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IN THE COMPETITION
APPEAL TRIBUNAL

Case No. 1249/5/7/16

Victoria House,
Bloomsbury Place,
London WC1A 2EB

21 June 2016

Before:

THE HON. MR. JUSTICE PETER ROTH
(The President)

(Sitting as a Tribunal in England and Wales)

BETWEEN:

SOCRATES TRAINING LIMITED

Claimant

- and -

THE LAW SOCIETY OF ENGLAND AND WALES

Defendant

—————
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Mr Philip Woolfe (instructed by Socrates Training Limited) appeared on behalf of the Claimant.

Ms Kassie Smith QC (instructed by Norton Rose Fulbright LLP) appeared on behalf of the Defendant.
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CASE MANAGEMENT CONFERENCE

1 THE PRESIDENT: I think we will take this in stages and deal first with the disclosure questions,
2 and then move on to consider the cost caps. So, Mr. Woolfe, I think it is your application
3 for disclosure.

4 MR. WOOLFE: Sir, yes. If I might ask, would you like me to deal with all the elements of
5 disclosure and then hear from Miss Smith on all of them, or would you like to take them
6 one by one and hear us individually.

7 THE PRESIDENT: I think it might be sensible to do them one by one.

8 MR. WOOLFE: I think that is sensible subject to some of them when you get to the end, some
9 are interconnected.

10 THE PRESIDENT: Unless you want to group them, see how we go, but if you think there is a
11 sensible break-off and take a few together that will be fine.

12 MR. WOOLFE: Sir, before I begin, there is just one other point, which is para. 10 of my learned
13 friend skeleton for today's hearing. There is a request for information and, to be fair, this
14 was put I think last Friday, that the claimant disclose the total number of firms (i.e. not just
15 residential conveyancing firms) that undertook any form of anti-money laundering training
16 from Socrates in each of those four years, including an indication of the make-up of
17 Socrates' customer base. We are happy to provide that, so that clears that one off the table.

18 THE PRESIDENT: That can be incorporated in an order, have you got a date?

19 MR. WOOLFE: No, we do not yet have a date. I think it may depend a little on everything else
20 that is ordered coming out of today.

21 THE PRESIDENT: This is for disclosure from you, but it is presumably clear what is regarded,
22 or you can explain, as AML training, the courses.

23 MR. WOOLFE: Sir, yes, effectively this will be a matter of finding information from the
24 database, and as regards the split I think there may be a certain amount of information in
25 witness evidence.

26 THE PRESIDENT: Yes, that can be explained. Can we put the same date as for the other----

27 MR. WOOLFE: Yes, I think 22nd July is the date we can do it.

28 THE PRESIDENT: Yes, thank you, that is helpful. While we are just on points like that, I think
29 something dropped off your footnote on the first page of your skeleton argument.

30 MR. WOOLFE: I am sorry, yes. In my learned friend's skeleton, it is convenient since we are
31 there, on p.7, she requires in Request 6 publicity material.

32 THE PRESIDENT: What should it read? "A sixth area, namely disclosure regarding publicity
33 for changes to the CQS, is identified in . . .?"

1 MR. WOOLFE: Disclosure by the defendant, it is the document that is at tab 7 of the bundle for
2 today's hearing. In that document at para. 35 we have this request for publicity information,
3 and they say they will provide it, so it is no longer in dispute.

4 THE PRESIDENT: Yes, I see. Thank you, so we have the five areas at issue. The first is
5 exchanges with mortgage lenders - is that right?

6 MR. WOOLFE: Sir, yes. In our application for disclosure at tab 3, that is request 1. As we
7 identified in paras.1.1 to 1.3 of the application, the defendant relies upon the needs of
8 mortgage lenders as expressed to the Law Society as part of its case on market definition,
9 this case of it being a platform. Hence their attack on dominance really turns on market
10 definition. Again, it is also relevant to effect and, critically, objective justification, where
11 uniformity of training is requested by mortgage lenders and required. Essentially, we say
12 that it would be wholly unfair if they were allowed to limit their disclosure simply to
13 documents on which they rely. Even if they come across an adverse document in the course
14 of their searches that they must be doing anyway, they are under no obligation to disclose it.
15 The context of saying that, of course, in a case where you have a putatively dominant firm,
16 there is an asymmetry of information between the two sides and an inbuilt inequality, that
17 they have access to the documents on market definition, but in particular on abuse and
18 objective justification. If they can simply present the documents on which they rely and not
19 adverse documents they will severely handicap the claimant in its ability to prove its case
20 and to test their case at trial.

21 We are most emphatically not proposing standard disclosure across the piece in this case,
22 nor are we saying that the defendant has to undertake the kind of exercise which, with
23 respect, Norton Rose are perhaps accustomed to undertaking in cartel investigations or very
24 large damage litigations where one naturally goes about it by doing these key word
25 searches, getting in teams of junior lawyers and paralegals, reviewing a very large mass of
26 documents to try and find the relevant material. We do say that there is a level of searches
27 that can be undertaken that fall below that that it is reasonable and proportionate to
28 undertake.

29 THE PRESIDENT: But it still involves going over several years and quite a number of
30 individuals. There may have been lots of contacts with mortgage lenders. People do not
31 remember every email. There are probably hardly any that they remember. They all have
32 to be looked at and read. It seems to me there is no getting away from the fact that it is an
33 expensive exercise, and I have to say you will see from the witness statement that you are

1 going to get, and it is for them to make their case - after all, it is their case that this all
2 reflects what is wanted by mortgage lenders, or some mortgage lenders - what they say and
3 how clear that is in the witness evidence that they have to give. It seems to me that
4 certainly at this point it is disproportionate to request that exercise. As you say, it can be a
5 limited exercise, and if you think something comes out of the witness statement on this
6 issue that suggests there is a lot more then you can apply again. I am really not persuaded
7 that to impose that sort of burden on a party that is seeking to make a case based on their
8 contacts with mortgage lenders is really a proportionate way to go when we are trying to
9 limit costs.

10 MR. WOOLFE: When it comes to my second request, I am going to be urging searches upon you
11 with perhaps rather more force, because I do take your point, Sir, that in respect of Request
12 1 it really relates to their case that they have to prove and therefore it is less of a concern
13 what extent of searches they undertake, whereas under Request 2 these documents are of
14 rather wider----

15 THE PRESIDENT: Request 2 is?

16 MR. WOOLFE: Internal strategy documents.

17 THE PRESIDENT: We will come to that, yes.

18 MR. WOOLFE: What I am coming to say is that I can see the distinction between perhaps the
19 two categories, in terms of what it might be reasonable to search for.

20 THE PRESIDENT: There are lots of contacts with mortgage lenders, and they will cover various
21 things, and so not just the CQS. I expect the Law Society has, and the Law Society is quite a
22 large organisation and people move around so, as I say, I have read what you said in your
23 skeleton and the other submissions, and I have to say I am not persuaded on this point. Of
24 course you, like any litigant, would like to know if there might be some damaging
25 document buried away, but experience suggests the effort involved is generally not
26 justifying the meagre results that are produced.

27 MR. WOOLFE: Sir, I understand you are expressing a concern regarding the proportionality of
28 the exercise, of doing any additional searches and I understand that.

29 THE PRESIDENT: I give you permission to re-apply. I appreciate we run into summer with this
30 but we do sit in September, so after digesting the witness statements you can come back in
31 September, the trial is not until, is it late October or early November.

32 MR. WOOLFE: Thank you, Sir. That is helpful because----

1 THE PRESIDENT: If you think there is something that springs out of the evidence that you want
2 to have rather more. It is 7th November, so that will give time if necessary.

3 MR. WOOLFE: There is one more point I would just like to clarify. Having understood that you
4 are saying that you do not want them to do any further searching, the question is what about
5 any adverse documents which they come across in the course of the exercise which they are
6 doing? In respect of that there can be no objection on proportionality, it is simply a
7 question of fairness that they should have to disclose them. That is the last point in respect
8 of this I would urge upon you.

9 THE PRESIDENT: I will restrict them to what goes into the witness statement. I think that is a
10 rather difficult calculation.

11 MR. WOOLFE: Thank you, I will move to Request 2.

12 THE PRESIDENT: Yes, as I understand it, they have agreed to give the minutes of these various
13 Bodies that have been----

14 MR. WOOLFE: Sir, that is correct.

15 THE PRESIDENT: Direct me to the place where they are set out.

16 MR. WOOLFE: It is tab 7 of the bundle, response on disclosure by the defendant, and it is on
17 p.5, para. 23.

18 THE PRESIDENT: So there are these five categories, and they have agreed to give that both for
19 the first period that you have asked, the initial introduction, and the restructuring, that is for
20 2013 and the restructuring in 2015. It did seem to me, subject to anything that Miss Smith
21 wants to say, as well as the minutes there should be disclosed any papers that were placed
22 before the meetings of which the minutes are provided, because usually the Board will have
23 a paper or a Committee will have a paper.

24 MR. WOOLFE: That is precisely the kind of thing that we would want.

25 THE PRESIDENT: It seems to me that that can be turned up or readily tracked, because it is
26 identified in the minutes, with the minutes themselves, so I see the force of that. I think that
27 is the point.

28 MR. WOOLFE: That is the point, there is simply one other area which is simply business plans.
29 There are people at a level in the Law Society who are involved in the business of the Law
30 Society, as it were, and they have produced business plans, revenue projections, etc. We
31 would submit that those kind of documents would be reasonably readily identifiable
32 because you go to the people in charge and say: "Did you prepare such documents?"

1 THE PRESIDENT: That does seem the sensible thing to break, and switch to Miss Smith. There
2 are two points. I think one is papers placed before these various committees and boards in
3 connection with the meetings, is that resisted, Miss Smith?

4 MISS SMITH: No, I have been able to take instructions immediately, and that is not resisted, we
5 can do that. As regards business plans, the question is just how far we need to go in
6 identifying and questioning individuals. At the moment, as I have identified in the skeleton
7 and in that document at tab 7, this is an issue which will, of course, be canvassed in the
8 witness statements that we are required to put in and we will be canvassing it in detail, so
9 witnesses will be asked about the inception of the CQS and the inclusion of AML in 2013,
10 and then on the restructuring. We will also be looking at each of the committees that we
11 have identified.

12 Insofar as business plans and policy documents are turned up as a result of each of those
13 two processes, then we would disclose them. The question is whether we then need to go
14 further in a more extensive disclosure exercise because then it becomes identifying I think it
15 is 26 individuals, and could have had relevant documents.

16 THE PRESIDENT: I think I can stop you. I think, in preparing that evidence, you will turn up
17 policy documents and business plans. The point that is being made is that you might choose
18 not to rely on them, but I think you should disclose them.

19 MISS SMITH: Yes, Sir, that is absolutely all right.

20 THE PRESIDENT: Policy documents and business plans that are turned up in the course of
21 preparing your witness evidence, even if the Law Society chooses not to rely on them.

22 MISS SMITH: Absolutely, Sir, and we are happy to do that.

23 THE PRESIDENT: Yes, thank you very much. Right, what is next?

24 MR. WOOLFE: The next is communications regarding the design of the CQS training. If I can
25 pick this up at tab 3 of our application, and this is dealt with at Request 3.

26 THE PRESIDENT: Let me pick it up first – is this A4, the design brief on p.5?

27 MR. WOOLFE: That is in my skeleton, Sir, yes. This is the design brief given to those who
28 drafted the previous AML training module, and the present “financial crime” training, and
29 any documents, evidence and communications with those persons regarding the content and
30 design of such training.

31 THE PRESIDENT: Why is this so relevant?

32 MR. WOOLFE: For a start they have agreed to give the design brief if they can find it within
33 certain searches. As para. 3.1 of our application, as we point out, their case, and this is

1 para.38 of their amended defence, is that the CQS training modules have been specifically
2 designed for the purposes of the CQS, this is part of their case on objective justification -
3 this is integrated into the CQS effectively - and that it would not be appropriate for the Law
4 Society simply to check that applicants for CQS membership have otherwise met the
5 statutory obligation to train on AML, because such training would not have been designed
6 for the purposes of the CQS. So it is relevant to see to what extent matters relating to the
7 CQS and not simply to anti-money laundering----

8 THE PRESIDENT: You will get your design brief. You will actually see, of course, the content
9 of the training modules.

10 MR. WOOLFE: We have got the training modules.

11 THE PRESIDENT: You have it.

12 MR. WOOLFE: Not the training modules, but----

13 THE PRESIDENT: And your client understands lawyers' training very well, and one would be
14 able to see objectively, it seems to me, from that to what extent this is tailored to the CQS
15 and to what extent it is just the sort of AML training that every solicitor, or every law firm
16 has to undergo under the regulations.

17 MR. WOOLFE: Yes, Sir, we can approach that at that level. It is simply that they have said that
18 they are going to search one individual, I think Mr. Ben Mullane, and see if there was a
19 design brief. If there is then that is wanted. If there is not, or, in fact, in any event, we
20 simply thought that if he is the person who liaised with the people who designed the actual
21 training at the end of the day, it would be fairly simple to go to an email inbox, what did
22 you send to them, and scan through to see what they related to. It does not require key word
23 searching or the like.

24 THE PRESIDENT: You are going to get all the minutes of the Committees, and the papers to the
25 Committees, explaining what the Law Society was trying to do, what were the objectives,
26 how they reviewed or refined or modified. That is going to show you quite a lot of what
27 their aim was. It seems to me that getting down to the detail of the design process is really
28 not appropriate for this case. The design brief, if there is such, you will be provided. See
29 what you get, and again you can apply again. I do not think at this point that is appropriate.

30 MR. WOOLFE: Sir, the next point, and there is some overlap here between the next two requests,
31 so perhaps I might take them together. Our request, point A(5) of my skeleton, what was
32 our request 4, we sought for each firm the date on which they applied for accreditation, and
33 the defendant has agreed to provide that. We need that for the cross-referring.

1 Secondly, we want to have records of the training which they purchased from the defendant,
2 the CQS training effectively. We originally asked for the dates of purchases, the training
3 purchased and the number of individuals concerned.

4 As I understand it, the point that is made against us is to say that it is very difficult to know
5 what training individuals did, because you have to go through a very large number of CPD
6 records. I think we would accept that it would not be proportionate to search 36,000 CPD
7 records. However, we are somewhat surprised that the defendant does not have records of
8 what firm purchased what training. You have to bill these firms, they are buying the
9 training for that.

10 THE PRESIDENT: I was not clear. Are you asking here for training within the CQS modules, or
11 are you asking whether the firms who did the CQS, what other courses within the list that
12 was annexed to the defence?

13 MR. WOOLFE: We are asking for what training they purchased which they were required to
14 purchase under the CQS.

15 THE PRESIDENT: I thought the CQS, it was not a set of different options, if you purchase the
16 CQS you have to do the package.

17 MR. WOOLFE: Sir, yes.

18 THE PRESIDENT: So once you do the CQS you do whatever is in it, and as it changes over time
19 you----

20 MR. WOOLFE: Perhaps if I explain the purpose of why we want the information, we are asking
21 for this information not right now because we know that firms now who are in the CQS
22 have to buy certain training. Historically, the requirements to purchase particular training
23 were introduced at particular points in time. It is really information which our expert
24 economist would like to have because----

25 THE PRESIDENT: What actually is it, this information? This is what I do not understand. It
26 would make sense if, in signing up or subscribing - if that is the word - to the CQS, you are
27 then presented with five modules and asked which ones would you like, and you can
28 choose. As I understand it, that is not the case, the modules were compulsory. They
29 changed over time, but you do not have a choice. Is that not correct? Have I misunderstood
30 it?

31 MISS SMITH: No, Sir, that is absolutely right. If the claimant's concern is that a firm does not
32 become a member of the CQS until four years into the scheme, the situation then is they
33 will become accredited in, say, 2014, and their employees will be required to carry out all

1 the training modules that have accrued up to that date. If you have, which we are proposing
2 to provide, the records of the CQS firms for each year, the names, the dates on which they
3 were accredited, you will be able to say Firm X became accredited in 2014, so as of that
4 date Firm X were required to undertake these various modules of training. The requirement
5 under the CQS is you have a six month window after the date of accreditation in which to
6 undertake the training.

7 THE PRESIDENT: We will know from what is being disclosed whether Firm X continued to be
8 a member in 2015?

9 MISS SMITH: Yes.

10 THE PRESIDENT: That is what I thought, so I do not quite understand what actually is the
11 information you are asking for?

12 MR. WOOLFE: You understand what it is we are asking for and you understand why we are
13 asking for it. I think you are under a misapprehension that what we are asking for is to
14 know whether these people were required to purchase mandatory training. Of course we
15 know that they were. What we are concerned with is the overall volume of purchases that
16 were required to be made.

17 Essentially, the way economists look at it, before the AML training became mandatory and
18 part of the CQS other people were fulfilling the demand for AML training. Once you know
19 the volume of AML training that is being undertaken by the Law Society once it introduces
20 this requirement, it tells you, in a sense, what demand is being sucked out of the other part
21 of the market. It, therefore, goes to the appreciability or materiality of any effect on
22 competition. We had understood that that was being contested.

23 THE PRESIDENT: I understand that point. Once you know the volume of CQS accreditation by
24 date, you will know the volume of AML training.

25 MR. WOOLFE: No, Sir, we do not. If you take a firm, a firm may have one fee earner in his
26 AML, or it may have 200.

27 THE PRESIDENT: Yes, I see. They pay according to number of fee earners presumably?

28 MR. WOOLFE: I understand that----

29 THE PRESIDENT: I cannot imagine that a small two partner practice in Wales is not charged
30 less than Linklaters, for example.

31 MR. WOOLFE: One imagines so.

1 THE PRESIDENT: I will check whether the billing is by number of fee earners or number of fee
2 earners taking the scheme within a firm. Then what you want to know is for each firm that
3 is quoted how many people were involved - is that right?

4 MR. WOOLFE: This is what I was coming to. Once we were told last week that the only way we
5 can get that information is to review 36,000 CPD records, we accept that that is not
6 proportionate. What we actually want to know is the total volume of training that has been
7 purchased for each module. To that extent, requests 4 and 5 are complementary. It may be
8 that one does rather than the other. Under request 5 we are asking for total revenue
9 obtained from selling each of these modules of training.

10 THE PRESIDENT: The revenue is not per module. You pay a fee for subscribing to CQS.

11 MR. WOOLFE: No, Sir, that is not right. As I understand it, you pay a fee for being a CQS
12 accredited firm. Then each time your fee earners need to do training in order to comply
13 with that, you pay an additional amount per fee earner for what training they take. Assume
14 for a second there are only two kinds of training, AML and mortgage fraud, I know this has
15 changed now but to make the point, we are not interested in the fees that the Law Society
16 gets merely for being CQS accredited. What we are interested in is all the law firms across
17 the country that took AML training from the Law Society who were required to under CQS,
18 what that total volume was.

19 THE PRESIDENT: It is the volume of people in the CQS. Each one has to do it.

20 MR. WOOLFE: Simply disclosing the number of firms, it does not disclose the number of fee
21 earners.

22 THE PRESIDENT: It is the number of fee earners in the firms that were covered.

23 MR. WOOLFE: Yes, it is the same information that can be got in a number of ways. It can be
24 the number of fee earners in the firms of CQS accredited, or it can be the total revenue that
25 they have received from selling the modules. That issue will just be a product of the total
26 number of fee earners who were doing it multiplied by whatever the cost to the fee earner is.
27 Either way, this gives you an idea of what demand is being, we would say, sucked out one
28 of the part of the market and hoovered up by the Law Society.

29 THE PRESIDENT: You are going to get the names and the firms that subscribed, are you not?

30 MR. WOOLFE: Yes, that is right, Sir.

31 THE PRESIDENT: There ought to be a sensible way of getting this information of the kind it
32 seems to me that you want, which is any number of people covered within each firm, that is

1 really what you are after because then each of those persons is a person who might have had
2 to get, either collectively or individually, training elsewhere. Is that right?

3 MR. WOOLFE: That is right. What we are fundamentally interested in is the number of people
4 who the Law Society sold training to.

5 THE PRESIDENT: Well, sold the CQS to, which will include at certain times the AML training
6 within the CQS. I do not think you need to go down to individual modules.

7 MR. WOOLFE: We think we do, because my client sells AML training, and the Law Society
8 sells AML training to people who do the CQS and, I think, more generally as well.

9 THE PRESIDENT: Mr. Woolfe, I think that is the misconception, I do not think it does. It sells
10 the CQS and within the CQS there has been mandatory AML training. So you can say it
11 sells AML training to people that do the CQS, but that is rather like saying that a motor
12 dealer sells steering wheels to people who buy motorcars.

13 MR. WOOLFE: Sir, I would disagree, because that is one of the issues in the case, Sir, and it is
14 too early to be expressing a view on that very point, and bearing in mind in particular that
15 when the CQS was started this training was not mandatory, so they are separate.

16 THE PRESIDENT: Oh, I know, but after a certain point that is your whole complaint because it
17 became mandatory and therefore, initially it was not there at all, I think.

18 MR. WOOLFE: That is right.

19 THE PRESIDENT: There was not any AML; after a certain point it was introduced. But, when it
20 was introduced it was mandatory and therefore, because it was mandatory everyone who
21 subscribed to CQS had to do that AML training, it is not that they could choose whether to
22 take it from the Law Society or someone else. Your whole complaint is they did not have a
23 choice, and it follows from that, that all those who were taking CQS training at a certain
24 date would have had AML as part of it.

25 MR. WOOLFE: We understand that, Sir, but what we do not know is what that equates to in
26 terms of the total volume of AML training that was being undertaken and therefore which
27 could not be undertaken----

28 THE PRESIDENT: The volume of AML undertaken by whom?

29 MR. WOOLFE: Take a step back. Before these mandatory requirements were introduced,
30 solicitors were required by the money laundering regulations to undertake AML training
31 and you could go to any provider in the market to do that, so that demand was being met
32 across the market.

1 Once the AML training became a mandatory part of the CQS, certain lawyers effectively
2 had to take AML training as part of the CQS. Our case is that that effectively reduced the
3 demand available to the rest of the market. What we are looking for was information that
4 tells us how much that demand is.

5 THE PRESIDENT: How many?

6 MR. WOOLFE: How many fee earners, or equivalently what revenue the Law Society took from
7 AML training.

8 THE PRESIDENT: No, from CQS----

9 MR. WOOLFE: No.

10 THE PRESIDENT: But they do not charge separately?

11 MR. WOOLFE: They do, sir, they charge a separate fee for AML training.

12 THE PRESIDENT: Within the CQS?

13 MR. WOOLFE: Within the CQS, I think it is £60 per fee earner.

14 THE PRESIDENT: I thought that for non-subscribers to the CQS?

15 MR. WOOLFE: No, Sir, that is a misapprehension.

16 THE PRESIDENT: Well, there is one thing that is bad, possibly----

17 MR. WOOLFE: I understand it is £60 for non-CQS, and £35 for CQS, but it is for the same
18 training.

19 THE PRESIDENT: Yes, it is offered outside.

20 MR. WOOLFE: But there is a fee for fee earners from firms who are within the CQS.

21 THE PRESIDENT: That is somewhere in the defence, is it not, that is at para. 19.

22 MR. WOOLFE: That is correct. There is a separate fee for CQS members.

23 THE PRESIDENT: That is for that module, but it is the only module that is supplied separately.

24 Let me try and understand this. Of course, I have not seen any bills for CQS. Let me hear
25 from Miss Smith. First, how is CQS billed?

26 MISS SMITH: There is a subscription fee that an accredited firm pays every year, and then they
27 buy each of the mandatory training modules, and they pay a fee per individual who takes
28 that training. So there is the firm subscription fee, and the individual training module fee
29 for each individual.

30 If I could explain a little about the databases and how they are held by the Law Society, and
31 then perhaps make a proposal that I hope would address the objective that the claimant is
32 trying to achieve by the disclosure that they are sought. As he said, there are two ways that
33 he thinks he can get to the material he wants, but what he really appears to be concerned

1 about is the question of appreciability, because obviously the question of volume at a sort of
2 granular level, or whatever is not a question for the liability stage, it may be a question for
3 the quantum stage, but we say it is not a question for liability.

4 Here, I think the issue the claimant is concerned with is appreciability: did the introduction
5 of the mandatory CQS AML training have an appreciable impact on AML training offered
6 by firms such as Socrates.

7 We have already identified what it would take for us to identify the individuals who took
8 training and tie that up with the CQS accredited firms, and I think Mr. Woolfe has fairly
9 accepted that would not be proportionate. That is just the nature, I am afraid, of the way in
10 which we hold the data.

11 As regards revenue information again I am afraid it is a function of how we hold the data.
12 Our financial recording system was changed in 2013/2014 and I am told that post
13 2013/2014 we can provide the revenue and income data for the CQS which we are being
14 obliged to provide under the CAT order I think we are being obliged to provide income and
15 profit, and we can do that overall for the CQS. Post 2013/2014 we can identify separately
16 the CQS revenue that was obtained as a matter of subscription fees, and that which was
17 obtained for training overall. We are not able, from the material that we have, or from my
18 instructions, able to identify the revenue from each separate CQS training module from our
19 financial database. We will disclose the information that I have just outlined.

20 THE PRESIDENT: The subscription fee per firm?

21 MISS SMITH: Yes.

22 THE PRESIDENT: But then there is the fee for what you call training which will vary according
23 to the number of individuals?

24 MISS SMITH: Yes. What we cannot do without a huge amount of work is to identify for each
25 firm how many individuals undertook the training, without cross-referring these two
26 separate databases, and therefore how much each firm paid for training.

27 THE PRESIDENT: But you say you can identify post 2014 for each firm?

28 MISS SMITH: Not for each firm. What we can do is within the Law Society's financial data, we
29 can say this is the income that came in for this year from the CQS, and we can split that
30 revenue from the CQS between subscription and training.

31 THE PRESIDENT: Is the training fee per head, or is it different for partner or junior lawyer?

32 MISS SMITH: I think it is just per head.

1 THE PRESIDENT: So, by looking at that part of the annual total that is attributable to training
2 overall, you should be able to work out how many individuals by dividing the cost----

3 MISS SMITH: Only by going back to each firm who is a member of the CQS for that year,
4 identifying in that firm, and it would not be just the number of solicitors in that firm, it
5 would have to be the number of residential conveyancing solicitors who took the mandatory
6 CQS training module. So there would have to be quite a lot of breaking down of data.

7 THE PRESIDENT: If the fee for training is £X per head, and if the total income of the Law
8 Society in 2015 for training within the CQS scheme was £180,000 can you not divide that
9 by the cost per head and say this is for the total number----

10 MISS SMITH: No, because----

11 THE PRESIDENT: --as many individuals therefore, without knowing how many in each firm,
12 but just the total number?

13 MISS SMITH: No, because the CQS membership is by firm, so the data we have on the CQS
14 database is a list of firms, firm names. So, we could say: "This is the list of firms, 3,000 etc.
15 as of 2014, who were members of the CQS, here is the figure as a whole for the revenue
16 obtained from training, but in order to split up that revenue obtained from the training CQS
17 we would have to take that number 3000 firms, identify the number of individuals in each
18 firm who were likely to take CQS training and, of course, it would only be the residential
19 conveyancing solicitors. Then, we would have to identify from that the number of
20 individuals that were taking that CQS module.

21 THE PRESIDENT: I have obviously missed something because if the cost of the training was
22 £X ----

23 MISS SMITH: I am sorry, I see now where you are coming from. Is it that you could say it was
24 £35 a head so you divide however many thousand by 35?

25 THE PRESIDENT: And you say, therefore, 47,000 individuals, you don't know how many in
26 each firm, but that is the total number.

27 MISS SMITH: I am afraid our financial data might not be quite – I would just like to double
28 check that.

29 THE PRESIDENT: The difficulty might be that there is a different charge for different people.
30 There is a differing charge for a continuing module as opposed to a new entrant, that I can
31 see is possible.

32 MISS SMITH: Can I just check that point, because that would require us simply to identify the
33 revenue figure, which we can.

1 THE PRESIDENT: Which you can do?

2 MISS SMITH: Yes, whether it is a safe assumption from that to just divide by £35 and you will
3 find out how many individuals I will double check.

4 THE PRESIDENT: Yes.

5 MISS SMITH: The other proposal we had as regards appreciability is, of course, to look at this
6 question on the circumstances of this particular case. We are going to have, as we
7 understand it, the claimant's database identifying who subscribed to his AML training each
8 year. He will have, and we will also have, our database of the CQS firms per year. We
9 will be able to cross-check, and say: "Firm X became a member of the CQS scheme in
10 2014". We can see that Firm X was a subscriber to Socrates, and now, post-2014 that firm
11 has either ceased to be a subscriber or it has continued to be a subscriber. Now, it may
12 continue to be a subscriber but at a much reduced level. So, what we are saying is that once
13 you have identified those firms, as a result of that cross-check of the database, you can
14 burrow down more deeply into those firms and say that either that firm stopped taking a
15 subscription, and subject to arguments about the causal link you can say that may be due to
16 the fact they have joined the CQS. If they continue to take out a subscription the claimant
17 might say: "They continue to take out a subscription but they are now only buying 20 per
18 cent of the subscriptions they used to buy".

19 So, in our submission, that is the most profitable line of inquiry for the question of
20 appreciability because that is the one where both parties are able to actually say something
21 helpful.

22 THE PRESIDENT: Yes. I think what they are wanting to do is to look, not just for the effect on
23 Socrates, but the effect on the market.

24 MISS SMITH: Absolutely.

25 THE PRESIDENT: Which, for reasons one can understand.

26 MISS SMITH: Yes.

27 THE PRESIDENT: It may be one has to use them as a proxy for the market.

28 MISS SMITH: Yes.

29 THE PRESIDENT: You take instructions – everything will depend on the level of charges, and
30 whether or not they are uniform.

31 MR. WOOLFE: Just before Miss Smith takes instructions, I just want to clarify one point that
32 may help. She said since 2013/14 they can identify separately the revenue from CQS
33 subscription fees and from training. I want to check whether that is identified training

1 within the CQS, whether that figure does not suck in training to non-CQS firms of other
2 types. If it does include that kind of revenue it would not be very useful to start
3 subdividing.

4 THE PRESIDENT: I do not think it does. No, it does not.

5 MR. WOOLFE: I just wanted to clarify that point. In which case, as I say, we are concerned with
6 the overall demand and, therefore, revenue figures of that kind are helpful provided we can
7 split it down between training that is genuinely CQS specific, and AML training. It may be
8 we can do that by taking a ratio of the prices of the various courses to produce some
9 attribution, even if it is not perfect.

10 This may assist with Miss Smith's proposal, we did understand that when a law firm applies
11 for CQS membership they have to agree with the Law Society the number of conveyancing
12 fee earners within the firm. We did think they held that information on their database
13 somewhere. That was why we included a proposal regarding the number of individuals
14 because we thought, since they asked for it, they would hold that information. If they do
15 hold it, it would equally assist if it was provided.

16 THE PRESIDENT: That would be another way of approaching it. Is that right, that when they
17 apply the firm has to say how many relevant fee earners they have got?

18 MISS SMITH: Sir, apologies, I am taking instructions as we go. As regards the revenue overall,
19 my initial proposal would be, Sir, that at this stage, in any event, Socrates acting as a proxy
20 is probably the best information we would get, or the most helpful we would get.

21 As regards the revenue for training overall that we can identify from our financial systems
22 post 2013/14, we can obviously give a figure for revenue from CQS training, and it does not
23 suck in other training.

24 As to the number of individuals that would cover, it is, I am afraid, not as simple as to say
25 you divide by £35 and you end up with the number of individuals, because there are, I am
26 now instructed, I am afraid, some discounts available for no doubt bulk purchases, and so
27 on, and also apparently a cap on the amount that individual firms can pay. In any event, this
28 will be covered in evidence, but it is slightly more complicated. What you will get from
29 those revenue figures an overall figure for the impact of the CQS generally.

30 I will have to take instructions on the identification of the number of fee earners at the time
31 of applying for accreditation. It may be that this is information we can give. It really
32 depends, I suppose, how that information is held internally at the Law Society, and what
33 would be required to be done to get that.

1 THE PRESIDENT: There are about 3,000 firms, are there not?
2 MISS SMITH: Yes. That will cover small firms that only do residential conveyancing, but it
3 may also cover larger firms----

4 THE PRESIDENT: Yes, for each of those 3,000 for someone to look and see how many fee
5 earners, it is a tedious job, but it is not a massive job.

6 MISS SMITH: I will just take instructions, if I may, Sir. (After a pause) Sir, I hope we can
7 assist. What we can do is, as we have already offered, identify the name of firm who
8 became CQS accredited and the date of accreditation. I am instructed that on the CQS
9 database, the claimant is right, on the application form for accreditation to the CQS the firm
10 has to identify the number of relevant fee earners. That is recorded as a number on the CQS
11 database for each firm. What we can do is we can say for each firm the number of relevant
12 fee earners and the date of accreditation, taking that from the same database. We can say
13 Firm X, accredited on whatever date, 2013, 10 fee earners.
14 If we need to go into any more detail as to when those individuals took training - although
15 we know that all those individuals will have to take the mandatory training within six
16 months - getting any more granular as to when particular individuals took particular training
17 on particular dates, we would have to go and do the sort of searches mentioned earlier.

18 THE PRESIDENT: I think the first piece of information, number of fee earners, should be
19 sufficient.

20 MR. WOOLFE: We would be happy with that, Sir.

21 THE PRESIDENT: The claimant accepts that. You are not going to get a precise figure down to
22 the last £1.

23 MISS SMITH: Can I just make one caveat, which I think it is important to make on the record,
24 which is that this is the number of fee earners that were identified at the date of application.
25 Of course, fee earners join and leave, so the number for each firm may change post the date
26 of application.

27 THE PRESIDENT: As I say, we are not trying to get a precise mathematical calculation.

28 MISS SMITH: We will do our best but I think there is a caveat.

29 MR. WOOLFE: Sir, that does the job that we want it to do.

30 THE PRESIDENT: That is very helpful, Miss Smith, thank you.

31 MR. WOOLFE: Can I just check whether or not the defendant is also providing the total revenue
32 figure for training?

33 THE PRESIDENT: Yes, the breakdown each year between subscription and training.

1 MISS SMITH: That can be provided, but, as I said, but only post 2013.

2 THE PRESIDENT: 2013/14, yes.

3 MR. WOOLFE: Sir, I think that completes everything on the application for disclosure. There
4 will be an exercise of cross-checking all this against the transcript and the requests that have
5 already been agreed to produce a total shopping list.

6 THE PRESIDENT: If you could draw up an order and have it agreed with Miss Smith, rather
7 than us drawing up an order, that would be helpful. Perhaps you could submit it in draft to
8 the Tribunal.

9 Can I add just one point I did not raise last time, but it seems to me it might be important,
10 and that is this: I noticed, Miss Smith, in the defence in para.14, you made a distinction or
11 referred to a particular category of firm called ‘specialist residential conveyancing firm’,
12 and you gave a definition for that. A specialist residential conveyancing firm is a firm
13 where residential conveyancing work accounts for more than 30 per cent of the firm’s total
14 turnover.

15 MISS SMITH: Yes, I think these figures were taken from various different sources which used
16 different definitions. I think as part of our obligations under the order made at the last CMC
17 you asked us to distinguish between firms of solicitors active in residential conveyancing
18 work and other definitions that were used. As part of what we will be doing in response to
19 that request is to identify the source of these figures which should give you why different
20 definitions were used for different figures because they are from different sources.

21 THE PRESIDENT: That is all right, but it is a useful definition. I do not know where that figure
22 comes from, that July 2015 figure. I think in some way - and I will not seek to specify how
23 because I do not know how your database is organised, and so on - it would be valuable to
24 know either for each year since 2011 or, if that is onerous, then at least as of 2015, how
25 many of these specialist firms had CQS accreditation. We know how many firms, but the
26 dates in that paragraph are different - one is 2016, one is July 2015. I think it would be
27 helpful to know either annually, but if that is difficult, then at least at some recent time, how
28 many of those specialist residential conveyancing firms have CQS accreditation.

29 MISS SMITH: I will investigate that.

30 THE PRESIDENT: I will not make an order about that, but perhaps you could consider what is
31 the best way to provide that information.

32 MISS SMITH: I will investigate that, because I am not sure whether that figure of 1,674 is our
33 figure or a figure obtained from another source.

1 THE PRESIDENT: If it identifies the firms you can do it, but if does not maybe you cannot.

2 MISS SMITH: Exactly.

3 THE PRESIDENT: Perhaps you could give that some thought.

4 MISS SMITH: Yes, we will.

5 THE PRESIDENT: Is there anything else on disclosure from either side?

6 MISS SMITH: I think that covers everything that was covered in our skeletons.

7 THE PRESIDENT: Your skeletons were, as usual, very helpful, thank you.

8 MISS SMITH: The order will, of course, have to reflect not only what was discussed today, but

9 also what has been agreed in correspondence between the parties, because there is quite a

10 lot that has already been agreed. This goes to our next point of costs.

11 THE PRESIDENT: Yes, exactly, that is another reason why we would like you to draw it up.

12 We then turn to costs capping. Mr. Woolfe?

13 MR. WOOLFE: Our submission is that the start and the end of the process in relation to costs

14 capping in this case should be with reference to proportionality and to the nature and

15 purpose of the fast-track procedure. Although I will make some submissions about the level

16 of costs proposed by the defendant in respect of particular stages, what I would urge the

17 Tribunal not to do is simply to go through the defendant's cost budget line by line on a

18 purely bottom-up exercise and then simply take whatever figure comes out at the end of

19 that. The fundamental question for the Tribunal is to ask what is a fair and reasonable costs

20 risk for each side to bear.

21 With that in mind, for your reference the defendant's cost budget is at tab 10, or there is

22 another version of it behind the witness statement, and that comes to a total of £640,000 to

23 get to a four day trial within the fast-track procedure. We say simply that is

24 disproportionate. Beyond that it is a level of costs risk which it is unfair to suggest that the

25 claimant should bear, and which would severely discourage small and medium size

26 enterprises, particularly firms - SMEs covers a multitude of virtues, Sir. I think the usual

27 definition is up to 250 employees, but it is a big difference between the top and bottom of

28 that scale. It is a massive burden to suggest that a small and medium enterprise should bear

29 if this procedure is meant to exist to allow those undertakings to bring cases to trial.

30 In that regard, if you look at the individual hours that are then built up, we already have

31 £171,000 worth of costs incurred since 25th April. So we are looking at some two months.

32 By our guess it was running at about £2,000 per day since the start of this case.

33 THE PRESIDENT: It was on 21st April that---

1 MR. WOOLFE: Norton Rose took over.

2 THE PRESIDENT: -- Miss Smith was instructed, or are you including the previous solicitors?

3 MR. WOOLFE: The previous solicitors' costs were about £10,000, which, in the context of this
4 costs bill, is minimal----

5 THE PRESIDENT: Yes, the £170,000 is----

6 MR. WOOLFE: The £170,000 is the total costs between----

7 THE PRESIDENT: -- post 25th April.

8 MR. WOOLFE: -- 26th March and today's date, and that gives you about £2,000 a day. In fact,
9 the bulk was incurred since 25th April, which gives you about £3,000 a day.

10 Beyond that, they are looking at a level of costs for each of the stages. They are suggesting
11 125 hours of solicitor time for this CMC, 275----

12 THE PRESIDENT: This is the second CMC.

13 MR. WOOLFE: The second CMC - 275 hours for the taking of witness statements and reviewing
14 ours. If you are imagining ten hours, which is, in reality, not what is charged, that is 27
15 days worth of solicitor work. Then 185 hours in respect of additional disclosure, 120 hours
16 in respect of expert evidence, and 350 hours in respect of attendance at trial.

17 Focusing, perhaps, on witness statements and expert evidence as indicators of the nature of
18 what is being proposed. In respect of witness statements, we have up to four witness
19 statements to be prepared. If it is to be the evidence of the witness, it should in bulk be
20 prepared, if the evidence needs to be given by the witness, albeit with drafting assistance
21 from lawyers bearing in mind the people who are giving the evidence from the Law Society
22 will not be uneducated people, they are people who are well capable of writing.

23 What it looks like, to be honest, is that this is a cost budget for junior solicitors at Norton
24 Rose, to be going through the relevant documents and drafting the witness statement from
25 scratch, subject to the witnesses' approval. It may be how it is commonly done, but it is not
26 terribly good practice in terms of getting the witnesses' actual evidence.

27 THE PRESIDENT: You say 275 hours for witnesses and reviewing your witness statements,
28 three witnesses.

29 MR. WOOLFE: It is too much, Sir.

30 THE PRESIDENT: It is disproportionate.

31 MR. WOOLFE: When we come to expert evidence, 120 hours, one imagines if you were to allow
32 10 hours for the drafting of instructions to go to the expert, which are fairly well defined
33 issues, that we drafted fairly broadly, allow another 10 hours for a conference with the

1 expert, imagining a conference lasting two hours with a good level of preparation, call that
2 10 hours being generous. 10 hours for a partner to review a draft expert report, you get to 30
3 hours, and you are a long way short of 120.

4 The reason I am picking on those is not to say I want you to strike unreasonable hours and
5 then allow the remainder, what I am pointing out, Sir, is the entire way the cost bills seem to
6 be prepared is on the basis of a Rolls Royce service, which I have no doubt Norton Rose
7 provide, but it is not what is appropriate in a case of this kind, nor, in fact, is it conducive I
8 would say to getting the unadulterated evidence of the witnesses. That is why we submit
9 that the overall cost bill is disproportionate and, in any event, whether or not the Law
10 Society does incur these costs it is not an allowable cost risk which it is fair for the claimant
11 to bear.

12 Apparently my calculation is slightly wrong, my instructing solicitor informs me that
13 Norton Rose's costs are more like £4,000 a day and not £2,000.

14 THE PRESIDENT: It is not a daily cost because some days more time is spent, sometimes none.

15 MR. WOOLFE: My points were solely in respect of solicitor time. They clearly have
16 experienced counsel on board who will have, from the look of this costs budget, a good
17 degree of involvement and that is on top of the solicitor time. Overall, Sir, it is just getting
18 to a place which the Tribunal should not allow the defendant to get to.

19 THE PRESIDENT: Yes, thank you. Yes, Miss Smith?

20 MISS SMITH: Sir, just by way of introduction, the claimant says that the start and end of the
21 process has to be one of proportionality given the nature of the proceedings.

22 THE PRESIDENT: Sorry to interrupt you, I do not think he does say it was the end of the
23 process, he says it is the start of the process.

24 MISS SMITH: The start of the process.

25 THE PRESIDENT: And then, over and above that, there has been cost capping and
26 proportionality applies to detailed assessment in any event.

27 MISS SMITH: Indeed.

28 THE PRESIDENT: He says over and above that there is a question of what is fair to a small
29 claimant, which is the purpose of fast track procedure.

30 MISS SMITH: Yes, he did say that you should not take a bottom-up approach but ask what the
31 fair and reasonable level of the costs risk and exposure should be. We say obviously one
32 has to look at it from both ends, but you cannot and should not ignore a bottom-up
33 approach, particularly where we have parties here in quite different situations.

1 Leaving to one side the hours at the moment, you cannot disregard a bottom-up approach,
2 because here we have an individual who is effectively proposing to do this case in-house.
3 Also, an individual who knows his own business intimately already. It is a small business.
4 Effectively he is running the case himself, and all the information is at his fingertips.
5 Sir, the benefit of it being run in-house is not just that a lower hourly rate can be charged,
6 which it is, but also the hours that will need to be incurred by definition will be fewer,
7 because he already knows what the case is, he already knows how his business works. He
8 knows where the information is.

9 This must be contrasted, in my submission, with the position of the Law Society, where the
10 case is being run by external solicitors, but also the nature of the Law Society is such that
11 there are a large number of individuals who have been involved in the various aspects of the
12 case within a large institution, which you can see, just as regards the submissions that have
13 been made on disclosure, has a relatively high turnover of staff, and uses not just
14 employees, uses volunteers, a number of different individuals, so the process of obtaining
15 the information necessary, the process of putting together witness statements by definition
16 will be a lengthier process than that which the claimant is engaged in. That is the first very
17 important point of difference between the positions of the claimant and the defendant.
18 The second very important point of difference is that actually when one looks at the terms
19 of the order made by the court on 18th May, and the disclosure that has already been agreed
20 in correspondence between the parties, the disclosure burden on the Law Society is
21 substantially greater than that on the claimant. Mr. Woolfe made the point this morning
22 about asymmetry of information, that we hold the information he needs. The upshot of that
23 is that the disclosure burden is substantially higher on us than on the claimant. The work
24 that needs to be done internally as regards more formalistic disclosure, but also putting
25 together witness statements with disclosure of relevant documents is proportionately much
26 higher.

27 So, comparing hours of the various stages of the process for the Law Society versus the
28 hours that will be incurred by the claimant might be misleading because of the fundamental
29 differences between the situations of the claimant and defendant in those two very
30 important ways.

31 As then one looks at the bottom-up approach of the actual costs budget, Mr. Scott also put
32 in a witness statement---

33 THE PRESIDENT: Yes, I have seen that.

1 MISS SMITH: --explaining the way in which the Law Society and Norton Rose Fulbright have
2 gone about seeking to run this case in the most cost efficient way possible with an eye to the
3 fact that the fast track procedure has been ordered.

4 As regards rates you will see from that evidence that all the members of the team – solicitor,
5 counsel and experts – have agreed to substantially reduced rates.

6 THE PRESIDENT: Yes.

7 MISS SMITH: As regards the make-up of the team, the team structure, again streamlined teams
8 have been put together. There is a team of one partner, one senior associate and one
9 associate at Norton Rose, and that is it; one counsel, and a streamlined team on the experts,
10 one partner and an assistant.

11 With regard to the hours I have already made the points about the----

12 THE PRESIDENT: You say a streamlined team of solicitors, a partner and senior associate and
13 junior associate and trainee strikes me as pretty standard for a three to four day trial in a
14 case which is not having massive disclosure. I appreciate there is some disclosure but it is
15 not standard disclosure. It is not a skeleton team by any means. I am not suggesting there
16 is anything wrong with it, but it does not seem particularly streamlined.

17 MISS SMITH: Obviously, there is a sense in having a junior and a senior associate so that the
18 time spent by the partner can be reduced, and that is----

19 THE PRESIDENT: Yes, that would be normal.

20 MISS SMITH: Yes. The point holds good, in my submission, as regards counsel and the expert.

21 THE PRESIDENT: Yes.

22 MISS SMITH: The hours have been very, very carefully considered. We have described the
23 process that has been gone through by the costs draftsman, and I have already made the
24 point about the burden that has been placed on the defendant, particularly as regards
25 disclosure and witness evidence. If one looks at the witness statements, for example, the
26 hours there, four witness statements, drafting, advising, on average thirty pages each, plus
27 the material exhibited and/or by way of initial disclosure, so it is not just drafting the
28 witness statements, it is getting together the material, liaising with the witnesses, reviewing
29 the material.

30 THE PRESIDENT: 275 hours is still a lot on any view, it is a phenomenal amount of time, for
31 four witness statements and reviewing three others; that is solicitor time, and then your
32 input on top of it.

1 MISS SMITH: That will be not just the putting together of the witness statements, as I have said,
2 the important point is that it will be also instructing the witnesses as to what material they
3 should go out and search for, going through the material produced by the witnesses, and----

4 THE PRESIDENT: I appreciate that.

5 MISS SMITH: --and exhibiting all that material

6 THE PRESIDENT: It seems to me to be an incredible amount of time for four witnesses.

7 MISS SMITH: I have not done the figures, but if one looks at the figures under the hours to be
8 produced - in any event we have sought to be as sensible as possible on the hours given the
9 disproportionate burden, given the burden on----

10 THE PRESIDENT: I also find it surprising, talking about hours, that some 450 hours have been
11 spent so far. What we have is a defence, which you drafted, an amended defence, of course
12 taking instructions, talking to people, but over 450 hours.

13 MISS SMITH: I think that includes the first CMC and the----

14 THE PRESIDENT: Yes, but 450 hours of time? I have no doubt it was spent, but it seems quite
15 an extraordinary amount.

16 MISS SMITH: One has to take into account, of course, the point that I have already made is that
17 we were starting from zero on the part of the solicitors, with no pre-existing knowledge of
18 the case or of the client, or of how the client works, or of how the market works, or any of
19 the factual background to this case, so it is not like the claimant coming in, having operated
20 in this market and then----

21 THE PRESIDENT: I am not comparing it to the claimant. I fully take your point, you are going
22 to spend more time and have more costs than the claimant. You would not expect an
23 equivalent, so I am just looking at your solicitors' budget in terms of who they are, who the
24 client is and what the work is.

25 MISS SMITH: The other point I think it is important to make is that obviously this case is
26 important to the claimant for the purposes of his own individual business, but it is also very
27 important to the Law Society, not just on the facts of this individual case. It is extremely
28 important to the Law Society because it impacts on the whole way in which the Law
29 Society can offer commercial services by way of training and/or accreditation, and so it will
30 have or could have an impact greater than the circumstances of this particular case.
31 I am not saying that that merits a Rolls Royce service, but it does merit that these issues are
32 considered not just in the context of this case but more generally and that care is taken in the
33 way in which they are dealt with.

1 If one steps back what you actually have is Socrates on the one hand, which is effectively a
2 litigant in person, and Junior counsel, whose costs overall are proposed to be still £220,000.
3 Given the very different position that we find the claimant and the defendant in, in my
4 submission, even if one stands back and looks at the figures on their face, there is not such a
5 substantial distinction that means that the overall figures proposed by the defendant are
6 unreasonable.

7 I have made my submissions, we have sought to do everything we can to run this case in as
8 cost efficient a way possible and even the litigant in person who knows what he is doing,
9 and Junior counsel still say it will cost £220,000 to do this.

10 THE PRESIDENT: Well, not quite a litigant in person, he is a solicitor, charging solicitors' rates,
11 but----

12 MISS SMITH: He is charging rates as if he were a solicitor independently instructed but, as I
13 have already said, he does know this case and this market and this product intimately
14 already. If one stands back, we do say that we have explained how we have gone about
15 putting together this cost budget, and, in our submission, it is the appropriate basis for a
16 costs cap.

17 There was a suggestion in the skeleton, and I am not sure whether the claimant pursues this,
18 that a costs cap should be set at just one level, that the costs to be obtained by either party,
19 regardless of the outcome should be capped at the level of X. I am not sure if that is what
20 he is saying.

21 THE PRESIDENT: That is not my view.

22 MISS SMITH: On the basis of the Rules, I say that is not----

23 THE PRESIDENT: You need not address it. Can I ask you about - you ask me to take a bottoms-
24 up approach - experts? The expert who is doing the report and commenting on the other
25 side's report a little over £33,000. The lawyers, it says, for reviewing the expert's report,
26 instructing him and discussing with him his views on the other side's expert, are charging
27 £51,000. Can that be proportionate?

28 MISS SMITH: I am sorry, where is that, Sir?

29 THE PRESIDENT: I am looking on p.3 of your cost budget. There is a heading "Expert", and
30 solicitors' fees, £35,500, counsel's fees, £16,000, expert's fees, £33,000. So that is £51,000
31 for lawyers for expert's report, and the expert £33,000. That does seem extraordinary. The
32 expert is supposed to be doing the work.

1 MISS SMITH: As you will know from your own experience, Sir, the expert does obviously
2 require instruction and the parties will be----

3 THE PRESIDENT: Yes, instruction and discussion.

4 MISS SMITH: A review and discussion not just of his initial expert report but of reviewing the
5 report that comes in from the other side. I take your point, and I cannot get in the mind of
6 the costs draftsman.

7 If you look at what is actually asked for by way of hours, on the basis of a ten hour day, the
8 partner is only proposing to spend two days on liaising with the expert.

9 THE PRESIDENT: 120 hours altogether of solicitors' time.

10 MISS SMITH: A lot of that, no doubt, will be the junior and trainee putting together relevant
11 materials, ensuring that all the materials that are submitted to the expert, they will have to
12 put together instructions which will be not just, "This is what we would like you to
13 consider", but "here are all the relevant materials that have come together as a result of
14 disclosure", and putting those together for the expert, and a lot of the admin, which is only
15 four days of the junior solicitors' time.

16 There is a lot that goes into dealing with these matters, but you have your views, Sir.

17 MR. WOOLFE: Sir, I just have three points in response. My learned friend depended a great
18 deal on a contrast with the claimant, and you said it is an individual doing the case in-house
19 who knows his own business, he is an in-house solicitor. I would just point out that the Law
20 Society is a body which, almost by definition, is stacked full of solicitors. There are these
21 various Committees of solicitors, and so on.

22 THE PRESIDENT: I am not sure the staff are.

23 MR. WOOLFE: No, the staff are not necessarily, but the staff equally know their own business.
24 If you are talking to a person who is a CQS product manager, one imagines that they will
25 know pretty well where the relevant documents are that relate to CQS, etc. There is not
26 some vast difference in how difficult it is to locate documents for a particular client, for
27 example, or to understand what the case is about between the claimant and the Law Society.
28 The Law Society is equally a participant in this market and is equally a body with a great
29 deal of in-house legal expertise as well.

30 The second point is that my learned friend said that our costs should be judged as being the
31 costs incurred by a litigant in person and junior counsel. As you pointed out, Sir, the costs
32 are capped on the basis of Mr. George acting as solicitor in the case, and accordingly time

1 costs are being charged as one would expect. That goes into the cost budget as a major
2 factor in it.

3 Also it includes expert's fees as well.

4 THE PRESIDENT: His time cost is put at what per hour?

5 MR. WOOLFE: I think it is £250. He does have a certain amount of external legal help as well,
6 and that is where the rate of £275 comes from, and that is on specific aspects of this case.

7 The £250 is his time.

8 THE PRESIDENT: Yes, thank you.

9 MR. WOOLFE: We say that is not a good contrast.

10 Just to be absolutely clear, my learned friend said she thought there was a suggestion in my
11 skeleton that there should be a single costs cap that is identical for both sides. That is not
12 what we say. What I did say in my skeleton is an appropriate level of costs cap would be
13 one approximating the level of the claimant's costs. What I am saying, Sir, is that our costs
14 are a measure, an indicator amongst other things, of the kind of level of costs which it
15 would be reasonable to incur. We do say that a costs cap of that kind of level on the
16 defendant's costs is what would be reasonable in the circumstances of this case. I am not
17 making a general point that costs caps must always be a matter----

18 THE PRESIDENT: Yes, and you accept that you would be subject to a costs cap as well?

19 MR. WOOLFE: Sir, yes.

20 THE PRESIDENT: Though it might be less.

21 MR. WOOLFE: Yes, Sir.

22
23 (Judgment sent for approval)
24

25 THE PRESIDENT: Is there anything else, Mr. Woolfe?

26 MR. WOOLFE: No, Sir. I think that is everything.

27 THE PRESIDENT: Miss Smith, is there anything?

28 MISS SMITH: Sir, if I may take instructions?

29 THE PRESIDENT: Yes, of course.

30 MISS SMITH: (After a pause) No Sir.

31 THE PRESIDENT: Thank you both very much.
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