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IN THE COMPETITION
APPEAL TRIBUNAL

Case No. 1303/5/7/19

Victoria House,
Bloomsbury Place,
London WC1A 2EB

21 March 2019

Before:

THE HONOURABLE MR JUSTICE ROTH

(President)

(Sitting as a Tribunal in England and Wales)

BETWEEN:

MELANIE MEIGH
(TRADING AS THE PRINKNASH BIRD AND DEER PARK)

Claimant

- and -

PRINKNASH ABBEY TRUSTEES REGISTERED

Defendant

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CASE MANAGEMENT CONFERENCE

A P P E A R A N C E S

Mr Matthew O'Regan (instructed by Burges Salmon LLP) appeared on behalf of the Claimant.

Ms Ciar McAndrew (instructed by Loxley Solicitors Limited) appeared on behalf of the
Defendant.

1 THE PRESIDENT: Thank you for your skeleton arguments, which were commendably brief and
2 to the point. Shall we start, following the agenda, with the question of the forum? It is,
3 I think, agreed by both sides that it should be in England and Wales, and that seems to me
4 clearly right, so I will make that order.

5 Secondly, it is suggested that the question of liability should be tried first, and any question
6 of quantum and damages held over. That also seems very sensible.

7 There is only the question - and I am coming to the preliminary issue point in a minute - as
8 to whether the Claimant urges the question of exemplary damages should be decided with
9 liability which, as I understand it, is simply the question of principle, whether the Claimant
10 should be entitled to recover exemplary damages rather than any question of quantification
11 of those damages. Is that right?

12 MR O'REGAN: Yes, Sir, that is right. Clearly, it seems to me, for the Claimant, whether or not
13 the Defendant is liable in exemplary damages is a question for the first hearing on liability.

14 THE PRESIDENT: Well, it is a pure question of law deriving from any facts that might be found.

15 I think, subject to anything that Ms McAndrew says, that seems sensible, because the hope,
16 if the Claimant fails that is the end of it, and if the Claimant succeeds then obviously there
17 is a hope that there might be a resolution of quantum and no need for a further hearing. To
18 do that, it is probably helpful to know whether the Tribunal considers that the Claimant is
19 entitled to exemplary damages or not, because that will materially affect the negotiations.

20 Unless, Ms McAndrew, for your client, you are very much against that, in which case I will
21 hear from you, it does seem to be sensible that we should deal with the point of principle.

22 MS McANDREW: Might I address that?

23 THE PRESIDENT: Yes.

24 MS McANDREW: Hopefully I can deal with that on two bases, the first being one really of case
25 management, and always approaching this case, which is a relatively compact one, on the
26 basis that we want to dispose of it with the maximum efficiency and proportionality.

27 Exemplary damages is a separate issue, which is likely to require additional evidence
28 beyond that which is required to resolve the----

29 THE PRESIDENT: What sort of evidence might it require?

30 MS McANDREW: Effectively, as the Tribunal will be aware, it will require a finding of
31 outrageous conduct by the Defendant, which is likely to require evidence of the Defendant's
32 state of mind going beyond that which is required to assess any subjective, or alleged
33 subjective, anti-competitive intent. All that evidence will have to be clearly well ventilated

1 in the course of the substantive hearing if the Claimant's proposed approach were adopted,
2 given the obvious severity of a finding that the Defendant was wrong in principle.

3 THE PRESIDENT: Yes, I just want to see how the claim for exemplary damages is put. It is
4 para.126, is it not?

5 MR O'REGAN: Yes, Sir.

6 THE PRESIDENT: (After a pause) Yes.

7 MS McANDREW: Sir, as you will see at para.129, the allegation is made that the Defendant
8 calculated to make a profit by protecting the monastery shop from competition. It is our
9 submission that that is qualitatively different from issues going to whether there was anti-
10 competitive intent. So, from the case management point of view, we say that that would put
11 an obstacle in the way of completing the hearing within a three-day guideline.

12 THE PRESIDENT: Yes.

13 MS McANDREW: And the second basis on which the Defendant would resist the Claimant's
14 suggestion is that it is a little odd, as a matter of legal principle, to consider this issue of
15 exemplary damages in isolation from quantum more generally, and that really is because, as
16 the Tribunal will be aware, there are essentially two categories of common law exemplary
17 damages, and it is only the second of these which is relevant. It is a calculation that a
18 cynical disregard for the Claimant's rights will result in a profit which exceeds the damages
19 at risk. It is our submission that it is quite difficult to calculate that until the level of
20 compensation payable as a result of the alleged infringements is known, because it has
21 happened. There are cases in which the level of compensation was considered to be
22 sufficient that no question of exemplary damages really arose.

23 We submit that naturally the two issues sit better alongside each other and should be
24 considered at the second stage.

25 THE PRESIDENT: Yes. Mr O'Regan?

26 MR O'REGAN: Sir, in my submission, it is unlikely that significant additional time would be
27 taken up in a main hearing with dealing with the question of exemplary damages, and that is
28 something that can be quite adequately put to the relevant witnesses at the time that they are
29 being cross-examined on other matters. It would be wholly disproportionate, in my
30 submission, Sir, to have to come back and have a further hearing upon this matter some,
31 say, six to nine months later when it is unlikely to take up a considerable amount of time at
32 the original trial.

33 As regards my learned friend's submission that one needs to, first of all, identify the award
34 of general damages, quantification of general damages, before one can consider a question

1 of exemplary damages, in my submission, that is to confuse liability and quantum. It is
2 quite clear, in my submission, that the Tribunal would be able, in an initial trial, to
3 determine whether or not the Defendant has acted in flagrant disregard of the Claimant's
4 rights with a view to making a profit. The quantification of that liability is something that
5 can either be dealt with by agreement between the parties or subsequently at a further
6 hearing, if necessary. That is a different question from the question of liability. So I would
7 submit that it can all be dealt with in the initial hearing within three days.

8 THE PRESIDENT: Thank you for those submissions.

9 I have looked at the way exemplary damages is pleaded. It is alleged that the Defendant
10 acted with the intention of causing the Claimant to cease to trade. It is said that the
11 Settlement Agreement, among other things, was entered into with a view to making a profit,
12 and it does seem to me that does open a number of issues which otherwise are not before the
13 Tribunal and may involve additional evidence, including the communications that led to the
14 Settlement Agreement itself internally within the Defendant. I think Ms McAndrew has a
15 fair point when she says that the question of whether exemplary damages might be awarded
16 may be affected by the quantum of compensatory damages that the Tribunal finds are
17 appropriate.

18 I am concerned that it could prolong the hearing, not extensively but significantly. I think,
19 for all those reasons, it is more appropriate that all questions of damages are dealt with
20 together, so the first trial will be liability only and no question of damages, and therefore
21 would not cover the question of exemplary damages.

22 The next question is whether there should be a preliminary issue on the construction of 9.1
23 of the Lease. I see what is said by the Defendant in your skeleton and also a letter that has
24 come to the Tribunal from your instructing solicitors, Loxley, and that it might take less
25 than a day and if the Defendant was wholly successful on that, it would resolve the matter.
26 I have to say, Ms McAndrew, that I have read that. As against that, and the whole trial is
27 about three days, if there is a preliminary issue there is a potential of an appeal against it by
28 either side. After the appeal, if you succeeded on the preliminary issue and it was reversed
29 on appeal, the matter comes back, and we then have to have the rest of the trial. If you
30 failed on it and then you appealed and your appeal was unsuccessful, again the same result.
31 We then have the rest of the trial, and there then could be another appeal. I do, I have to
32 say, have very severe doubts that it is a very efficient way of proceeding, bearing in mind it
33 may not be a binary question, because it is possible that certain of the activities sought are
34 permitted and others are not. So it is not so clean-cut.

1 I am not very attracted in this case - if it was a three-week case, that might be very different,
2 but for a fairly short case that actually isn't a short cut that is really going to be an efficient
3 way out. So that is my provisional view. I have not heard you orally, but I have looked at
4 the written submissions.

5 MS McANDREW: I am very grateful to the Tribunal for the indication. If I might just address
6 you briefly now on the matter.

7 THE PRESIDENT: Of course.

8 MS McANDREW: As, Sir, you have observed, it is difficult to state at this stage that there would
9 be a binary question, and the Defendant's submission is that is due in large part to some of
10 the pleadings in the claim form, which I think we will come on to later and they will be
11 clarified, so that might clear up some of that risk surrounding that issue once we know
12 precisely what it is that the Claimant seeks to do.

13 THE PRESIDENT: It might not, if I can interrupt you, because there are distinct strands. There
14 are the gifts and there is the food, and those issues are going to remain. One might have
15 greater clarity of what kind of souvenirs, but there is still a point about souvenirs and gifts,
16 and there is a distinct point about food. They might be decided differently.

17 MS McANDREW: They may well be, but my submission would be that it would be in the
18 interests of the efficient disposal of the claim to have those issues decided as soon as
19 possible, and therefore the rest of the claim can proceed on a common understanding of
20 what the Lease means.

21 Just to address you on the issue of an appeal, the Defendant of course accepts that that is a
22 risk. It is a risk that adheres in respect of really any preliminary issue that might be ordered
23 by this Tribunal. As a side note, I would observe that the Claimant would obviously not be
24 entitled as of right to bring an appeal. She would have to obtain permission to do so, and
25 her chances of doing that are necessarily speculative.

26 THE PRESIDENT: Yes.

27 MS McANDREW: I would make the further submission that it is not possible as a matter of
28 practical reality to totally fireproof any course of litigation, and what the Tribunal must do
29 here, in my submission, is to look at the course which is most proportionate. I have heard
30 what the Tribunal has said on that, but I would submit that the preliminary issue proposal
31 that we make offers real and tangible potential savings in terms of costs and time.

32 Those are the reasons that I have set out in my skeleton argument and I will not detain the
33 Tribunal much more with those. If the claim, as pleaded, is effectively disposed of by this
34 preliminary issue, then a whole range of matters will never have to be ventilated before the

1 Tribunal, and in particular the evidence that will be required will be much more limited
2 given that it is an issue of contract or construction of a lease that was entered into 2011, so
3 the issues of what was happening at the time of the Settlement Agreement and the time of
4 the Licence, they would, if we succeed, never have to be ventilated.

5 Sir, we say effectively, the risk of an appeal, we cannot deny that it exists, but it is one that
6 must be weighed against the, we say, substantively larger benefits that are potentially
7 offered by the route that we propose.

8 Also, could I just draw the Tribunal's attention to the fact that this appears to have been the
9 Claimant's initial position that this could be dealt with by way really of mainly legal
10 submissions without the need for lots of evidence or anything like that - that is set out quite
11 clearly in the application for the fast track procedure which the Claimant made - and our
12 position is that that is, frankly, unchanged. That is at para.14.1 of Annex 1 to the claim
13 form. At the end of that paragraph you see the Claimant has----

14 THE PRESIDENT: Yes, "largely by way of legal submission".

15 MS McANDREW: "Largely", yes, I accept that, and obviously there will be some evidence filed
16 to say substantially that.

17 With regard to the six-month timetable that is envisaged for fast track proceedings, we say
18 there is really no risk to that barring the limited risk of appeal, which we cannot exclude,
19 against which must be advanced that the savings that I have described----

20 THE PRESIDENT: When you say "no risk" to that, do you mean that we could have a hearing of
21 the preliminary issue, judgment in the preliminary issue, a further hearing on the other
22 issues within six months?

23 MS McANDREW: I accept that it would require co-operation as between the parties themselves
24 and between the parties and the Tribunal, but essentially the Defendant is coming to this
25 litigation with a view to doing it in the most cost-effective and proportionate way possible,
26 and we submit that, from our point of view, we would not think that that would necessarily
27 be a problem, and if the Tribunal would be assisted I can take you, Sir, through our
28 proposed timetable.

29 THE PRESIDENT: Yes, but it is also a question of availability of a Tribunal. The question of
30 the situation as at 2011 will clearly require some evidence and investigation, and potentially
31 expert evidence on the meaning of these terms in the Lease.

32 MS McANDREW: If the expert evidence is a concern for the Tribunal, then I would be happy to
33 address you on why the Defendant strongly submits that it would not be necessary to have a
34 second expert.

1 THE PRESIDENT: We will have to come to that either way, because we are going to address
2 experts. It is likely to be most of a day, is it not, the preliminary issue?

3 MS McANDREW: We would budget for a day at the outset, or perhaps we could say a half day,
4 but realistically we accept it might be a day.

5 THE PRESIDENT: Yes. Thank you. That is attractively put, and I can see some force in those
6 submissions. At the same time, as the courts have frequently warned, preliminary issues
7 can be a perilous short cut in causing greater costs and delay at the end, and so one has to be
8 extremely careful as to the circumstances when they are appropriate. It does seem to me
9 here, when we are talking about a trial in total of three days or, at most, four days, and a real
10 possibility of the unsuccessful party seeking to appeal, it is far better if everything is heard
11 together, and I do not think, in the circumstances of this case, it would be a proportionate
12 and sensible way forward to have a preliminary issue which is not purely an issue of law. It
13 would clearly involve investigation of the factual background in 2011 to the entry into the
14 Lease and the attendant Licence. Some of that factual background also becomes relevant on
15 the competition issues which would then come back for a further hearing if a preliminary
16 issue is decided against the Defendant.

17 Further, there is a not insignificant potential that if the preliminary issue is not decided all
18 one way or the other, as Ms McAndrew realistically accepted it may not be a binary
19 question, that that could cause still more complication. So, on balance, although
20 I appreciate the way the submissions were advanced, I do not think this is an appropriate
21 case for a preliminary issue.

22 We then come, I think, to the question of whether this case is appropriate for a fast track
23 procedure. I think that is what the Claimant asks for. I think the Defendant does not object
24 to that. That will apply to the liability. It will not apply to the quantum. That is to be
25 addressed separately, if the Claimant should succeed.

26 It means that there will need to be a costs cap. That is not going to be addressed today,
27 because it depends on various directions regarding experts, the number of witnesses, and so
28 on, which I am going to hear from both sides about in a moment. So the procedure that will
29 follow is that when those directions have been made and those matters settled, we will fix a
30 further hearing at which the costs capping can be carried out, unless it is agreed in
31 correspondence, or it may be that you are content for it to be done in writing, but if not we
32 can find an hour for a short hearing in April.

33 Can I turn, before going to directions and taking the agenda in a slightly different order, to
34 the pleadings. The defence: Ms McAndrew, as to a defence, the CAT Rules, Rule 35 of the

1 Tribunal Rules is quite clear that the case should annex any documents that are relied on in
2 so far as practicable. That does not seem to have been done, so that has not been complied
3 with. There are a whole lot of documents referred to in this defence and the Rule has just
4 been ignored, which does somewhat concern me. For example, para.20(c), p.7, the tenancy
5 to Chorley's. The next page, there is even highlighted in bold the "1972 Abbey Contract of
6 Sale". Further down that page, para.23(a), a reference to a series of proposals, presumably
7 in writing. The Defendant rejected those proposals, presumably in writing. Para.25(d),
8 p.10, in July 1974 the Defendant wrote to him - we have not got the letter. Over the page,
9 para.27 and 28, more letters referred to, none of them annexed. So they have got to be
10 produced. Can that be done by next Friday, please, all to be served on the Claimant and the
11 Tribunal - yes? I presume those who instruct you will have them.

12 MS McANDREW: I am instructed that if we were able to have a little bit longer to carry out
13 searches, that would be----

14 THE PRESIDENT: Some of these are pleaded as specific letters. The Rule is that so far as
15 practicable they should be annexed to the defence, so I will say as far as practicable by next
16 Friday, 29 March, and then in so far as you cannot do that you can write and state when
17 they can be produced.

18 Can I also ask you to clarify, please, in the defence - I struggled a bit, and it may be a typo,
19 I do not know - on p.13, para.33(d):

20 "Similarly, the term 'events and educational courses' ..."

21 that is a quote from the claim form, I think -

22 "... in the abstract, does not identify any specific category or type of event and/or
23 provision. It is denied, however, that 'events and educational courses' of the type
24 referred to at paragraph [25] above are within ..."

25 I am not clear what that is referring to.

26 MS McANDREW: I am not either, because I did not type that. That is intended as a reference to
27 para.23 of the defence.

28 THE PRESIDENT: 23, I see, fine. Thank you. Mr O'Regan, your claim form?

29 MR O'REGAN: Yes, Sir.

30 THE PRESIDENT: You have annexed a lot of documents, and obviously have had regard to the
31 Rules. There is just one thing at para.36, the Licence, the 2011 Licence, which permitted
32 the Claimant to construct two buildings, one animal and the other a visitor centre.

33 MR O'REGAN: I apologise, Sir, which paragraph are we looking at?

34 THE PRESIDENT: Para.36 of the claim form. You refer to the Licence, the 2011 Licence:

1 “... which permitted the Claimant to construct two buildings, one an animal
2 welfare facility and the other a visitor. A copy of the 2011 Licence is annexed
3 hereto as Annex 7.”

4 Annex 7 is indeed the Licence, but the Licence has an annexure itself. It may be it was not
5 attached, but the plans and specifications, were they not in the end part of the Licence, or do
6 you know what the position is, because at the moment the permitted works, which is what
7 the Licence is about, means under the definition the works detailed in the plans and
8 specifications annexed, and as they are not, you cannot actually work out what the permitted
9 works are.

10 MR O'REGAN: Yes, I follow, Sir.

11 THE PRESIDENT: Do you know what the position is about that?

12 MR O'REGAN: Can I take instructions, Sir?

13 THE PRESIDENT: Yes.

14 MR O'REGAN: (After a pause) Those instructing me are not able to assist me any further, Sir.

15 May I suggest that we similarly check if they exist, Sir, and if the Claimant is still in
16 possession of them, we then again file and serve by 29 March.

17 THE PRESIDENT: Equally, if you have not got them then maybe your solicitors can correspond
18 with the Defendant's solicitors, because if this is a mutual Licence and this is not a
19 contentious issue----

20 MR O'REGAN: Yes, Sir.

21 THE PRESIDENT: -- it is difficult to think there were not any plans, because otherwise it is not
22 clear what the Licence is actually allowing. So perhaps that can be sorted out.

23 There were two aspects of your claim that seemed to me somewhat unclear, and which we
24 do need to clarify. The first concerns the gifts and souvenirs. You say in the claim form at
25 para.79.3 - and 79 is:

26 “Absent the restrictions imposed on the Claimant by clause 5.15 of the 2014

27 Licence ... [the Claimant] would have -

28 3. operated a retail gift shop that would have sold to visitors a range of gifts
29 and souvenirs related [to] the Bird Park's activities, including locally produced
30 craftwork and produce.”

31 You say in para.91:

32 “The Monastery Shop and Café sells a wide range of gift items.”

33 That is the monastery shop, and “many are ... similar to those sold by the Bird Park”.

34 Para.92:

1 “The Bird Park presently sells a limited range of gifts and souvenirs ... Absent
2 those restrictions, the Bird Park would sell a wider range of gifts and souvenirs.”

3 It is very unclear what, in fact, it is that your client is wishing to sell that she cannot sell at
4 the moment. The possibility is enormous. Locally produced craftwork and produce could
5 be locally made garden furniture, or locally grown strawberries and potatoes. Is that what
6 she is saying she would wish to do, or, if not, what, given that the Lease itself - and I am
7 talking about the 2011 Lease which she is not challenging at all - says that she may sell
8 ancillary items connected with the commercial running and management of a bird park.
9 She accepts that is not an anti-competitive restriction and is not challenging it, so there have
10 got to be items connected with the commercial running and management of a bird park, and
11 I am not at all clear what it is that she actually has in mind. I think it is rather important that
12 is clarified.

13 MR O'REGAN: Yes, Sir.

14 THE PRESIDENT: And it can be done by way of further particulars, further information. Given
15 that she says that, absent the restrictions, this is what she wants to do, and would have done,
16 she will know.

17 MR O'REGAN: Yes, indeed she will, Sir.

18 THE PRESIDENT: So I think both for the Tribunal and indeed for the Defendant, we need to
19 have that in the form of a statement, so it can be further information of, I would have
20 thought, para.79.3, but para.92 is effectively saying the same thing, except 92 puts it rather
21 more broadly.

22 I think it would be helpful for the Tribunal - the Defendant may know this - to have also
23 information of the gifts and souvenirs that are presently sold. So it can be in two parts: at
24 present, this is what the shop sells, but absent the restriction in 5.15 it would wish to sell the
25 following which it contends are within the terms of clause 9.1 of the Lease. All right?

26 MR O'REGAN: Yes, Sir, and that by next Friday as well, Sir?

27 THE PRESIDENT: Well, if you want a bit longer, I think that would be all right. This is not a
28 pre-existing document that should be in a file, this is something that has to be prepared.
29 I think two weeks - would that be reasonable?

30 MR O'REGAN: Yes, Sir.

31 THE PRESIDENT: The second aspect concerns the events. Again the claim says in para.71:

32 “‘It is the Claimant’s case that clause 5.15 of the 2014 Licence and clauses 1, 2 and
33 7 to 18 inclusive of the Settlement Agreement [restrict competition].

34 That is, as it were, picked up at para.81:

1 “Absent the restrictions imposed on the Claimant by clauses 1, 2 and 7 to 18
2 inclusive of the Settlement Agreement, the Claimant would have provided a broad
3 range of events, activities, courses and lectures, and related catering ...”

4 Catering is probably covered by the other matter -

5 “... a broad range of events, activities, courses and lectures ... to individuals,
6 families and groups ...”

7 If one actually looks at the clauses of the Settlement Agreement that are being relied on,
8 which are at tab 21, clause 1 of the Settlement Agreement is an agreement not to host a
9 Halloween event. So the only event that is restricted by clause 1 is a Halloween event.

10 MR O'REGAN: Specifically by clause 1, yes, Sir.

11 THE PRESIDENT: That is one of the clauses identified as being restricted. Clause 2 is
12 prohibiting a fortune teller, or fortune telling event, and nothing else.

13 MR O'REGAN: Yes.

14 THE PRESIDENT: So the only matter restricted by that is having a fortune teller. You have seen
15 the defence and how the defence put their case. What they say is that this is a Benedictine
16 Abbey, and the ethos of the Abbey is such that Halloween and fortune telling - Halloween is
17 obviously a pagan festival - they would find offensive. If we are opening up that whole
18 question and therefore a *Wouters* type justification and it is reasonable, that does make this
19 a rather different kind of case. I do wonder if your client is really pursuing the notion,
20 “Well, never mind what the religious sensibilities are of the Abbey, competition law should
21 override that”, and she should be permitted to have Halloween celebrations and fortune
22 tellers. It is a pretty narrow restriction and it is one that is clearly tailored to the religious
23 beliefs and feelings of the Defendant.

24 MR O'REGAN: One can understand the Defendant's sensitivities. There is a debate as to
25 whether Halloween is a pagan festival, but we do not need to get into that.

26 THE PRESIDENT: I do not think that is a matter the Tribunal really want to rule on.

27 MR O'REGAN: No, absolutely not. This is a business tenancy and the Claimant's position is that
28 she should be entitled to carry on her business as she wishes. If the Defendant thinks there
29 is an issue with nuisance then that is dealt with in the next stage. This is one example of a
30 restriction on what the Claimant might otherwise do, or would otherwise do.

31 THE PRESIDENT: They are two very specific and tailored restrictions.

32 MR O'REGAN: They are, Sir.

1 THE PRESIDENT: If you want to pursue the case, clearly I cannot prevent you. I am just saying
2 that it changes the nature of the case, or at least part of it, and opens up another area of
3 argument.

4 That takes me to the next point, which is that it is not clear to me what sort of events she is
5 saying that she would wish to hold. Is it any kind of attraction, and is she saying, "I could
6 have a Bank Holiday funfair, with a bouncy castle and roller coaster and bumper cars set
7 up", as you have, for example, at Hampstead Heath, and all of that comes within ancillary
8 items connected with the commercial running and management of a bird park, which is the
9 user clause, which is accepted? What sort of events does she have in mind? Again, what is
10 the boundary that is being accepted as within clause 9.1?

11 MR O'REGAN: It comes down to the commercial reality of the situation Sir, which is that all
12 similar venues and wildlife parks and indeed other kinds of tourist attraction will host
13 probably a number of events over the course of the year to drive custom and thus revenue.
14 The Claimant obviously would need to particularise further to some extent. The difficulty,
15 Sir, is that what is appropriate for one year in the market may well not be appropriate the
16 following year, so it is very difficult to be precise, and that is indeed what the Claimant's
17 real complaint is, that the Settlement Agreement specifies very particularly what she is and
18 is not allowed to do, and therefore that is a restriction of competition.

19 THE PRESIDENT: But it is all within the terms of the user in 9.1?

20 MR O'REGAN: Yes, Sir, she would say that a bird park open to the public would hold such
21 events for its paying customers.

22 THE PRESIDENT: What are 'such events'? - that is what I mean. Would hold 'such events' -
23 what are 'such events'?

24 MR O'REGAN: Well, Halloween is a big driver, particularly at half-term.

25 THE PRESIDENT: So you will be calling evidence that bird parks have Halloween events, and
26 so on? That would be your case?

27 MR O'REGAN: Yes, Sir, and they will hold similar events at around Christmas time, which is
28 another key period, winter illuminations, etc.

29 THE PRESIDENT: As I say, if your client knows what her competitors do, and she identifies
30 certain competitors in the claim form, the sort of events they hold that she wants to hold,
31 and that is going to be her case, we would like to know that up-front.

32 MR O'REGAN: Yes, Sir.

33 THE PRESIDENT: It is not dissimilar from the point regarding the souvenirs, but it is a broader
34 question, because it is clear that she can sell ancillary items, there is no doubt about that.

1 Events is less clear. Under the agreement, of course, under the settlement she is permitted
2 to run the various events that are in clause 6, which is not said to be one of the clauses to
3 which objection is taken. We have got all those, and if there is said to be an appreciable
4 restriction of competition then there must be some other significant events that she says, as
5 she does say in the pleading, “I would be holding absent these restrictions”, Apart from a
6 Halloween-themed event, which is the only thing that is prevented by clause 1, having a
7 fortune teller, which is the only thing that is prevented by clause 2, I am not clear at all what
8 are the other events to which she is referring in para.81 of the claim form. Again, is two
9 weeks a reasonable time for that?

10 MR O'REGAN: Yes, Sir.

11 THE PRESIDENT: I note that para.81 of the claim form is seeking to go beyond para.79.2 of the
12 claim form, which is a more restricted kind of event, one that clearly is related to the Bird
13 Park's activities.

14 MS McANDREW: Sir, apologies for interjecting, but if I could just ask for a point of
15 clarification on that. The Defendant welcomes greater particularity and the directions
16 which the Tribunal has made. If the Claimant is effectively going to be putting a more
17 detailed or potentially slightly altered case, would the Tribunal be willing to make a facility
18 for the Defendant to respond effectively, and I am just not quite clear how that will be done.
19 Is the further detail to be provided by way of a statement?

20 THE PRESIDENT: I do not think it is an altered case. Indeed, you made the point in your
21 skeleton argument, or maybe in the defence, that the pleading is vague in certain respects.
22 It is further information. The pleading is there, [para.]81, “Absent the restrictions, ... a
23 broad range of events, activities”, and so on, “each of these ... is permitted”. You have said
24 in your defence, I think, that you do not know what - perhaps the same point that I have
25 made. If you wish to amend the defence in the light of what is said - let me just find your
26 plea to that, para.81, where it is denied in any event, so it may not be necessary.

27 MS McANDREW: It is simply to have the facility if that is required.

28 THE PRESIDENT: I would have thought that the argument about what is permitted and is not in
29 clause 9.1 does not need to be pleaded in detail. If any of those events that are set out, your
30 client's position is, “Well, actually that is permitted”, then say so because that will remove
31 one area of dispute.

32 MS McANDREW: Of course we will do so.

33 THE PRESIDENT: At the moment the position is you say they cannot do these various things, as
34 I understand it.

1 MS McANDREW: Yes, absolutely, I simply would like to reserve the right that, if anything new
2 transpires that the Claimant is going to provide the Tribunal with, we would have the right
3 to respond accordingly by amending the pleading.

4 THE PRESIDENT: Yes, you can put in voluntary further particulars if you want.

5 MS McANDREW: I am grateful.

6 THE PRESIDENT: It is really getting - as I say, you have joined issue with the case. We do not
7 need an excess of pleadings. What I want to do is to make sure we can understand what the
8 Claimant's case is and indeed what your client's case is.

9 Can I ask you this: there were these High Court proceedings, they were settled, we have the
10 Settlement Agreement. Other than as part of the claim for exemplary damages, are the
11 reasons for the settlement that Ms Meigh was under pressure for a planning grant or
12 whatever to agree the settlement, relevant to a competition case?

13 MS McANDREW: We say it is primarily relevant to the exemplary damages point.

14 THE PRESIDENT: Apart from that?

15 MS McANDREW: There is some suggestion - there is obviously a suggestion that we acted with
16 subjectively anti-competitive intent. The Claimant may wish to make a point around that,
17 but from our perspective, no.

18 THE PRESIDENT: Mr O'Regan, it seems to me that the settlement says what it says, and it
19 restricts you in the various ways it restricts you, which you say are anti-competitive. We
20 know about the shop and the café run by the Defendant, and you have had various letters,
21 and so on, but beyond that, is it relevant to start exploring what went into the settlement? It
22 does seem to me a whole area of investigation about the strength of the case in the High
23 Court, and all the rest of it, is not really relevant to the case before us.

24 MR O'REGAN: It is what it is, Sir.

25 THE PRESIDENT: Sorry?

26 MR O'REGAN: It is what it is, an agreement----

27 THE PRESIDENT: It is the question of disclosure and evidence that I am concerned about,
28 where you have any grant or other, issues of privilege get opened up, and so on, but it seems
29 to me that it is really not an area that we need exploring in these proceedings.

30 MR O'REGAN: Certainly not in any detail, Sir, no.

31 THE PRESIDENT: I would not be minded to order any disclosure relating to the settlement,
32 unless you seek to persuade me that this is relevant.

33 MR O'REGAN: It is relevant, Sir, in relation to the claim for exemplary damages.

34 THE PRESIDENT: Yes, I understand that, but that is not going to be heard with----

1 MR O'REGAN: If that is not going to be heard, then no, Sir, it is not relevant. Why the parties
2 entered into the agreement for the purposes of competition law is neither here nor there, and
3 the agreement says what it says.

4 THE PRESIDENT: That is my view. If we get as far as exemplary damages then one might have
5 to look at other matters, but it seems to me that we are not concerned with that. I think that
6 is important because there will no doubt have been a lot of correspondence in the High
7 Court proceedings.

8 So on that basis, can we think about the future, but I should ask you both before that, is
9 there any further clarification, first of all, I think, dealing with the claim form that you think
10 should be provided at this stage? Ms McAndrew, you have not raised anything?

11 MS McANDREW: No, Sir.

12 THE PRESIDENT: Equally, Mr O'Regan, any other clarification of the defence that you think
13 should be provided?

14 MR O'REGAN: Not at this stage, Sir, no.

15 THE PRESIDENT: You are always, of course, able to write requesting information or
16 clarification.

17 So we turn then to the future direction of the case, and before we get to the direction I think
18 it is helpful to think about the evidence. Experts: I get the impression you each want one
19 economist - is that right?

20 MS McANDREW: Yes.

21 MR O'REGAN: Yes, Sir.

22 THE PRESIDENT: So single economist, and there will be the usual directions that they should
23 meet on a without prejudice basis in the absence of lawyers and prepare a statement of
24 matters on which they agree and matters on which they disagree. The timetable, we will
25 work back once we have a trial timetable.

26 Expert on activities of a bird park, and what is normally involved in the use of a bird park
27 open to the public and connected to the commercial running and management thereof. As
28 I understand it, Mr O'Regan, you want to call an expert on that?

29 MR O'REGAN: Yes, Sir. It seems to me there are two ways of dealing with this. One is to call
30 however many operators of bird parks there are and to have them each give evidence as to
31 what they were doing in 2011, which would clearly be extremely inefficient, or to have an
32 expert, probably a surveyor, or something like that, who has expertise in the relevant sector
33 who will be able to give his professional view based upon his knowledge of the market and
34 any research that he does as to what the activities of a bird park open to the public would

1 have been in 2011. It seems to me that the meaning of the words ‘bird park’ and ‘bird park
2 open to the public’ is not something that the Tribunal can take judicial notice of.

3 THE PRESIDENT: I think ‘open to the public’ we can understand, but ‘bird park’ might be
4 something we cannot necessarily understand.

5 MR O’REGAN: Obviously one is looking for the objective meaning of those words, which will
6 require evidence, and expert evidence would seem to be the most appropriate. Whilst there
7 is only a limited number of authorities, cases in the property sector often would seem to
8 involve an expert giving evidence on that matter.

9 THE PRESIDENT: Yes, and you have helpfully referred the Tribunal to a couple of authorities in
10 that field. Ms McAndrew, are you resisting that?

11 MS McANDREW: Yes, we are, on the basis that it is not reasonably required in order to
12 determine the meaning of the user clause, and nor is it likely to be particularly useful to the
13 Tribunal. If I could just make some brief further submissions on that?

14 THE PRESIDENT: Yes.

15 MS McANDREW: Just to begin with, I would point out that our proposal for one expert is
16 consistent with the position that the Claimant originally took when making the application.
17 I will not take the Tribunal to it, but it is para.12 of the application. We entirely disagree
18 that it would be necessary. As my learned friend pointed out, it is a question of construing
19 the objective meaning of the words. That is a task with which any court construing the
20 contract is charged. The term ‘bird park’ is not some kind of technical term of art which
21 can be understood in the abstract, or that expert evidence is required upon, it is simply a
22 term in a user clause which can be construed by reference to the plain meaning of those
23 words, and the factual background as it was understood by the parties at the time that it was
24 entered into.

25 THE PRESIDENT: Is it just as understood by the parties, or is it in a lease in an objective sense?

26 MS McANDREW: Objective clearly, but the court is always looking for the objective intentions
27 of the parties. That is, I would submit, distinct as to whether any particular term in any
28 particular industry has an inherent meaning to which an expert can speak. I would suggest
29 that here, ‘bird park’ is not of the same category as the terms in the cases that my learned
30 friend relies upon.

31 THE PRESIDENT: Why is it so different from ‘supermarket’?

32 MS McANDREW: Well ‘supermarket’ is a term, and it is set out in the authority to which my
33 learned friend refers the Tribunal, that originated in the distributive food industry. It was
34 not a term that was commonly used in English at the time that the court was considering

1 that case. The court says that expressly. I can take the Tribunal to the authority. The
2 Claimant has helpfully provided an authorities bundle.

3 THE PRESIDENT: Yes, this is *Calabar v Tesco Stores*, which is 1977.

4 MS McANDREW: Yes, at which time there----

5 THE PRESIDENT: It was pretty commonly used in 1977, ‘supermarket’, I can tell you that. You
6 are too young to remember, but I can tell you everyone talked about supermarkets. They
7 may not have been precise but they certainly used it.

8 MS McANDREW: Yes. I can accept that that might be true. I think, in fact, the court there was
9 construing a lease which actually dated from 1961, so they were having to put themselves in
10 the position of the parties at that time.

11 THE PRESIDENT: That is a fair point.

12 MS McANDREW: On p.115 of that case, if I could direct the Tribunal to the second column at
13 M.

14 THE PRESIDENT: That is where, I think - and I do not know if this is like the judicial question
15 that is so often mocked of High Court judges saying, “Who are the Rolling Stones?” but Sir
16 John Pennycuick says, “I do not accept the contention that the word ‘supermarket’ is even,
17 now, an ordinary English word.” He says it is word that:

18 “... even today ... [is] ... an intermediate area between a technical term and an
19 ordinary English word. ... I should not be certain of its precise meaning.”

20 MS McANDREW: So my submission based on that would be that ‘bird park’ is not the same
21 kind of free-standing, technical term of art that ‘supermarket’ might have been in 1961 or
22 indeed the date that the case was decided. It is a plain phrase in English language. The
23 clause sets out in terms what it is envisaged that the parties will be able to do under it. It is
24 not just----

25 THE PRESIDENT: It says “used for the purposes of a bird park”, and the way properties were
26 used for the purpose of bird parks in, is it, 2011 is not something certainly that I know, but
27 someone who regularly visited bird parks in 2011 would know. That is the objective
28 question: what, in 2011, would properties being leased for bird parks, to what use would
29 they put other than keeping birds? Is that all? For example, toilets would be part of the use
30 for the purpose of a bird park, I can see that. Maybe providing parking would be a use for
31 the purpose of bird parks. There are a whole lot of questions that one starts opening up
32 which actually I do not know, and it would be arrogant of me to say, “Well, I am quite
33 familiar with that”, and when we get into the detail of, well, if it is providing toilets and
34 parking, and you can sell ancillary items, is it soft drinks, is it also teas and coffees, is it also

1 hot food, which is a major area of dispute, and so on? It seems to me that it would be very
2 difficult to say that the Claimant and indeed your client could not call the operators of three
3 other bird parks saying, “Oh, no, that’s not part of what we regard as a bird park”, to try and
4 get the sense of how the word was objectively understood at the time.

5 MS McANDREW: Precisely, Sir, that is the question, how the parties objectively understood the
6 word at the time, and to the extent that the Claimant wants to adduce evidence of what other
7 bird parks, what they knew other bird parks were doing at the time, then we would submit
8 that that is factual evidence, and they can use one of their factual witnesses to do that. To
9 the extent that an expert would be providing evidence on issues to do with bird parks that
10 are not within the minds of the parties, we say that that is not relevant because this is a
11 question of interpreting the objective intentions of the parties as they were at the time.

12 THE PRESIDENT: It does not have to be whether it is a particular bird park in their mind, it is
13 how the expression was understood at the time, is it not, commonly understood?

14 MS McANDREW: Yes, and we say that that is a question which the Tribunal can determine by
15 reference to the ordinary principles. In so far as the Claimant might seek to adduce
16 evidence of other bird parks in the vicinity, or potential competitors, our position is---

17 THE PRESIDENT: They do not have to be in the vicinity, your competitors. They could be in
18 the Lake District. It is what is used for the purpose of a ‘bird park open to the public’ as a
19 term? It is not ‘bird park open to the public in Gloucestershire’. It is anyone.

20 MS McANDREW: Yes, I accept that.

21 THE PRESIDENT: We could have evidence from all over the country. It may be that the
22 surveyor is partly compiling factual evidence from a number of sources and presenting it,
23 but if there are - and there might be, I do not know, I have no idea whether there are
24 planning issues on having a bird park. There might actually be some matters that arise from
25 practice at the time as to what was generally expected.

26 MS McANDREW: Sir, if I could just make a few very brief further submissions on that, my
27 submission is essentially that there are a discrete number of terms within the landlord and
28 tenant context on which it is well accepted that expert evidence might be required, a
29 supermarket being one of them, or a pharmacy, for example. We say this is plainly not that
30 variety, it is a term which the court is well able to construe by reference to the ordinary
31 principles of contractual interpretation. The Tribunal has heard my submissions on that, but
32 if I could make submissions from a different angle, which is a case management angle, we
33 say it is disproportionate from a case management point of view. This rests to some extent
34 on my submission that the Tribunal is able to do it itself, and therefore it is not reasonably

1 required in order to determine this issue. It would jeopardise the three-day timetable which
2 we are working to.

3 THE PRESIDENT: Yes.

4 MS McANDREW: Just to put that in a bit of practical context: if we had, for example, two hours
5 per party for closings, nearly one sitting day, and then we would have just two days. Even
6 if we did away with openings and just relied on written submissions, we would have two
7 days to get through four factual witnesses and four experts. In my submission, that would
8 be----

9 THE PRESIDENT: Sorry, four factual witnesses?

10 MS McANDREW: Yes. We say that is completely disproportionate from a case management
11 perspective, and if I may say, Sir, a case which my learned friend included in his skeleton
12 argument and I believe is in his bundle of authorities - apologies it has not been included in
13 the bundle of authorities, but it is the case of *Williams v Kiley*.

14 MR O'REGAN: I do apologise, Sir, I was not intending to rely upon that.

15 THE PRESIDENT: I had it, but it is possible I have not got it here. (Same handed) This is the
16 judgment of Sir Andrew Morritt, yes.

17 MS McANDREW: Yes, and effectively here the user clause permitted the tenant to carry on the
18 business of a grocery and general stores.

19 THE PRESIDENT: This was the tobacconist?

20 MS McANDREW: Yes, exactly, and the question really was a quantitative issue of when an
21 enterprise was selling tobacco, how much tobacco does it have to sell before it transmutes
22 from a grocers into a supermarket.

23 THE PRESIDENT: No, it is a tobacconist, is it not, not a supermarket?

24 MS McANDREW: I believe it was put on the basis that it was a supermarket, but I will be
25 corrected if I----

26 MR O'REGAN: If I may assist, the defendant in that case, Mr Kiley, was operating a business as
27 a grocer, which he called a supermarket, whereas the claimant was operating a business as a
28 confectioner and tobacconist.

29 THE PRESIDENT: I thought the clause----

30 MS McANDREW: The clause does make reference to excluding tobacconist, yes.

31 THE PRESIDENT: That was the question, whether he was within the user clause or within the
32 prohibition that he should not be a confectioner or tobacconist.

33 MS McANDREW: Yes, apologies, I am grateful for the correction. Effectively there the
34 Defendant would point to that case as an example of where expert evidence, which was said

1 to be essentially, was really a fool's errand because the court - the Tribunal will have seen
2 the procedure, it was a complicated case. The court ordered expert evidence. The court and
3 the parties went through the procedure of instructing a joint expert only for the judge to find
4 that the evidence was unhelpful, it did not assist him.

5 THE PRESIDENT: That is at---

6 MS McANDREW: Para.14, about half way through:

7 "He referred to the report of Mr Gregory [the expert] and expressed the view that
8 he was not bound by it, and it was not all that helpful anyway."

9 At para.19 the Court of Appeal agrees:

10 "Where to draw the line is essentially a question of fact", not opinion. "[Expert]
11 evidence ... was adduced. ... The judge expressed his view ... that [the expert
12 report in that case] did not focus on the essential point in relation to [it]."

13 THE PRESIDENT: The problem there was that the expert was not asked to address the key
14 question.

15 MS McANDREW: Yes, there were obviously problems with the instructions.

16 THE PRESIDENT: They were not saying that it was inappropriate to have an expert, but
17 obviously the expert produced his report on a question which is not the question the court
18 has to decide.

19 MS McANDREW: I wholly accept that. My point is simply that if we go into this realm of
20 having another additional expert it quite possibly opens the door to costly procedures which
21 may not end up being that useful and, in our submission, really are not required. It is a huge
22 over-complication for what is really quite a simple question of construction of a lease.

23 THE PRESIDENT: Mr O'Regan, do you want to respond to that?

24 MR O'REGAN: Yes, Sir, the principal question the expert will need to be asked is whether or not
25 selling food and drink, having a gift shop and holding events to attract custom are for the
26 purposes of a bird park open to the public. They are not matters upon which I think the
27 Tribunal can take judicial notice, so it will require evidence. Where that evidence comes
28 from could either be a series of factual witnesses who speak to their own experience and
29 knowledge of their own facility or a single expert who will give a professional view based
30 upon his professional expertise of what a bird park does and what its activities were in
31 2011. It does not seem there is any way around evidence, because, first of all, evidence is
32 needed to assist the Tribunal in coming to its views on the construction of clause 9.1, but
33 also then apply that to the facts and facts require evidence.

1 THE PRESIDENT: Yes. I think it will be helpful to have an expert. I do not think it will greatly
2 add to the length of the case. It might slightly add to the costs, but it may indeed avoid a
3 certain excess of factual evidence because the expert will be able to encompass that in his or
4 her research. Just as the terms ‘supermarket’ and ‘pharmacy’ may be imprecise, so the term
5 ‘the purposes of a bird park’ is imprecise. Indeed, speaking for myself, I have a much better
6 idea of what is involved in a pharmacy than a bird park, and I think it will be of assistance.
7 It is obviously a key issue. It will be important that the expert considers as at 2011 what
8 activities would normally be involved in operating a bird park open to the public, to
9 consider clause 9.1, and he or she may be assisted by looking at the further information that
10 I have directed regarding the matters that might be sold, that the Claimant wishes to sell in a
11 shop and the sort of events that she wishes to hold. Ultimately, of course, the question of
12 construction is a matter for the Tribunal, but it will have to decide that upon evidence.
13 So I will allow one expert on each side to deal with that. It may be that, in the light of that,
14 it is prudent to list the case for three days with an extra day in reserve, bearing in mind what
15 Ms McAndrew said.

16 Factual witnesses: Mr O’Regan, you have obviously got Ms Meigh, how many other, if
17 any, factual witnesses?

18 MR O’REGAN: Possibly one other, Sir, to give evidence primarily on the events and perception
19 that may be held by competitors in the vicinity, which obviously is relevant to the question
20 of the effect on competition.

21 THE PRESIDENT: Yes. Ms McAndrew, your client?

22 MS McANDREW: Sir, there will be one representative from the Abbey who was present at the
23 time of the conclusion of the 2011 Lease, mostly likely the Abbot, but that may be subject
24 to change. Then, as with my learned friend, we reserve the possibility of a second factual
25 witness who can speak to the day to day running of the estate.

26 THE PRESIDENT: Disclosure: I note the proposal that there should be specific requests for
27 disclosure. If we can consider any of that now, what sort of matters might be involved?
28 With disclosure, I think we would like to know - your client charges, Mr O’Regan, for
29 visitors presumably?

30 MR O’REGAN: Yes, Sir.

31 THE PRESIDENT: -- the number of visitors, and I do not know how she keeps her records,
32 whether there are, for example, children paying less, or there is a family ticket, or whatever.

33 MR O’REGAN: Yes, Sir, there is a variety of different charges.

1 THE PRESIDENT: Yes, and it might have changed over the period, but from, I would have
2 thought - what would be reasonable? I think we would like to know before the Lease, 2010,
3 would that be----

4 MR O'REGAN: Yes, Sir, I have seen various management accounts, as one might call them.
5 They are fairly rudimentary, as may be expected for a business of this type, but there, as
6 I have seen, records going back which would record almost on a daily basis the amount of
7 money that has been taken in relation to admissions, shop, etc, etc. So that would be----

8 THE PRESIDENT: So I think management accounts going back, I think to start at 2010. Is that
9 reasonable? I know there were previous leases, and so on, but we are construing the thing
10 as at the end of 2011.

11 MR O'REGAN: Yes, Sir.

12 THE PRESIDENT: The management accounts will show the financial accounts. I am thinking
13 also of records of numbers of visitors, and whether one can tell from that whether they are
14 adults or children, or families, and so on. I am not going to make a precise order, but
15 I would have thought that is relevant.

16 MR O'REGAN: The number of admissions, Sir, that is what you are asking for?

17 THE PRESIDENT: Yes, the number of admissions, broken down----

18 MR O'REGAN: By category.

19 THE PRESIDENT: -- as best she can. Then the revenue split between admissions, sales of food
20 and drink, sales of other items and revenue from events, to get a sense of how the business
21 works, I would have thought that is all rather important to provide.

22 MR O'REGAN: Yes, Sir.

23 THE PRESIDENT: As a first tranche of disclosure, and I will hear from Ms McAndrew if there
24 is something else that she thinks is relevant at this point. How long would you want for that
25 - about a month?

26 MR O'REGAN: I think a month would be plenty, Sir. It is financial information that should be
27 held either by the Claimant or her accountant, I would have expected.

28 THE PRESIDENT: Then publicity material about the Bird Park and such events as there have
29 been, so we have a complete record, again I would have thought going back to 2010. We
30 are looking for a one month period.

31 Now, Ms McAndrew, this does not preclude your client from seeking more, but it is helpful
32 when we are on tight timetables, if we can identify particular matters for which disclosure is
33 appropriate, to deal with it now that we are here. Is there anything else - there is, of course,
34 the mutual correspondence between you with various arguments about what can be done

1 and cannot be done, which I assume will be produced. Apart from that, and you will have
2 that anyway, is there anything else that occurs to you now that you want to ask for?

3 MS McANDREW: I think this will be probably be encompassed in the direction that the Tribunal
4 has just made, but if the relevant further information concerning revenue could, if possible,
5 be split out as per individual items, that would be relevant and useful. We would also ask
6 for any copies of any business plans prepared by the Claimant in respect of the Bird Park,
7 really going to her intention of what she would have done.

8 THE PRESIDENT: Yes, any pre-existing business plans.

9 MR O'REGAN: Yes, Sir.

10 THE PRESIDENT: That seems reasonable, again going back to 2010. The other thing is the Zoo
11 Licence.

12 MR O'REGAN: Yes, Sir.

13 THE PRESIDENT: That is on the Claimant's side.

14 MS McANDREW: Sorry, Sir, I have another specific request for details of - I might hear from
15 my learned friend that this is to come out in evidence - the specific local attractions which
16 the Claimant considers to be a direct competitor of the Bird Park.

17 THE PRESIDENT: I think that is not a matter for disclosure. I think that will come out in
18 evidence.

19 MS McANDREW: Understood, I am grateful.

20 MR O'REGAN: To some extent, they are specified in the claim form, Sir.

21 THE PRESIDENT: Well, you have identified competing - I think what Ms McAndrew is saying
22 is: are there any particular events that are held at those places? If she says, "This one is
23 having a Halloween event and therefore I am prejudiced, because I can't", for example, but
24 I think that will be a matter for factual evidence.

25 I do not know how the present catering arrangements operate, but if there is any menu or
26 something that sets out what you can have, that would be useful.

27 MS McANDREW: Sorry, I didn't have time to---

28 THE PRESIDENT: I think we can do that on as it is today. I think that is sufficient, because that
29 is what you are doing.

30 MR O'REGAN: So the food and drink the Claimant is presently selling at the Bird Park?

31 THE PRESIDENT: Yes. That may be in your further information, but if there is actually a sort
32 of tariff, or it may be just be on a board, I do not know.

33 MR O'REGAN: Information of what it is more likely what she would sell but for the restriction,
34 as well as what she is now selling.

1 THE PRESIDENT: Yes, but we also want to know what she is selling.

2 MR O'REGAN: Yes.

3 THE PRESIDENT: Now, as regards the----

4 MS McANDREW: Apologies, Sir, would that logic extend to the list of items that are sold
5 currently as gifts?

6 THE PRESIDENT: That would be in the further information. That will not be a printed
7 document. I am talking about documentary disclosure, but there might be a - a menu is
8 perhaps putting it too strongly, but a lot of cafés have a published list of food and drink you
9 can get with the price, and so on.

10 MS McANDREW: I understand.

11 THE PRESIDENT: Now, on the Defendant's side I think you also have your café, which I think
12 is more of a restaurant - is that not right?

13 MS McANDREW: Yes, it serves more substantial food.

14 THE PRESIDENT: So I think you will have a menu.

15 MS McANDREW: I believe we may do. We will certainly look for that.

16 THE PRESIDENT: We certainly want to know. I think again it would be helpful to have such
17 accounts as there are of the food and drink and the shop just to get a sense of the scale of it,
18 and again going back in terms of accounts to 2010?

19 MS McANDREW: Yes, Sir.

20 THE PRESIDENT: Is there anything else, Mr O'Regan, you think is important that occurs to you
21 now?

22 MR O'REGAN: There are the documentary records, Sir, as set out in para.16 of my skeleton,
23 whether they can be dealt with by order or by correspondence----

24 THE PRESIDENT: Let me just remind myself. It is para.16.

25 MR O'REGAN: Some of that has already been dealt with by----

26 THE PRESIDENT: Documents relating to the conclusion of the Settlement Agreement - as I say,
27 I do not think the documents relating to that have anything to do with the litigation. I do not
28 think that is relevant. Equally, the draft Lease, and so on, also not relevant. I am not sure
29 the negotiations of these documents are relevant to construction, are they?

30 MR O'REGAN: They are part of the pleaded cases, and the documents are already available, and
31 the Claimant's case already shows that the Defendant entered into this agreement
32 intentionally to restrict competition, which is something that is relevant to the competition
33 claim, even if not specifically to the claim for exemplary damages.

34 THE PRESIDENT: You have got those documents.

1 MR O'REGAN: We have some, Sir, yes.

2 THE PRESIDENT: As I say, there will be a lot of documents relating to the Lease when
3 everyone is looking at it in general terms, including no doubt drafts and revised drafts, and
4 so on. I am not inclined to require any more.

5 MR O'REGAN: Yes, Sir. Item number (2), Sir, is the business plan. I think, if the Claimant has
6 to disclose hers, then the Defendant should likewise disclose any business plans that they
7 have.
8 Accounting records, we have dealt with, Sir.

9 MS McANDREW: Sorry, if could just interject in respect of that one, I would submit that we,
10 realistically, should be required the business plan that was *extant* at the time. We will
11 obviously conduct reasonable searches, but I am instructed that there may only be one
12 business plan.

13 THE PRESIDENT: May not----

14 MS McANDREW: There may only be one business plan.

15 THE PRESIDENT: If there is only one that is all you have to disclose. There may well not be
16 more business plans, but only if it exists.
17 Just going through, Mr O'Regan, accounting records I think we have dealt with. Is there
18 anything under (4), do you know?

19 MS McANDREW: I do not know, I cannot give a cast iron guarantee, but we do not think so.

20 THE PRESIDENT: I think, if there are - have a look. I think (5), I have mentioned the lease
21 itself. Is it just one lease? It is one lease they have had, is it, over this period?

22 MS McANDREW: Can I take instructions?

23 THE PRESIDENT: Can you find out about that?

24 MS McANDREW: (After a pause) We will have to check whether it is a single lease.

25 THE PRESIDENT: I think all the concluded documents, if there is a licence, or whatever, dealing
26 with Simon Chorley - are they there at the moment on the estate? They are, are they not?

27 MS McANDREW: Yes, I believe so.

28 THE PRESIDENT: Are they just an auction house, or are they also selling art and antiques?

29 MS McANDREW: I understand that it is effectively a storage room where, once a month, an
30 auction is held. That is as I am presently advised.

31 THE PRESIDENT: Yes, I see.

32 MS McANDREW: Just in respect of the way in which request number (5) is couched----

33 THE PRESIDENT: I just say just the concluded lease and any licence, any concluded documents,
34 not correspondence and drafts.

1 MS McANDREW: Yes, I am grateful. It refers to premises generally, in particular the
2 auctioneer, just to clarify that the Tribunal is not asking us to disclose, for example,
3 residential tenancies on the estate. There are a lot of documents in respect of those.

4 MR O'REGAN: I think there is somewhere in the order of 20 residential properties on the estate.
5 We are not interested in those. It is purely commercial leases.

6 THE PRESIDENT: Are there any other commercial properties?

7 MS McANDREW: I understand there are two agricultural tenancies, but no other commercial
8 properties.

9 THE PRESIDENT: No, I think those are not relevant. Then (6), well, that is very broad. The
10 management of the estate will be a very broad category. I do not know how decisions on
11 behalf of the Defendant are actually taken. Is it that the Abbot takes it, or is it that there is a
12 - if one was dealing with a company, you would have a board. How actually is the
13 Defendant run?

14 MS McANDREW: There is a board of trustees, and I understand that they take certain important
15 decisions. There is also a general manager of the estate who deals with all the day-to-day
16 running of the administrative, the practical side, the logistics. On that basis, we would
17 submit that----

18 THE PRESIDENT: Does the board of trustees have meetings?

19 MS McANDREW: Yes.

20 THE PRESIDENT: And presumably minutes?

21 MS McANDREW: Presumably, yes. We would not resist a direction for disclosure of those.

22 THE PRESIDENT: I would have thought that it is the minutes of the meetings of the board of
23 trustees that concern either the Bird Park, and they can be redacted for privilege, legal
24 privilege, or the grant of the lease to Simon Chorley, or dealings with Simon Chorley. How
25 often does the board meet - do you know?

26 MS McANDREW: I can take instructions. We are not presently advised.

27 THE PRESIDENT: Sorry?

28 MS McANDREW: I do not know, I apologise.

29 THE PRESIDENT: It would be helpful to know whether it is monthly or quarterly or whatever.

30 MS McANDREW: Sir, on the basis that future disclosure discussions are going to occur, would it
31 be sensible for me to find out that information and then in our mutual correspondence we
32 can clarify the scope of that?

33 THE PRESIDENT: If I say at the moment, Mr O'Regan----

34 MR O'REGAN: May I assist with or clarify what one is looking for there?

1 THE PRESIDENT: Yes.

2 MR O'REGAN: It is the Defendant's pleaded case both in relation to objective justification and
3 section 9 exemption that the restrictions to which the Claimant is subject are necessary to
4 maintain the ethos and character of the estate and/or to promote a desired mix of activities -
5 it is documents relating to those matters, because one would expect, if that is the case, there
6 would be a policy, for example, on how to maintain the character and ethos of the estate, or
7 there would be some of document setting out the Defendant's general policy on letting -
8 some kind of, in the property context, letting scheme or an estate management plan, or
9 something like that, and that is what----

10 THE PRESIDENT: There may be, or it may be----

11 MR O'REGAN: There may or may not be, Sir.

12 THE PRESIDENT: -- done *ad hoc* when they have requests. It is any dealings with the
13 Claimant, dealings with Simon Chorley, and I would think any other requests for
14 commercial letting. If we start with that, see where you get to, you can clarify to the
15 Claimant how often the board of trustees meets, I think that would be sufficient for present
16 purposes. You will be able to seek more, either provided by agreement, and you should
17 sensibly co-operate, and we are going to have - we are about to come on to discuss this - a
18 further date fixed for costs capping when you can, of course, raise any further disclosure
19 matters as well.

20 So that is all, I think, by way of disclosure at the moment, unless either of you want
21 something else specifically on disclosure.

22 MR O'REGAN: Matters obviously put forward for disclosure now, but the general question is
23 how the rest of disclosure is to happen. Our proposal, and I think my learned friend would
24 agree, is that it be dealt with by the parties in correspondence as to what they would wish by
25 way of specific disclosure from the other, and then a response as to whether it exists and
26 whether they are prepared to disclose it or not. If there is any dispute we could bring that
27 back to the Tribunal.

28 THE PRESIDENT: I do not need to make an order.

29 MR O'REGAN: No, Sir.

30 THE PRESIDENT: That is something you should sensibly do anyway. You can always apply to
31 the Tribunal, but we will expect that, before you apply, you have raised it with the other
32 side unsuccessfully. If you have not, we will not be very enthusiastic in receiving an
33 application. You can at any time apply. So I do not think that need be included in an order.

1 Then I think we come to a further CMC to deal with costs and costs budget which will now
2 be prepared on the basis of this hearing with one additional point. I have said three days
3 with a fourth in reserve. On reflection, unless you seek to persuade me otherwise, I do think
4 this is a case where a site visit would be quite helpful, just to see the nature of the property,
5 the café and restaurant of the Abbey, and the existing limited café of Ms Meigh. Of course
6 we can have photographs, but it really does assist a great deal in this sort of case and
7 I would propose - it is not too far away - presumably half a day for that. One can be there
8 for an hour and then come back, and that would be separate from the hearing. It could be
9 held before the hearing - not to receive any submissions - just for the three members of the
10 Tribunal to see what is available, and obviously you can attend. It may be sufficient for
11 your solicitors to attend, but that is a matter for you. Certainly, when I was counsel, if the
12 judge went to see something I always wanted to see it for myself, but you do not have to be
13 there on the same occasion, of course, but I would encourage you both to go and see it if
14 you have not already done so.

15 So we are looking for initially a date for a further CMC to deal with the costs capping, to
16 give you time to prepare a costs budget and exchange costs budgets, covering the matters
17 we have envisaged. I would have thought it would be desirable to do it in April because
18 you want to know what your costs capping is sooner rather than later. It does not have to be
19 fixed now. I know that for the Defendant there are other counsel involved, so I do not know
20 who would wish to attend that hearing. If I can throw out these dates, which are available
21 for me, the 4, 8 or 9 April. Would that give your respective solicitors time to do a costs
22 budget at least a week in advance of that?

23 MS McANDREW: Yes, I think if it would be possible to go for the later of those dates, that
24 would be feasible. I know, personally, I have a court commitment on 4 April.

25 In respect of the timeframe that the Tribunal has ordered for disclosure, we would submit
26 that it would be ideal if the CMC were after that, so that any further requests for disclosure
27 could be dealt with conclusively at that hearing.

28 THE PRESIDENT: That takes it to late - the problem, of course, is Easter.

29 MR O'REGAN: A month from today, Sir, would be a week after Easter.

30 THE PRESIDENT: Let me just have a look. Term starts on 30 April.

31 MR O'REGAN: Easter Sunday is 21 April, Sir.

32 THE PRESIDENT: It is 21/22. Although it is before the start of term, it may be 25 or 26 April
33 would be possible. How does that sound?

1 MS McANDREW: From a personal perspective the 25th would be better, but 26 April could be
2 accommodated as well.

3 THE PRESIDENT: Do you know, Mr O'Regan, what your availability is?

4 MR O'REGAN: I am available on both those dates, Sir.

5 THE PRESIDENT: 25 April, shall we say, at 10.30, in which case costs budgets to be furnished
6 by, again having regard to Easter, 15 April?

7 MR O'REGAN: From our perspective, yes, Sir, we have filed a costs budget already, and
8 obviously it will be updated.

9 THE PRESIDENT: That was confidential, and in fact I have not looked at it for that reason, if it
10 has not been supplied to the other side. It obviously means that you are well down the road.
11 And it is subject only to the fact that exemplary damages will not be dealt with as you had
12 hoped. That will be on the basis of what has been discussed. It will be for a three day
13 hearing, a bit of costs for, if you like, the half day - the Tribunal will travel up by train, so
14 we only need to be met there. What is the station for ...

15 MR O'REGAN: The nearest station will be Gloucester, Sir. The trouble is Gloucester is not
16 particularly easy to get to from London.

17 THE PRESIDENT: Really?

18 MR O'REGAN: There is not a particularly frequent through service.

19 THE PRESIDENT: How long is the drive?

20 MR O'REGAN: It is about four or five miles, I think, Sir.

21 THE PRESIDENT: No, from London, all the way?

22 MR O'REGAN: I would say a couple of hours, Sir, depending on where one starts from.

23 THE PRESIDENT: So it might be a couple of hours all told to get to Prinknash Abbey from
24 London.

25 MR O'REGAN: Yes, Sir, maybe a bit longer.

26 THE PRESIDENT: It may be that we would come by car. That I cannot arrange now in any
27 event, because it will involve the other members of the Tribunal.
28 The hearing of the case and looking at the Tribunal's availability: clearly it should be heard
29 before the summer vacation, and this will involve no doubt all counsel. Ms McAndrew, we
30 are thinking potentially of the week beginning 15 July.

31 MS McANDREW: Yes. My personal availability is fine that week. I would just need to check
32 with----

33 THE PRESIDENT: Yes, with the other counsel. If it were to be at the beginning of the previous
34 week, we would have three and a half days, which might be sufficient. Then one would

1 work back from that to fix when it would be convenient for a visit to the Abbey, but that is
2 not going to be problematic.

3 MS McANDREW: Sorry, Sir, just in respect of the previous week, I believe our counsel team
4 will have commitments, at least in the first half of that week.

5 THE PRESIDENT: Yes, so the previous week is not good. We will not fix it now, but we will
6 try and fix it over the next few days, but that certainly is a week that is available, and would
7 fit, I think, with disclosure, experts, and so on. So I am not going to make any directions for
8 timing for experts - I am just wondering whether it is better that we should - you have not
9 got your experts, that is why I am slightly reluctant.

10 MR O'REGAN: I am sorry, Sir?

11 THE PRESIDENT: You have not got your experts yet, certainly the expert on the meaning of
12 'bird park'. You may have your experts already, I do not know.

13 MR O'REGAN: Only in relation to economics, Sir, not on the other matter.

14 THE PRESIDENT: Have you got an economist yet?

15 MS McANDREW: Yes, we have. I do not think it is properly confirmed, but we have someone
16 in mind, yes.

17 THE PRESIDENT: It may be that it would be useful. What would you prefer? Clearly they are
18 going to have to produce a report in the early part of June and have a meeting around mid-
19 June in order to produce their joint statement. That is the sort of timetable we are working
20 to.

21 MR O'REGAN: There is one issue there, Sir.

22 THE PRESIDENT: I can make directions for a timetable now, or we can leave it, which I would
23 prefer, for you to make proposals to each other once you have got your economists, having
24 in mind, once we have a trial date, you can work back and seek to agree a timetable for
25 expert reports and that can be submitted to the Tribunal for my approval. I think that is
26 more sensible.

27 MS McANDREW: I think that is sensible.

28 MR O'REGAN: Yes, Sir, there is one issue on experts. The Claimant's expert economist has
29 indicated that he would wish to do a survey at the estate in order to determine both relevant
30 geographic market and also the effect on competition, asking people, "If you had a choice
31 as to where you bought a bowl of soup, for example, where would you go to buy it?" The
32 question is how we fit that in to a timetable - obviously I am not in a position to make an
33 application for that today----

34 THE PRESIDENT: This is a survey of visitors?

1 MR O'REGAN: Yes, Sir. Obviously that will require the Tribunal's approval.

2 THE PRESIDENT: Yes, they are perilous, these surveys, to get a robust survey. Who is your
3 economist?

4 MR O'REGAN: Matthew Johnson at Oxera, Sir.

5 THE PRESIDENT: Yes.

6 MS McANDREW: Sir, if I could possibly just interject on that? I completely agree with the
7 Tribunal's observation that survey data can be difficult to obtain, robust survey data,
8 particularly in a matter like this. We do not oppose a survey, but we would want the
9 opportunity to make submissions on what the questions should be, the scope of the persons
10 asked, etc.

11 THE PRESIDENT: Yes, it would be sensible to do that, otherwise it is going to be criticised
12 because you have not asked this question or whatever.

13 MR O'REGAN: I think, Sir, in accordance with the Whitford guidelines, as applied in *Interflora*
14 *v Marks & Spencer*, the questions would need to be submitted to the Tribunal for its
15 approval, and hopefully the parties will have been able to agree those between their experts
16 in advance. Otherwise there is little point in making the application.

17 THE PRESIDENT: Yes. If that were dealt with on 25 April, which is not that far away,
18 I imagine that visitors to the Bird Park go up as the weather improves, so you would have
19 May.

20 MR O'REGAN: It would need to be done some time in May.

21 THE PRESIDENT: I can see it is a little bit tight. How many visitors - I have no idea at the
22 moment - per year does the Bird Park get?

23 MR O'REGAN: Over the course of the year it is somewhere in the order of 40,000 or
24 thereabouts, but obviously, as you have observed, Sir, they are squeezed into certain
25 months, weeks, of the year. One would expect that May would not necessarily be a bad
26 time to do a survey because you have got the two Bank Holidays, and hopefully the weather
27 will be improved and therefore there will be people to ask. Obviously, if the weather is not
28 good there will not be anybody going.

29 THE PRESIDENT: Let us work on that basis. The one thing that would concern me is if the time
30 to do a survey means - and it is your client who wants this case heard - that we cannot hear
31 it in July, in which it goes off to----

32 MR O'REGAN: It would be September, would it not, Sir, at the earliest?

33 THE PRESIDENT: -- late September. That would be the result.

34 MR O'REGAN: I think the intention, Sir, would be that we do the survey in early May.

1 THE PRESIDENT: Yes.

2 MR O'REGAN: I do not see we would need to do one for a month.

3 THE PRESIDENT: You probably need to do it for - well, Mr Johnson will advise you whether it
4 is two weeks, three weeks, what he thinks is appropriate, two weekends, I do not know.

5 MR O'REGAN: It would need to be in the early part of May.

6 THE PRESIDENT: It may be that encompassing a Bank Holiday and another weekend is
7 sufficient, I do not know, because those will be peak times.

8 MS McANDREW: Maybe.

9 THE PRESIDENT: It ought to work.

10 MR O'REGAN: Yes, Sir.

11 THE PRESIDENT: I am not going to rule on the survey. I think you should produce it with a
12 statement from Mr Johnson of what is proposed, serve that on the other side, and we can
13 revisit it on 25 April.

14 MR O'REGAN: Thank you, Sir.

15 THE PRESIDENT: Is there anything else that we then need to address today?

16 MR O'REGAN: There is the matter of confidentiality, Sir. Obviously, in your directions you
17 have directed that both parties will disclose financial information relating to their
18 businesses. Certainly, for the Claimant's part, she is somewhat anxious as to some of that
19 information not being provided directly to the Defendant on the basis that it is confidential.
20 No doubt, I suspect, given they are either actual or potential competitors, the Defendant
21 may not wish some of their financial information, business plans, etc, to be made available
22 directly to the Claimant. So it seems that we may need to put a confidentiality ring of some
23 sort in place. Perhaps that can be best dealt with by consent, rather than in the order.

24 THE PRESIDENT: It should not be necessary for those involved in running the Abbey to see
25 your client's management accounts, so it would be a confidentiality ring of external legal
26 representatives - they are all external in this case - and the expert economists.

27 MS McANDREW: Sir, we would resist any application for a confidentiality ring on the basis that
28 we do not particularly see how it is necessary or appropriate in this case. Obviously, our
29 position is that there is no actual or potential competition between the parties. We do not
30 see how this information could be said to be commercially sensitive or a business secret in
31 any way. Some of the information is publicly available. The Defendant could walk to the
32 café and check the prices of the various----

33 THE PRESIDENT: It is not the prices, it is the management accounts and the profitability.

1 MS McANDREW: In that regard there is an issue relating to the 2011 Lease which makes
2 provision for the Defendant to be able to check certain financial information of the Claimant
3 anyway.

4 MR O'REGAN: That is dealt with, Sir----

5 THE PRESIDENT: Just a minute.

6 MS McANDREW: It is Annex 4 to the claim form.

7 THE PRESIDENT: Which clause?

8 MS McANDREW: If I could take you to clause 5 first to set the scene. That is the clause which
9 governs rent, and the covenant there is to pay the turnover rent. Then the turnover rent,
10 itself, was defined in clause 6. At 6.2, the method of calculation of the turnover rent is set
11 out.

12 THE PRESIDENT: I see, so you would see the turnover.

13 MS McANDREW: And 6.2 and 6.3 go through that procedure, and then at 6.4 there is a
14 provision for the inspection of accounts.

15 THE PRESIDENT: Presumably you have been getting the certificates?

16 MS McANDREW: I understand that, in practice, that this is not often, or at all, acted upon, but
17 what we submit is that there is----

18 THE PRESIDENT: Interrupting you for a moment, when you say it is not acted upon, is the
19 turnover rent paid?

20 MS McANDREW: I understand the rent is paid.

21 THE PRESIDENT: The rent is the turnover rent - I think that is the rent, is it not?

22 MR O'REGAN: There is the minimum sum, Sir, and then there is additional rent on top. My
23 understanding is that it has been the minimum sum. In reality, what----

24 THE PRESIDENT: There is the minimum sum - the minimum sum, where is that?

25 MR O'REGAN: 6.2.2, Sir, and that is up to a maximum gross turnover of £120,000, and the
26 Claimant's turnover has been above that figure. I think what in practice happens, Sir, is that
27 the Claimant's accountant sends a very short letter to the Defendant saying that the
28 Claimant's turnover in the previous financial year is X, and that is then being accepted by
29 the Defendant. That does not, of course, entitle the Defendant in 6.4 "Inspection" to review
30 the management accounts. At most, that would involve the Claimant's profit and loss
31 account. Of course, the Claimant is a sole trader and does not publish her accounts in any
32 event. Therefore, they would be confidential. The Defendant in turn does publish accounts.
33 It does not obviously break them down to the level of the monastery shop and café. So that
34 information would not be publicly available either.

1 THE PRESIDENT: I do not quite follow, Ms McAndrew, what really is in practical terms the
2 objection. It should not impede your client in any way in conducting their case.

3 MS McANDREW: Sir, the objection simply is that it is unnecessary, and there is a pre-existing
4 obligation to disclose various items of accounting information, and if the Claimant wants to
5 say that there are other items of accounting information not covered by that clause that
6 specifically require a confidentiality ring, then our submission is that that application needs
7 to be made, particularised, and we can respond to it. It may be that we agree, I do not
8 know. The application is not detailed and we can go from there. Given that disclosure now
9 is not ordered for another month, I would have thought that the Claimant could provide at
10 least some further particulars of what information she says falls outside the scope of this
11 clause that is commercially sensitive.

12 THE PRESIDENT: The matter was raised before this hearing and disclosure is going to take
13 place before the next CMC, and I think the sensible course is to impose a confidentiality
14 ring. That should only relate to the financial information I think, Mr O'Regan. I think the
15 number of admissions should not be kept confidential for that purpose.

16 MR O'REGAN: One can work that back, Sir, once one knows the number of admissions, the
17 number of adults at £7.50 or whatever it is, one can then calculate that for the number.

18 THE PRESIDENT: Yes, but the management accounts will cover the sale of food and drink and
19 gifts, will they not?

20 MR O'REGAN: Yes.

21 THE PRESIDENT: That is the matter that I would have thought is particularly confidential, not
22 the number of people coming in. I do not see that that is----

23 MR O'REGAN: It is just simply, Sir, with the number of people coming in, one knows, and
24 particularly if they are broken down by category rather than just aggregate number, one can
25 then, by knowing how much the ticket charge is for each category, work out the
26 information.

27 THE PRESIDENT: Yes, but I do not see why that is confidential vis-à-vis the Abbey.

28 MR O'REGAN: Very well, Sir.

29 THE PRESIDENT: I think it is the detailed management accounts. If, having got that
30 information, as you will, by the next CMC, you think there is nothing here which should be
31 maintained as confidential, you can make submissions then. What I do not want to do is
32 impede the disclosure process by some argument over confidentiality, as it is quite difficult
33 to arrange a further hearing in the interim. I think we will set up a confidentiality ring in the
34 usual way compromising external lawyers and expert economists. That, for the moment,

1 will cover management accounts. If there are any other things to go into it, then that can be
2 dealt with by correspondence or referred to the Tribunal if necessary.

3 MR O'REGAN: I think there are a couple of other categories of documents we can identify today.
4 You have ordered disclosure of business plans, and also the Defendant is required to
5 produce a copy of the leases - lease or leases, licences, etc - with Chorley's, and obviously
6 Mr Chorley would not particularly wish the Claimant to have the precise details of his lease
7 arrangements.

8 THE PRESIDENT: It may be that you will have----

9 MS McANDREW: It may be, I would have to check that.

10 THE PRESIDENT: I think I am not going to say what goes into it. You decide what is
11 confidential.

12 MR O'REGAN: Very well, Sir.

13 THE PRESIDENT: It can always be challenged, but it may be----

14 MS McANDREW: I just think that it may be----

15 THE PRESIDENT: -- as Mr O'Regan has said helpfully from your point of view, Ms McAndrew,
16 it may be that actually some of your documents or board minutes about how much you can
17 charge Mr Chorley might also be confidential.

18 Yes, thank you. Anything on that?

19 MR O'REGAN: I do not think so, Sir.

20 THE PRESIDENT: I think if you could draw up the confidentiality order, which can be made
21 separately but adjacent to the directions, the directions will just provide that there shall be a
22 confidentiality ring limited to external lawyers and expert economists in accordance with
23 the separate order.

24 MR O'REGAN: And the other experts on the surveying issues, Sir?

25 THE PRESIDENT: Do they need to be in the confidentiality ring? They are dealing with----

26 MR O'REGAN: It is unclear what would need to be provided to them. Perhaps that is something
27 that, if necessary, we could----

28 THE PRESIDENT: I would not have thought they should be in the confidentiality ring. The
29 documents they are dealing with should be quite different.

30 MR O'REGAN: If it seems necessary for either party to disclose such information, then we can
31 come and deal with that at the time of----

32 THE PRESIDENT: You can in the first instance ask each other and then come back, but I would
33 have thought that they are not going to be dealing with the financial side of things at all.

1 I am also not sure at the moment whether, given the nature of what they are looking at, a
2 joint statement is necessarily productive, but it might be. It is something you might think
3 about when you appoint your experts. The economists, yes, but the other experts, I have
4 rather an open mind.

5 Anything beyond that?

6 MR O'REGAN: Nothing further from me.

7 THE PRESIDENT: Anything beyond that?

8 MR O'REGAN: No, Sir.

9 THE PRESIDENT: Costs in the case.

10 We will confirm the dates. We have got 25 April as fixed, and we will confirm, if possible,
11 by the end of this week, the date for the actual hearing, and then we will explore a date for a
12 site visit some time before that.

13 Very well. Thank you both very much.

14 MS McANDREW: Thank you.

15 MR O'REGAN: Thank you, Sir.

16
