

ENGLAND AND WALES / JUDGMENT

Sayers & Ors v Smithkline Beecham Plc & Ors

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Neutral Citation Number: [2004] EWHC 1899 (QB) IN THE HIGH COURT OF JUSTICE QUEEN'S BENCH DIVISION IN THE MATTER OF THE MMR/MR VACCINE LITIGATION Case No: S/01/0173 and others Royal Courts of Justice Strand, London, WC2A 2LL Date: 30 July 2004 Claimants Defendants Before : THE HONOURABLE MR JUSTICE KEITH

- ----- Between : Paul Sayers and others

- and -

(1) Smithkline Beecham Plc

(2) Smith Kline & French Laboratories Ltd.

(3) Merck & Co. Inc.

(4) Aventis Pasteur MSD Ltd.

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- ----- Mr Augustus Ullstein QC (instructed by Alexander Harris) appearing pro bono to assist the Court Mrs Jennifer Horne-Roberts, litigation friend, for Harry Horne-Roberts Mr Angus Stewart, uncle, and Mr Andy Geoffrey-Stewart, father, for Tobias Geoffrey-Stewart Mrs Ann Hewitt, litigation friend, for Thomas Hewitt Mrs Joan Campbell, litigation friend, for Jack Campbell Mrs Jacqueline Fletcher, litigation friend, for Robert Fletcher Mrs Isabella Thomas, litigation friend, for Michael Thomas and Terry Thomas Mrs Rosemary Kessick, litigation friend, for William Kessick Mrs Wendy Pickering, litigation friend, for Lewis Pickering Mrs Deborah Heather, litigation friend, for Andrew Heather Mrs Carol Stephenson, litigation friend, for Daniella Stephenson Mrs Marion Wickens, litigation friend, for Melissa Wickens Mrs Susan Hamlyn, litigation friend, for Francis Hamlyn Mr Fred Mills, father, for Scott Mills Mrs Marilyn Cramer, litigation friend, for William Cramer Mr Charles Gibson QC and Mr Prashant Popat (instructed by Davies Arnold Cooper) for the First and Second Defendants, Smithkline Beecham Plc and Smith Kline & French Laboratories Ltd. Mr Andrew Prynne QC, Mr Jonathan Waite QC and Mr Toby Riley-Smith (instructed by Lovells) for the Third Defendant, Merck & Co. Inc. Mr George Leggatt QC and Mr Harry Matovu (instructed by CMS Cameron McKenna) for the Fourth Defendant, Aventis Pasteur MSD Ltd. Hearing dates: 26 and 27 July 2004

Judgment

Mr Justice Keith:

Introduction

1. 2. 3. The latest case management conference in the MMR/MR Vaccine Litigation took place on 26 and 27 July 2004. It was dominated by the fallout produced by the decision of the Legal Services Commission (“the Commission”) to withdraw funding for the litigation. As before, all references in this judgment to the defendants are to the corporate defendants unless otherwise stated. And depending on the context, references in this judgment to the claimants include their litigation friends – for the most part, one or other of their parents. Broadly speaking, the claimants fall into four categories. First, many of them wish to discontinue their claims. None of them would have wanted to do that, but the withdrawal of funding has been thought by many of them to have significantly increased their exposure to orders for the payment of the defendants’ legal costs if they lose their claims, and they have decided to bring that exposure to an end, if they can, by discontinuing their claims. Secondly, there are a few claimants who are not prepared to discontinue their claims while the restoration of public funding remains a possibility. Thirdly, there were some claimants who intended to proceed with their claims even if public funding was not restored, though they wanted their claims to continue as individual claims outside the context of the group litigation. There may not in fact be any claimants who now take that stance, but for the time being, it is impossible to know for sure. Fourthly, there are a number of claimants who have not indicated what their intentions are at all. There are therefore three broad issues which need to be addressed now. First, what are the appropriate orders to make to ensure the orderly and fair departure from the litigation of those who wish to discontinue their claims? Secondly, what orders should be made for the future conduct of the litigation in respect of those claimants who wish to keep the litigation alive, either because they wish to pursue their claims in any event (albeit in a different form), or simply in case public funding for their claims is restored? Thirdly, what orders should be made in respect of those claimants who have yet to notify the defendants what their intentions are? The dilemma which the claimants face 4. 5. Before I address these issues, there are a number of things I want to say. No-one can fail to have enormous sympathy for the parents of the children to whom this litigation relates. They have spoken eloquently and with great feeling of the tragedies which befell them when their children became ill. They blame the vaccines produced by the defendants for damaging their children, and they are very bitter over the withdrawal of public funding to proceed with their claims. For the most part, though, they recognise that without public funding it is impossible for their claims to proceed. Their dilemma is what to do while the possibility remains – however remote – that public funding could be restored. On the one hand, they do not want to expose themselves to the risk of having to contribute to the defendants’ legal costs. Indeed, they are understandably being encouraged by the

defendants to discontinue their claims by costs amnesties which have a limited time for acceptance. On the other hand, they do not want to discontinue their claims while there is a chance that public funding could be restored, and in case continuing research into the effects of the vaccines provides evidence of a link between the vaccines and the disorders from which their children suffer. Resolving that dilemma is particularly difficult because the claimants are not receiving advice about (a) the true effect of discontinuing the claims, (b) their real exposure to costs and (c) their chances of having their public funding restored. As for (a), the effect of discontinuing their claims is that they will cease to be parties to the group litigation. They will have great difficulty rejoining it even if public funding is restored. Not only will they need the permission of the court to do so, but they will be treated as bringing a new claim. That will mean that many of them will not be able to resurrect their claims for the supply of a defective product under the Consumer Protection Act 1987 ("the 1987 Act"), because such claims have a limitation period of 10 years. They will be left with claims for negligence, which are much more difficult to prove because of the need to establish fault, and which have a more onerous burden of proof than the claims under the 1987 Act. As for (b), it may be that their increased exposure to costs will not be that great, even if they do not take advantage of the costs amnesties available to them. The defendants will have incurred very significant costs while the claimants were publicly funded, but any liability on the claimants to pay those costs would be shared among all the claimants, and the liability of publicly funded litigants for the costs of other parties to the litigation is limited. In that connection, it is possible that the claimants – for the most part damaged children with no assets of their own – would be assessed as having no liability for the defendants' costs, and it may be that in law their litigation friends are only liable for the costs for which the claimants are liable. In that event, there would be no liability for costs at all for the period during which the claimants were publicly funded. Moreover, now that the defendants are no longer preparing for trial, and their energies are devoted to managing the litigation, their costs are very much less. And even if the defendants obtain orders for costs against the claimants which are payable by their litigation friends, the negative publicity which the defendants may attract if they choose to enforce those orders against the distressed and embittered parents of damaged children may result in the defendants choosing not to enforce them after all. As for (c), namely the claimants' chances of having their public funding restored, one cannot ignore the events of the last year or so. The funding of the claimants' claims came from two sources. Generic work was carried out pursuant to a contract between the claimants' former solicitors and the predecessor of the Commission, the Legal Aid Board. Non-generic work was carried out under legal aid certificates issued to each of the claimants. Authority to carry out generic work was withdrawn, and the legal aid certificates in favour of the eight lead claimants were subsequently discharged. The decision to discharge the legal aid certificates in favour of the eight lead claimants was upheld by the Commission's Funding Review Committee on 30 September 2003, and a claim for judicial review of the decision of the Funding Review Committee to uphold the discharge of the legal aid certificate of one of the lead claimants, Nicholas Williams – a claim which was itself funded by the Commission – was dismissed by

Davis J. on 27 February 2004. Davis J. refused leave to appeal, and no application for permission to appeal was made to the Court of Appeal. On what basis, then, could it be said that there is scope for public funding to be restored? What the claimants rely upon is that following the dismissal of the claim for judicial review, the Commission proceeded to discharge the legal aid certificates of the non-lead claimants. Fifty or so of those claimants have appealed to the Funding Review Committee against the discharge of their legal aid certificates. The Commission has said that those appeals will be considered by the same sub-committee of the Funding Review Committee who discharged the legal aid certificates of the lead claimants. Those appeals are expected to have been decided by the end of September. At first blush, the claimants have no reason to hope for an outcome of the appeals to the Funding Review Committee which is any different from the Funding Review Committee's decision last year. But the circumstances are said to be different in two respects. First, the eight lead claimants had disorders of the autistic spectrum, with or without inflammatory bowel disorder. They were chosen as claimants because it was the alleged link between the vaccines and those disorders which Bell J. decided should be tried as one of the preliminary issues. But the vaccines are alleged to have caused other disorders as well – deafness, epilepsy and arthritis to name but a few. It is hoped by the claimants that the Funding Review Committee will restore public funding at least to enable the alleged link between the vaccines and those disorders to be investigated. Secondly, it is said that new scientific evidence is available to undermine what the Funding Review Committee presumably regarded as the paucity of the evidence showing the link between the vaccines and disorders in the autistic spectrum. I have no idea how persuasive those arguments are, or how they will impact on the Funding Review Committee. 10. These, then, are some of the considerations which should inform the decisions of those of the claimants' litigation friends who have yet to decide whether to discontinue the claims in order to take advantage of the costs amnesties which are available or to keep the claims alive in the hope that public funding will be restored. Without legal advice, it is extremely difficult for them to make informed decisions on this topic, but despite the absence of public funding Mr Augustus Ullstein QC has informed me that he and Mr Richard Follis of Alexander Harris propose to circulate to the claimants' litigation friends well before the next case management conference a paper which identifies their options and explains the various consequences of exercising those options. I am very grateful to them for undertaking that task. 11. That brings me to the last thing which I want to say before returning to the particular issues which I must address. The claimants who have attended the latest case management conference beseeched me to protect the interests of their children. But the interests of their children can only be advanced in this litigation if public funding is restored, and the claimants must realise that the powers of the courts to help in their quest for restoration of public funding is extremely limited. Which claims receive public funding is decided by the Commission. Parliament has conferred that role on the Commission, not on the courts. The only role which the courts have is in reviewing the Commission's decisions. That power of review, though, does not enable the court to substitute its own view for that of the Commission. The court can only quash decisions of the Commission if they are unlawful,

truly irrational or reached by a process which was procedurally unfair. The claimants who have not yet identified their intentions 12. 13. I return, then, to the three broad issues which I must address. I start with the claimants who have yet to state what their intentions are. On 5 April 2004, all the claimants were required to notify the relevant defendant's solicitors by 14 May whether they intended to proceed with their claims or to discontinue them. There are 110 of them at the latest count who have not done that. It may be that they did not respond because their intention was to proceed with their claims only if public funding was restored, and they did not know whether that meant that they were intending to proceed with their claims or discontinue them. The questionnaire to which para. 3 of the defendants' draft directions relates makes it clear that such claimants should notify the defendants that they intend to proceed with their claims. The order which I made on 5 April did not identify any sanction to be imposed for a failure to comply with the notification requirement. Difficult though the decision which the claimants have to make is, the time has now come for a suitable sanction to be imposed if despite a further order requiring the claimants to state what their intentions are, a claimant still does not do so. An appropriate sanction is the dismissal of his or her claim. That is what Ian Kennedy J. did in the Benzodiazepine litigation. The order which I make, therefore, is that sought by the defendants in para. 1 of their draft directions, though I substitute the date 22 October 2004 for 9 August 2004, the words "up to the date of the discharge of the claimant's legal aid certificate" must be added after the words "with costs", and the list in schedule 1 will have to be amended to reflect those who have stated what their intentions are since schedule 1 was drafted. I have chosen the date of 22 October 2004 because the claimants who are still undecided about what they should do should not be forced to make up their minds until they know the results of the appeals to the Funding Review Committee. 22 October is a good three weeks after the fifty or so appeals to the Funding Review Committee are expected to have been decided. The claimants who wish to proceed with their claims 14. 15. 16. 17. 18. 19. I turn to those claimants whose parents have stated that they wish to keep the litigation alive. At the latest count, 20 of them wish to keep the litigation alive only if public funding is restored, and 37 of them wish to proceed with their claims irrespective of whether public funding is restored. Of those who wish to keep the litigation alive only if public funding is restored, Mrs Jennifer Horne-Roberts on behalf of her son Harry proposes at the next case management conference, if her appeal to the Funding Review Committee is dismissed, to apply for a stay of the proceedings to enable an application to be made to the European Court of Human Rights – presumably for a declaration that the UK is in breach of its obligations under Art. 6 of the European Convention on Human Rights by failing to give state support for her son's claim to continue. In the meantime, she asks the court to declare that the claimants will not be liable for any legal costs incurred by the defendants for work done between this case management conference and the next. I do not think that it would be right to make such an order. The defendants are entitled to carry out such work as is required to manage the litigation. I do not suppose that the defendants will be doing much work on the issues which the litigation raises – not merely because that work need not be done unless the litigation is to proceed, but also because the defendants realise that the claimants' resources are limited,

and it would be commercially imprudent for them to incur unnecessary legal costs in the hope of recovering those costs from the claimants. I turn to the 37 claimants who wish to keep the litigation alive because they wish to pursue their claims whether or not public funding is restored. A number of them have proposed that the status of this litigation as group litigation should now be terminated, and that each of the claims should be dealt with separately by the courts. That would allow the claims of those claimants who “have problems not yet investigated by the court” (by which is meant conditions other than disorders in the autistic spectrum, with or without inflammatory bowel disorder) to be considered. It is said that those claims should be transferred to each claimant’s local county court to cater for the exceptional difficulties which their families face in getting “safe, minding facilities for their disabled child for extended periods of time”. It is also said that “all costs should be capped to protect against costs being run up unnecessarily”. How many of the claimants are still supporting this course of action is impossible to tell. I understand entirely why these parents seek these directions. They do not want their own children’s claims, which may have particularly distinctive features to them, to be defeated simply because they are members of a group action which has no chance of success because of the unavailability of public funds to sustain its continuation. They want their claims to continue in a way which is responsive to their personal needs and which would not expose them to legal costs which would cripple them financially. Although I sympathise with what the parents of these claimants want to achieve, I fear that these proposals are not realistic. I deal first with the proposal that the status of this litigation as group litigation be terminated. Group litigation is covered by Part 19 of the Civil Procedure Rules. Since this litigation commenced before the Civil Procedure Rules were promulgated, its status as group litigation was achieved by a Practice Direction made by the Lord Chief Justice. The Practice Direction can only be revoked by him. I do not believe that the court’s inherent power to control its own procedures – which Steyn LJ (as he then was) recognised in *A B v John Wyeth & Brother Ltd.* [1993] 4 Med LR 1 applies to group litigation par excellence – permits the court to revoke the Practice Direction without the consent of the Lord Chief Justice. I do not believe that it would be right for me at this stage in the litigation to refer the case to the Lord Chief Justice with a recommendation that he revokes the Practice Direction. What is needed at present are effective orders which will enable the court to know which claims are to be discontinued, which claims are to proceed only if public funding is restored, and which claims are to proceed whether or not public funding is restored. When that is known, a more informed judgment can be made as to whether the remaining claims need to be litigated under the umbrella of the equivalent of a group litigation 20. 21. 22. 23. order. The Practice Direction needs to remain in place for the time being so that there can be a co-ordinated approach to the gathering of the data which needs to be collated in order for that judgment to be made. But I have to say that I doubt very much whether the time will ever come for these claims to be litigated outside the context of group litigation. Separate trials of the remaining claims – whether in the County Court or the High Court – could result in inconsistent decisions by different courts, which would be highly undesirable, and the prospect of many expert witnesses being required to give evidence many times over cannot

sensibly be contemplated. Should the time come when separate trials of the remaining claims can be contemplated, that is the time when a decision as to venue – High Court or County Court – should be addressed. In order to identify which claims are to proceed only if public funding is restored and which claims are to proceed whether or not public funding is restored, I make the order sought by the defendants in para. 3 of their draft directions, substituting 22 October 2004 for 1 October 2004, since by then the fifty or so appeals to the Funding Review Committee will have been decided. The schedules ancillary to this direction will have to be amended as well. The list in schedule 3 will have to be amended to reflect the up-to-date information about which claimants have indicated an intention to proceed with their claims. And para. 11 of the questionnaire in schedule 4 will have to be amended to add the words “and if the answer to Q.10 is ‘the latter’” after the words “If the answer to Q.9 is ‘yes’”. I do not make an order in the terms of para. 4 of the defendants’ draft directions. What the effect of a failure to comply with para. 3 should be will be decided at the next case management conference. At present, I propose to hold the next case management conference on a convenient date in the week commencing Monday 8 November 2004. I turn to the application for the court to cap the costs incurred by the defendants which the claimants might be ordered to pay. The power to make cost-capping orders is now recognised, despite the absence in the Civil Procedure Rules of an express power to do so. The exercise of that power in group litigation was considered by Gage J. in *A B v Leeds Teaching Hospitals NHS Trust* [2003] EWHC 1034. Without wishing to lay down a hard and fast rule, it seems to me that a prospective order limiting the amount of costs which one party to group litigation may recover from another party should only be contemplated where there are grounds for believing that a party may incur excessive legal costs, i.e. costs which are not justified by the scale of the litigation or the complexity of the issues which it raises, or which are disproportionate to the sums of money at stake, and where the risk that excessive legal costs are being incurred unnecessarily will not be picked up by the court when exercising case management functions or when conducting a detailed assessment of the costs after the trial. It has not been suggested that that can be said to apply to this case up to now. Whether it could be said to apply to the case in the future will depend on the form which the case takes. But cost-capping is a relatively dramatic course to take, and it will only be ordered on cogent evidence. If the issue is raised again, it will have to be supported by evidence of a compelling kind. There are two directions, though, which I should make for the future conduct of the litigation. One relates to the reports from the 58 experts in a variety of disciplines which were prepared and exchanged by the parties in connection with the preliminary issues which Bell J. ordered should be tried in relation to the 8 lead claimants. Now that the cases of the lead claimants will not be tried (because they have all consented to the dismissal of their claims or discontinued their claims), the status of that evidence has to be addressed. It is likely to be highly relevant to the issues which will arise on those claims which will be proceeding, and it would not be right for the valuable and costly work carried out by those experts to be wasted. The reports (as well as the parties’ case statements) are also needed by those claimants who are continuing to press for public funding to be restored. I therefore make the following order which mirrors para. 5 of the

directions sought by the defendants: "Permission is given to Alexander Harris, and the relevant Defendant's solicitors if so advised, to disclose to the litigation friends of the claimants to whom paragraph 3 relates and who request the same (a) the parties' statements of case and (b) the compact disc on which are stored the experts' reports exchanged by the parties pursuant to paragraph 5.2 of the Order of Mr Justice Keith dated 10 February 2003 and including any answers to Part 35 questions arising therefrom. Any statements of case or reports disclosed pursuant to this order may only be used for the purposes of an application to the Funding Review Committee (the FRC) of the Legal Services Commission in the cases of the claimants to whom para. 3 relates, any future claim for judicial review of any decision by the FRC in such cases, and the current proceedings brought by such claimants." I also make the order sought by the defendants in para. 6 of their draft directions, with the addition of the words "and those claimants to whom para. 3 relates" after the words "the First/Second, Third and Fourth Defendants". The claimants who do not intend to proceed with their claims 24. 25. 26. I turn finally to those claimants who have notified the defendants that they are not intending to proceed with their claims. They come into two categories. First, there are those claimants who have notified the defendants that they are not intending to proceed with their claims, but who have not yet served notices of discontinuance. Secondly, there are those claimants who have served notices of discontinuance or who have agreed to the dismissal of their claims. I deal first with those who have notified the defendants that they are not intending to proceed with their claims, but who have not yet served notices of discontinuance. There were 123 of them at the latest count. It may be that they are having second thoughts about whether they should proceed with their claims, and in case they are I propose to give them the same time to decide finally what they are going to do as I have given to those who have not notified the defendants what their intentions are. The order which I make, which mirrors para. 2 of the draft directions sought by the defendants, is: "This paragraph applies to each claimant who, pursuant to paragraph 2 of the order dated 5 April 2004, has notified the relevant Defendant's solicitors that he/she intends to discontinue his/her claim, but has not to date served and filed a notice of discontinuance (the names of such claimants being set out in Schedule 2 hereto) and to any claimant who indicates an intention to discontinue pursuant to paragraph 1 above. Each such claimant shall by 4.00 pm on 22 October 2004 either (a) serve and file a notice of discontinuance in accordance with CPR Rule 38.3 (or, alternatively, agree terms with the relevant Defendant for the disposal of his/her claim) or (b) notify the relevant Defendant's solicitors that he/she intends to proceed with his/her claim." I have not thought it appropriate to include a sanction for failure to comply with this order, because there has been no question of any of these claimants failing to comply with any previous order of the court. It will be necessary for schedule 2 to the order to be amended to bring the list of claimants to whom it applies up to date. I now deal with those claimants who have served notices of discontinuance or who have agreed to the dismissal of their claims. That is by far the largest group of claimants. At the latest count there were 604 of them. The discontinuance of a claim is governed by Part 38 of the Civil Procedure Rules. The mere discontinuance of a claim by a person under a disability (by which is meant someone under

the age of 18 or who by reason of mental disorder is incapable of managing and administering his affairs) does not require the approval of the court. But if the discontinuance of a claim by a person under a disability amounts to a settlement or compromise of his claim, the approval of the court for the discontinuance is required under rule 21.10(1). In the light of that, it is necessary to distinguish between those claimants who served notices of discontinuance pursuant to an agreement with the relevant defendant settling or compromising their claims, and those who served notices of discontinuance otherwise than on agreed terms. At the latest count there were 243 claimants who come into the former category, and 361 claimants who come into 27. 28. 29. 30. the latter. But Mr Ullstein argued that that is not a distinction that needs to be made. That is because those claimants who have served notices of discontinuance otherwise than on agreed terms still need the permission of the court for their notices of discontinuance to be effective. He contended that that is the effect of rule 38.2(2)(c) which provides that the court's permission for the discontinuance of a claim is required "where there is more than one claimant unless every other claimant consents in writing". I agree with Mr Ullstein to this extent. Rule 38.2(2)(c) applies to claims in which "more than one claimant" is named in the claim form. I see the force of the argument of Mr George Leggatt QC for the fourth defendant, Aventis Pasteur MSD Ltd. ("APMSD"), that the rationale underlying rule 38.2(2)

- (c) may have been to deal with the situation where claimants make joint claims, and where the discontinuance of the claim by one such claimant may affect the rights of other claimants. But if rule 38.2(2)(c) was to apply only to claims where the claimants are making joint claims, it would have been easy for the rule to provide for that expressly. If I gave effect to Mr Leggatt's argument, I would be reading into rule 38.2(2)(c) words which are not there. There are apparently a number of claim forms naming more than one claimant. That may simply have been done to avoid separate fees having to be paid on the issue of claim forms naming only one claimant. But those claimants who served notices of discontinuance otherwise than on agreed terms still need the permission of the court for their notices of discontinuance to be effective if at least one other claimant was named in those claim forms. However, I cannot go along with a wider argument which Mr Ullstein deployed. He contended that where a group litigation order has been made, the claims to which the group litigation order relates all constitute one action, since the case of every claimant stands or falls with the success or failure of the claims which are treated as lead claims. The fallacy in this argument is that rule 38.2 deals with claims, not actions. Even if it is right to describe a number of claims to which a group litigation order relates as a single action (which I doubt), the fact is that it comprises a number of claims. Those claims are being litigated together under the umbrella of the group litigation order to ensure effective case management, but that does not mean that they are not separate claims. Accordingly, it is only those claimants whose claim forms named at least one other claimant who need the permission of the court for their notices of discontinuance to be effective, even if they served notices of discontinuance otherwise than on agreed terms. It follows that the claims of some of the claimants who have served notices of discontinuance do not require the approval of the court under rule

21.10(1) (because the notices of discontinuance were not served pursuant to an agreement with the relevant defendant settling or compromising their claims) or the permission of the court under rule 38.2(2)(c) (because the claim forms of those claimants did not name at least one other claimant). Those notices of discontinuance apparently take effect according to their terms. But should they take effect according to their terms? Everyone agrees that these claimants may not have appreciated the significance of what they were doing. That can be graphically illustrated by the claimants who are suing the third defendant, Merck & Co. Inc. (“Merck”). On 29 April 2004, Merck’s solicitors wrote to the litigation friends of the claimants who had issued proceedings against Merck offering terms of compromise. In effect, those terms were that upon a notice of discontinuance being served, and upon the claimant’s litigation friend undertaking on behalf of the claimant not to issue proceedings against Merck in this or any other jurisdiction arising out of the same or substantially the same facts, Merck would not seek any orders for costs against the claimant or his litigation friend. Of the 395 claimants who served notices of discontinuance on Merck, 350 of them did so without giving that undertaking. If the rights which they would have given up by giving that undertaking were valueless (for example, because a fresh claim under the 1987 Act would be statute-barred and a claim in negligence would be fraught with difficulties), their discontinuance without giving that undertaking would have resulted in them exposing themselves to an avoidable liability for costs without any discernible benefit. If that had been appreciated, it is unlikely that such a high proportion of them would have forgone the opportunity to take the benefit of the costs amnesty which was being offered to them. 31. The nagging concern that many, if not most, of the claimants may have served notices of discontinuance, whether on agreed terms or not, without appreciating the significance of what they were doing became a source of real worry as the case management conference continued. Claimant after claimant made it clear that they had not appreciated the ramifications of serving notices of discontinuance, whether on agreed terms or not, and that they were unsure about whether they had done the right thing. In those circumstances, while not formally abandoning their contentions that

- (a) notices of discontinuance served otherwise than on agreed terms were binding, and
- (b) notices of discontinuance served pursuant to an agreement with the relevant defendant settling or compromising the claims were also binding, subject to the court’s approval of the agreement, the defendants accepted that the claimants should have time to reassess their options in an informed way in the light of the paper which Mr Ullstein and Mr Follis were going to circulate. If, having been given that opportunity, they are satisfied that they made the right decision, well and good. But if they choose another option, the question whether they should be allowed to do that will have to be addressed. Accordingly, for the time being the defendants no longer press for orders declaring what the effect is of any notices of discontinuance or consent orders served or signed by the claimants. Instead, the only additional issue which both Mr Ullstein and counsel for the defendants wanted me to consider was whether I was prepared to give my approval in principle to the settlement of the claimants’ claims on the terms offered by the defendants, leaving it to the claimants to

decide in due course (if I approved the terms of settlement in principle) whether to accept the terms of settlement offered by the defendants. Since each of the defendants offer different terms of settlement, I must deal with each of the defendants separately. The terms of settlement offered by APMSD are that if the claimants agree to the dismissal of their claims with no orders for costs, APMSD will not (a) enforce against the claimants or the claimants' litigation friends any orders for costs which have been made in the litigation in the past, or (b) seek against the claimants or the claimants' litigation friends any orders for costs in the litigation in the future. Mr Leggatt confirmed that the claims which were being dismissed were the claims under the 1987 Act, and not any claims in negligence. That was because, although claims in negligence may have been pleaded, only the claims made under the 1987 Act were actually being pursued. The terms of settlement offered by the First and Second Defendants, Smithkline Beecham Plc and Smith Kline & French Laboratories Ltd. ("SK"), are similar. If the claimants confirm that they no longer wish to proceed with their claims, SK will not seek any orders for costs. SK have not identified how the claimants should bring their claims to an end if they choose to accept these terms of settlement, and it is for the claimants to decide whether to serve notices of discontinuance or to agree to their claims being dismissed. Mr Charles Gibson QC for SK did not expand on SK's agreement not to seek any order for costs, but I have assumed that the offer is the same as that offered by APMSD, because SK have been prepared to treat the claimants who have submitted consent orders in the terms of APMSD's offer as having accepted SK's offer. Like Mr Leggatt, Mr Gibson confirmed that the claims to which the terms of settlement related were the claims under the 1987 Act, and not any claims in negligence. The terms of settlement offered by Merck are that if the claimants serve notices discontinuing their claims, Merck will not seek against the claimants or their litigation friends any order for costs in respect of the claims being discontinued. I have assumed that that offer includes an offer not to enforce against the claimants or their litigation friends any orders for costs which have been made in the litigation in the past. But the claims which the claimants will have to discontinue are all the claims which have been relied on in the claim forms or in the statements of case, i.e. both the claims under the 1987 Act and the claims in negligence. Moreover, Merck's offer is dependent on three further things: 32. 33. 34. 35.

- (i) The claimants' litigation friends must undertake on behalf of the claimants that they will not make any other claim, either in the UK or elsewhere, arising out of facts which are the same or substantially the same as those relating to the discontinued claims. However, by rule 38.7, a claimant who discontinues a claim needs the permission of the court to make another claim against the same defendant if "the other claim arises out of facts which are the same or substantially the same as those relating to the discontinued claim". Accordingly, Merck accepts that the claimants should be able to make another such claim if the court permits the claimants (a) to be discharged from their undertakings and (b) to make another such claim. (ii) Rule 38.7 only requires a claimant who discontinues a claim to obtain the permission of the court to make another such claim against the same defendant if the claim was discontinued after the defendant filed a defence. Since defences were only filed in the

lead claims, it is arguable that a non-lead claimant who discontinues his or her claim could make any fresh claim against Merck without having to obtain the court's permission to do so. Accordingly, Merck in effect require the claimants to agree that their notices of discontinuance should be treated as having taken effect from the time when the notices were served on Merck's solicitors. (iii) If the court discharges any of the claimants from the undertaking given by their litigation friends and permits those claimants to make a new claim on the same or substantially the same facts against Merck, Merck are insisting that those claimants should be deprived of the costs amnesty which the claimants would otherwise have been entitled to. 36. Whether I can give my approval in principle for any of these sets of terms of settlement depends on my assessment of (a) what the claimants would be giving up and (b) what they would be getting in return. What they would be giving up depends on whether they agree to the dismissal of their claims or to serve notices of discontinuance. If they agree to the dismissal of their claims, they would be giving up any chance of pursuing their claims under the 1987 Act, even if public funding is restored for the remaining claimants and even if new scientific research makes the claims more sustainable. Those claims would be *res judicata*, and new claims under the 1987 Act could not be lodged (even in the unlikely event that the 10 year limitation period had not expired). In that connection Mr Leggatt told me that the 10 year limitation period has expired in the case of APMSD because they ceased distributing the vaccines in 1992, though he has e-mailed my clerk since the hearing to correct that because there was an occasion in 1994 when APMSD distributed the MR vaccine in the UK. But the dismissal of their claims would not prevent the claimants from issuing a fresh claim in negligence in the future, provided either that they were suing SK or APMSD (because of the concessions made by Mr Gibson and Mr Leggatt) or that a claim in negligence had not been included in the existing claims, though they will have to get over the formidable argument that such a claim would be an abuse of the court's process since it should have been included in the current proceedings. On the other hand, if they agree to serve notices of discontinuance, they do not give up all chance of pursuing claims under the 1987 Act or claims in negligence in the future, but

- (a) they would have to get the permission of the court to do so, which would involve defeating the argument that the resurrection of their claims would amount to an abuse of the court's process,
- (b) if they were suing Merck, they would have to persuade the court to release them from the undertaking which Merck's terms of settlement require their litigation friends to give, as well as giving up the costs amnesty on the current claims, which is another condition attached to Merck's offer, and
- (c) they could only issue fresh claims under the 1987 Act if the 10 year limitation period had not expired. 37. There may be many parents who have decided that the chances of getting anything for their children out of the present or any future litigation are so remote (because the possibility of getting public funding restored is itself so remote) that they might as well get out now with such costs amnesties as are available. By the same token, there may be

some parents for whom the difference in effect between dismissal and discontinuance of their children's claims is vital. Only SK's offer gives them that choice. APMSD are insisting on the claims being dismissed, and Merck are insisting on the claims being discontinued. But I am being asked to give my approval in principle to the terms of settlement which have been offered. If parents whose children are suing Merck want their claims to be dismissed, so that there is no fetter on them bringing a claim for negligence in the future (assuming that a claim in negligence has not been pleaded), that will be a reason for them not accepting Merck's terms, and making a counter-proposal of their own. The same is true for parents whose children are suing APMSD and want their claims to be discontinued. All I am saying is that I do not think that the fact that APMSD and Merck are stipulating the route by which the individual claims against them should be brought to an end should stand in the way of those parents who are prepared to settle on those terms. I turn to what the claimants would be getting in return for agreeing to the dismissal or the discontinuance of their claims. They would not be liable at all for the defendants' costs. How valuable that is depends on what their liability for the defendants' costs would be if they did not take advantage of that costs amnesty. I touched on some of the points which this issue raises in para. 6 above. It is impossible to make an accurate forecast about that, but my assessment is that the exposure of individual parents for large sums while their children were publicly funded is not great. But they do not now have the protection which publicly funded litigants enjoy, and they run a significant risk of being ordered to pay the defendants' costs which have been incurred since public funding was withdrawn. For the time being, those costs will be modest in comparison to what the defendants have incurred in the past, but the claimants' liability to pay such costs as are being incurred is unquestionably far greater. Having put carefully on each side of the balance sheet what the claimants would be giving up by accepting the terms of settlement offered by each of the defendants against what they would be getting in return, I have concluded that I can give my approval in principle to the terms of settlement offered by each of the defendants. I believe that the claimants' chances of getting public funding restored (without which the claims cannot sensibly be advanced) can properly be regarded by individual litigation friends as sufficiently remote for their children to be giving up very little. And I regard their liability for costs in the future as being such that a costs amnesty now is something of value. I am fortified in that view by Mr Ullstein's stance in respect of the terms of settlement offered by SK and APMSD. He did not contend that I should not give my approval in principle to those terms of settlement. In adopting that stance, Mr Ullstein did not regard what was said in *Rhodes v Swithenbank* (1889) 22 QBD 577 as standing in the way of the court's approval of those terms of settlement. That case is authority for the proposition that a litigation friend does not have the power to agree terms of settlement if the claimant gives up a right (in that case, a right of appeal) and the litigation friend obtains a benefit (in that case, a release from a liability to pay the costs for which the claimant would have been liable, if the claimant had assets, which she did not). But I do not think that the costs amnesty which constitutes the benefit which the claimants' litigation friends get from the terms of settlement is a benefit to the litigation friends alone. The interests of the parents are inextricably linked to the interests of their children, since it is upon their

parents that the burden of maintaining and caring for them has fallen. The peace of mind which their parents would get from knowing that valuable family funds would no longer be at risk would contribute to the consummate and unstinting care which the claimants' parents are devoting to them, and the fact that those funds would be available to provide for the maintenance of the claimants is a tangible benefit which the claimants get. 38. 39. 40. 41. I appreciate that Mr Ullstein put the terms of settlement offered by Merck in a different category. I readily accept that their terms of settlement make it even more difficult for the claimants to bring their claims to court in the future. But at the end of the day, that is a matter of degree, and I do not regard the claimants as giving up significantly more under Merck's terms of settlement than they give up under SK's or APMSD's. Postscript 42. 43. By way of a postscript to this judgment, I wish to express my admiration for the many claimants who came to court to tell me what they wanted to say about the litigation. They expressed themselves with courtesy and moderation, despite the overwhelming sense of bitterness which they feel about the way the litigation has gone. I thank those of them who have sent me since the hearing recent research which they say supports the link between the vaccines and the disorders from which their children suffer, but they must appreciate that that research is of little help to the issues which the latest case management conference required me to decide. I also wish to express my personal thanks to Mr Ullstein and Mr Follis for giving me their valuable assistance on a non-remunerated basis. There is one final thing I want to say. The orderly transfer of this litigation from public to private funding has been significantly hampered by the lack of advice which the claimants' parents undoubtedly need if they are to make informed decisions about their future participation in this litigation. Although it is not for me to question the decision of the Commission to withdraw funding for the litigation to continue, it would have made everyone's task easier if funding had been available to enable advice to be given to ensure that the litigation was brought to an orderly conclusion for the many claimants who have decided that enough is enough. I do not know what funding, if any, was made available for that purpose. But if none was made available, I endorse Mr Ullstein's comment that it is hardly an advertisement for access to justice that such advice as the claimants' parents have received has had to be given on a piecemeal and wholly unremunerated basis.

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