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IN THE COMPETITION
APPEAL TRIBUNAL

Case No. 1262/5/7/16

Victoria House,
Bloomsbury Place,
London WC1A 2EB

11 October 2016

Before:

THE HON. MR. JUSTICE PETER ROTH
(President)

(Sitting as a Tribunal in England and Wales)

BETWEEN:

AGENTS' MUTUAL LIMITED

Claimant

- and -

GASCOIGNE HALMAN LIMITED
T/A GASCOIGNE HALMAN

Defendant

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COSTS CASE MANAGEMENT CONFERENCE

APPEARANCES

Mr. Alan Maclean QC (instructed by Eversheds LLP) appeared on behalf of the Claimant.

Mr. Philip Woolfe (instructed by Quinn Emanuel Urquhart & Sullivan, UK LLP) appeared on behalf of the Defendant.

1 THE PRESIDENT: Yes, Mr. Woolfe, can I just check that I have the right things? I have
2 obviously got both sides' helpful outline submissions. I have, I think, the claimant's cost
3 budget is the one from 25th August, is that right? That has not been updated?

4 MR. WOOLFE: That is my understanding, that is correct.

5 THE PRESIDENT: Then your client's cost budget is dated 19th September?

6 MR. MACLEAN: That is correct, Sir.

7 THE PRESIDENT: And then there is the summary discussion report. I have those. We must
8 remember at the end I think there are costs reserved from the application to set aside that
9 brings us here today.

10 The other costs that have been reserved, which I had written submissions on, that is the
11 costs of, I think, an earlier security for costs application which I said I would deal with in
12 writing, which I have not got around to doing yet because of other things intervening – I
13 will, but that is not for today.

14 MR. MACLEAN: We are grateful for the indication about that because we were wondering
15 whether we had to make arguments about it.

16 THE PRESIDENT: No, I think not.

17 MR. WOOLFE: Sir, before I actually begin, you said you have the submissions, but there is one
18 point I do want to correct in my submissions at the outset with a personal apology. You
19 will see, I think at para. 10.3 of those submissions, we make the point of principle that
20 insofar as the claimant has apportioned certain costs between his costs budget in these
21 proceedings and his costs budget in the Moginie James proceedings, then that should be
22 taken into account if you are undertaking any exercise of comparing one party's costs
23 budget to the other. So far so good, and we stand by that.

24 However, I am afraid that my bundles were not updated on the occasion of the last hearing
25 because I was not at it, hence I had not seen that the claimant has served a further costs
26 budget in relation to Moginie James, so therefore the figures I used later on in the skeleton
27 argument in relation to witness statements, expert reports and trial, I used figures in respect
28 of the claimant's costs for Moginie James which were wrong.

29 THE PRESIDENT: I think I have been possibly looking at – I looked at a costs budget of the
30 claimant in Moginie James, also dated 25th August, is that right?

31 MR. WOOLFE: That is right.

32 MR. MACLEAN: It is the one at tab 16 of bundle A, at p.326.

33 THE PRESIDENT: Is it the same at 330A? I think it is the same, but it is just more legible.

34 MR. MACLEAN: Yes, they both fit together.

1 THE PRESIDENT: Oh, well I am using it. It is dated 25th August.
2 MR. MACLEAN: Yes.
3 THE PRESIDENT: That is all right, I have the right one then.
4 MR. MACLEAN: They are one behind the other. So 326 is the Gascoigne Halman one, and
5 immediately behind it at 330A is the Moginie James one.
6 THE PRESIDENT: That is the one I have been looking at, that is the right one.
7 MR. MACLEAN: Yes, that is the right one.
8 MR. WOOLFE: That is the right one.
9 THE PRESIDENT: That is not the one you have?
10 MR. WOOLFE: When I was preparing the submissions yesterday morning I used an earlier
11 version that had higher figures in.
12 THE PRESIDENT: That explains your para. 27, which I could not follow----
13 MR. WOOLFE: Indeed. As it turns out they have only got costs of solicitors and counsel in
14 relation to expert reports, so they have put some chunk in Moginie James – I will call them
15 the ‘Moginie James costs budget’ but I mean the claimant’s costs budget in the Moginie
16 James proceedings. They do have, I think, some----
17 THE PRESIDENT: Yes, I was trying to understand that bit, if someone can explain to me at
18 some point. I see, so that £57,475, which is shown on the summary page, experts’ reports in
19 Moginie James – this is really a question for Mr. Maclean. It says “Experts’ Reports
20 £57,475”.
21 MR. WOOLFE: Yes, there is, in fact, something of an inconsistency between that and the details.
22 THE PRESIDENT: That is what I could not quite follow, but there is a figure there for experts’
23 reports.
24 MR. WOOLFE: There is a figure, but if you look at the detail behind it, there is no separate
25 identification of fees for the expert, however, some counsel’s fees are apportioned to the----
26 THE PRESIDENT: One would have thought that the expert is relevant. I am a bit puzzled by
27 that. The figure there is £32,500.
28 MR. WOOLFE: Yes, p.330D you have some £32,500 in total which is an adding together of
29 £24,975 of solicitors’ time, together with----
30 THE PRESIDENT: I just do not see how that translates into the £57,475, there must be
31 something else.
32 MR. MACLEAN: I think the answer is there, is it not? If you are looking at 330D----
33 THE PRESIDENT: Oh, I see.
34 MR. MACLEAN: Do you see, Sir, £24,975 under the heading “Expert Reports”.

1 THE PRESIDENT: I see.

2 MR. MACLEAN: And then to the right of that £32,500 and if you add those two together you
3 get----

4 THE PRESIDENT: I see, so it is solicitors' ----

5 MR. MACLEAN: Solicitors' costs.

6 THE PRESIDENT: Solicitors' costs in terms of instructing the expert, yes, I see.

7 MR. MACLEAN: That is how you get there, Sir. As the box explains, that is on the assumption,
8 set out in that box, that the bulk of the experts is between my clients and Gascoigne
9 Halman, but on the assumption that Moginie James prepares its own evidence as matters are
10 raised which are additional to those raised in the Gascoigne Halman matter, hence these
11 being in this budget and not the other one.

12 THE PRESIDENT: Yes, I understand. Thank you.

13 MR. WOOLFE: So, if you like, I will take you through the other----

14 THE PRESIDENT: No.

15 MR. WOOLFE: I just wanted to correct any misapprehension.

16 THE PRESIDENT: Yes, thank you.

17 MR. WOOLFE: Sir, if I can mention something with a note of regret, which is we do actually
18 regret that we are here arguing about this before you today. We did seek to engage with the
19 claimant, both before and after the service of the budget discussion reports, to see if matters
20 could be agreed. Unfortunately, prior to service of the budget discussion reports, the
21 claimant simply refused to engage on the basis that they thought we should waive the
22 budget discussion reports. Since then they have served their submissions at the same time
23 as the budget discussion reports, and they have held fast to their stance since then.

24 The real issue of principle appears to be between us: what is the appropriate starting point?
25 As you will have seen from our submissions, we say that the proper approach to the
26 Tribunal is to look at the budgeting question and consider, phase by phase, in respect of the
27 estimated costs, the costs that remain to be incurred, whether they are reasonable and
28 proportionate having regard to the fact that it has been prepared by experienced solicitors,
29 and having regard to the factors set out in CPR 44.3, namely the complexity of the
30 proceedings, the value of not only monetary but also non-monetary relief and effective
31 relief and the wider importance of the proceedings.

32 By contrast, the claimant exhorts you to adopt a starting point that our costs should be no
33 higher than that, largely on the basis that they are, in name, the claimant, and we are, in

1 name, the defendant, and therefore the starting point should be our costs should be lower,
2 and hence they have carved out a figure which is lower----

3 THE PRESIDENT: You do not have to worry about the submission that because they are the
4 claimant their costs should be higher. It seems to me that is doubtful in many cases
5 anyway, but certainly in this case it is you who have raised the competition issue which is
6 what we are concerned with. In theory, therefore, on that, in practice, you are the claimant,
7 but equally I do not see that your costs would necessarily be higher. It seems to me it does
8 not take anyone anywhere in this case.

9 MR. WOOLFE: We would say that in respect of certain parts of the costs, and particularly when
10 you get towards trial, when you are the one advancing the case and you have to satisfy the
11 court on all elements and there is more work involved.

12 THE PRESIDENT: They are advancing an objective justification which may be quite important.

13 MR. WOOLFE: On that element, yes, Sir.

14 THE PRESIDENT: And really the competition issues wrap up obviously on the collective
15 boycott of that factual case that you are running, but that is not really an issue of law
16 particularly, or of economics, it is an issue of what was agreed or not. But on the
17 competition issues I think they are pretty much equal in this case. Certainly, I do not see
18 why the claimant's costs would be higher on anything other than the mechanics of trial
19 preparation.

20 MR. WOOLFE: And those trial preps. are limited. We would say, however, that there are a
21 number of respects in which, in practice, we would need to spend more time than them. For
22 instance, in relation to the OOP Rule itself, and in relation to the other contractual terms
23 with which we take issue, the bricks and mortar restriction and so forth, and, indeed, in
24 relation to the allegation of collective boycott. Those are agreements in terms, I should say
25 alleged agreements in terms as well, to which they are the party and they have direct first-
26 hand knowledge. Thus, there is an information asymmetry. Therefore, the process of
27 disclosure and reviewing disclosure and trying to understand what documents mean in that
28 context, and how they have to be interpreted at trial is necessarily more laborious for the
29 person receiving the mass of disclosure who is not familiar with it. That is a factor which
30 should not be underestimated.

31 Similarly, we would say in relation to expert reports, as our experts are trying to analyse a
32 market and arrangements to which our clients are not party and hence, for instance there are
33 various forms of data and so on which they have to take account of, there is work involved
34 at that stage.

1 THE PRESIDENT: Your clients, you say, are not party, they do not run a portal but it is all about
2 the general businesses of estate agents, which they know a lot about, and means of reaching
3 clients, and how the other portals compete, and they advertise on those portals, so I do not
4 think they are quite outsiders to this area. I have to say, I would have thought, as far as the
5 experts are concerned, that they are covering the same ground, covering the same issues,
6 looking at the same data. This is not very sophisticated scientific data like in a patent case. I
7 do not really see that there is a great difference between the two sides.

8 MR. WOOLFE: Sir, with respect, in respect of data, in the nature of anything that is online a lot
9 of data can be generated and the analysis of that data might be quite sophisticated.

10 THE PRESIDENT: I see that, but that, I think, applies for both experts. The data is new to the
11 experts, they have never seen it before the case.

12 MR. WOOLFE: Indeed, but there is a difference as to the extent to which one can take
13 instructions and understand data, and so on. That may have an impact on the fees.

14 Sir, those are our broad submissions on how the matter should be approached.

15 The other point I wanted to add is that, in accordance with the practice direction, the latest
16 version of the practice direction, it is not the role of the court to conduct a detailed
17 assessment or to lay down hourly rates. It is a matter of global assessment of the overall
18 sums claimed.

19 If we are adopting the approach which we say should be adopted, the natural thing at this
20 point would be to jump to the cost budget and start going through each of the phases, and
21 we can have a more concrete discussion about each of the phases. Alternatively, if you are
22 minded to accept the claimant's submission largely, I think, as a point of law as to how one
23 should approach that, particularly relying on the *CIP* case.

24 THE PRESIDENT: The *CIP* case was a case where the judge just rejected the budget as wholly
25 unreliable.

26 MR. WOOLFE: Indeed, Sir, he was left with no option but simply to take a figure, not quite out
27 of the air but in respect of----

28 THE PRESIDENT: I certainly do not take that view in this case. It may be disproportionate in
29 certain respects or not, but it is not a budget I would just reject. I do not think that approach
30 helps here, and I do think it is a case of looking in detail at the budget.

31 The other thing I would say is disclosure, which is often a major part of costs management,
32 is not, it seems to me, unless Mr. Maclean succeeds in persuading me otherwise or tries to
33 persuade me otherwise, part of this order, (a) because it is largely incurred; and (b)
34 because, albeit it was an order of this Tribunal, but disclosure in the whole action has taken

1 place, not just on the competition issues. That covers the bits of the actions that are in the
2 High Court and for which, as we know, there is no costs management. I do not think it
3 would be appropriate to approve or disapprove or review that stage of the budget. I think
4 that is a matter for detailed assessment should it arise.

5 MR. WOOLFE: Sir, we certainly would be perfectly content with that approach.

6 THE PRESIDENT: It seems to me, Mr. Maclean, that that is the right approach here. In a normal
7 case where costs budgeting starts early and the whole case is here, of course one would look
8 at disclosure, but that is not this case, it seems to me, for the reasons I have just set out.
9 You can try and persuade me otherwise if you wish.

10 MR. MACLEAN: Sir, I am slightly puzzled by what is going on because my learned friend is
11 setting up a straw man, or, to mix my metaphors, as Mr. Justice Langley used to accuse me
12 of doing, tilting at windmills by suggesting there is some big divide as to the proper
13 approach.

14 THE PRESIDENT: I did not detect any divide.

15 MR. MACLEAN: There simply is not, so I do not quite understand----

16 THE PRESIDENT: I just wanted to say if you are on disclosure, which was not clear, that is the
17 view I have formed, that we should not get into, even though there are significant costs
18 remaining, disclosure. We can look at the stages on pp.2 and 3 of the Gascoigne Halman
19 costs budget.

20 MR. MACLEAN: Sir, your second point is clearly right, both disclosure in the Chancery
21 Division proceedings and we are all very familiar with Sir Kenneth Parker's order - you are
22 right about that. It is also right that disclosure and indeed inspection on my client's side has
23 been given. We have given inspection of 2,000 documents. The other side have given
24 inspection, as I understand it, of 500. Leaving to one side the point about the Chancery
25 Division part infecting the process, if you like, disclosure is nearly over. I accept that. So,
26 even if we did not have that complication, it is a little hard to see how disclosure is a matter
27 for costs management in the full-blown CPR 3.12 to 3.18 sense.

28 You do, of course, have the ability, the power, nonetheless, if you thought it appropriate, to
29 make observations about those incurred costs which some of the cases say may or may not
30 give some pointer to the costs judge if and when we ever get to any detailed assessment.

31 That is a matter for you, Sir. I can see, if one was sitting in your position, Sir, one might
32 want to eschew that entertaining opportunity.

33 THE PRESIDENT: I do not think I am minded to do that at this stage because I do not know
34 enough about----

1 MR. MACLEAN: I see that. With respect to my learned friend, I do not recognise his
2 characterisation of my submissions. I do not think there is an issue of principle. I do not
3 suggest that this is a case which is in *CIP* territory on the facts. I do not know whether it is
4 now my shot or his. I am not sure how you want to proceed, Sir. What I wanted to do was
5 to show you some extracts of one authority which you may tell me quite quickly you are
6 familiar with, which is the case of *Yeo v Times Newspapers*.

7 THE PRESIDENT: I know of it, but I do not know the detail of it. It might be sensible,
8 Mr. Woolfe, and I know it is jumping about for me to do that, so we will just look at the
9 principles and then go through the heads. As I say, we can start with witness statements.
10 Have you got a copy for me?

11 MR. MACLEAN: Did you get a bundle of authorities?

12 THE PRESIDENT: No.

13 MR. MACLEAN: We also delivered one to Monckton Chambers yesterday.

14 THE PRESIDENT: The one delivered to Monckton Chambers was presumably not for me.

15 MR. MACLEAN: We delivered no fewer than five copies yesterday to this Tribunal specifically
16 so that one would get to you.

17 THE PRESIDENT: Apparently it is here, but nobody told me about it before we came into court.
18 This is Mr. Justice Warby, yes.

19 MR. MACLEAN: The reason for showing it to you is that, unlike the other cases, it is reported in
20 the Weekly Law Reports at a practice note. You will remember, Sir, that Mr. Yeo, a former
21 MP, took some libel proceedings. I was not going to take you through the Rules. Your
22 Lordship knows that it is 3.12, 3.13 and 3.15 that gives rise to the costs management order,
23 and obviously practice direction 3E, to which we have both made reference in our
24 submissions. Can I just show you *Yeo*, so that we have the principles in mind. Mr. Justice
25 Warby identifies at para.7 that there were two issues for decision on that case. The first was
26 a matter of obviously defamation law as to whether the claimant's plea of malice should be
27 struck out; and secondly, the extent to which a party's cost budget should be approved.
28 You get that from para.7.

29 We can then skip over, although it is a very good read, the discussion of the plea of malice,
30 and then we get to the heading "Costs budgeting". Do you see that above para.52? I will
31 not read all this out unless you want me to, but Mr. Justice Warby, first of all, essentially
32 reminds himself of the relevant provisions of the rules and practice direction at 52, 53 and
33 54, and then at 57 he says:

1 “I reserved my decision because, although cost budgeting has now been in place
2 for over 20 months, the detailed implementation of the scheme is still relatively
3 untested, the argument on this application addressed issues of methodology, and
4 the case throws up some other issues of general importance for costs budgeting in
5 publication cases. For those reasons only I thought it useful to give this judgment
6 highlighting particular issues that arise, and offering some guidance for the future,
7 with particular reference to publication cases. As will be seen, it is very far from
8 being my view that a costs management conference should ordinarily involve
9 lengthy oral argument and a reserved judgment.”

10 Then he deals with hearing or no hearing, and that is water under the bridge in this
11 particular case.

12 We then go to 60, “Incurred costs”:

13 “These are not subject to the approval process. This means that under the default
14 procedure substantial costs may already have been incurred, without any budgetary
15 control, by the time a decision is taken at a CMC. The parties’ costs figures in this
16 case illustrate the point.”

17 Then he sets out the illustration. Then he makes the point that I have just made about
18 commenting, and so on. Then he says:

19 “The court may reduce a budget for reasons which apply equally to incurred costs,
20 or for reasons which have a bearing on what should be recoverable in that respect,
21 for instance, that so much had been spent before the action began that the budgeted
22 cost of preparing witness statements is excessive.”

23 Pausing there, and just anticipating a submission I will make in due course, if, for example,
24 experts have been involved to the tune of £85,000 in the pleadings process, which is the
25 position for Gascoigne Halman, we see from their Precedent H, then one might be forgiven
26 for thinking that that would lead to rather less in terms of expert costs further down the line
27 because they have been heavily plugged in at the beginning of the process. It is an obvious
28 point.

29 Then over the page to “The approach to approval”, and the learned judge set things out in a
30 table, and then he records Mr. Browne’s submission, which was in the middle of 63:

31 “The process was intended to be one conducted swiftly and economically and of
32 necessity had to be something of an impressionistic exercise.”

33 That is a submission, not the judgment.

1 “He submitted that this is a matter of substantial non-monetary value to both sides,
2 complex, and raising issues of reputation and public importance on both of sides of
3 the case.”

4 Then he said that Mr. Browne referred to a speech by the senior costs judge, emphasising
5 that costs management is not a prospective detailed assessment, which I entirely accept:

6 “... and described the training given to judges on these issues as having suggested
7 they should not look at hourly rates or hours but rather at overall reasonableness
8 and proportionality. That may be so, but I note first of all that the Master recorded
9 that the common question raised by judges was how they could approach the
10 overall question without reference to hours and rates.”

11 which seems a fair point.

12 “Secondly, I note that whilst [the practice direction states] ... ‘the court will not
13 undertake a detailed assessment ...’ it also states that ‘in the course of its review
14 the court may have regard to the constituent elements of each total figure’.”

15 Then he refers to Precedent H, and then he says this at 67:

16 “On one view, the costs of libel, privacy and some harassment cases typically
17 become disproportionate at an early stage, before the ordinary time for costs
18 budgeting has arrived. Such cases do in any event involve rights and interests that
19 cannot be measured simply in money. In a case involving costs that run to six or
20 even seven figures in total it is in my judgment appropriate to have regard not only
21 to the factors listed in CPR 44.3(5) ...”

22 which is essentially proportionality -

23 “... but also to the hours and rates, as would be done on a summary assessment of
24 costs at the end of an interim hearing. That is not the same as conducting a
25 detailed assessment.”

26 Then the other aspect of this that is important, in my submission, is how the judge deals
27 with contingencies. Would you just glance, Sir, at para.68, first of all, and then 70 and 71.
28 Would you read those to yourself.

29 THE PRESIDENT: Yes, I will read those.

30 MR. MACLEAN: (After a pause) When you have read 71, Sir, could you then glance, please, at
31 73, where the learned judge says:

32 “I consider that excessive preparation time was provided for in respect of the pre-
33 trial review. The trial preparation estimate is very considerably cut in my
34 schedule, but this is because the estimated figure includes counsel’s brief fees. The

1 guidance notes make clear that these should be included in trial costs, which is
2 what [Times Newspapers] have done. It is important that the schedules compare
3 like with like ... I have therefore transferred what I consider appropriate for brief
4 fees to the trial phase. I consider that the main sections allow enough for 'strategy
5 review and consultation' which is not a separate contingency. 'Possible further
6 work' meets none of the three CRA for a contingency that I have identified above."

7 So the contingencies did not count.

8 Then, finally, the learned judge makes the point at para.76, the last sentence, the need to
9 control costs, he identifies that as a means of ensuring equality of arms. That is obviously
10 consistent with what Lord Justice Moore-Bick said in one of the other cases in that bundle,
11 which we do not need to turn up, the *Henry* case, where Lord Justice Moore-Bick said that
12 the primary function of the budgeting process was to ensure the costs incurred are not only
13 reasonable but proportionate to what is at stake in the proceedings.

14 So what we get, pulling the threads together from *Yeo*, is that I entirely accept that the
15 court's approval, the process, is to relate to the total figures for each phase of the
16 proceedings. The court does not direct or make orders at a more granular level, but
17 obviously it has regard in doing so to rates and hours and what more is said by the parties is
18 going to be involved in that phase.

19 Secondly, the court may reduce a budget for reasons which apply equally to incurred costs.

20 Thirdly, as Mr. Justice Warby expressly set out, in cases where costs run to six or seven
21 figures the court will have regard to the number of hours claimed and the hourly rates
22 claimed and not merely to 44.3(5).

23 *CIP* is essentially an application of the same approach. It is just that the judge in that case
24 junked the budget altogether and, as it were, rolled his own. He still went through each
25 phase and came to a figure for each phase. As a matter of structure it was the same.

26 THE PRESIDENT: Yes, we have got to do it phase by phase.

27 MR. MACLEAN: Sir, it is really those aspects of principle which Mr. Justice Warby set down
28 which, in my respectful submission, the court may find of assistance when my learned
29 friend takes you through his schedule.

30 THE PRESIDENT: Yes, thank you. Yes, Mr. Woolfe?

31 MR. WOOLFE: Sir, there is not really very much for us to disagree on, I do not think. There are
32 two points I would note. The first is, we should be working from the April 2016 version of
33 practice direction 3E, which does post-date *Yeo*. Perhaps we should look at exactly what it
34 says. Do you have a copy of practice direction 3E?

1 THE PRESIDENT: Yes.

2 MR. WOOLFE: What it says at para.7.10 and the wording is really quite important:

3 “The making of a costs management order under rule 3.15 concerns the totals
4 allowed for each phase of the budget.”

5 It does not say it here but it is clearly for costs yet to be incurred.

6 “It is not the role of the court in the cost management hearing to fix or approve the
7 hourly rates claimed in the budget.”

8 Clearly that is not saying you cannot have regard to them. They are in the budget, you will
9 see what they are. You understand the result. It is not your role to fix or approve them. I
10 think that is fairly clear and I do not think it is in dispute. Nor is it in dispute that, of course,
11 you can look at the hourly rate that is being used.

12 The concern we have is that we do think *CIP* is a different approach. We do think it is
13 different from what was done in *Yeo* and what is required by the practice direction. What
14 we are concerned about is that if the court takes a very interventionist approach to setting an
15 overall budget for a phase, deducting incurred costs, and so on, that can come pretty close,
16 when it is applied late in proceedings, to being similar in effect to a costs capping order.

17 The claimant did intimate at one stage that it might try and make such an application.

18 THE PRESIDENT: There is a sort of overlap between approving costs budgets and costs
19 capping. I think Lord Justice Jackson commented on that. Shall we get down to the budget.

20 MR. WOOLFE: Yes. You will see the first item in our costs schedule is witness statements. The
21 first point to make, if we are having regard to the relative level of the budget, is that we are
22 serving more witness statements than they are, which is quite an important part of the
23 difference. In addition, it is perhaps right to note that they do allocate approximately
24 £20,000 of costs to witness statements in the *Moginie James* action as well.

25 These witness statements will need to be fairly substantial. The claimant has said it is not a
26 case with issues of primary fact. There are, in fact, a number of issues of primary fact
27 which lead into the issues of economic principle - so the dynamics of the market, the entire
28 justification case in terms of the impact on property seekers and agents of their launch, the
29 success or otherwise of the claimant’s business, what drives demand from property portals
30 from an agent’s point of view and from a property seeker’s point of view.

31 THE PRESIDENT: And the collective boycott is entirely factual, is it not?

32 MR. WOOLFE: Indeed, Sir.

33 THE PRESIDENT: I see that.

1 MR. WOOLFE: And some of that evidence - there is the example that is pleaded in the defence
2 of the four party meeting which included Connells----

3 THE PRESIDENT: Clearly I would expect that you would be serving more witness statements.
4 It is a lot of work doing witness statements. One would expect your budget to be higher, I
5 can see that, but it still strikes me as extremely high.

6 MR. WOOLFE: Sir, perhaps it might assist you (inaudible), if you turn to p.330T, and it would
7 perhaps be easiest to work from the more detailed pages as we go through. Sir, you can see
8 in respect of witness statements a total of £375 solicitor----

9 THE PRESIDENT: There is a lot of partner time on witness statements, a lot. 150 hours of
10 partner time seems a great deal.

11 MR. WOOLFE: There is a fair chunk of partner time, yes, Sir, but what we ought to bear in mind
12 is that the issues of fact are quite important in this case. They do feed into the economic
13 issues, and therefore they do require to be understood. In terms of what questions are asked
14 and what documents are referred to, and so on, having a fairly high level input into that is
15 important and it is also why there was a substantial amount of counsel time as well.

16 MR. MACLEAN: I am sorry to interrupt, but the 150 hours of partner time is the estimated costs,
17 because 75 x 590 is £44,250.

18 THE PRESIDENT: Sorry, just a minute. The 150 is the estimated - yes. Do you mean there is
19 the incurred cost as well?

20 MR. MACLEAN: Exactly, that is on top, so it is not 150 hours, it is more than that.

21 THE PRESIDENT: I understand, and you are telling me that you have calculated it back?

22 MR. MACLEAN: I have just multiplied 75 for Mr. Bronfentrinker times £590, which is his
23 hourly rate, which is £44,250.

24 THE PRESIDENT: We have got that set out on the schedule.

25 MR. MACLEAN: Yes, exactly, but that tells us that----

26 THE PRESIDENT: It is clearly under the heading of estimated costs. I thought you had divided
27 £17,700 by 590.

28 MR. MACLEAN: No, I am simply pointing out that it is not 150 hours, it is more.

29 THE PRESIDENT: Yes, I see that.

30 MR. WOOLFE: (without microphone) Clearly (inaudible)----

31 THE PRESIDENT: I think on this, I do. This is a phase that is going on. Here it does seem to
32 me on phases that I am dealing with, I have got to look at the total reasonable cost for that
33 phase, and then see what is left.

1 MR. WOOLFE: Clearly, one of the points which my learned friend mentioned briefly when we
2 went through the case, but did not pick up, is that insofar as incurred costs on the
3 reasonableness of what remains to be incurred, the work that has already has been done, etc,
4 then clearly they are relevant.

5 There is a very specific point as well, not only with regard to the complexity of the case, but
6 also in the particular circumstances of this case, which is advancing very swiftly towards
7 trial, why partners do need to be substantially involved, which is simply the speed with
8 which it requires to be done. It is all hands on deck.

9 THE PRESIDENT: Bring in another associate. There is one associate and two partners, that is
10 the point. One might expect it is reasonable to do it the other way round. I make it 30
11 hours that have been incurred by Mr. Bronfentrinker to date. I have not done the other
12 calculation yet.

13 MR. MACLEAN: It is 30, Sir - 30 and 30.

14 THE PRESIDENT: Both 30, yes.

15 MR. WOOLFE: This is a case in which we would say it is appropriate----

16 THE PRESIDENT: I appreciate that it is expedited, and therefore a lot has to be done in a short
17 space of time.

18 MR. WOOLFE: And also these are, in some cases, quite important witnesses. It is appropriate to
19 have a proper scrutiny of what is being put to them, and it is appropriate, we say, for
20 partners to attend the taking of the evidence from the witnesses.

21 THE PRESIDENT: They may want to do that for client relations. I am not sure that it is
22 reasonable and proportionate to recover for that. It is not the normal way, I would have
23 thought, reasonably one would prepare for litigation, but I hear what you say.

24 MR. WOOLFE: We do not deny it is a substantial amount of time. We do note, if the
25 comparison is relevant, that they are assuming some 350 hours of preparation for their
26 witness statements for four witnesses. On that basis we are actually doing less time per
27 witness. It may not be the best rule of thumb either, because clearly witnesses may differ.
28 It does show that we are not actually out of line with what they are doing, but we do have a
29 greater burden.

30 We do say that senior involvement is appropriate in this kind of case where a witness may
31 say something to a junior associate who is sitting there, but the question is then the follow-
32 up question, "Oh, you say that, what about this?" and another subject arises. In practice,
33 having only junior solicitors taking evidence, the process cannot be done very quickly.
34 They prepare the drafts, then they go to more senior lawyers for review, then they come up

1 with, “Oh, you say this, what about X?” and you have to go back to the witness. By that
2 stage some days have passed and the process is rather slowed up.

3 Sir, you have my submissions in essence on that. I do not know whether Mr. Maclean has
4 anything to say. (After a pause) Sir, I am reminded as well, this is also to cover not only
5 the costs of preparing the principal witness statements but also reviewing their evidence,
6 and so on.

7 THE PRESIDENT: Yes.

8 MR. WOOLFE: I do not know whether Mr. Maclean has anything to say.

9 THE PRESIDENT: I think it is better if you go through everything rather than stopping at each
10 stage.

11 MR. WOOLFE: The next item is expert evidence. This is a substantial item because economic
12 evidence is very important in the case. The total in relation to this is £317,133 of which
13 essentially about half has already incurred.

14 THE PRESIDENT: This does not include attendance at trial by the expert, or does it?

15 MR. WOOLFE: No, it does not. There is a separate provision under the trial limb. You will see
16 there are costs both in relation to trial preparation and trial for the economics team.

17 THE PRESIDENT: I am trying to see what is the total.

18 MR. WOOLFE: Sir, I do not have a total.

19 THE PRESIDENT: Just to pick up various bits, this is just for reports and meeting, is the
20 £317,133. Then you say it appears also that the expert has been involved for some reason in
21 disclosure apparently, which is a little odd.

22 MR. MACLEAN: Sir, they are multi-talented, because they are involved also in the statements of
23 case.

24 THE PRESIDENT: That is not unusual.

25 MR. MACLEAN: £85,000.

26 THE PRESIDENT: I can see that.

27 MR. MACLEAN: Then they were involved in disclosure at £10,000, and then they were involved
28 in witness statements.

29 THE PRESIDENT: I am taking Mr. Woolfe through it. Thank you, but your turn will come.
30 There is disclosure of £10,000, you say.

31 MR. WOOLFE: Yes, that is right, it is line 12.

32 THE PRESIDENT: Yes, that is estimated, not incurred.

33 MR. WOOLFE: Yes, estimated at the time of this costs budget.

1 THE PRESIDENT: Then they are not involved in the PTR, but they are involved in trial
2 preparation, £35,000 - is that right?

3 MR. WOOLFE: That is correct.

4 THE PRESIDENT: Trial preparation £35,000 and attendance at trial £35,300.

5 MR. WOOLFE: Shall I take you chronologically through that line?

6 THE PRESIDENT: Well, the report itself, which is much the major part, of course, was involved
7 in witness statements as well.

8 MR. WOOLFE: Shall I explain the disclosure and witness statements, I can take those together?

9 THE PRESIDENT: Yes.

10 MR. WOOLFE: The nature of the report in this case, which will be about the dynamics of the
11 market, and the effect within that market of the OOP Rule, the other terms in question, the
12 experts want to know that they have the primary fact material available to them. So, for
13 instance, in relation to disclosure there is an element of they will look at some of the
14 disclosed documents insofar as they are relevant to what they have to decide, and then they
15 ask for more, make a request for data, advising on what we should be asking for.
16 In relation to witness statements as well they have questions which they will want to put to
17 witnesses to incorporate the answers in their actual report – in the simple way of even
18 primary facts, to opinion, to conclusion. So we would say having some provision, an
19 estimated provision in respect of the disclosure and witness statements, for experts to be
20 involved at those stages would ensure that they have what they need to deliver their opinion
21 properly in the report, and we would say it is entirely sensible. The sums involved, in the
22 context of this proceeding, on any view, are not large.

23 THE PRESIDENT: Yes, but it means – just so I understand this – the £317,000 is embracing, the
24 total of £317,000 and the £233,000----

25 MR. WOOLFE: If I might assist you, the actual cost of the expert's fee for the expert report for
26 that phase are £233,000. The £317,000 embraces also the work of solicitors and counsel in
27 relation to the expert report. (After a pause) Does that help clarify?

28 THE PRESIDENT: Yes, there is £80,000 of lawyers' fees for the expert's report?

29 MR. WOOLFE: Yes, Sir, that is correct. You have a totals of just under £66,000 for solicitors,
30 and £18,000 for counsel. That encompasses, obviously, instructing the expert, liaising with
31 them, for instance, about various matters, materials they need and so on, also looking at the
32 other side's expert report and any work in relation to that at that stage, and then, similarly,
33 in relation to the reply report. That covers the expert costs of the meetings as well.

34 THE PRESIDENT: Yes, I see, that is the experts. Then we come to the PTR?

1 MR. WOOLFE: Yes, there is no cost in relation to the expert for the PTR. In relation to trial
2 preparation----

3 THE PRESIDENT: Trial preparation would be preparing, working with counsel on cross-
4 examination and so on, is that right?

5 MR. WOOLFE: Sir, yes, and obviously, there is perhaps an asymmetry in the way that counsel's
6 fees are dealt with and experts' fees, Sir, because in the usual way counsel's fees for that
7 kind of thing going to trial are not a separate phase for trial preparation, but in fact, experts'
8 fees have been split in that way here, so you have a cost between preparation and
9 attendance.

10 THE PRESIDENT: Yes. (After a pause) I see, right. Then the attendance at trial speaks for itself.
11 PTR?

12 MR. WOOLFE: There are no costs of the expert at the PTR.

13 THE PRESIDENT: No, I think we have covered the expert. It is the next one----

14 MR. WOOLFE: I just want make some brief submissions to put the expert reports into context,
15 they are a very important element of the case.

16 THE PRESIDENT: Indeed.

17 MR. WOOLFE: As the claimant on the issues of anti-competitive effect, we are the ones who
18 will bear the brunt of it down to the stitching it together.

19 THE PRESIDENT: They have to rebut it and show it does not, effectively. As I say, I do not see
20 there is a great difference between what the experts will be doing and, as I say, objective
21 justification seems to me fundamental to one of the issues in this case.

22 MR. WOOLFE: It is fundamental but it is one which may be less, (inaudible) is the anti-
23 competitive effect. There is quite a lot of hypothetical analysis that has to be done of the
24 effect of the OOP Rule on the position of Zoopla and what that means for the market
25 position of Rightmove and so on. In a two-sided market those are very complex economic
26 issues that do require a lot of work, and some data driven work as well, and our experts will
27 be the ones who are advancing the case on that.

28 THE PRESIDENT: Yes, but so does objective justification, does it not, to say that you need to
29 have that sort of provision if you are going to be able to enter, and it is a high burden, is it
30 not, objective justification. That is also major expert work.

31 MR. WOOLFE: It is expert work, Sir.

32 THE PRESIDENT: And your expert has to deal with that as well, of course, because he/she has
33 to say: "No, it is not necessary". So they are both going to be examining the same data and
34 tackling the arguments on that.

1 MR. WOOLFE: The focus on the objective justification problem, it is one that crops up again in
2 relation to the trial. I think I have two points. First, I am not sure that it is the case that in
3 these particular proceedings that the objective justification case will be as heavily data
4 driven as the effects case.

5 Secondly, they are the party who introduced the OOP Rule, they had a business plan based
6 upon the OOP Rule, and they will already have done – maybe not from a forensic
7 economist’s point of view, but nonetheless – the work of considering the necessity of that
8 rule and justifying it, and they are, in fact, raising that justification not only in these
9 proceedings but in other proceedings. This is not the first time the claimant has been
10 looking at the issue; it also bears upon the extent to which they need to work hard to make
11 their case.

12 Those are my submissions in relation to the expert report. We do say that the overall level
13 of expert fees is proportionate in the context of this case, and that it is not only an
14 economics heavy case, but a difficult economics case, and requires a fair amount of lawyer
15 input as well.

16 THE PRESIDENT: Yes.

17 MR. WOOLFE: The next item is the PTR.

18 THE PRESIDENT: Yes.

19 MR. WOOLFE: I think the costs in this case have been reduced in this version of the costs
20 budget from what they were in an earlier version that you saw, albeit they are still
21 substantially above what the claimant has put in its costs budget, but that is partly due to
22 different assumptions as to how heavy a PTR will be. We are assuming that there could
23 well be a lot of matters to be dealt with by that stage.

24 THE PRESIDENT: If there are extra applications they will fall outside the cost budget, will they
25 not, if there are particular contested applications of significance.

26 MR. WOOLFE: I think in relation to the PTR it may be slightly complicated in that if something
27 is wholly unanticipated, and well outside what may be expected to occur at a PTR in a case
28 of this kind, then clearly that would be a significant development in the case and you could
29 add it in to the cost budget at that stage.

30 Insofar as we can anticipate now something specific that was likely to arise we could
31 identify that as a contingent cost, but we have not been able to do that. This is simply an
32 estimate for the PTR, based on the fact that these proceedings are giving rise to various
33 disputes about the point as we go along, and there is limited time in which these can be
34 resolved prior to trial and in practice there may well be substantial issues in relation to

1 further disclosure, admissibility of evidence and so on, the last minute things that PTRs
2 have to deal with that could make that a very substantial hearing.

3 THE PRESIDENT: Then there is trial preparation, and that includes £35,000 of expert costs?

4 MR. WOOLFE: Yes, of the kind that for counsel would ordinarily be included in the brief fee,
5 that is split out here. Perhaps what is more normally said to be case preparation/trial
6 preparation is the £63,000 of solicitors' time.

7 By comparison, the claimant has budgeted some, I think, £122,000 for that phase. Now,
8 there may be an issue as to who is preparing the bundles, but in practice the printing of the
9 bundles----

10 THE PRESIDENT: You say there is an issue, it is the claimant, is it not?

11 MR. WOOLFE: It is the claimant. The actual cost of preparing the bundles is partly involved
12 with agreeing indexes and partly involved with the printing of them. We accept they are
13 printing them, but as the people who are advancing the case on the competition issues we
14 are going to be centrally involved in working out what actually goes into the trial bundle,
15 insofar as that is concerned.

16 THE PRESIDENT: Then there is trial, again including expert costs of £35,300.

17 MR. WOOLFE: That is correct. And this is one of the points at which, in fairness, at para.34 of
18 my submissions you should disregard the figures in respect of brief fees and so on because
19 they were erroneous. In fact, I understand in the Moginie James costs budget there were
20 additional trial costs of some £57,600, so they have apportioned to some extent. The trial
21 in this matter will be very substantial. As I say, perhaps at the cost of repeating myself on a
22 point where you have already indicated your view, but as the people who are advancing a
23 case on both complex forensic factual issues on collective boycott, and on complicated
24 economic issues, very substantial preparation will be required in order to make sure that all
25 elements of the cause of action are properly placed before the court and all the proper
26 evidence is there, and the cross-examination and so on is properly prepared. Not only
27 cross-examination of experts, but also of people who are alleged to have been involved in
28 hardcore anti-competitive activities by reference to the documents, and that is a burden in
29 particular which will fall on our side.

30 THE PRESIDENT: The next one I did not quite understand, the ADR. It says: "Mediation held
31 on 20th April" but only £237,000 was incurred, costs removed on the basis that each side
32 bear their own, so this is----

33 MR. WOOLFE: Pardon me, shall I explain what that mediation was?

34 THE PRESIDENT: Yes. If it is water under the bridge----

1 MR. WOOLFE: It is.

2 THE PRESIDENT: --then it does not matter.

3 MR. WOOLFE: There was an attempt to mediate, I think, back in----

4 THE PRESIDENT: Yes, that is what it says, in April, but those costs are not here, so that is why
5 there are no incurred costs, and then it says: "Future costs estimated of £17,000", this is
6 future anticipated costs if an unsuccessful attempt at settlement.

7 MR. WOOLFE: What this is intended to capture is the fact that there was an attempted settlement
8 which failed, and those costs were then removed, but there are estimated costs which are a
9 provision for dealing with ADR, should it arise.

10 THE PRESIDENT: No, sorry, you have lost me. There was an attempt, those costs have been
11 removed.

12 MR. WOOLFE: Yes.

13 THE PRESIDENT: What is the estimated £19,500 of costs?

14 MR. WOOLFE: That is provision that has been made for future attempts at ADR.

15 THE PRESIDENT: For future attempts at ADR, which it is assumed will be unsuccessful?

16 MR. WOOLFE: No, Sir.

17 THE PRESIDENT: If they are going to be successful and resolve the case, it will not be part of
18 recoverable costs. It is only on the basis that it is unsuccessful that it could then be
19 recoverable. Is there any realistic prospect, having had an ADR, heading for a trial in
20 February – there is not going to be another formal ADR unless I am told it is being set up,
21 that is what I am not quite clear about. I appreciate there is something in the other side's----

22 MR. WOOLFE: Yes, there is, Sir.

23 THE PRESIDENT: I just do not quite follow this part of the budget.

24 MR. WOOLFE: What may be confusing is that the same item has been used to mark – normally,
25 when the costs budget is prepared there has not yet been an attempt at mediation. There has
26 been one global item for settlement, an ADR. As it happens, a specific and formal attempt
27 was made, that failed, but both sides have made provision for ongoing engagement.

28 THE PRESIDENT: Yes, I see. I will hear from Mr. Maclean what their position is, which I do
29 not understand either. Then review of third party material is agreed and there is a
30 contingency. That has been incurred, but is that the costs I am going to determine?

31 MR. WOOLFE: That includes the costs you are going to determine, and it also includes some of
32 the costs that you have, in effect, determined, by saying there is no order as to costs in
33 respect of the last security for costs hearing. So this contingency is being used to split out
34 the costs of security for costs.

1 THE PRESIDENT: Insofar as I have said there is no order for costs it is not recoverable?
2 MR. WOOLFE: That is correct.
3 THE PRESIDENT: So it should come out. Insofar as being reserved I am going to deal with it
4 separately. It is the costs of the hearing----
5 MR. WOOLFE: That you will deal with.
6 THE PRESIDENT: Which I will deal with and I would have thought should be summarily
7 assessed.
8 MR. WOOLFE: Sir, it is there, in a sense, because it was in earlier versions of the figures that we
9 gave you and in order to make it clear how this figure relates to the previous figure, we
10 certainly know that that is not subject to management.
11 THE PRESIDENT: Yes. Okay, apart from the ADR, which is a relatively small part of the whole
12 picture, I think that is clear. Yes, thank you. Mr. Maclean?
13 MR. MACLEAN: Sir, if I can deal with the last point first while it is in my head. The security
14 for costs on any view are all water under the bridge.
15 THE PRESIDENT: I think that is accepted.
16 MR. MACLEAN: Yes, and so it should all come out of the budget.
17 THE PRESIDENT: That has just been accepted.
18 MR. MACLEAN: Before we come to the points we are really concerned with, the answer to the
19 settlement and ADR is that these Precedent Hs set out, as we can see, the usual stages in a
20 case, and they include settlement and ADR as a specified heading, and so it tends to be dealt
21 with, whereas other contingencies, for example, security for costs, or specific disclosure or
22 something might arise in a particular case and not in others. So that is why both parties
23 have made some provision for it, but insofar as both parties have made provision for a
24 hypothetical prospective attempt to settle the case then it all falls within Mr. Justice Warby's
25 principles, that is why I showed you *Yeo v Times Newspapers*, it is all entirely speculative.
26 THE PRESIDENT: But you put in----
27 MR. MACLEAN: Yes, we have.
28 THE PRESIDENT: --£45,000.
29 MR. MACLEAN: Yes, on that same speculative basis.
30 THE PRESIDENT: But what is it for, that £45,000? It seems to me I should not approve any
31 figure from (inaudible) discussions. There may be, or maybe not, discussions going on,
32 there often are, but they can continue, as we all know, to the door of the court, but I am just
33 trying to work out if you put in £45,000 why are you objecting to----
34 MR. MACLEAN: I am not objecting. I am not objecting.

1 THE PRESIDENT: You are not objecting to it.

2 MR. MACLEAN: I am not objecting at all, I am simply addressing the court's observation to my
3 learned friend, which was, in effect, what is going on here? There was £237 spent in April
4 that did not work.

5 THE PRESIDENT: What is the £17,000 about? Is there some extant process?

6 MR. MACLEAN: I have no idea whether there is some extant process, and you, Sir, should be
7 the last person to know, and I, no doubt, the second to last person to know.

8 THE PRESIDENT: But in your budget report it appears to be an error reduced rate.

9 MR. MACLEAN: Yes, but the rates, of course, deals with the general objection.

10 THE PRESIDENT: What is the error.

11 MR. MACLEAN: That is about taking out the – I am not sure, Sir, is the answer. We misread it,
12 I am told, there is no error. I cannot find an error, there is no error.

13 THE PRESIDENT: Right. So in that case the purpose of this report being to see what is agreed,
14 are you objecting, as far as the future is concerned, to £19,525?

15 MR. MACLEAN: I am sorry, Sir, now you----

16 THE PRESIDENT: I have taken out the £237 incurred.

17 MR. MACLEAN: Right. I see.

18 THE PRESIDENT: That leaves £19,525, is that----

19 MR. MACLEAN: Only in relation to the overall submission about the hourly rates and so on; it
20 is not the most important point.

21 THE PRESIDENT: No, I do not think so.

22 MR. MACLEAN: So that is that. Can I then go back to where we started, with the witness
23 statements?

24 THE PRESIDENT: Yes.

25 MR. MACLEAN: If you go back to p.330T, what this schedule tells us that Mr. Bronfentrinker
26 and Ms. Vernon have spent 30 hours each already, and Ms. Clark has spent 40 hours, if you
27 do the arithmetic already, to which is to be added a further 375 hours of solicitor time, to
28 give----

29 THE PRESIDENT: So, Ms. Clark has spent?

30 MR. MACLEAN: 40 hours, if you divide £15,800 by 395 you get 40. So 100 hours have been
31 spent already, or had been spent on 19th September already, actually, which is now some
32 time ago. Then there is to be another 375 hours split 75, 75 and then 75, 50, to give you the
33 £212,319. Frontier are then to add in £12,500 of their valuable time and then £75,000 is
34 suggested – estimated, I think – for my learned friend and for his leader.

1 Now, what are we all going to be doing? If you take my learned friend's submissions for
2 today, para. 21, Mr. Woolfe says, under his heading "Witness Statements":

3
4 "In each case the budget should allow for advice on evidence, the collating of
5 relevant documents on which the witnesses will need to comment."

6 As you, Sir, will know better than I, courts repeatedly emphasise that the purpose of witness
7 statements is not for witnesses to comment on all the documents, or a substantial number of
8 the documents in the case. The purpose of witness statements is for the witness to give
9 his/her account of the relevant facts to the extent that they are at issue, and it is the process
10 of parties arguing the case via comment and documents in witness statements that leads to
11 their inordinate length, and leads to these *cris de cœur* from the courts.

12 There is no sensible basis, in my submission, on which Frontier Economics can have any
13 substantial input into the factual witness statements, and it is a little hard to see how we get
14 to the £75,000 that is suggested for counsel involved in the witness statements either. I
15 accept, of course, that drafts of witness statements are commonly run past counsel, junior
16 counsel might, on occasion, have some input into the drafting, I accept all of that. But the
17 idea that Mr. Harris is going to spend £50,000 of his client's money on the witness
18 statements is frankly, unreasonable.

19 So, the witness statements are skewed, in that there is too much which has been done by the
20 grade A fee earners. Sir, you will have gathered, of course, the Quinn Emanuel structure is
21 not the same structure as the Eversheds structure, which is a partner and then a senior
22 associate and an associate. Quinn Emanuel have two partners, and then somebody who is
23 described as an "Associate", yes, but that associate's hourly rate is £395 per hour, which is
24 more than the senior associate in the Eversheds set up. In other words, the number three in
25 the Quinn Emanuel team is paid more per hour than the number two in the Eversheds team.

26 THE PRESIDENT: Yes.

27 MR. MACLEAN: That, presumably is a reflection of----

28 THE PRESIDENT: I get your point, you say that leads to an inflated cost, yes.

29 MR. MACLEAN: And the fact that Ms. Clark is paid that sum is presumably a reflection of her
30 experience, talent and ability.

31 THE PRESIDENT: Yes.

32 MR. MACLEAN: And if she is experienced, talented and able, then----

33 THE PRESIDENT: Well, I have your point.

34 MR. MACLEAN: And other people like her can----

1 THE PRESIDENT: Yes, I have the point.

2 MR. MACLEAN: --can be shouldering more of the burden.

3 THE PRESIDENT: Yes.

4 MR. MACLEAN: That is witness statements. So far as experts' reports are concerned, which is
5 the next topic, if you take my friend's document at para. 24, this is an example, and it is the
6 theme of my learned friend's submissions today, the theme of his submission is that the
7 discrepancy in costs between the two parties is, in effect, to be explained by the fact that his
8 clients bear the effective burden, and that is a recurring theme of his written submissions.
9 You see it, first, in para. 6 and it crops up again in a number of places. It crops up at
10 para.27 in relation to experts, it crops up at para. 30 in relation to the PTR, you see the
11 words "effective claimant", and it crops up again at para. 31 in relation to trial preparation
12 and, indeed, it crops up again at trial. That submission cannot possibly bear the weight, the
13 burden, which my friend puts on it in his submissions. We see that in relation to experts'
14 reports.

15 If we look at the same page we have just been on----

16 THE PRESIDENT: I understand that, and I have made comments on that already, so forgive me
17 if I cut you short.

18 MR. MACLEAN: Yes, Sir, of course.

19 THE PRESIDENT: You are pushing at an open door. Can you help me, your expert's report? I
20 appreciate it is never a direct comparison, but it has been agreed, and this is what you asked
21 for. What I am just trying to understand, your £257,763, I asked Mr. Woolfe, and he
22 helpfully explained, what his figure includes and does not include. In your trial preparation,
23 does the expert feature in that? We can look through it, obviously?

24 MR. MACLEAN: The expert features----

25 THE PRESIDENT: Does not seem to.

26 MR. MACLEAN: --only in relation to the expert's report.

27 THE PRESIDENT: But does not seem to appear at trial, so does that include attendance at trial?
28 Because, obviously he/she is going to charge for that.

29 MR. MACLEAN: Yes, but there is a note at p.329.

30 THE PRESIDENT: "Note: counsel's fee for trial. Expert's costs" and it is zero, so does that mean
31 that – what I am trying to see is whether I am comparing like with like. Does your
32 £257,763, which seems to be the expert's fee, does that include----

33 MR. MACLEAN: Sir, where is that number you have just referred to?

1 THE PRESIDENT: I am looking at the front page of your Precedent H. It says: "Expert's report",
2 if I am looking at the right figure, it is £257,763?

3 MR. MACLEAN: Yes, that is right.

4 MR. WOOLFE: You might get some assistance on p.328 of the bundle.

5 THE PRESIDENT: 328?

6 MR. WOOLFE: That is the more detailed split down.

7 MR. MACLEAN: I see, yes.

8 MR. WOOLFE: It tells you the split both between solicitor timing and expert timing at that stage,
9 and also there is a note explaining what the expert time consists of.

10 MR. MACLEAN: I was nearly there, Sir. If you go to 329, you see under the heading: "Trial",
11 row 11 "Other disbursements", do you see that, Sir? That £30,000.

12 THE PRESIDENT: 329?

13 MR. MACLEAN: The heading "Trial".

14 THE PRESIDENT: Yes.

15 MR. MACLEAN: If you look then to row 11 "Other disbursements", £30,000, that is the expert's
16 attendance at trial.

17 THE PRESIDENT: For some reason it is not under "Expert". It is not in the "Expert" column.

18 MR. MACLEAN: No, but that is an explanation of disbursements immediately below----

19 THE PRESIDENT: It says "Details to be completed" in my copy.

20 MR. MACLEAN: In the second last----

21 THE PRESIDENT: "Expert attendance".

22 MR. MACLEAN: "Expert attendance" that is it.

23 THE PRESIDENT: That is the £30,000, right, so that is the equivalent of their £35,000.

24 MR. MACLEAN: That is right.

25 THE PRESIDENT: And that comes, therefore, under trial.

26 MR. MACLEAN: That is right.

27 THE PRESIDENT: But trial preparation, in other words, the expert, perhaps, assisting you with
28 preparing cross-examination is not in trial preparation, there is nothing there.

29 MR. MACLEAN: That is part of the £30,000.

30 THE PRESIDENT: It is part of the £30,000 or part of the £257,000.

31 MR. MACLEAN: It is part of the £30,000 I am told. So the experts' fees----

32 THE PRESIDENT: It looks good value for attendance at the trial, and preparation. Yes, I see.
33 The report is----

34 MR. MACLEAN: £150,000.

1 THE PRESIDENT: Plus solicitors, so that is for the expert, and that is how you get to £257,000?

2 MR. MACLEAN: Yes, the £257,000, Sir, comes from p.328. The £257,000 is the total of the
3 solicitors' input in that last column, the £82,763 – if you go to p.328, under "Expert
4 Reports", the solicitors' incurred costs of £8,788 added to the £73,975 of estimated to be
5 incurred costs, which gives you the £82,763. Then the experts own fees of £150,000 and
6 then there is an estimate of involvement of leading and junior counsel totalling £25,000.
7 You add all of that up and you get to £257,000. So that, is the £257,000 and then in the trial
8 costs, in the summary page – I am getting there eventually, Sir – p.326, that is the £257,000,
9 and then the additional expert costs over and above that are included in the trial estimate,
10 the trial section at p.329.

11 THE PRESIDENT: Which is the £30,000.

12 MR. MACLEAN: That is right, and they come in, as I have just explained, in row 11 as to
13 £30,000 of that £483,000.

14 THE PRESIDENT: I have it. I am sorry, I have been perhaps a bit slow, but I have got it.

15 MR. MACLEAN: It is my fault. When one looks at the row 12 of the Gascoigne Halman
16 Precedent H – just focus on Frontier's own costs for the moment, and forgetting about the
17 involvement of solicitors and counsel in helping them along.

18 THE PRESIDENT: Yes.

19 MR. MACLEAN: The arithmetic, we start at statements of case of £85,000 and, as I have already
20 made the point, I am repeating myself, the fact that the experts are heavily plugged into the
21 pleadings on the Gascoigne Halman case, in a way that they were not on my case, is of
22 some importance and relevance for the court when it is asking itself what the *in futuro* costs
23 are of the expert.

24 My learned friend makes a point in his written submissions that there is something very
25 curious going on because we had not put any figure in for incurred costs, and we must have
26 had some discussion with our expert. Of course, we have. The reason why we have not
27 incurred any costs is simply that the expert has not yet submitted a bill, but he has had
28 involvement. I should just add at this point---

29 THE PRESIDENT: Is that included in the estimate for the future?

30 MR. MACLEAN: Yes, it is all in there. My learned friend makes quite a bit of the fact that my
31 clients are familiar with the issues and so on, and there is a bit of a learning curve on their
32 side, and so on. In fact, the expert engaged by my learned friend's clients was the same
33 expert who acted for Zoopla in the Zoopla merger with the Digital Property Group, which

1 eventually gave rise to the OFT's Decision, published on 26th April 2012 on the anticipated
2 merger between the Digital Property Group and Zoopla Limited.

3 Any suggestion that the other side's expert started at ground zero or below would not be
4 correct. The other side's expert knows more about online property portals, I apprehend,
5 than almost any other person in the country, and did do before they got instructed to be the
6 expert in this case, and that is no doubt why they were instructed.

7 THE PRESIDENT: Yes.

8 MR. MACLEAN: So that, with respect is a thoroughly bad point. If you add up Frontier's costs,
9 starting with £85,000 and statements of case, and you add up all of the numbers in that row,
10 all the way through this Precedent H, you get to a number which is in excess of £400,000, if
11 my mathematics is correct, which I think it is. You get £85,000 and then £10,000 of
12 disclosure, and £12,500 of witness statements, £233,000 for the actual experts report itself,
13 £35,000 for trial preparation and £35,300 for trial, and it comes to more than £400,000,
14 which is well over double the costs which my clients are budgeting for, for the expert
15 themselves, leaving aside the involvement of the lawyers with the experts. As you will
16 have already observed, Sir, there is no reason in principle in this case why there should be
17 any material discrepancy really – this is not how you put it, Sir, but this is what I think you
18 meant----

19 THE PRESIDENT: Yes.

20 MR. MACLEAN: --there is no reason in principle why there should be any material discrepancy
21 one way or the other between the experts.

22 Looking then at the lawyers' involvement, in my learned friend's client's Precedent H at
23 p.330T, there is provision for 75 hours of partner time – partner time – in the production of
24 the expert report. It would be very surprising if the experts, who had acted for Zoopla in the
25 Digital Property Group and Zoopla Limited merger, needed his/her hand held as to 75 hours
26 of Quinn Emanuel partner time. But that is what we are being asked to budget for, and that
27 is what we are being----

28 THE PRESIDENT: Just a moment----

29 MR. MACLEAN: This is p.330T.

30 THE PRESIDENT: Under "Experts' Reports"?

31 MR. MACLEAN: Under "Experts' Reports". The *in futuro* partner time is 75 hours----

32 THE PRESIDENT: Yes, I am with you.

33 MR. MACLEAN: --split 35:40, to add to the time they have already spent, no doubt having
34 discussions with the expert already, and then there are 50 hours of the experienced, able and

1 talented Ms. Clark, giving a total of more than £65,000 of solicitor input into the expert
2 report. And, as if that was not enough handholding for the expert, we then have £10,000 of
3 Mr. Harris' valuable time and £8,000 from my learned friend as well. I accept, of course,
4 as I did with the witness statements, of course, there will be some input with counsel in
5 discussing things with the expert report and having some discussion with the expert before
6 the report is finalised, but the idea that one has 75 hours of partner time in the production of
7 an expert report----

8 THE PRESIDENT: Yes, are you saying that counsel's time is pretty similar to yours?

9 MR. MACLEAN: It is pretty similar, yes.

10 THE PRESIDENT: It is the £65,000, yes, I have got that point, thank you.

11 MR. MACLEAN: That is what I say about that. My learned friend's suggestion that there is
12 some obvious deficiency in our approach is not right for the reasons I have just given.
13 Can I then say something very briefly about the PTR? The overall point about the PTR is
14 the one which you, Sir, have already made, which is if there is to be some great punch-up at
15 the PTR about specific disclosure or privilege or goodness knows what it might be, that is
16 all speculative at this stage. There may not be such a set piece for you, Sir, to grapple with
17 there and, if there is, it will be something that is outside the budget, and if there is not, we
18 will have the usual type of pre-trial review where the parties come along, of course familiar
19 with their case, and help the court essentially to programme, manage and plan for the
20 upcoming trial. So, this budget is overblown. It provides for 40 hours which, to some
21 people, is a working week – I am sure it is not a working week for partners at Quinn
22 Emanuel, but for some people it is a working week. 40 hours of partner time for a pre-trial
23 review, with 30 hours from Ms. Clark and 25 hours from the paralegals – I am not sure
24 what they are doing either, added to brief fees which one can only assume are calculated on
25 the basis that there is going to be some significant preparation for some of these as yet
26 phantom applications which are going to be heard at the pre-trial review, because the idea
27 that one would spend more than £68,000 on counsel for a vanilla pre-trial review, which is
28 the basis on which the court ought to be proceeding in my submission, is again entirely
29 unreasonable.

30 So, the suggestion that my learned friend's document, that a lot of preparation will be
31 required is speculative. To the extent that it is not speculative in that he says that a PTR
32 requires a party's legal representatives to be properly on top of the way in which the case
33 will be put at trial, if that is right, that should be reflected in a reduction of the trial and trial
34 preparation costs, because one knows from one's practice that you prepare the case for trial

1 and often by the time the pre-trial review comes along one has a good idea of the detail of
2 cross-examination and sometimes one does not.

3 THE PRESIDENT: Yes.

4 MR. MACLEAN: But you only properly prepare it, and you only do prepare it, once. So my
5 learned friend is trying to have his pre-trial review cake and then eat it at trial and that, with
6 respect, is not the right approach.

7 So far as the time estimate for the PTR is concerned, at the moment there is no reason to
8 think that it is going to take more than half a day in my submission, and so the court should
9 proceed on that basis.

10 Trial preparation: my learned friend makes the point on a number of occasions that they
11 have more witnesses than we have. Now, we do not know what these witnesses are going
12 to say. So far as they are factual witnesses, presumably the factual witnesses are going to
13 deal with the alleged boycott allegations.

14 THE PRESIDENT: Well, not only, they will deal with how the market works, and---

15 MR. MACLEAN: Yes, but in terms of the factual issues on which the case will turn might be
16 those. My point is simply this: if there are more witnesses from the other side, which we
17 are told there are going to be, of course, they have to prepare those witness statements, I
18 accept that, but, in fact, when there are more witnesses the resultant burden at trial and trial
19 preparation falls on the other side. It is me who is going to have to cross-examine all these
20 people.

21 THE PRESIDENT: That is your brief fee, it is not part of trial preparation.

22 MR. MACLEAN: No, but I am simply making the point that the fact there are more witnesses is
23 not something which rebounds to my learned friend's advantage by the time you get to trial
24 preparation or trial. Indeed, if anything it goes the other way because, as you will
25 remember, Sir, I am sure the bit that takes the inordinate amount of time in any trial
26 preparation is preparing the cross-examination, whether of a factual witness or an expert
27 witness, and that is a burden which, preponderantly, is going to fall on me and not on Mr.
28 Harris.

29 THE PRESIDENT: Your trial preparation is £123,000 is it not?

30 MR. MACLEAN: Yes, that is because this schedule treats trial preparation as being a solicitor
31 exercise, it does not make any provision for experts or counsel----

32 THE PRESIDENT: Which schedule, sorry? Your schedule?

33 MR. MACLEAN: My Precedent H, p.329 "Trial Preparation".

34 THE PRESIDENT: That is £123,000?

1 MR. MACLEAN: That is right, that is all solicitors.

2 THE PRESIDENT: This is £98,000, including £35,000 of expert?

3 MR. MACLEAN: That is right.

4 THE PRESIDENT: So this is a lot less than yours?

5 MR. MACLEAN: Yes, but that is because the burden of preparing the trial preparation is
6 preparing the bundles, which takes a long period of time. My learned friend, says they have
7 some input into what goes into the bundles but, with respect, it is obvious what goes into the
8 bundles.

9 THE PRESIDENT: But their lawyers' cost is half yours, effectively?

10 MR. MACLEAN: Yes, but the burden of preparing the trial falls on the party whose job it is to
11 put together the trial bundles.

12 THE PRESIDENT: If you say it costs £60,000 to prepare trial bundles I find that pretty
13 remarkable, but even if it is, it cannot be more than £60,000 to prepare trial bundles, can it?
14 So you have already got yourself in preparing trial, liaising with counsel and all the rest of
15 it, about the same as the defendant. What they have added is the cost of their expert to be
16 involved in preparation. You may object to that but I do not see what you are objecting to
17 in the solicitors' work, it seems to be much the same as yours – probably less, because as I
18 say I find it hard to think it costs £60,000 to prepare trial bundles.

19 MR. MACLEAN: What are the 60 hours of partner time doing in trial preparation at that stage?
20 We have counsel who, in the next stage, are seeking a budget of £640,000 for trial – I will
21 come to that in a moment.

22 THE PRESIDENT: Well, you have 55 hours of trial preparation by a partner, what is the great
23 difference? It is not preparing bundles, is it?

24 MR. MACLEAN: It is mostly preparing the bundles for the trial.

25 THE PRESIDENT: The partner is preparing the bundles?

26 MR. MACLEAN: Putting the material together for the trial, liaising with the witnesses and----

27 THE PRESIDENT: Hang on a minute, Mr. Maclean, are you saying the partner in Eversheds is
28 going to be preparing the bundle?

29 MR. MACLEAN: No, no, of course she is not.

30 THE PRESIDENT: Aside from having 110 hours by an associate, 140 hours by trainee paralegal,
31 who I imagine is preparing the bundle, you have 55 hours of partner time.

32 MR. MACLEAN: Yes.

33 THE PRESIDENT: I do not see why you should have significantly more partner time than the
34 other side. I just do not follow what you are----

1 MR. MACLEAN: Sir, I accept that there is not much in it in terms of partner time.

2 THE PRESIDENT: The burden of your argument, it seems to me, is that both sides are grossly
3 exaggerated or disproportionate - I should not say exaggerated----

4 MR. MACLEAN: I accept that there is not much in it in terms of the trial preparation as to the
5 partner time. I do seriously query what Frontier Economics are doing at this stage at trial
6 preparation. I accept, of course, that in the run up to trial one would ordinarily have
7 discussions with one's expert, and so on. We do this in phases, but one cannot let the wood
8 completely dominate the trees. You ought, Sir, in my submission, to take half a step back
9 and just ask yourself how much money are Frontier collecting for their overall work on this
10 case?

11 THE PRESIDENT: I understand that. I understand the Frontier point, and you say £400,000 may
12 be what they charge, but as a recoverable cost it is disproportionate and unreasonable.

13 MR. MACLEAN: That is right.

14 THE PRESIDENT: Therefore, they should not have an extra £35,000, or include in it £35,000 for
15 preparation.

16 MR. MACLEAN: Yes. Then, Sir, we come to trial. If we assume that the trial preparation, the
17 solicitor input at trial preparation has been including things like liaising with witnesses and
18 experts, and feeding in assistance to counsel in cross-examination, and so on, by the time
19 one gets to the trial this schedule appears to contemplate that both partners at Quinn
20 Emanuel will be present throughout the trial. I assume that is how we get 85 hours each.
21 Although it is a 12 day trial, you will, in fact, remember that the order provides for there to
22 be gaps of two days and one day. It is actually nine hearing days - nine days when we will
23 all be together, as I understand it. So it is a nine hearing day trial.

24 I query, object, take issue with, whatever phrase one wants to play with, the 170 hours of
25 grade A partner time at trial. If the client is sufficiently important that Quinn Emanuel need
26 to show up with two partners, that is a client liaison, client relationship matter which is
27 between them and their client, but that is not a recoverable cost in litigation.

28 THE PRESIDENT: Yes.

29 MR. MACLEAN: Then one comes to the expert. I accept, of course, the expert has got to be
30 there at trial, and there is nothing between the parties really. There is £5,300 in it for the
31 cost of the expert attending trial. So that, in the scheme of things, is *de minimis*.
32 What is not *de minimis* are counsel's brief fees. Mr. Harris's hourly rate is, we are told,
33 £850 - we see that - which, in itself, in my submission, is a little bit on the high side,
34 certainly a good bit higher than my rate which I think is identified in our schedule, if it is

1 not we have told them, it is £700. Even taking the £850 and allowing Mr. Harris a ten hour
2 day for his trial preparation - and, as I say, although it is a 12 day trial, it is nine hearing
3 days that one is preparing for, because there are two days built in for written submissions,
4 for which no doubt a refresher will be charged - so even allowing ten hours of preparation at
5 £850 an hour is £8,500; and even allowing 20 days of preparation for these nine hearing
6 days gives £170,000 of preparation, to which, of course, one has to add presumably
7 refreshers for days 2 to 12 of the hearing. Even allowing the sort of refresher that one might
8 expect for somebody of Mr. Harris's seniority and experience, it is very, very, very difficult
9 to get anywhere close to £442,000 - I find it, frankly, impossible to get to any number that
10 has got a 3 at the front of it, never mind a 4 - unless this case is going to be prepared for
11 weeks and weeks and months on end, which would be excessive and unreasonable. It is a
12 nine hearing day case. In my experience, a one day case takes roughly two days preparation
13 plus perhaps a little bit. On that basis of two plus a little bit, nine hearing days, that would
14 be 20 days of preparation. Twenty proper days of ten hours a day preparing for a case such
15 as this ought to be sufficient for somebody of Mr. Harris's talent to get his head round the
16 case and be ready for trial.

17 The same applies to junior counsel *pro rata*. On any view, these brief fees are exorbitant.
18 If, which appears to be the case, there is a lot more in total of senior solicitor involvement at
19 the trial stage as well, then all the more so because somebody else in the end is doing the
20 work. In my experience, it is nearly always the barristers who do the work for the trial in
21 terms of the conduct of the trial. So again, there is over-egging of this particular trial
22 pudding.

23 Sir, that, I think is all I would urge on you in relation to this.

24 THE PRESIDENT: Thank you. Yes, Mr. Woolfe?

25 MR. WOOLFE: Sir, I do not want to take up too much more of your time on what should be a
26 fairly swift process. There do seem to be certain, I think, mistaken assumptions as to how
27 this has been prepared. In relation to witness statements, one of the points that Mr. Maclean
28 was making seemed to relate to the time one would spend in preparing the principal witness
29 statements, the first round of witness statements. These costs relate not only to the
30 preparation of those witness statements, but also to reviewing the other side's witness
31 statements and preparing witness statements in reply. That is a lot more work beyond that.
32 In fact, if you divide the solicitor time by the number of statements, it is about 67 hours----

33 THE PRESIDENT: I know you have both made detailed points, as tends to happen on these
34 hearings from what I am told, and I am much less experienced at costs budgeting than

1 obviously Masters, but from what they have told me people always want to get into the
2 detailed scrutiny of particular items. In the end, I have to stand back and take an overall
3 view informed by looking at things like - as I say, what struck me is the amount of partner
4 time compared to more junior lawyer time, and so on, that has been spent - why the figure
5 seems very high. I know that preparing witness statements does take a lot of time. The
6 facts of this case are not necessarily easy. I do not think they are as simple as Mr. Maclean
7 makes out, so I can see that a lot of time is involved. Of course, there are rebuttal
8 statements, and equally you serve more witness statements, which means the other side has
9 to consider more witness statements. So there is a lot of work, I see that.

10 MR. WOOLFE: The first point applies to witness statements throughout, which is actually that
11 there can be a case that employing somebody more senior leads to things being done more
12 efficiently. Hence, in relation to the number of witness statements, we actually have a
13 smaller number of hours per witness statement, if you like, which may reflect the fact that
14 somebody more senior is doing it. Focusing solely on partner time in isolation does not
15 really give you the full picture.

16 In respect of experts, Mr. Maclean made great play of the fact that Frontier Economics
17 acted in relation to the Zoopla merger. My understanding is that the specific partner at
18 Frontier who is going to be acting as the expert did not act in relation to that merger. That
19 is my understanding as I stand here now.

20 THE PRESIDENT: Who is it?

21 MR. WOOLFE: David Parker.

22 THE PRESIDENT: David Parker is your expert.

23 MR. WOOLFE: There are two more high level points I would make in respect of expert
24 evidence. First of all, the time for expert reports is very comparable between the two costs
25 budgets - the costs are very similar, the differences in respect of the experts' fees.
26 The second point I would make is that we do find it somewhat surprising that they have no
27 time in their costs budget in relation to statements of case from experts or in relation to
28 disclosure or witness statements. They only have this one fee of £150,000 in relation to the
29 preparation of the report, and £30,000 for attendance, with no separate provision for
30 preparation for trial. We note that is an estimated cost and a round figure.

31 THE PRESIDENT: Yes, but I think what they said is that the expert was involved in the
32 statement of case but it does not appear under that head. Just as we went through how the
33 expert fee is allocated, it is all included. It is not that they were not involved, it could have
34 been split out that way, but it is included in the 150. That is what I understood.

1 MR. MACLEAN: That is right.

2 MR. WOOLFE: If that is the case then our simple remark is this: if we are trying to take their
3 costs budget as a point of comparison, which is why it is being raised, we find it surprising
4 and unrealistic in a case of this magnitude that one can get that involvement at statement of
5 case time, the preparation of an expert report, plus the preparation of a reply report, plus a
6 meeting, plus assistance of counsel in preparation for cross-examination for an all in fee of
7 £150,000.

8 THE PRESIDENT: Yes.

9 MR. WOOLFE: We have estimated ours on what we think is a realistic basis. We do not accept
10 that their £150,000 is----

11 THE PRESIDENT: It is said that if even if £150,000 is unrealistic, £400,000 altogether is
12 unreasonable.

13 MR. WOOLFE: That is what they are saying. We can see how it breaks down and if you take the
14 provision in respect of statements of case, disclosure, witness statements, those are all
15 items, some of which have been incurred, some of which have been estimated. Therefore,
16 there is £233,000 in respect of the actual preparation of the expert report. We say that is
17 reasonable and proportionate in a case of this nature.

18 Once you get to the end of expert reports there is not a great deal of expert cost beyond that.
19 You are looking at £35,000 for trial preparation and £35,000 for the defendants, which we
20 would say is reasonable.

21 THE PRESIDENT: Yes.

22 MR. WOOLFE: Again, if you are concerned with setting them out then detailed points are of
23 limited assistance, but for the PTR we have pretty similar allowances of senior solicitor
24 time, as you saw, Sir, 60 hours for us, 55 hours for their solicitor time. The bundles do not
25 make such a difference as they are making out. It is hard to see how our PTR costs----

26 THE PRESIDENT: The PTR----

27 MR. WOOLFE: Sorry, I meant the trial preparation costs.

28 THE PRESIDENT: You are talking about trial preparation. You have dealt with PTR.

29 MR. WOOLFE: It does boil down to how far one anticipates issues that may arise. If this
30 Tribunal is going to take a more lenient approach about amending the costs budget - should
31 the PTR be bigger than Mr. Maclean anticipates then there needs to be consistency across
32 the piece, is what I am saying. You can either be tight now and lenient later or lenient now
33 and tight later, but there has to be consistency between the two.

34 THE PRESIDENT: Yes.

1 MR. WOOLFE: Trial preparation, I have already made my points.
2 Sir, in respect of partner time at trial, our schedule was prepared on the basis of ten hour
3 days for partners when they are attending trial. I do note that the guidance notes for
4 Precedent H are supposed to cover attendance at trial or conferences and other activity
5 outside court hours during the trial.
6 THE PRESIDENT: What puzzled me about your attendance at trial was that it appears that both
7 partners will be attending the totality of the trial.
8 MR. WOOLFE: In our schedule the 85 hours of partner time is not calculated on the basis of both
9 partners attending the entire trial.
10 THE PRESIDENT: It is a nine day hearing----
11 MR. WOOLFE: It is a nine day trial. This is calculated on the basis of ten hour partner days. So
12 that, in itself, without any time in meetings----
13 THE PRESIDENT: I do not quite follow.
14 MR. WOOLFE: If you were looking at the figure for equivalent attendance for all parties at trial
15 and associated elements, Ms. Clark's hours, estimated, are 120.
16 THE PRESIDENT: That is obviously not just in court?
17 MR. WOOLFE: No. No, it is full court days and the immediate - trial preparation involves----
18 THE PRESIDENT: I am surprised that, when you have got to that point, there is 85 of each
19 partner through the trial, particularly if they are not both attending.
20 MR. WOOLFE: Clearly, this is a case where it would be proper for at least one partner to be in
21 attendance on each day of the trial, rather than have a junior fee earner only. There also
22 needs to be provision for work around the trial, in relation to the trial and not the trial
23 preparation.
24 Perhaps, Sir, it may assist you to be aware of the guidance notes for Precedent H. I am sure
25 you are familiar with them up to a point, but sometimes it drops out of one's mind. It starts
26 at p.151 of volume 1 of the White Book. At trial, the costs that are specifically supposed to
27 be included here are solicitors' attendance, also all conferences and other activity outside
28 court hours during the trial, attendance on witnesses during the trial. So there is an element
29 of work which is not simply sitting in court.
30 THE PRESIDENT: I understand that.
31 MR. WOOLFE: We say that if you add them together that is 170 hours of partner time, plus 120
32 on an equivalent basis of immediately involved stuff. There may be some points where it is
33 appropriate to have two partners in attendance, but we are not allowing for them both to be
34 there all the time.

1 THE PRESIDENT: I see, yes.

2 MR. WOOLFE: Then the final matter was counsel's brief fees for the trial. My learned friend
3 made some play of the fact that Mr. Harris's hourly rate is higher than his. Equally, my
4 hourly rate is lower than Mr. Holmes' hourly rate. However, hourly rates are not
5 necessarily a turning point when one comes to brief fees. They are agreed on a different
6 basis. They have been prepared with regard to the work that would be required, the
7 blocking out of the diary and the kind of focus that would be required to bring this case
8 properly to trial.

9 THE PRESIDENT: All right, thank you. Have you finished?

10 MR. WOOLFE: Simply that our figures for an PTR are very similar to theirs at solicitor level,
11 that is the only point.

12 THE PRESIDENT: Yes, and you say it is a difference of approach.
13 All things being equal, I would have wanted to give judgment straight away, but I do have
14 to get away today, I cannot sit late. It is also the first costs management ruling in the
15 Tribunal, so I am encouraged by Mr. Justice Warby's concern to try to get it right, so I think
16 I will reserve my decision. I will, if possible, subject to other things, get judgment out by
17 the beginning of next week.
18 I have to rise just after four, so I will deal with the reserved costs. That is your application?

19 MR. MACLEAN: That is my application. There is a schedule, which I hope has been inserted
20 into the court's bundle A, section F, tab 7H.

21 THE PRESIDENT: Yes, section F - has it got a page number?

22 MR. MACLEAN: Yes, 135CG. You should then be looking a statement of costs, summary
23 assessment, and about a quarter of the way down the page, "Claimant's statement of costs,
24 re set aside costs management". What it comes to is a total of £27,390.50. You get that
25 from p.135CI.

26 THE PRESIDENT: Let me just see, your fees, attendance - it says "Attendance at hearing", is
27 that today?

28 MR. MACLEAN: Yes, that is today. Obviously the matter will be fresh in the Tribunal's mind,
29 but the application did give rise to quite a lot of work on the part of both myself and
30 Mr. Holmes, but also at Eversheds there was a host of witness statements from both sides,
31 there were the submissions which the court has got in the same bundle at 7A, which were
32 our----

33 THE PRESIDENT: Just a minute.

1 MR. MACLEAN: I did ask my learned friend earlier whether there is an issue of principle on
2 these costs, and I understand there is, which I do not begin to understand, because, in my
3 submission, this application, having been brought and been dismissed, the only appropriate
4 order, and the one I ask for is an order that my clients have their costs of and occasioned by
5 the other side's application to discharge s.2 of the Tribunal's order of 14th September. I
6 invite the court to summarily assess them and order them to be paid within - if it is 14, 21 or
7 28 days I do not really mind - in the sum in that schedule. That is my application.

8 THE PRESIDENT: Thank you.

9 MR. WOOLFE: Sir, can I just address you, and I will be very brief, on the issue of whether we
10 should bear the costs. We only have two points. The first is that these are costs which are
11 ancillary to costs management essentially, and that ordinarily falls within the general
12 conduct of the case. Obviously there was a specific application made in this case. The
13 reasons why that application was made, as you will be very well aware, Sir, was that there
14 was a difference of recollection on the two sides regarding an agreement which was reached
15 through a combination of orally and emails and the like in rather horrid circumstances
16 around the CMC back in July.

17 We say, first of all, costs management is normally a matter for costs in the case; and
18 secondly, it is understandable, and in fact you recorded in your judgment that there was a
19 matter of honesty on either side. It was a matter of recollections differing and that may be
20 understandable in circumstances where things are discussed around a CMC. It was an
21 agreement, or a matter of interpreting the scope of an agreement that was reached - a
22 question of the scope of it - around a case management hearing and its implications for the
23 case management of the case, and we say, therefore, the costs should be costs in the case.

24 THE PRESIDENT: Yes, thank you.

25 By order made on 30th September 2016, and for the reasons in my judgment of 7th October,
26 I dismissed an application made by the defendant, Gascoigne Halman, to vary the terms of
27 an order for costs management that I had made on 14th September.

28 Because it was a matter of costs management in the proceedings, the order I made for costs
29 in the 14th September order was that the costs of the claimant's case be costs in the case.

30 The issue of the effect of an order made by Sir Kenneth Parker in the High Court on 5th July
31 was raised at that hearing. As it was raised in somewhat hurried circumstances, I gave
32 Gascoigne Halman liberty to consider the position and make an application to vary the order
33 of 14th September if so advised.

1 Having considered it, they then decided to make a specific application by letter of
2 19th September, followed by a witness statement the following day. As recorded in my
3 judgment of 7th October, I rejected the application and found that the evidence of the
4 claimant as to what was agreed was to be preferred as against the evidence of Gascoigne
5 Halman. I made it clear that this was not specifically a criticism of the credibility of the
6 solicitors for Gascoigne Halman, but the fact remains that they took out an application and
7 Gascoigne Halman was unsuccessful.

8 Mr. Woolfe, in resisting an application by the claimant for the costs, says that this was a
9 matter that was ancillary to costs management. Of course it related to costs management,
10 but costs management was dealt with at the hearing of 14th September. This was a very
11 specific application based on a view of the arrangements made in or outside a High Court
12 hearing which failed. It need not have been made. It was clearly made after careful
13 consideration following the 14th September hearing and, having been made and having
14 failed, it seems to me that the usual order for costs should follow, namely that the successful
15 party should recover its costs. The fact that it was based on a difference of recollection is,
16 of course, true of many disputed matters in court, but that, in itself, in my view, is not a
17 reason to avoid the usual costs order.

18 Accordingly, I order that the claimant recovers its costs of that application, which I am
19 asked summarily to assess. There is before me a statements of case signed by the partner at
20 the claimant's solicitors. It shows the costs in the amount of £27,390.50. Mr. Woolfe has
21 not sought to raise any challenge or criticism----

22 MR. WOOLFE: Sir, I hesitate to interrupt, but I understood we argued about the principle and
23 then, if you were against me, I was going to address you briefly on quantum. I will take all
24 of 30 seconds.

25 THE PRESIDENT: You tell me what you want to say because I thought I had made it clear I
26 have to go in a minute.

27 MR. WOOLFE: Indeed, Sir, it is a fairly substantial costs schedule, it does involve 20 hours of
28 counsel time and some 30 hours of partner time, including 20 hours working on documents.
29 There were two fairly shortly witness statements from Ms. Farrell, and we say the sum
30 should be reduced somewhat.

31 THE PRESIDENT: Do you want to say anything, Mr. Maclean?

32 MR. MACLEAN: Very briefly. If the basis of the application had been factually correct we
33 would not have had to spend so much time trawling through our email boxes for the night

1 that we were told we had received the order, which actually was never sent. This entire set
2 of costs were brought on the other side's head.

3 THE PRESIDENT: Thank you. Going to back to what I just said, Mr. Woolfe intervened to say
4 there is a challenge to the amount. I do not see any fault in the amount of solicitors' time
5 involved. They had to very carefully trawl through what happened in really quite fevered
6 exchanges over the days running up to and then overnight in the hearing in the High Court
7 before Sir Kenneth Parker. A lot was said on the cost management application which I
8 heard a few moments ago about the costs of counsel. I do think that the amount for both
9 leading and junior counsel on a matter of that nature is somewhat excessive, and I will,
10 therefore, reduce the amount to £24,000 to be paid, Mr. Woolfe, in 14 days?

11 MR. WOOLFE: Yes, Sir.

12 THE PRESIDENT: So be it, £24,000 to be paid in 14 days.

13 I do not make an absolute promise that it will be at the beginning of next week, but I will do
14 my best to get a judgment out on the costs management for the beginning of next week.

15 MR. MACLEAN: I am very grateful.

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