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IN THE COMPETITION

Case No. 1088/3/7/07

APPEAL TRIBUNAL

Victoria House
Bloomsbury Place
London WC1A 2EB

Tuesday, 20th November 2007

Before:
MARION SIMMONS QC
(Chairman)
MICHAEL BLAIR QC
ARTHUR PRYOR CB

Sitting as a Tribunal in England and Wales

BETWEEN:

M E BURGESS, J J BURGESS AND S J BURGESS
(trading as J J BURGESS AND SONS)

Claimants

and

(1) W. AUSTIN AND SONS (STEVENAGE) LIMITED
(2) HARWOOD PARK CREMATORIUM LIMITED

Defendants

MS. JENNIFER SKILBECK appeared for the Claimants.

MR. NICHOLAS PARFITT appeared for the Defendants.

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CASE MANAGEMENT CONFERENCE

1 (The hearing commenced at 2.02 pm)

2 THE CHAIRMAN: Good afternoon. Can I just ask, although there is nobody in court, is there
3 anything confidential today?

4 MRS. SKILBECK: Not so far as I am concerned.

5 THE CHAIRMAN: You do not mind mentioning why we are here?

6 MR. PARFITT: Certainly not from our point of view.

7 THE CHAIRMAN: On that basis, can I just make a few remarks to put into context where we have
8 got to. The Tribunal handed down a judgment in this case on 6th July 2005. In that judgment
9 the Tribunal held that the defendants had infringed the Chapter II prohibition contained in s.18
10 of the Act between 18th January 2002 and 22nd March 2004 by refusing access to
11 Harwood Park except through Nethercotts for cremations to be carried out by the Knebworth
12 and Welwyn Garden City branches of Burgess; and also from 22nd March 2004 by refusing all
13 access to Harwood Park in respect of cremations by those branches of Burgess.

14 These proceedings were commenced on 3rd August 2007, and the Tribunal has been asked to
15 stay them now on three occasions, the result of which, if settlement is not achieved, will be to
16 add a delay of a further seven to eight months.

17 The Tribunal understands that both parties consider that there was no need for a CMC today.
18 They have requested a further stay of this action until 7th February 2008. The purpose of the
19 stay is to allow more time for the alternative dispute resolution of this case. We would like to
20 say at the outset that we very much support and encourage ADR of cases, particularly in
21 follow-on damages actions of the kind before us today.

22 The Tribunal Rules of Procedure specifically refer to ADR, and Rule 44.3 says that the
23 Tribunal may in particular encourage and facilitate the use of an alternative resolution
24 procedure if the Tribunal considers that appropriate. We emphasise the use of the word
25 “facilitate”.

26 However, the Tribunal is also concerned about the position where settlement is not achieved
27 and as a result the proceedings become unduly delayed by the unsuccessful attempt to resolve
28 the dispute by other means.

29 The Tribunal does not want the parties to incur unnecessary costs in pursuing proceedings
30 which will settle. However, the case management powers of the Tribunal, particularly those
31 relating to disclosure, can be used to facilitate and support the ADR process. The parties’
32 correspondence to date suggested to us that disclosure of documents, or their non-disclosure,
33 was one of the main reasons for delay in the ADR. Any application to the Tribunal might
34 perhaps avoid such a delay.

1 The question which is in the Tribunal's mind is as to whether it can now assist to ensure that
2 there is no further delay in the mediation process by making some directions. The Tribunal
3 also wishes to consider with the parties whether directions can be made today which can apply,
4 if the mediation process does not now achieve the desired result, so that in that event there will
5 be no further delay.

6 What we would like to know is the up to date position so that we can put that into a proper
7 context.

8 MRS. SKILBECK: Thank you, madam, it is very helpful to have had your thoughts. The position is
9 as follows: the currently selected mediator is not available in the first week of February but is
10 available throughout January. We have established today that all the parties are available in
11 the last week in January, and it is now intended to move speedily to fixing a date in that final
12 week. It is just the particular date that has now to be established.

13 THE CHAIRMAN: Why is it going to take between now and the end of January to have a mediation
14 when one has been concerned with this at least from the middle of summer?

15 MRS. SKILBECK: Madam, until a few days ago my solicitor had not supplied to the other side
16 some information which they requested. The reason for that, if you would like to hear it, is
17 that the information was requested at the end of August or early September – I can check the
18 date – and what it was was a breakdown of the cremations according to the office and the
19 crematorium used. That was information we had not previously supplied but were obviously
20 able to do. When that information was supplied by the clients it turned out that the total
21 figures were slightly different from total figures that had been supplied previously, including in
22 the particulars of claim. My solicitor therefore, quite properly, sought an explanation for the
23 differences, albeit they were minor. It was quite difficult to establish what the differences
24 were. In the end, and I will explain how we got there, the reason for the differences is that in
25 the books kept by the Burgesses sometimes a funeral appears twice. That is, I think, because
26 sometimes the client requests another car or some other service to be added. As a result, when
27 the Burgesses had made their initial calculation some funerals had appeared twice.
28 As a result of this, and because of a slight element of confusion, my solicitor himself wanted to
29 check the figures and has been down from Birmingham to Hertfordshire twice to do so. He
30 had an unfortunate matter arising in the interim, in that one of his partners suffered a
31 bereavement and he took over quite a major trial meanwhile. That accounted for three or four
32 weeks delay which I know, in a sense, is a long delay, but in terms of the progress of the case
33 generally it is not a particularly lengthy time.

1 I think it is probably fair to say that our clients would be happy to proceed much more quickly
2 as of this date to a mediation – we would have liked one before Christmas – but the other side
3 want to get expert evidence or an expert’s report on the figures we have now supplied.

4 I would like just to mention that we have supplied all the information that has been requested
5 from the other side. There is nothing now outstanding. I am sorry, there is some information
6 that we were requested to provide at the beginning of November from Golden Charter, which
7 is a third party, which has yet to be supplied. That is a small part of the overall claim.

8 THE CHAIRMAN: When can that be supplied?

9 MRS. SKILBECK: Golden Charter is an organisation where you can pre-buy your funerals, and it is
10 not an organisation ----

11 THE CHAIRMAN: Is that a sort of insurance thing?

12 MRS. SKILBECK: Exactly, and it is a third party that organises it. The information is being
13 obtained from that third party, so we do not at the moment have a date for when it will be
14 supplied.

15 THE CHAIRMAN: It they do not supply it this is going to go off again, is it?

16 MRS. SKILBECK: I would hope not. It is not for me to say, but I would have thought that an
17 expert could make 90 per cent of headway without those figures immediately to hand, because
18 it is just a small part of the business.

19 THE CHAIRMAN: We will hear about that in a minute.

20 MRS. SKILBECK: As I say, because we are not at the moment seeking expert advice ourselves,
21 though we might do so, we would happy with an earlier date. It is the other side that have
22 wanted to make it that much later, and we have agreed at present.

23 THE CHAIRMAN: Are they going to make their expert advice available to you before the
24 mediation, or is it just advice which is going to be sitting behind them at the mediation?

25 MR. PARFITT: I understand that it will be advice that will be sitting behind at the mediation. No
26 doubt, if the mediation would be assisted by some form of a disclosure of that report then that
27 is something that we would give serious consideration to if necessary.

28 THE CHAIRMAN: At least they would know what the parameters that you were looking at were. If
29 it is an expert’s report that was going to be used in the case anyway ----

30 MR. PARFITT: I think, in a position where the report does not actually exist at the moment, it
31 would not be right for me to make any further comment than I have in relation to that.

32 THE CHAIRMAN: What about these documents that you requested at the beginning of November?

33 MR. PARFITT: As my learned friend indicated, they relate to a small but presumably, from their
34 point of view, important part of their claim for damages, and the documents that we have
35 requested are ones that will throw some light on that. I do not see it as holding up the

1 mediation process. I am sure that they will do whatever they can to have them provided. If
2 those documents are not available there is no reason why the mediation process ----

3 THE CHAIRMAN: Are they relating to funerals which they were concerned in, or are they relating
4 to general information?

5 MR. PARFITT: The claim that is made in respect of Golden Charter is that the claimants lost a
6 number of Golden Charter funerals or putative funerals that they would otherwise have got.
7 The documents relate to that assertion and I suspect the quantum of losses as a result of that if
8 they make out that assertion.

9 MRS. SKILBECK: If I could just add, it is not a large part of the business, but on the form that the
10 client fills in the client nominates the name of the chosen crematorium, so obviously during the
11 course of the dispute they were unable to sell any Golden Charter plans that involved
12 Harwood Park.

13 THE CHAIRMAN: So why would Golden Charter have documents relevant to that? That question
14 is probably addressed to both of you.

15 MRS. SKILBECK: Madam, we were asked for a schedule of Golden Charter sales which our clients
16 tell us is something that is kept by Golden Charter.

17 THE CHAIRMAN: But if, as you have just told me ----

18 MRS. SKILBECK: I absolutely see your point and maybe there is a slight misunderstanding and
19 maybe all we need do now is ask our own clients for the number. I am sorry, it is very
20 difficult, I imagine, for my clients to know how many Golden Charter sales they lost because
21 they were simply unable to sell them.

22 THE CHAIRMAN: What have you asked Golden Charter? If it is how many cremations did they
23 insure, if that is the word, at Harwood Park during this period, then Harwood Park would have
24 that information. So why are you going round in this circle?

25 MRS. SKILBECK: All I can say is that what we were requested to supply:

26 "We therefore request a copy of your client's funeral and sales schedule from
27 Golden Charter for the years 2002 to 2006."

28 There is a sort of implication that the figures that we had given from our own records of the
29 trend was not, itself, sufficient and they wanted verification from Golden Charter. That is how
30 one reads this.

31 THE CHAIRMAN: I can see that. Mr. Parfitt, can you explain why you need this information?

32 MR. PARFITT: Only in the broadest possible terms. I sought instructions as to whether or not there
33 was any outstanding information that we required and my instructions did not identify this as
34 being something that was outstanding. It was only when I heard that it was outstanding that
35 I realised that there was something left over. I suspect that the fact that I was instructed that

1 there was not anything particularly outstanding means that it is not going to be a major
2 obstacle and I do not really want to make a mountain out of it.

3 THE CHAIRMAN: What I am concerned about is that it becomes a mountain in the middle of
4 January.

5 MR. PARFITT: There is no reason to think that it will.

6 THE CHAIRMAN: Right. So you are not asking me for an order because you had no instructions to
7 deal with it.

8 MR. PARFITT: Precisely.

9 THE CHAIRMAN: I think we are all wondering if what is being asked – maybe we ought to look at
10 the pleadings, but if what is being said is that they were not able to sell Golden Charter plans
11 and therefore lost that business in relation to the Harwood Park cremations then the question is,
12 how many Harwood Park Golden Charter cremations were there in that period?

13 MR. PARFITT: Certainly, if there was a deficiency between the ones that did not go with them and
14 they wanted Harwood Park so it would come to us or other people who use our facility.

15 THE CHAIRMAN: Right, so it is not Golden Charter that would have that information, but your
16 client would have that information.

17 MR. PARFITT: We might have some of the information or indeed Golden Charter might have it. It
18 is not just funeral directors owned or controlled by us who have access to our facility. I think
19 there are tens of others in the area as well. We would not know those that had ----

20 THE CHAIRMAN: Had gone through Golden Charter.

21 MR. PARFITT: I do know enough to know whether we could advise Golden Charter, but I do not
22 think we would know whether they came to us because they could not go through the
23 claimants.

24 MRS. SKILBECK: I wonder if I can assist, madam, the sale by Golden Charter is to people who are
25 still alive.

26 THE CHAIRMAN: That is the point. I was thinking that it was the people who had died in that
27 period who had lost their funerals.

28 MRS. SKILBECK: Yes, exactly.

29 THE CHAIRMAN: You may have lost more than their funerals, so you have to ask Golden Charter
30 who had nominated Harwood Park during that period. Do they need to give you that
31 information? Are they going to give you that information?

32 MRS. SKILBECK: We cannot be sure. We do not know.

33 THE CHAIRMAN: Both of you could ask that. It may be that a joint approach might be better than
34 an individual approach, because they could think they are giving away some business
35 confidence.

1 MRS. SKILBECK: It is possible.

2 THE CHAIRMAN: Mr. Parfitt, your instructions are that you have got all the documents you need?

3 MR. PARFITT: Yes, in the context of this discussion, yes.

4 THE CHAIRMAN: You are going to say to your clients, “Apparently there is something else”, but
5 your instructions were that they have got all that they need?

6 MR. PARFITT: Yes.

7 THE CHAIRMAN: Your instructions are that you are going to instruct, I assume, an accountant
8 who is going to look at these documents and work out what you say the loss is.

9 MR. PARFITT: Yes.

10 THE CHAIRMAN: That can be done in a period which will allow the last week of January for a
11 mediation?

12 MR. PARFITT: For a mediation, yes.

13 THE CHAIRMAN: It would be unfortunate if this went off again.

14 MR. PARFITT: Extremely.

15 THE CHAIRMAN: So in relation to that, if the Tribunal can assist either party in order to make sure
16 that this mediation does take place then we are here to assist.

17 MR. PARFITT: Certainly I will indicate to those instructing me that if difficulties arise of whatever
18 kind that are not dealt with immediately in correspondence then perhaps there could be a
19 written application.

20 THE CHAIRMAN: One moment.

21 (The Tribunal conferred)

22 THE CHAIRMAN: What we can do, if there is a problem and you write to the Tribunal I can deal
23 with this by myself rather than having to get the three of us in. We can also try and deal with it
24 on the telephone, have a telephone CMC or do it in writing.

25 MR. PARFITT: That is very helpful.

26 THE CHAIRMAN: If that is of assistance.

27 MR. PARFITT: Very much so, thank you.

28 THE CHAIRMAN: We are here to facilitate. The other thing is what happens if this does not settle
29 at the end of January? It seems to me that we are here today and there is no reason not to make
30 some directions.

31 MR. PARFITT: From our point of view, we are very content with a direction that, if it does not
32 settle, we should file our formal defence within 28 days of that failure. As far as further
33 directions after that are concerned, at the moment I think both parties are of the view that it
34 will not be until that defence is filed that there will be able to be a bit more clarity about what
35 issues remain, what issues there are, how best to resolve those, the extent to which disclosure is

1 necessary, what shape really any further hearings need to take. Certainly for our part on our
2 side we would not think it was sensible at this stage to seek directions ----

3 THE CHAIRMAN: To go further than that.

4 MR. PARFITT: -- boiler plate directions that might not actually be adequate or necessary for the
5 particular disputes that arise. We will be doing our defence – we are in a world where we have
6 not settled – and it should be possible for the parties in the context of that document, with the
7 Tribunal’s assistance, again using the procedure that we have discussed, to agree further
8 directions if necessary.

9 THE CHAIRMAN: Yes, you might be able to do it that way which would save costs. One of the
10 matters that was in our mind before we came in is the question of whether it would have been
11 helpful, or it would be helpful, if there was a defence before the mediation. I do not know how
12 much discussion you have had as to the points you are raising between yourselves. That might
13 assist the mediation.

14 MR. PARFITT: From our point of view there are two aspects to that. The primary one is in relation
15 to costs. I think I am right in saying that neither of these companies or individuals, in one case
16 a partnership, are very substantial in terms of their assets, and any saving that could be made in
17 respect of costs is going to be extremely useful. So the primary reason for not incurring the
18 costs of a defence at this stage is just that, costs.

19 THE CHAIRMAN: You have to prepare for the mediation. One knows that if the parties have not
20 properly focused on each other’s issues then that is not very helpful in the mediation. If
21 everybody just turns up on the morning and there is no focus that is not very helpful.

22 MR. PARFITT: The procedure to be adopted in relation to the mediation will be a matter for the
23 mediator and the parties.

24 THE CHAIRMAN: Absolutely, yes.

25 MR. PARFITT: In my experience of mediation, which is something which has recently been
26 substantial, I have never known a mediation where the parties do not exchange some form of
27 statements beforehand, which would set out the basis of their position and, in theory, and I am
28 not speaking in relation to this particular case, there is a flexibility that they have ----

29 THE CHAIRMAN: My experience of that is that it sometimes happens too late in the sense that it is
30 only a day or two before and then everybody is scurrying around.

31 MR. PARFITT: I am sure that in order to avoid that danger, and taking on board this discussion, the
32 parties in this case can agree that those statements should be provided a week in advance or
33 something.

34 There is a second reason as well ----

35 THE CHAIRMAN: Possibly even more than a week in advance. That is the problem.

1 MR. PARFITT: We do not want to back too far into the holiday period because I think it is
2 necessary for this accountant to do his accountancy work.

3 THE CHAIRMAN: He must be getting on with that now because you have got all the documents.

4 MR. PARFITT: We have now got all the documents.

5 THE CHAIRMAN: Has he been instructed?

6 MR. PARFITT: He either has been instructed or is being instructed. It is a matter of days rather
7 than weeks. He could have been instructed yesterday or the day before, or he could be
8 instructed at the end of this week.

9 THE CHAIRMAN: How long is going to take him, or do you not know at the moment?

10 MR. PARFITT: I do not know that.

11 The second point about the defence, which is one that relates I think particularly to this
12 situation where the parties are involved with each other on a day to day basis, working
13 together, and so on, and with a view to keeping everybody happy or at least positive so far as
14 mediation is concerned, is ----

15 THE CHAIRMAN: Constructive.

16 MR. PARFITT: Thank you very much, constructive – we are concerned that there may be some
17 additional antagonism added into the mix by us putting in a very aggressive – as indeed our
18 defence would be – defence at this present stage. Whilst we are sympathetic to the idea that it
19 might be sensible for there to be a defence in general terms, in this particular case because of
20 reasons of costs and because of trying to be constructive, we think it is not appropriate.

21 MRS. SKILBECK: We agree with both of those points. Madam, just following on from what my
22 learned friend said, directions as to exchange of issues would be perhaps helpful, whether it is
23 two weeks before or even ----

24 THE CHAIRMAN: That is really a matter for the mediator, because he is in charge of the procedure
25 for the mediation. Perhaps both parties could think about it. You are in discussion with the
26 mediator at the moment about the date, and one could indicate to him the feelings that have
27 been expressed today and say that it might be helpful if the parties got together and there was
28 some sort of agreed issues; and also, depending on the status of this report, the question of
29 whether it ought to be disclosed. If it is going to be a report that would be used in the case ----

30 MR. PARFITT: Then it should be disclosed.

31 THE CHAIRMAN: Then it should be disclosed.

32 MR. PARFITT: Without committing anybody who might come after me, then it should be disclosed,
33 I would have thought.

1 THE CHAIRMAN: Yes. It might be helpful if it was helpful if it was disclosed and that would
2 actually highlight what the issues were. I do not know if there any legal issues, but certainly
3 that would highlight the financial issues.

4 I suppose one of the ways that this could have been done is to have the expert as a single joint
5 expert with both parties putting their points so that he could deal with both sides.

6 MR. PARFITT: Madam, it could have been done that way, but as we have now instructed me it
7 would be unfair to the other side if he was to become the joint expert; and likewise, if he was
8 to be disinstructed, it would be unfair to my side because we will have incurred presumably
9 some costs in relation to him already. Whilst that would have been a possibility, I do not think
10 it is one that is available now.

11 MRS. SKILBECK: If I may just add there, when this was initially discussed my clients were not
12 terribly keen to incur the additional costs of an expert's report at that time. We agreed with the
13 other side that we would appoint a mediator who was an accountant so that there was some
14 expertise there to assist the parties. Indeed, the expert is an accountant.

15 THE CHAIRMAN: I was just thinking that it is all very well on the day, but there is quite a lot
16 leading up to the day of the mediation. Parties can get very entrenched positions, as you were
17 talking about, if one side has got an expert report that says something and he has not taken into
18 account views of the other side. That makes it much more difficult on the day. I am not
19 saying it cannot be sorted out on the day, but if that can be sorted out and one knows where
20 one's positions are before then there is less pressure on the day.

21 MR. PARFITT: Madam, I will certainly make clear to those instructing me that there is likely to be
22 considerable value in providing to the other side any report from our expert as soon as it is
23 finalised.

24 THE CHAIRMAN: Or some summary, or something, which will set out what the issues are which
25 they can then look at and comment on, or at least it gives some agenda for the mediation.

26 MR. BLAIR: In the light of this discussion, which is very helpful, I was one of the members of the
27 Tribunal that was provisionally in favour of seeing a defence, because I thought it might have
28 helped you with the mediation, but I quite see that you both think that this might antagonise
29 things. If we combine the fact that the mediator has control of his own procedure with the fact
30 that the Tribunal itself is still in charge of the case, as it were, I wonder whether it would be
31 useful if both sides, perhaps through one solicitor's letter, could let us know how things stand
32 at, say, the end of the year when we are a month away from the mediation just to see if there is
33 anything the Tribunal could do at that stage to try and assist the mediation to be productive.
34 Would that be a step that might be worth thinking about?

35 MR. PARFITT: Certainly from our point of view that seems very sensible.

1 MRS. SKILBECK: Especially in the light of the possibility of a telephone CMC or written CMC.

2 THE CHAIRMAN: I am just looking at the diary. You are thinking of having the mediation – is it
3 the week of the 21st or the week of the 28th?

4 MR. PARFITT: I think the week of the 28th.

5 THE CHAIRMAN: The week of the 28th. Next year is a leap year, I see from this diary.

6 MR. PARFITT: Hopefully it will all be resolved by then.

7 THE CHAIRMAN: What I am thinking about is making the date for the defence. That is why
8 I mention it is a leap year and Friday is the 29th, which would give you four weeks. Do you
9 really need four weeks for the defence?

10 MR. PARFITT: I am instructed that we do. I cannot provide any more detail. I imagine that once
11 we have gone through the process that it would not take that long. I am told that if we were
12 forced to do the defence now it would take four weeks. We have agreed that four weeks
13 should be allowed. I do not think that I am in a position to take that further?

14 THE CHAIRMAN: You have agreed the four weeks? Are you happy with four weeks?

15 MRS. SKILBECK: It is the normal length of time that the Tribunal permits.

16 THE CHAIRMAN: Nothing is normal! It depends on the case.

17 MRS. SKILBECK: I would say it could be done in a shorter time.

18 THE CHAIRMAN: It is not going to make that much difference. If we order that in the event that
19 this case does not settle in the meantime the defence shall be filed and served on Friday,
20 29th February. Do you think you might want to reply?

21 MRS. SKILBECK: It is possible.

22 THE CHAIRMAN: So why do we not make an order for that as well. How long do you want for
23 that?

24 MRS. SKILBECK: Twenty eight days for reply.

25 THE CHAIRMAN: Twenty eight days, which is Friday, 28th March. Reply, if any, shall be filed
26 and served on Friday, 28th March. I wonder if we can go a bit further than that.

27 MR. PARFITT: Next would be disclosure.

28 THE CHAIRMAN: Why do I not say that your defence shall be filed and served on Friday,
29 29th February, including any expert evidence?

30 MR. PARFITT: Okay.

31 THE CHAIRMAN: To include any evidence, including expert evidence, upon which the defendant
32 wishes to rely.

33 MR. PARFITT: That would incorporate not merely expert evidence but also, for example, witness
34 statements and everything else?

35 THE CHAIRMAN: Yes, why not, because you have got to do that for your defence anyway.

1 MR. PARFITT: What we would not have to do is incur the costs of preparing formal witness
2 statements and ----

3 THE CHAIRMAN: What about documentary evidence on which you are relying, or shall we make
4 an order for disclosure?

5 MR. PARFITT: It was those types of orders which I was suggesting earlier might be better made in
6 the light of what the actual issues are rather than a general order.

7 THE CHAIRMAN: If you supplied any documents you relied on with the defence – you have got to
8 have them because you have them for the defence.

9 MR. PARFITT: Yes, but the key part of disclosure of course is the documents we get from the other
10 side.

11 THE CHAIRMAN: Absolutely, and they do it in the reply. Then we have got a basis after that for a
12 disclosure application, if necessary.

13 MR. PARFITT: Okay.

14 THE CHAIRMAN: So to include any disclosure and any expert evidence on which the defendant
15 wishes to rely.

16 MR. PARFITT: Shall we say documentary evidence or expert evidence? The word “disclosure”
17 tends to carry with it obligations to provide documents which do not assist your case.

18 THE CHAIRMAN: All right, any documentary evidence and any expert evidence on which the
19 defendant wishes to rely. You may not be able to do an expert report by the time of the reply.

20 MRS. SKILBECK: Exactly. I wonder if, instead, we might have a date by which we should have
21 agreed some directions ourselves.

22 THE CHAIRMAN: Why do I not put a CMC in after the reply. If the reply is coming in on
23 28th March then I could put a CMC in for two weeks after that. Do we want it on a Friday?
24 Does it make any difference to any of you?

25 MR. PARFITT: It does not make any difference to me, but that may not be the most helpful remark
26 I have made today!

27 MRS. SKILBECK: No, not to me.

28 THE CHAIRMAN: All right, CMC Friday, 11th April. Your reply is coming in on the Friday after
29 Easter.

30 MR. PARFITT: I was just mentioning that. They are going to, in a sense, have to deal with and
31 respond to points made in our expert report. Whilst they do not have to provide their expert
32 report within that time, one imagines that they may need to address, with the assistance of an
33 expert, points that might be made in that report. Whilst I do not want to push the timetable
34 back ----

35 THE CHAIRMAN: Maybe we should say 4th April?

1 MRS. SKILBECK: Yes.

2 MR. PARFITT: It may be more sensible.

3 THE CHAIRMAN: We could still leave 11th April.

4 MR. PARFITT: Yes.

5 THE CHAIRMAN: We all hope that this is not going to have to happen and that you will settle into
6 a better way forward.

7 MRS. SKILBECK: My understanding is that certainly, on our side, it is not just going through the
8 motions, this is a serious attempt at mediation. I understand it is the same for both sides.

9 THE CHAIRMAN: Unless there was a good reason why the mediation did not take place or got
10 delayed at the end of January, one is starting to wonder whether it would be better to run the
11 action at the same time as trying to mediate. I understand your concerns about “maybe
12 antagonistic”, but on the other hand it may focus the minds because it will be nearly a year
13 then since the action was started. Sometimes the pressure of costs and the hearing might focus
14 minds on trying to settle it.

15 MR. PARFITT: Yes. It does seem to me that they ought to get on with it now.

16 THE CHAIRMAN: Yes. Is there anything else that we can help you with? What I have been
17 reminded about is the year end letter. Is that going to be joint letter or a letter from one or both
18 of you? Maybe it should be from both of you.

19 MRS. SKILBECK: I would guess that my solicitor will probably draft something and seek the other
20 side’s agreement.

21 THE CHAIRMAN: Is that going to be antagonistic?

22 MR. PARFITT: I was going to say a joint letter or, if that is not possible, then ----

23 THE CHAIRMAN: A letter from either side.

24 MR. PARFITT: -- a letter from either side explaining why it has not been possible to write a joint
25 letter.

26 THE CHAIRMAN: So a joint letter or a letter from each party informing the Tribunal of the up to
27 date position as to the mediation process. When are you going to suggest doing that by?

28 MRS. SKILBECK: 31st December. I hope it might be within the next week. You say year end.

29 THE CHAIRMAN: What we are thinking of is if you need some help in January if, having started
30 the mediation process, there are then problems.

31 MR. PARFITT: Because it is in the middle of the holiday season it might be more sensible to say by
32 the end of, say, the first week in January.

33 THE CHAIRMAN: I am just wondering whether we should pull it back and say by 21st December?

34 MR. PARFITT: I was anticipating that it might be helpful for the Tribunal to know the directions
35 that the mediator was processing. The parties and the mediator may have not have agreed

1 those by then. If that is not an issue and it is just a question of whether things are progressing
2 as you would hope they would by that stage then that would be fine. It is just a question of
3 how much useful information the Tribunal is going to have.

4 THE CHAIRMAN: If it is by 21st December, if each party says, “We have got a mediation fixed for
5 X”, we have indicated today that if there is any problem and we can facilitate – if it something
6 that the mediator cannot deal with and we can facilitate – then you should come back and I will
7 try and deal with it. So I think by 21st December. It may be better, having regard to the
8 holidays, if we brought that back a little bit so that we could deal with it before Christmas
9 because if it is 21st December we cannot deal with it before Christmas.

10 MR. PARFITT: I completely agree with that, although I am just a little bit concerned that by
11 bringing the date back too much you actually do not give enough time for any issues to arise.
12 It is obviously a balance between the two.

13 THE CHAIRMAN: What I am anticipating is that you are going to instruct your accountant. If your
14 accountant has any questions that might result in further information being required and if that
15 happens then you might want our assistance, and it might be easier to come back to us than to
16 the mediator, because that is actually probably cheaper, immediately or in the next few weeks.
17 That is what I am anticipating. I am not anticipating that something is going to happen in
18 January.

19 MR. PARFITT: Yes, I understand.

20 THE CHAIRMAN: The only thing that might happen in January is that if you do exchange issues,
21 which I hope you do, then the result of that might be that you might need some more
22 information and you might feel that it is cheaper to come back to us than the mediator.

23 MR. PARFITT: If our accountant knows that a letter is going to be written to the Tribunal at a
24 particular date then we can chivvy the accountant along to do what he should be doing before
25 then and that gives a focus to us. So there is a benefit in that.

26 THE CHAIRMAN: I would hope that you will have had a report in your hand by 21st December.

27 MR. PARFITT: Yes.

28 MR. BLAIR: And it might be that you had some directions from the mediator which made it
29 unnecessary for us to do anything.

30 MR. PARFITT: It is possible.

31 THE CHAIRMAN: Why do I not say by 18th December, which is the Tuesday, which will give us
32 Wednesday, Thursday and possibly Friday to sort out any problems. At the moment I can tell
33 you that I have got a hearing here on 18th and 19th December. I could do something either
34 before or after that hearing, or we could do it on the Thursday. I am anticipating that, if there
35 is a problem, it is going to be much earlier, you are not waiting for the 18th.

1 MR. PARFITT: It will only be if the problem has not been resolved between the parties.
2 Presumably our accountant will say, "I need X", and we ask for X, and they say, "Do not be
3 ridiculous, you are not having that", or, "We have not got it", or whatever. Then there might
4 be something that the Tribunal can usefully help with.

5 THE CHAIRMAN: What we do not want to happen is that this bit of information which you did not
6 know about, that that suddenly becomes a very big problem in a few months time.

7 MR. PARFITT: I will tell my side that they need to ----

8 THE CHAIRMAN: I think one needs to make whatever the information is that is required a little bit
9 clearer, and it may well be that it is information in your client's possession, or some of it ----

10 MR. PARFITT: Yes, there might be other routes to it.

11 MRS. SKILBECK: Maybe we could have, in some suitable wording, liberty to apply in case there is
12 anything.

13 THE CHAIRMAN: Of course there is permission to apply.
14 I hope you found that of some use. We do appreciate that coming down here is costly, but it
15 did seem to us important to make it clear, firstly, that we can facilitate; and secondly, that we
16 are concerned about the time this has been going on. If one does come and ask the Tribunal to
17 help facilitate an ADR that might prevent undue delay.

18 MRS. SKILBECK: Thank you.

19 MR. PARFITT: Is it necessary for there to be a costs order?

20 THE CHAIRMAN: Are any of you applying for costs?

21 MR. PARFITT: Costs in the case?

22 THE CHAIRMAN: Costs in the case. That may be something you need to remember to wrap up in
23 the mediation if you settle it.

24 MR. PARFITT: Certainly they will need to be settled, however it is done.

25 THE CHAIRMAN: Thank you very much.

26 (The hearing concluded at 2.50 pm)