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IN THE COMPETITION
APPEAL TRIBUNAL

Case No. 1249/5/7/16

Victoria House,
Bloomsbury Place,
London WC1A 2EB

26 May 2017

Before:

THE HON. MR. JUSTICE ROTH
(President)
WILLIAM ALLAN
PROFESSOR STEPHEN WILKS
(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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Official Court Reporters and Audio Transcribers
5 New Street Square, London EC4A 3BF
Tel: 020 7831 5627 Fax: 020 7831 7737
civil@opus2.com*

Mr. Philip Woolfe (instructed by Mr Bernard George) appeared on behalf of the Claimant.

Ms. Kassie Smith QC and Ms. Imogen Proud (instructed by Norton Rose Fulbright LLP) appeared on behalf of the Defendant.

MATTERS FOLLOWING JUDGMENT

1 THE PRESIDENT: For the reasons that are set out in the written judgment being handed down,
2 we find that the Law Society was in breach of the Chapter I and Chapter II prohibitions
3 under the Competition Act 1998 from the end of April 2015, but not before.

4 Yes, Mr. Woolfe?

5 MR. WOOLFE: Thank you, Sir. The matters which I believe are outstanding are, first of all, the
6 matter of the relevant injunctive relief; secondly, matters relating to costs; and thirdly,
7 further directions for the quantum and damages part of the proceedings. The last part is
8 agreed between the parties, but the Tribunal will need to approve it.

9 THE PRESIDENT: Yes, so let us take that after the injunction.

10 MR. WOOLFE: Would it be easiest to deal with those turn, rather than me deal with all of them
11 and then you hear from Ms. Smith?

12 THE PRESIDENT: Let us take it in stages. Let us start with the injunction. We have seen the
13 Law Society's draft order and the draft order prepared by Mr. George for your client. As
14 far as the terms of the injunction are concerned, we thought the Law Society's draft was
15 more appropriate, and it deals with, as you do, the specific courses, but in terms of the
16 injunctive order you would not normally say, "shall cease to abuse to its dominant
17 position", as it is what it has actually in practical terms got to do.

18 MR. WOOLFE: Yes, Sir. If I can just make the claimant's position clear, I will just begin with
19 the recitals. I understand that the Law Society do not like our recitals. They were simply a
20 drafting technique to try and get a definition in, so that really does not matter.

21 We do not have any strong objection the Law Society's framing of para.1 of the order.

22 THE PRESIDENT: We will make the order in terms of that para.1. We note what you have put
23 in para.2, and we have read what Mr. George says in his witness statement, but the Law
24 Society obviously has got to comply with the law, and must not commit any other abuse.
25 We have found that it is dominant and so it will be aware of those obligations. It is not for
26 us to assume that it will not behave as it should. This rather anticipates that things might
27 not be done properly.

28 MR. WOOLFE: Sir, can we deal with paras.2.1 and 2.2 separately, because I infer that you are
29 talking about para.2.1?

30 THE PRESIDENT: I am talking about 2.1 at the moment.

31 MR. WOOLFE: In particular, yes. The first point to make is that our drafting of that paragraph
32 was explicitly conditional. It says in so far as certain things continue to be the case, which
33 is they continue to require certain mandatory training, and to offer such training itself. It is

1 only if that present part of the situation continues. Our contention, Sir, is that what is then
2 in para.2.1 is what is necessary to bring the present abuse of the dominant position to an end
3 in that scenario.

4 THE PRESIDENT: What is necessary to bring it to an end is to not require that these courses are
5 obtained only from the Law Society. That was the abuse and the breach of Chapter I, the
6 restriction.

7 MR. WOOLFE: Shall I first explain what led us to include the wording in 2.1. The important
8 point I think in para.2.1 from the claimant's point of view are the words 'without
9 restriction'. There should not be restrictions on CQS members obtaining training from
10 alternative providers.

11 THE PRESIDENT: It is 'without restriction save', and then you get into a whole lot of detail of
12 how it might be done.

13 MR. WOOLFE: What we envisage, Sir, is if the words 'without restriction' were there and there
14 was not any qualification of it, that would be potentially problematic. That was the reason
15 for including this wording, Sir.

16 THE PRESIDENT: There are various ways in which they might do it. It is not for us to
17 prescribe. It might not just be a quality monitoring system. They might set out a
18 curriculum, they might specify content, there are all sorts of things that may happen. We
19 cannot anticipate that now and assume that it will not be done in a proper way. I just do not
20 see how that flows from the breaches that we have found.

21 MR. WOOLFE: Sir, in light of that indication, can I just take a moment to take instructions.
22 (After a pause) Sir, in the light of your indication we do not press that.

23 THE PRESIDENT: The Law Society obviously has read, and will read again, and take advice on
24 the judgment. They will be aware of what is required, and they will consider how to
25 implement a - I will not say a 'new' regime - reformed regime. If you think in the way they
26 do it they have not complied with competition law then you can complain and take it up
27 with them.

28 MR. WOOLFE: Thank you for that indication, Sir. If I may turn to para.2.2, this is slightly
29 different, in that this was not intended to try and prevent future problems. This is intended
30 to fully remedy past problems. The nature of our claim was precisely that by tying training
31 to the accreditation scheme, they have hoovered up training and simply a requirement to
32 properly inform their members that this is no longer the case. It is part of the----

33 THE PRESIDENT: We can understand that. It is a rather different point.

1 Ms. Smith, it is a small point, but obviously important to the claimant, which is that there
2 will be people who have got their accreditation but will not have done the training yet
3 because of that period. They may not all log on to the Tribunal website and follow with
4 great enthusiasm this case, so perhaps you can address how they might be informed.

5 MS. SMITH: Perhaps I can make the position crystal clear, and I am not sure this was absolutely
6 clear from the documents that we put in to the Tribunal. The Law Society, now that
7 judgment has been handed down, is withdrawing from sale with immediate effect the “CQS
8 Core - Financial Crime” training module. That is being withdrawn as we speak from sale.
9 So no CQS members who are in the position, Sir, that you have just outlined will be able to
10 take that training module because it has been withdrawn.

11 THE PRESIDENT: I see.

12 MS. SMITH: Now the judgment has been handed down, we are able to take instructions from
13 those running the CQS as to what the next steps are, as to what that will be replaced with, if
14 anything, what our continuing role will be in offering training, if we continue to play a role,
15 and how we will involve third party trainers.

16 I hope, in the light of that, the position is absolutely clear. The training will not be
17 available.

18 THE PRESIDENT: The other courses, of course, were withdrawn some time ago.

19 MS. SMITH: Exactly, yes, Sir, they were.

20 THE PRESIDENT: Even the 2015 update, that is no longer offered anyway.

21 MS. SMITH: That is no longer offered, no.

22 THE PRESIDENT: Mr. Woolfe, do you want to take instructions?

23 MR. WOOLFE: Can I ask for clarification of the clarification, because, as I understand it, there is
24 a change in the law which is pending, which you may recall from the correspondence a few
25 weeks ago. I think training would have to be withdrawn anyway. So training being
26 withdrawn and it being clear that, going forward, you do not have to buy it from the Law
27 Society, or similar training from the Law Society, there is a difference there which may be
28 commercially important.

29 THE PRESIDENT: There is nothing to buy once it has been withdrawn. New training, new
30 requirements, may be imposed, but they will then be notified when they are imposed. The
31 concern that you expressed, which I understood, namely that there are people out there who
32 might be about to buy the financial crime course from the Law Society, and would not be
33 aware that they have no option unless they are specifically informed, that concern, it seems

1 to me from what we have just heard, does not arise because they cannot buy from the Law
2 Society because it has been withdrawn.

3 MR. WOOLFE: If I might have a moment, Sir. (After a pause) On the basis of that clarification,
4 Sir, we are content.

5 THE PRESIDENT: I think we have dealt with the injunction, which will be in terms of para.1 of
6 the Law Society's order, and I will read that out for those here:

7 "The Law Society shall not oblige CQS accredited firms to purchase exclusively
8 from the Law Society the mandatory training in mortgage fraud, anti-money
9 laundering and financial crime required for CQS accreditation."

10 Perhaps we should say, Ms. Smith - it says 'the mandatory training' - 'any mandatory
11 training'?

12 MS. SMITH: Or just delete 'the', Sir.

13 THE PRESIDENT: Yes, just delete 'the'. That is better, thank you.

14 Can we then deal, Mr. Woolfe, with the third point, which is not contentious, about the
15 future directions for the action before coming back to costs. It is proposed by the Law
16 Society that there should be a stay of two months.

17 MR. WOOLFE: It is actually our proposal.

18 THE PRESIDENT: It is your proposal, and you are happy with 1st September, are you?

19 MR. WOOLFE: Yes, Sir, to explain the reason, we need some time to gather evidence and talk to
20 the other side. Then, if that process fails, some time to put together the next stage of the
21 claim. That was where the timings came from.

22 THE PRESIDENT: Yes. I think, as regards a further CMC, rather than fixing a date now, can we
23 say on a date to be fixed.

24 MR. WOOLFE: Thank you, Sir.

25 THE PRESIDENT: That takes us to costs.

26 MR. WOOLFE: Thank you, Sir. I take it that you have read Mr. George's witness statement?

27 THE PRESIDENT: Yes.

28 MR. WOOLFE: In a sense, all the parts of our application for costs really relate to the same
29 point, which is proportionality. The difference between standard and indemnity costs is
30 precisely whether or not the requirement of proportionality applies. That recognises the fact
31 that if, for various reasons that may arise, one party behaves unreasonably the overall costs
32 incurred may end up being disproportionate to the issues involved, even though the party
33 seeking its costs being paid has not behaved unreasonably.

1 Similarly, the purpose of imposing a costs cap is precisely to constrain costs to what is
2 proportionate. We say that in the circumstances of this case there are various matters, as set
3 out in Mr. George's statement, both changes in circumstances, but also the Law Society's
4 conduct of these proceedings, which means that it would work as an injustice in this case to
5 constrain Socrates to recover costs on the standard basis, and subject to the present costs
6 cap.

7 In a sense, the overall story is one of the Law Society really treating Socrates as a
8 troublemaker from the start, and dealing with the case on that basis rather than engaging
9 with the merits of it. When the claim was intimated, they did not instruct a competition
10 specialist to begin with, they sent the case off to Mills & Reeve in Birmingham. With no
11 disrespect to Mills & Reeve, it was not their competition department who was dealing with
12 it. From the time the claim was first intimated, which I think was on 11th January, the first
13 substantive response that Socrates received was when the defence was served in mid-May.
14 That was after the Law Society, having instructed competition specialists late in the day,
15 applied for a further four week extension. That was a very, very long period with no
16 substantive response.

17 Their initial substantive response was to plead a non-admission to both market definition
18 and dominance. As you will recall, we made something of a fuss about that at the first
19 CMC, because we said it was an obstructive plea by failing to plead to the issues in order to
20 engage them, and you required them to plead properly to the issues, Sir, in the end.

21 They then proceeded to dispute market definition using a plea of a two-sided market, which,
22 as you will recall, Sir, wholly failed to engage with the issues, and we say that should have
23 been apparent from the start, as well as disputing dominance and anti-competitive effect, or
24 appreciable effect.

25 You will have seen from Mr. George's statement, Sir, and it is appended to his statement as
26 exhibit BG15, the without prejudice letter that we wrote on 22nd June, which effectively
27 offered to drop hands on the costs of those issues if they conceded them going forward.

28 They chose to maintain these issues.

29 THE PRESIDENT: There are two quite distinct aspects to this. Are you saying that is a letter
30 within Rule 45?

31 MR. WOOLFE: No, Sir. It does not say it is a Rule 45 letter. It is not a Rule 45 letter, that is not
32 what we are saying. It is a *Calderbank* letter in one sense.

1 THE PRESIDENT: It is a *Calderbank* letter, but at the same time what Mr. George asked for in
2 that letter is more than he got, because the case that was run was that the Law Society was
3 dominant from the time the scheme was introduced, or at least from the time that the first
4 financial lender made it a requirement - that was the opinion of your expert. Therefore, the
5 obligation to take the mortgage fraud course when it was introduced in, I think, 2012, was
6 an abuse, and the obligation to take the anti-money laundering course from, I think, 2013
7 was an abuse. We found that they were not dominant at that point. So he did not achieve
8 everything that was alleged. One can say that on the balance of the case Socrates was the
9 winner, but not that they won on every point to the full extent.

10 MR. WOOLFE: Sir, I accept that we did not win on everything in our pleaded case. Returning to
11 the letter of 22nd June----

12 THE PRESIDENT: And the case advanced - not just pleaded, Mr. Woolfe, the case advanced at
13 trial.

14 MR. WOOLFE: Indeed, Sir. I was drawing a distinction between case in the pleadings and then
15 as advanced at trial on the one hand; and the admission which we requested they make in
16 the letter of 22nd June on the other hand. Do you have that letter to hand, Sir?

17 THE PRESIDENT: I think Mr. George appended it to his witness statement.

18 MR. WOOLFE: That is right, Sir.

19 THE PRESIDENT: This was written, of course, after the claim form and defence.

20 MR. WOOLFE: That is right, Sir.

21 THE PRESIDENT: The issue which he asked for them to effectively give up contesting covered
22 the courses from the time the requirements were imposed, as I read the bullet point on the
23 second page.

24 MR. WOOLFE: Sir, we would say those bullet points are phrased in the present tense.

25 THE PRESIDENT: You say 'in the present tense', there was not a separate course in AML
26 training at that time. It had been, I think, withdrawn in April, and you are saying 'abandon
27 its defences'. Had they abandoned the defences, then any damages they were awarded
28 clearly would have been greater, because they would have gone back a couple of years
29 further.

30 MR. WOOLFE: Sir, we say that AML is a component of the training which, until withdrawn, is
31 there, although it is not a separate course. We say it is phrased in the present tense, but we
32 have simply got no----

1 THE PRESIDENT: You asked them to abandon its defences on those issues, and that is on those
2 issues, as claimed. We can go through the pleadings, but, as I think you accepted, the
3 pleaded case was from the moment of introduction. It seems to me that is quite right.

4 MR. WOOLFE: I was going to say that under bullet points we do say - I do not make this as a
5 point about the tense - if you read the words under the bullet points we do offer to discuss
6 with them the precise wording of any admissions they may make. We offered them a
7 chance to make narrower admissions if they wanted to, and they did not take it.

8 Sir, we are not contending it is a Rule 45 offer that we have beaten, and therefore
9 consequences flow, it is part of the story. It is an important part of the story, Sir, because
10 those issue, 'dominant' and 'anti-competitive effect', are responsible for a very large
11 proportion of the cost and complexity in this case.

12 Then we come forward to disclosure issues, and in particular the disclosure of the minutes
13 of the management board meeting, which figured reasonably prominently in the judgment,
14 and the income and costs and profit forecasts which were appended to those management
15 board meetings.

16 THE PRESIDENT: Yes, the business case.

17 MR. WOOLFE: The business case, precisely, Sir. We do note that the very first case
18 management order made in this case, the order of 18th May, para.8(f)(v) - tab 4 of bundle A
19 - required not only for them to serve schedules containing income and profit, and we know
20 the issues with those, but also any income and profit forecasts.

21 THE PRESIDENT: That was not dealing with the business case, that was dealing with income
22 and profit going forward. I think the business case was actually dealt with expressly, was it
23 not, in another order, which was the order of 30th June, at para.3(f)

24 "... the Defendant disclose to the Claimant the following documents ...

25 (f) all policy documents and business plans relating to the inception of the
26 CQS ..."

27 MR. WOOLFE: Sir, yes.

28 THE PRESIDENT: That is what covers this, but it is qualified by saying:

29 "... insofar as the same are found by the Defendant in the course of preparing
30 evidence ..."

31 That was the one that was going to the business case, and the previous one was just looking
32 at forward forecast.

33 MR. WOOLFE: Sir, I apologise, I misread that as referring to a forecast that had been prepared.

1 In any event, Sir, that business case did not come to light from the Law Society in
2 disclosure. There was some correspondence about the issue of a business case generally,
3 and my client wrote to the Law Society on 29th August requesting disclosure of a number of
4 matters.

5 THE PRESIDENT: 29th August?

6 MR. WOOLFE: 29th August, Sir.

7 THE PRESIDENT: Is that in the clip?

8 MR. WOOLFE: I think, Sir, that is actually not in the clip, but I have copies of it available. Sir,
9 can I hand up a copy of that. (Same handed) The response to it, however, is in the clip of
10 correspondence. As you will see, Sir, this is predominantly about the schedule that the Law
11 Society had served, but then it goes on. The reply is the 12th October letter, which is at p.3
12 of the clip of correspondence that Mr. George has provided for today.

13 THE PRESIDENT: (After a pause for reading) Yes.

14 MR. WOOLFE: Sir, what we had done was to put together various references to this kind of
15 material that we had found in the document, albeit not the one that Professor Wilks
16 identified at trial, but what was apparent at that stage, and said there must be something
17 further along these lines, and we received a pretty comprehensive note.

18 I would also note, Sir, that it took a month and a half for them to respond to our letter of
19 12th August, which again is indicative of their general attitude to this case.

20 Then, if I might come to the hearing itself, and you will recall, Sir, the difficulties with the
21 Law Society's schedule of income and costs. We had identified ourselves that the cost
22 allocations really were of no use to anybody. Yet that is what led the Law Society to assert
23 that the CQS was loss-making on a standard basis.

24 Shortly before Professor Wilks' intervention, which led to the business case coming out, in
25 the course of the same interchange with the Tribunal the Law Society instructed Ms. Smith
26 to say that no central forecasts of costs and income had ever been produced. That was, as
27 became apparent, wrong.

28 THE PRESIDENT: Yes.

29 MR. WOOLFE: If we had had those documents earlier in the process, the litigation may have
30 taken a different course, not massively different, but the preparation for trial would have
31 been considerably streamlined, because we were piecing together a very disparate picture
32 from an awful lot of documents, as you will recall from the cross-examination, Sir. Yet that

1 document actually brought things together in a rather clearer fashion, and would have
2 enabled things to be conducted rather more efficiently.

3 THE PRESIDENT: I am not, speaking for myself, quite sure I follow that. It would have
4 obviously enabled you to ask Mr. Smithers about the business case and the assertion that it
5 was loss-making, or it was envisaged that it would be loss-making. That all came out in the
6 end.

7 MR. WOOLFE: There were two matters, Sir. One is whether or not it was loss-making; and
8 secondly, the role of training in the CQS and what the training was envisaged to be on. It
9 was a very laborious process trying to construct what training was envisaged at what stage
10 in the light of Mr. Smithers' evidence that training was always at the heart of CQS, and it
11 being asserted in this bundle, and the Law Society generally, that this kind of training was
12 essential.

13 THE PRESIDENT: I am not sure that management minute changed anything. It was yet another
14 summary of what the CQS was, of which there were numerous ones. I do not think it
15 altered that, and was quoted in the judgment because it was a convenient way whereby it
16 was brought together. One could have quoted from a number of other minutes around that
17 time saying much the same thing, not surprisingly, because it was the same people who
18 were making reports to these different commissions. The significance, it seemed to us, of
19 the management minute was that it revealed the business case, which was not evident from
20 anything else. The business case shed light on what had been envisaged in terms of loss-
21 making or otherwise. That was the significance of that minute, not what it said about the
22 CQS generally.

23 MR. WOOLFE: Sir, nonetheless, it was a significant document, which was not disclosed until a
24 late stage. We spent considerable time and effort in trying to get it from them, and only got
25 it at the trial and we had further submissions afterwards.

26 THE PRESIDENT: You are entitled to, and did, make submissions afterwards, and we have dug
27 those out, what Mr. George wrote following disclosure, 18th November, as he was entitled
28 to do, a letter of four and a half pages and did some calculations. What was the cost of
29 doing that, as an extra cost?

30 MR. WOOLFE: I am afraid I do not have instructions on specifically what that cost is today, Sir,
31 but we can identify it.

1 THE PRESIDENT: Just some rough indication. Mr. George did this, if his pattern of working
2 was as he described to us when he gave evidence, that he did a lot of the work himself. The
3 disclosure came on 11th and 15th November, and he responded on 18th November.

4 MR. WOOLFE: Sir, I understand that it took a fair bit of work in that short timescale, over a
5 couple of days, but I am afraid we do not know----

6 THE PRESIDENT: Would it be fair to say a couple of days work - would that be reasonable?

7 MR. WOOLFE: Something of that order, yes, Sir.

8 Sir, my overall submission is, if you take it as a whole the Law Society has taken, we say,
9 and obstructive approach to this litigation from the beginning by failing to respond, dealing
10 with non-admissions, and throughout the process maintaining its case----

11 THE PRESIDENT: When you say 'from the beginning', the costs capping was imposed after the
12 beginning of the case, obviously, after, I think, defence, even, was it, but certainly after the
13 pre-action correspondence. It was on 30th June. In so far as the matters you complain about
14 go to what was being done before 30th June, they should have been put before the Tribunal
15 and taken account of when the costs cap was imposed. You can only be justified, if at all, in
16 going beyond the costs cap for things that have happened since, can you not?

17 MR. WOOLFE: Sir, if you are talking specifically about the costs cap, that would be right. I was
18 addressing you on the issue of the other side's conduct generally, hence going to the issue
19 of proportionality, which is relevant both to the issue of indemnity costs within whatever
20 cap is imposed and----

21 THE PRESIDENT: I do not quite follow. In so far as you want to make any complaint about
22 what happened before 30th June, that should have been made then, because it all could have
23 been taken account of, rightly, if you are correct, or not, if you are wrong, when deciding
24 what costs cap to impose on 30th June. It is really whether anything has changed since.

25 MR. WOOLFE: Sir, I have addressed you on certain things that have happened since.

26 The final point to make is ground three in Mr. George's witness statement, para.24, p.8.

27 There are three threshold things notified as changes in circumstances, one of which-----

28 THE PRESIDENT: I am sorry?

29 MR. WOOLFE: Ground three on p.8, para.24, one of which was a mediation process. The
30 parties actually agreed that should fall outside the costs cap. I understand the Law Society,
31 in summary, say, "I am not sure we can agree this, but if it can be agreed, we agree it". It
32 may be that the Tribunal will think it may be necessary to regularise the situation.

33 THE PRESIDENT: When was that? That was after 30th June, was it?

1 MR. WOOLFE: It was, Sir, it was late October, I understand.

2 THE PRESIDENT: It seems to me that would fall outside it. That was not something that----

3 MS. SMITH: Yes, and we are not seeking to argue that.

4 MR. WOOLFE: I think it needs to be - it depends on the Tribunal's view of the nature of costs
5 capping, whether it is open to parties to simply agree it, or when you have to regularise it in
6 an order, Sir. We do not have a strong view on it. If it needs to be regularised then----

7 THE PRESIDENT: They agree. I do not know what has been agreed about who should pay those
8 costs and what the terms of the mediation were. I have no idea, we know nothing about it.
9 It seems to me that those costs are clearly outside the costs cap. Who should pay them may
10 depend on the terms on which you agreed the mediation, I do not know.

11 MR. WOOLFE: We are seeking an order that the Law Society pay our costs of the mediation, as
12 being part of the costs of the proceedings.

13 THE PRESIDENT: Yes. That should have been made clear in your application for today. It may
14 be that Ms. Smith will be able to deal with that. I do not know what was said when the
15 mediation was set up.

16 Why do you not continue, Mr. Woolfe. That is (a), that is the point there.

17 MR. WOOLFE: Point (b) I have already addressed you on, Sir, that is a post-trial point. Point (c)
18 is that there was a post-trial application. This not anybody's fault and no aspersion should
19 be cast on anybody, least of all the Law Society, but this is something that was not
20 anticipated at the time the costs cap was imposed.

21 THE PRESIDENT: I see. Thank you. Ms. Smith, can you just help on the mediation? What was
22 agreed about the costs of the mediation?

23 MS. SMITH: I am going to try and find out, I was not involved in it in an attempt to keep the
24 costs down.

25 THE PRESIDENT: Sometimes people agree that they will be costs in the action, sometimes they
26 agree that each side will bear its own costs, I just do not know.

27 MS. SMITH: I suspect there is a separate commercial agreement in the nature of these things, but
28 I am afraid I going to have to take instructions. Perhaps I can make submissions on the
29 other points first, if you wish to hear me, Sir.

30 THE PRESIDENT: We have read what you have said, so I think, if you can take instructions,
31 please, about the mediation, that would be helpful. (After a pause) It would be desirable if
32 we can wrap everything up and not have to have correspondence afterwards.

33 MS. SMITH: Yes.

1 THE PRESIDENT: Would you like us to rise for ten minutes while enquiries are made?

2 MS. SMITH: If you do not mind, Sir. It is clear from the correspondence that I have seen that
3 there was an agreement as to a separate costs cap for the mediation. The mediation was
4 obviously unsuccessful. I am not sure whether there was explicit agreement as to what
5 happened in that situation but, given the subsequent judgment, I am sure we can come to
6 some sort of arrangement where we can agree it.

7 THE PRESIDENT: Yes, I would hope so. We do not even know what the overall costs are,
8 because the costs of the mediator might be more than £4,000.

9 MS. SMITH: The costs of the mediator are, I think, known.

10 THE PRESIDENT: They are known, yes, so you know----

11 MS. SMITH: The costs of Mr. George in taking part in the mediation, we have not got any detail
12 from him on that.

13 THE PRESIDENT: Why do we not rise for ten minutes, and you try and sort that out.

14 MS. SMITH: Thank you, Sir.

15 (Short break)

16 MS. SMITH: Thank you, Sir, and thank you for the time. We have managed in the time to have a
17 look back at the correspondence between the parties prior to the mediation to clarify the
18 situation, and we have, as a result, come to an agreement which I hope will meet with the
19 Tribunal's approval, that there be an addition to the order that we have proposed in our draft
20 order, an extra sentence to the following effect: that the defendant pay the claimant's costs
21 of the mediation, to be assessed, if not agreed, up to the sum of £4,000, plus the claimant's
22 share of the mediator's fees.

23 THE PRESIDENT: Plus the claimant's share of the mediator's fees?

24 MS. SMITH: Yes.

25 THE PRESIDENT: The share is known, is it?

26 MS. SMITH: Yes, it is.

27 THE PRESIDENT: Does that deal with that point satisfactorily?

28 MR. WOOLFE: That deals with that, Sir.

29 MS. SMITH: Sir, I do not think you wanted me to make submissions on the other points as
30 regards the costs cap and indemnity.

31 THE PRESIDENT: No. Just on the point that Mr. George said he spent some two days on
32 preparing his calculations, which are quite detailed calculations, and his four page response
33 to the extra disclosure----

1 MS. SMITH: Sir, we say those should also fall within the cap. There were exchanges after the
2 hearing. There was not only the point about the figures, but there was also an application
3 for an injunction made by Mr. George after the hearing closed which we had to deal with,
4 and we had to incur costs in dealing with that as well.

5 THE PRESIDENT: Although you wrote very sensibly saying, rather than wasting money on this,
6 the judgment is about to come now.

7 MS. SMITH: Sir, we would ask that these costs fall within the cap. The cap is set for a purpose
8 as part of the fast track procedure, and was applied as an automatic result, if you look at
9 Rule 58(2)(b). It says that there shall be a cap as a result of the proceedings being ordered
10 to be fast track proceedings. They were applied as a result of the claimant's application for
11 these proceedings to be fast tracked at the claimant's request. They would have protected
12 his position had he lost, but they do cut both ways once they have been put in place.
13 I would also say this - and this is slightly off the point you have just raised, Sir, but I think it
14 is important: you referred to the date of 30th June being the date when the costs cap was
15 initially imposed. It was, but you will have recall that it was increased by 15 per cent
16 shortly before the hearing commenced by order of 8th November.

17 THE PRESIDENT: You are quite right, yes.

18 MS. SMITH: So none of the points which are now made about the conduct of the proceedings
19 were made at that stage. On 8th November, the cap was increased by 15 per cent and one
20 would have expected that perhaps they would have been made then if they were good. We
21 do say that the costs cap should be applied, even when there are some costs incurred after
22 the close of the proceedings. They were incurred because of, as you have heard, the
23 disclosure during the course of the proceedings of this business plan. Obviously the fact
24 that it was not disclosed before the proceedings was, we accept, regrettable. We have
25 explained why in the letter that we sent you yesterday dated 25th May. We attached to that a
26 letter of 15th November 2016. That explained why, on p.3 of the letter under the heading -
27 have you got that?

28 THE PRESIDENT: It is the letter of 15th November?

29 MS. SMITH: Yes, it is the attachment to the letter of yesterday's date. On the third page of that
30 we explain to the Tribunal why the management board minutes and the business case were
31 not disclosed initially. The management board minutes, if you look back at the disclosure
32 order, were not included, as you indicated, but business cases were, in para.3(f) of the
33 disclosure. You will see para.7, towards the bottom of p.3, that we accept that the 2010

1 business case was not identified, or relied upon, and as such it was not disclosed. We say
2 why in paras.8 and 9: in para.8, those people who were involved with the 2010 business
3 case were no longer around at the Law Society. Paragraph 9, this was a fast track and of
4 course there was no standard disclosure. We did not carry out what we might have done as
5 a result of the standard disclosure, and we went through and disclosed, as I said in para.10
6 over the page, a number of documents.

7 We make the point there that, yes, it is unfortunate that this one document was not
8 identified, but as soon as it was identified during the course of the proceedings it was
9 disclosed. Both sides were given opportunities to make submissions upon it. We say, first,
10 this conduct is not such so as to justify any order of indemnity costs. Secondly, we also say
11 that this was conduct that, in hindsight, ideally it should have been disclosed the first time
12 round, but the reality is, particularly in a fast track procedure where you are only engaging
13 in specific disclosure, not standard disclosure, you are not carrying out a standard disclosure
14 exercise, it is not hugely surprising that one or two documents might have fallen through the
15 net. They come out, and as soon as they come out they are disclosed.

16 We say a costs cap is put in place for good reason in fast track proceedings, and we say it
17 should not be departed from except in pretty serious circumstances, exceptional
18 circumstances, and we say that in this case those circumstances do not exist. We should not
19 increase the costs cap, we should not fall into the temptation of messing about with the costs
20 cap, it is there for a very good reason.

21 Is there anything else I can assist you with, Sir?

22 THE PRESIDENT: I do not think so, thank you very much. We will rise for a few minutes.

23 (Short break)

24 (For ruling, see [2017] CAT 12)

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

26 MR. WOOLFE: No, Sir, I do not think there is anything else, only to say thank you to the
27 Tribunal for coming today.

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