likely that it would have been accompanied by some form of physical presentation, whether in the form of computer-presented slides, acetates or documentary handouts, or perhaps a combination of those. One would expect that at a serious conference, and as Ms. Edwards-Stuart (who appeared for Teva) pointed out, it is very hard to see how the identity of the compound can have been communicated without some form of physical presentation. The full name of the compound is:

    5-Chloro-N-({(5S)-2-oxo-3-[4-(3-oxo-4-morpholinyl)phenyl]-1,3-oxazolidin-5-yl]}methyl)-2-thiophenecarboxamide.

12. I doubt if Dr. Roehrig read that it and expected it to be taken in without some form of physical expression. It is much more likely that the name appeared in some physical presentation and/or that its molecular structure was shown in diagrammatic form so that the audience could understand what she was talking about. That is not pure speculation. It is a sensible inference, if not an inevitable inference. I therefore consider it very likely that the document sought existed and still exists. It would have been very easy for Bayer to

short-circuit this whole procedure by saying that the disclosed document did not exist, or no longer exists, but it has not said so. That is of itself some probative value on this point.

13. I turn therefore to the legal basis on which disclosure is claimed. The first is that the document is one "mentioned" in a witness statement. When the issue of the likelihood of Bayer disclosing the identity of BAY 59-7939 first emerged from the pleadings as a result of the special subset of pleadings ordered by Meade J, Bayer put in a witness statement devoted to the issue. It is a witness statement of a Dr. Misselwitz, who worked at Bayer at the relevant time in a relevant capacity, the details of which are not relevant for present purposes. His witness statement deals with the question of how Bayer would have approached a request for the sort of information which would be the subject of the putative request for details about BAY 59-7939, and then in section 4, it turns to the question of "The ACS presentation and Perzborn." (Perzborn is another disclosure which is not relevant for present purposes).

14. He then says:

> "36. I have been informed by A & O that the chemical structure of BAY 59-7939 was disclosed, together with the code name BAY 59-7939, publicly on the following two occasions before the priority date:
>
> "(i) during a presentation entitled 'Discovery of the novel antithrombotic agent BAY 59-7939 an orally active direct factor Xa inhibitor' given by a Bayer scientist at the 228th American Chemical Society National Meeting in Philadelphia from 22-26 August 2004 ('ACS presentation'): and
>
> "(ii) [Perzborn – details not relevant].

"37. I do not recall the ACS presentation specifically and I am unaware of whether, and to what extent, it was discussed in the GPT or the core team ...

"38. Although I cannot recall the ACS presentation and Perzborn, I believe they would not have affected, and to my knowledge did not affect, the approach taken to a BAY 59-7939 request for information, at least if it was from a third party seeking to do any type of clinical investigations with the compound..."

15. That is the extent of reference to the presentation. This is said to be a "mention" in the document within the provision PD 57 para 21:

"21. Documents referred to in evidence.

"21.1. A party may at any time request a copy of a document which has not already been provided by way of disclosure but is mentioned in - .. .

"(ii) a witness statement:

...

"21.2. Copies of documents mentioned in a Statement of Case, witness evidence or an expert's report and requested in writing should be provided by agreement unless the request is unreasonable or a right to withhold production is claimed.

"23.1. A document is mentioned where it is referred to, cited in whole or in part, or there is a direct allusion to it.

"21.4. Subject to rule 35.10.4, the court may make an order requiring a document to be produced if it is satisfied that such an order is reasonable and proportionate (as defined in paragraph 6.4)."

16. Paragraph 6.4 of PD 57 provides:

"6.4. In all cases, an order for extended disclosure must be reasonable and proportionate having regard to the overriding objective including the following factors -

"(1) the nature and complexity of the issues in the proceedings;

"(2) the importance of the case, including any non-monetary relief sought;

"(3) the likelihood of documents existing that will have probative value in supporting or undermining a party's claim or defence;

"(4) the number of documents involved;

"(5) the ease and expense of searching for and retrieval of any particular document (taking into account any limitations on the information available and on the likely accuracy of any cost estimates);

"(6) the financial position of each party; and

"(7) the need to ensure the case is dealt with expeditiously, fairly and at a proportionate cost."

17. The main question arising under paragraph 21 on this application is whether a document is "mentioned." As well as the reference to a need to a "direct

allusion", there is also case law guidance on how the provision is to be applied. The authorities were summarised by Joanna Smith J in *FCA v Papadimitrakopoulos* [2022] EWHC 2061 (CH) at [15]:

> "15. It is common ground that the leading authority on the meaning of the word 'mentioned' in CPR 31.14 is the Court of Appeal's decision in *Expandable v Rubin* [2008] EWCA Civ 59. My attention was drawn specifically to [19], [23], [24] and [25] of the judgment of Rix LJ in that case, which refer to the decision in *Dubai Bank Limited v Galadari* (No.2) [1991] WLR 721. Without setting those paragraphs out in full, I draw the following propositions from them:
>
> "(a) the mention of a document requires a direct allusion or specific mention.
>
> (b) subject to the need for a direct allusion or specific mention, the expression 'mentioned' is 'as general as can be.' It is not intended to be a difficult test. The document in question does not have to be relied upon or referred to in any particular way or for a particular purpose in order to be mentioned.
>
> "(c) where a party mentions a document, then, subject to the question of privilege, the other party should be entitled to inspect. This is consistent with the 'cards on the table'approach to litigation. As Rix LJ points out '[w]hat in such circumstances is the virtue of coyness?'. (I note that of course this is now subject to the issue of reasonableness and proportionality).
>
> "(d) a reference to a conveyance, guarantee, mandate or mortgage will involve the mention of a document, as will the words 'he wrote to me'

because the latter is a direct allusion to the act of making the document itself (i.e. 'he wrote a writing').

"(e) a reference to the effect of the transaction or document such as to, say, 'a property has been conveyed' or 'someone has guaranteed a loan', will not be sufficient to involve a mention.

"(f) it is insufficient that a witness statement refers to a transaction which, on the balance of probabilities, will have been effected by the document for which inspection is sought. A reference by inference is not enough."

18. That useful summary was not disputed in the application before me.

19. Applying these principles, I do not consider that the likely documentary presentation was "mentioned" within the meaning of the CPR. It was not directly alluded to in the sense that there is a specific reference to it. All there is is a reference to the occasion on which a document is likely to have been used and that is not the same thing. This case falls into the "inference" category which the authorities say is not enough. Coupled with that is the context in which the witness statement was produced. The reference to the presentation came first in some issues-specific Points of Claim ordered by Meade J. The plaintiff pleaded disclosure at that presentation and at paragraph 6.1 pleaded that the skilled person would have been motivated to find out the structure of BAY 59-7939, would have made a direct approach to Bayer and would have been given the information.

20. That last point (the likelihood of being provided with the information), but not the disclosure of the presentation, was put in issue by Bayer. Dr. Misselwitz's statement was served in specific response to the question of what Bayer would

have done if approached for information as to the structure of BAY 59-7939 and the bulk of his witness statement deals with that. He says Bayer would not have disclosed the structure.

21. At the end, he turned to the presentation in the terms set out above and says that the fact and pleaded content of the presentation would have made no difference to his views about the likelihood of disclosure. In doing so, he is responding to an event first pleaded by the claimant and is directly alluding to the event and its consequences or non-consequences on the question of Bayer's response to a question. He is not introducing a new, or any real, reference to a document any more than the reply document was making such a reference in admitting the disclosure at the admitted presentation. He is not directly alluding to any presentation document at all. He is therefore alluding to an event which is the equivalent of a reference to a transaction from which there is merely inferred to be documentation. This line of attack therefore fails.

22. Next is the line of attack based on disclosure. The claimant seeks the presentation document as a piece of extended disclosure by way of varying a prior order about extended disclosure on the footing that the likely underlying presentation document is disclosable on normal disclosure principles as a relevant document.

23. In my view, the claimant has overcome one hurdle in establishing a case of relevance for the reasons appearing above when I discussed probative value. One then moves to CPR PD 57, under which Ms. Edwards-Stuart applies on behalf of Teva, which provides:

> "18.1. The court may at any stage make an order that varies an order for extended disclosure. This includes making an additional order for

disclosure of specific documents or narrow classes of documents relating to a particular issue for disclosure.

"18.2 The party applying for an order under paragraph 18.1 must satisfy the court that varying the original order for extended disclosure is necessary for the just disposal of the proceedings and is reasonable and proportionate (as defined in paragraph 6.4)."

24. The order which Ms. Edwards-Stuart seeks to vary is part of an order made by Meade J on 2nd May 2023 at a time when the issue arising out of a follow-up of Harder had not clearly arisen. His order provided for point-specific pleadings on what the heading to that part of his order describes as "statements of case on BAY 59-7939", which resulted in the point-specific pleadings to which I have referred above.
25. Paragraphs 15 and 16 of the order provide for Bayer to inform the other parties whether it was relying on certain identified types of evidence and providing that if it were, then the parties were to seek to agree the scope of such extended disclosure as might be necessary on those issues.
26. Paragraph 17 provided:

"17. Subject to paragraphs 15-16 above, there shall be no extended disclosure."

27. That is the order for extended disclosure that Ms. Edwards-Stuart seeks to vary under PD 57 para 18.1. Bayer ultimately indicated that it was not going to rely on the evidence referred to in paragraphs 15 and 16, and therefore the provisions of paragraph 17 kicked in.

28. Ms. Edwards-Stuart having sought to apply by way of variation of that order, Bayer's main response was contained in a short paragraph in Ms. Hart's skeleton argument which says that there is no order for extended disclosure to vary. The order made by Meade J was not an order for extended disclosure at all. However, that stance was undermined by Ms. Hart's acceptance in submissions that if one had an order such as that made by Meade J, and a new issue arose in those proceedings which required some extended disclosure, then extended disclosure would be available by way of variation, although she says that the present case does not fall within that category. I am sure Ms. Hart's acceptance of the principle is correct, but it does inevitably mean that her original stance was wrong so that an original "no extended disclosure" provision can indeed be varied later to allow for extended disclosure, or that an application can be made de novo. One of those two routes would have to be available to allow an application of the sort on which Ms Hart's concession was based.

29. I consider that extended disclosure would not be barred by paragraph 17 of Meade J's order. There are two routes to that conclusion, and they are those to which I have just referred. The first is under paragraph 18 of the Practice Direction. In my view, in the present circumstances, an order which deals with extended disclosure by saying there should be none is, in substance, an order for extended disclosure within the paragraph in the sense that it provides for what extended disclosure should be given (i.e. none). If it later transpires that extended disclosure becomes necessary, whether by virtue of the addition of an issue or not, then that order about the extended disclosure is one that can be varied under paragraph 18 and Ms. Hart was right to accept that in principle

that can be done. On this footing, Ms. Edwards-Stuart can bring her application under paragraph 18. In my view, it would be anomalous if, for example, there was a provision for extended disclosure for one single document, which could then be varied by adding other documents later because that single disclosure is a peg for a paragraph 18 application, but one could not get some further disclosure if a decision, proper at the time, had been taken that there should not be a disclosure of even a single document. That would be an irrational state of affairs which can hardly have been intended by the framers of the Practice Direction.

30. Furthermore, and in any event, I consider that the present case does demonstrate a situation falling within Ms. Hart's accepted category of a case in which a subsequently arising issue requires some extended disclosure for the first time. Although the follow-up issue arising out of Harder can be said to have been theoretically in play from the outset, at least in a technical sense, the issue was only thrown up in its present form as a result of the point-specific pleading for which Meade J provided. It is therefore a new issue which justifies revisiting extended disclosure by way of a variation of the existing order.

31. If that is wrong, however, and there is no extended disclosure order to vary, then there never has been any provision for extended disclosure at all, so I do not see why extended disclosure cannot be sought de novo, as it were, under the procedures provided for in paragraphs 6 and following of the Practice Direction. Ms. Edwards-Stuart did not put her application on that basis and I do not need to develop the point, but at the moment, I do not see why that alternative course would not have been available to her as a matter of logic.

32. Having decided that a procedural course is available to Ms. Edwards-Stuart, it does not automatically follow that she should have disclosure of the document. Relevance is not enough. She still has to bring herself within the provisions of paragraph 6.4. In my view, she gets over all the specifically-identified hurdles. These are complex proceedings and the issues within them are complex. It is right that they should be decided on a proper evidential basis. The document sought goes to some of those issues. The case is highly important to the parties because it involves a blockbuster drug and a lot of money. Indeed, it is important to the industry as a whole, as is reflected by the number of other companies bringing similar revocation claims which are being managed together. I have already dealt with the likelihood of the document existing and it will be extremely easy to produce. I have also already alluded to its potential probative effect, which might be questionable in some respects, but bearing in mind the ease of production of the document and the fact that there does not seem to be any principle (such as confidentiality) or practical objection to its production, I do not consider that the question-marks over its probative effect have as much weight as they might otherwise have if there were such principled or practical objections or difficulties.
33. The financial position of the parties hardly arises in the sense of a lack of finances being a bar. These are two extremely well-heeled entities and the costs of production of the document will be minimal. Bayer does not rely on the cost of production as a bar, nor will the production of the document, of itself, stand in the way of the expeditious and fair disposition of the proceedings. If anything, it would be non-production of the document that would stand in the way of the fair disposition of the proceedings. There are no

disproportionate costs involved or arising out of the production of the documents other than the cost that Bayer has chosen to incur in resisting the production of the apparently easily producible document, and that arises out of Bayer's own choice.

34. There are, however, some other issues which Bayer raised. First, Ms. Hart said that this application was being made late and it could and should have been made earlier. She submits that the application should have been made at the end of July when Bayer's points of response in the point-specific pleadings was served on 27th July 2023, and when it became apparent that Bayer's response to the putative enquiry was going to be an issue. Instead of applying then, the claimant only made the application when Dr. Misselwitz's witness statement was served in September, and then used that together with paragraph 21 as the primary vehicle for the seeking of a document, a route which, on the basis of my determination above, was not open to them. The witness statement did not change the position. It merely developed a point in a piece of evidence which was already in issue. Furthermore, there was no application at the second CMC, which took place on 31st July, where, I am told, BAY 59-7939 was an active topic of discussion and where there were discussions about expert evidence on the point. Ms. Hart's skeleton argument hints at, but does not develop, save in one respect, a potential disruptive effect of the provision of a document at the present late stage in these proceedings with a trial date in January or February.

35. I agree that in several respects Ms. Hart's points are good. This application is made later than it might have been expected to have been made. It could have been made once the point-specific pleadings had been digested, though it is

perhaps understandable that it might not have been raised at the second CMC, which followed on so hard after the service of Bayer's Points of Reply, which crystallised some of the issues. I note that Bayer's response was served on a Thursday and the CMC was the following Monday, so there was only one working day in between. But it is nonetheless true that the application for specific disclosure could have been made thereafter and the claimant cannot have been waiting for Dr. Misselwitz's witness statement because it cannot have known what the contents would be. I think it likely that the thought only occurred to the claimant to seek the document after service of the witness statement.

36. However, none of that is a particularly compelling reason for not ordering disclosure. This is not a late application which will, of itself, disrupt trial preparation in any practical sense. I do not consider that the claimant should be punished for a late disclosure application when the disclosure will have no disruptive effect in itself. If, which I frankly doubt, the conduct of this particular application has disrupted trial preparation, then that arises out of the choice of Bayer to stand on a point of misplaced principle rather than taking the practical way out of this situation. It would not be right to punish the claimant merely for delay.

37. The last point made by Ms. Hart, however, is of a little more substance. She points out that there is the potential disruptive effect arising out of arguments as to how far the claimant’s case is allowed go in relation to the putative enquiries and their consequences. One of the claimant’s points is that the presentation might, as apparently they sometimes do, invite post presentation discussion by giving contact details of the presenter. If those details are given

in the actual presentation documents, then the claimants will seek to argue that they demonstrate that Dr. Roehrig (and therefore Bayer) were more likely to be less coy about the chemical position in BAY 59-7939.

38. Ms. Hart had two objections to that. The first is a pleading point. What is pleaded by the claimant is that enquiries should be made of Bayer generally, not of Dr. Roehrig specifically, so the claimants should not be entitled to run the Roehrig part of the point anyway.

39. The second is a trial preparation disruption point. If the point were run in its full scope then it would or might necessitate the production of more witness statement evidence from, perhaps, Dr. Roehrig if not others.

40. So far as the pleading point is concerned, Ms. Hart may have a point. Insofar as it is right it has an interaction with probative value since the claimants cannot say that the document is necessary in order to pursue a non-pleaded point. However, the probative value in relation to the generality of Bayer's attitude to the putative question still arises even if the claimants are not allowed to rely on a direct inquiry to Dr Roehrig.

41. If there is a pleading point it will have to be taken at some appropriate point at or before trial. It is right that there is no specific pleading that enquiries might have been made of Dr. Roehrig arising out of an invitation in the presentation, but I am not going to decide the pleading point, not least because it has not been fully argued and this is not the occasion to decide it. I do, however, note that it might be open to the claimants to argue that the reference to enquiries of Bayer generally might be taken to include references to Dr. Roehrig specifically as an employee of Bayer. I will say no more about it than that.

42. So far as the potential need to consider further witness statements are concerned, that may or may not arise depending on what the document discloses when it is produced and then when further arguments, in some appropriate forum as to whether the point can be taken, can be run and consideration can be given as to what the consequences may be in relation to the evidence. There may be a real live point in there somewhere, but this is not the occasion on which to ventilate it and it is certainly not a point of prejudice which stands in the way of a disclosure which should otherwise be ordered.

43. I shall therefore order the disclosure of the document under the court's disclosure jurisdiction.

44. That means I do not have to consider the third potential route to disclosure, namely CPR 3.1(1)(m) (the court's residual general power to apply the overriding objective). I will say only that if the disclosure route to production of this document had otherwise been blocked by an unfortunate and unfair effect of the drafting of the disclosure practice direction, I would have been likely to have ordered disclosure via this route; but it is unnecessary for me to consider or develop that further.

45. Having decided that the claimants (through Teva) succeed, I will not leave this judgment without saying something about the resistance to the application. As will already be apparent, this application has been made necessary, with all its attendant costs and use of court resources, by the decision of Bayer not to produce an apparently existing single, straightforward, non-confidential, probably easily producible and inevitably short document, and instead spend large sums of money in pursuit of some vague point of principle. I do not

doubt the good faith of Bayer in taking that view, but I do doubt and indeed deprecate its implementation as a matter of common sense and in the light of the proper modern approach to litigation. This was a document as to which there was, to put it at its lowest, a bona fide dispute as to disclosability. There was only one sensible response to the request for disclosure, in my view, even though the first ground put (the "mentioned" point) has not been found to have been the appropriate route.

46. The notes in paragraphs 1.4.4 and following of the White Book demonstrate the need for parties to co-operate sensibly in the conduct of litigation. Nothing that I have heard from Bayer's side indicates to me that their response in relation to this document can be characterised as even vaguely sensible in the context of the modern co-operative conduct of litigation.
47. That is not to say that a party to litigation will always have to comply with a request for easily producible documents (which is itself a variable concept) simply because they are easily producible. However, on the facts of this particular case it seems to me that the attitude of Bayer, a multinational company which engages in a lot of litigation, does not fall within the category of reasonable bearing in mind the costs which it chose to incur and which it chose to impose on the other side.
48. I therefore make the order sought.

Post-script

Immediately after I had delivered judgment Ms Hart confirmed that there was indeed a presentation document in the form of a number of computer presentation slides. They were indeed producible almost immediately. I was also told what the costs of

the claimants (all of them) were. They were over £92,000. Th aggregate costs of this application about the production of one easily producible document were therefore over £130,000.

The large amount of the claimants' costs itself requires some explanation and examination. It arises in part out of the fact that there are a number of claimants, with a number of separately instructed solicitors, all of whom incurred some costs in relation to this application, though they were not all separately represented at the hearing; it was Teva that made the actual application. I made an award of indemnity costs against Bayer, which included all the claimants' costs (it was not suggested to me that only Teva's costs were in play in this application), but ordered that they be assessed by a costs judge rather than assessed by me because I was concerned that there might be elements of duplication in the claimants' costs, or other factors, which meant that even when assessed on the indemnity basis they might not all be judged as being as recoverable as one might otherwise expect. Nevertheless the point remains – in my view none of these costs (I resist the temptation to apply some adjectives to that noun) would have been incurred if this matter had been approached sensibly and proportionately.