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IN THE COMPETITION
APPEAL TRIBUNAL

Case No. 1303/5/7/19

Victoria House,
Bloomsbury Place,
London WC1A 2EB

25 April 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.

Mr Philip Woolfe (instructed by Loxley Solicitors Limited) appeared on behalf of the Defendant.

1 THE PRESIDENT: Can I just say something first of all about bundles. As you know, a feature
2 of this Tribunal is, first, that we have the assistance of great value of Référéndaires, and
3 secondly, that all proceedings are transcribed. It really is essential, if we are given a bundle,
4 that we have three copies so that the transcriber, who is working while the court is in
5 session, has her own copy, otherwise it is impossible for her to follow what is happening,
6 and that the Référéndaires - they can share if necessary - have a bundle, and to be given just
7 one bundle quite late is, therefore, rather unhelpful. Please could you note that in future. It
8 may be there will be no other interim hearing in this case. For the actual hearing,
9 substantive hearing, we will need six bundles, because of course we will have a full
10 Tribunal on that occasion.

11 MR O'REGAN: Yes, Sir, I would apologise on behalf of those instructing me for that, and
12 obviously the point will be taken and fed back.

13 THE PRESIDENT: Thank you. If we then work through - we have a list in the Tribunal's letter,
14 and I think the first question is the costs cap. You have both put in a costs budget for that.
15 If I start with the Claimant's budget, Mr O'Regan, I see the total is £370,400 odd. Just
16 looking at that, first of all, there is a sum for a preliminary issue, and for mediation and
17 indeed for ADR. Those are contingencies. We are not going to have a preliminary issue
18 now. I do not know if mediation is still anticipated. They amount to a not insignificant sum
19 all together.

20 MR O'REGAN: Contingency A, Sir, if I can assist, would appear to relate to the Defendant's
21 application that there would be a preliminary issue. There is a small amount of time for my
22 learned friend Mr McCreath, who has advised on some property issues relating to that, so
23 that sum has actually been incurred.

24 THE PRESIDENT: That is not part of the expenditure on the CMC above, where there is----

25 MR O'REGAN: No, Sir, it has not been included within that.

26 THE PRESIDENT: I see.

27 MR O'REGAN: That is what the time relates to. In the note in the Assumptions at row 21 it says
28 "work on preliminary issue on interpretation of clause 9.1". That should probably say "in
29 relation to the application for there to be a preliminary issue".

30 THE PRESIDENT: Yes.

31 MR O'REGAN: That is what that relates to. It is not really a contingency, because it has actually
32 happened.

33 THE PRESIDENT: Yes, I see.

34 MR O'REGAN: So it has probably been recorded in the wrong place.

1 THE PRESIDENT: I understand, it is work incurred. It does say “incurred”, that is why I was
2 asking.
3 That is that one. Then the mediation is an estimated sum.
4 MR O’REGAN: That is so.
5 THE PRESIDENT: Is it anticipated that there will be a mediation at this stage?
6 MR O’REGAN: I have no instructions that there will be one, but in---
7 THE PRESIDENT: It has been explored in the run-up? There has been quite a run-up to this.
8 MR O’REGAN: The parties are in discussions on certain matters. Obviously, without prejudice,
9 I cannot really go into it, Sir, but if there were to be a mediation that is what it is for, to
10 explore----
11 THE PRESIDENT: Yes, but I do not think it need be included in a costs cap. If there is a
12 mediation, there will not be the substantial costs of - unless it is a failed mediation, if that is
13 what is envisaged.
14 MR O’REGAN: Yes, if it settles on mediation then we do not get to trial.
15 THE PRESIDENT: It all goes away.
16 MR O’REGAN: If it is unsuccessful then it will fall back in.
17 THE PRESIDENT: I see. So you say that is still a possibility?
18 MR O’REGAN: Yes, I cannot say, Sir, with certainty that contingency will arise. I think it is
19 there in case there is one, rather than in the expectation that----
20 THE PRESIDENT: It might be appropriate, because a cap can always be revised, not to include it
21 in the cap. If there is a mediation then you will know what it costs and you can apply to
22 vary the cap.
23 MR O’REGAN: Yes, Sir. I note the Defendant has included that in settlement/ADR.
24 THE PRESIDENT: You have got that as well.
25 MR WOOLFE: We have got that as well, Sir.
26 THE PRESIDENT: Do they go together, effectively, because they are about £32,000 together,
27 which is a significant sum.
28 MR O’REGAN: It is about £31,000, I think, Sir, and theirs would be £17,500.
29 THE PRESIDENT: Yes. This is not a detailed assessment, as you know. However, I do need to
30 think about the overall cap if this goes to trial and you succeed. I appreciate there may be
31 some ongoing discussions about settlement, as there often are. It might be sensible - you
32 have incurred some amount already - to put in a small amount, but it seems rather a lot in
33 the circumstances.

1 MR O'REGAN: I think we have a relatively small amount estimated under the ADR/Settlement
2 column, whereas the Defendant has a much larger sum.

3 THE PRESIDENT: I am not looking at the Defendant at the moment, I am looking at you. You
4 have got about £7,500 to come.

5 MR O'REGAN: Yes, Sir, that seems to be mainly in relation to settlement discussions, rather
6 than either a mediation or a joint settlement determination of some sort.

7 THE PRESIDENT: Yes, I see.

8 MR O'REGAN: It may be that it would be appropriate not necessarily to allow £20,000 odd, but
9 a proportion of that would then be moved into the ADR/settlement column.

10 THE PRESIDENT: Yes. I think I will not allow anything for mediation. If you go through a
11 formal mediation then you can apply to amend the cap.

12 MR O'REGAN: Yes, Sir.

13 THE PRESIDENT: It seems to me more appropriate. So that is that on that aspect. Then your
14 expert economists' total fees are £57,500, as I understand that.

15 MR O'REGAN: Yes, Sir, it is £67,500. I am instructed, Sir, that includes the survey costs which
16 are estimated disbursements of both the company doing the survey, but also the economist's
17 costs in setting the survey up and then analysing the results.

18 THE PRESIDENT: That includes the costs of the survey company?

19 MR O'REGAN: Yes, Sir, which are £27,500, which are estimated costs of the survey. If one
20 takes that out one comes down to about £30,000.

21 THE PRESIDENT: Yes, I see.

22 MR O'REGAN: Which of course are somewhat lower, Sir, than one would normally expect in a
23 case of this nature.

24 THE PRESIDENT: Yes, thank you. I think those were my initial questions. I think it is sensible
25 to take this, as it were, item by item. Mr Woolfe, have you any comments on the
26 Claimant's costs budget beyond those that I have raised.

27 MR WOOLFE: Sir, we do not have a point on the Claimant's costs budget *per se*, or anything
28 very specific. Mr O'Regan has made certain comparisons between the two cost budgets,
29 and used his as a benchmark to judge ours, and we have some responses to that.

30 THE PRESIDENT: On the Defendant's, on your budget?

31 MR WOOLFE: Yes, exactly, there are some comments on our budget that he has made by
32 reference to his. There was one quite small point of detail actually, which is in respect of
33 Mr O'Regan's counsel's fees to trial, which is that the arithmetic seems to have gone
34 somewhat awry, in that the fee that is in there of £21,000 is in the----

1 THE PRESIDENT: This is on p.5?
2 MR WOOLFE: Page 5, that is right. In the Assumptions, there is then reference made to a brief
3 of £18,500, plus three times refreshers of £2,500, which would add up to £26,000.
4 THE PRESIDENT: Yes.
5 MR WOOLFE: I would not be making the point, but it is reasonably clear as to what it actually
6 relates to. The other point is that there is quite a substantial sum for Mr O'Regan's fees for
7 trial preparation. As I understand it, trial preparation should normally include - it is very
8 rare one gets much by way of counsel's fees for trial preparation, because it tends to be----
9 THE PRESIDENT: The brief fee.
10 MR WOOLFE: Yes, exactly. We do not have a problem with the overall amounts, it is all part of
11 the detail, which we noted, and certainly when it comes to comparisons between them, and
12 so forth, to get an accurate comparison.
13 THE PRESIDENT: Yes. Mr O'Regan, can you clarify that?
14 MR O'REGAN: I am grateful to my learned friend for pointing out that there is an arithmetical
15 error, which seems to have eluded us entirely on our side. £21,000 would only include one
16 refresher, when it should be three. I agree with my learned friend that it would be £26,000.
17 THE PRESIDENT: That should be £26,000.
18 MR O'REGAN: As relates to the trial preparation, I am not quite sure what that relates to, but it
19 seems to relate to an attendance in a pre-trial meeting with the experts. We can move that
20 into----
21 THE PRESIDENT: I thought, if we amend your trial to £26,000, we should remove the £4,000,
22 because that would be normally part of the brief fee, would it not, trial preparation?
23 MR O'REGAN: It would be, Sir, yes. I am not quite sure why it has been split that way.
24 THE PRESIDENT: Unless those instructing you say that this has been prepared in some different
25 way, that the brief fee is actually £18,500, plus £4,000, so it would be £22,500.
26 MR O'REGAN: I think that is what has happened, Sir, that they have included time for meetings
27 with particularly the experts as a trial prep, and trial prep, more properly, would be bundling
28 and administrative matters.
29 THE PRESIDENT: Yes. The other question I did have, which I meant to ask is PTR. We have
30 had the CMC, we have got the hearing today. I do not think either side, in fact, envisages
31 that we need - subject to any discussion on the survey, and let us park that - a full PTR.
32 MR O'REGAN: Yes, Sir, I think that is right, and in preparing this my timetable assumes there
33 will not be one.
34 THE PRESIDENT: Can that figure come out?

1 MR O'REGAN: My proposal would be, Sir, that if we are not going to have a PTR, and the
2 Defendant does not think one is necessary because they have not budgeted for it, and I do
3 not see, if we have a timetable to trial today, that we need a PTR. If that situation changes
4 then we will have to revisit it. My proposal would be that we can take that out.

5 THE PRESIDENT: Yes. Just to make clear, your total at the moment, is, let us say, £370,434. If
6 we take out, as I said I will, the £20,395 for mediation, the----

7 MR O'REGAN: Pre-trial is £7,500, Sir, in round figures.

8 THE PRESIDENT: £27,490 can come off, and I think the addition that has been made, thanks to
9 Mr Woolfe's sharp eye, is to add £5,000, for three refreshers, on the assumption that it goes
10 for four days----

11 MR O'REGAN: That will be £23,000 net off, Sir, I think, in round numbers.

12 THE PRESIDENT: Yes, £347, 549, I think is what it comes to.

13 MR O'REGAN: Yes, Sir.

14 THE PRESIDENT: Yes, thank you. If we then turn to the Defendant's costs, and perhaps it is
15 sensible for me to ask Mr Woolfe first, you have made certain points in your skeleton.
16 Mr Woolfe, one significant item obviously is the use of three counsel, and indeed a second
17 junior of some 17 years call, to deal, as I understand it, just with the construction of the
18 lease.

19 MR WOOLFE: Sir, yes, I would not presume to describe - junior counsel, but not my junior in
20 any way, it was a sense of co-ordinate counsel, if I can put it that way. Perhaps I could start
21 at the beginning. Clearly this case is predominantly a competition case and in the
22 Competition Tribunal, and it makes sense to have specialist competition counsel for the
23 trial.

24 THE PRESIDENT: Yes.

25 MR WOOLFE: However, there is this highly significant point of landlord and tenant law. This is
26 an important case for my client. In terms of the proportionality, which is what I think we
27 are fundamentally concerned with, one needs to bear in mind what is at issue. This is not a
28 case where, for my client at any rate, simply money is at issue. They are being sued for
29 substantial damages, but beyond that the Estate is their home, it is their community and it is
30 where they are trying to live a religious life. Their perception is that the development of a
31 bird park in the way they understand the Claimant wants would interfere with that.
32 One has to approach our costs budget on the assumption that we have eventually won and
33 the Claimant is paying.

34 THE PRESIDENT: Yes.

1 MR WOOLFE: In that scenario, we will have been justified, and you can see that we will have
2 defended these proceedings and also have defended what my clients see as an important
3 point about their way of life. In that context, they would like to instruct specialist counsel
4 to deal with this point of landlord and tenant law because they want to ensure the right
5 result is reached.

6 Beyond that, I would also say the Tribunal is likely to be substantially assisted by having
7 specialist counsel to deal with that, all the more so because this is a specialist competition
8 Tribunal and, therefore, not one with enormous familiarity with those issues.

9 THE PRESIDENT: Yes.

10 MR WOOLFE: The context of instructing Ms Fitzgerald should be understood in that context.

11 If I can then turn to Ms McAndrew. Obviously, in the grand scheme of this litigation, her
12 brief fee is not the most significant item. That is the first point to make.

13 Secondly, the value that she brings on our side is essentially to bring efficiency throughout
14 the proceedings by picking up points between now and trial, and one only really gets the
15 benefit of that if she is then there at trial with all her knowledge. For a relatively small sum,
16 we think----

17 THE PRESIDENT: I think the concern is that it produces an overall fee for competition counsel
18 of £46,000, which is quite significant. It might be helpful, I am sure very helpful, to have
19 the benefit of Ms McAndrew, but that is a lot of money when you are also incurring
20 £22,500. After all, Ms Fitzgerald is able to assist you on other things. She is not a
21 specialist competition lawyer, but no doubt a good lawyer able to deal with various matters.
22 So you have a team of three at the end of the day. You may want to do that, and there is
23 nothing to stop you doing that, but the question is whether, if you do win, that is
24 proportionate, even for something which is I am sure very important to your client. I think
25 it is equally very important to the Claimant. It is her livelihood, I think as well.

26 MR WOOLFE: Absolutely. The only other point I would make, Sir, is this - I appreciate that we
27 are travelling on this, but perhaps one further point - you will have seen that the partner
28 rates are substantially different between the Claimant and the Defendant - very substantially
29 different.

30 THE PRESIDENT: Yes.

31 MR WOOLFE: I have not made a point about that, *per se*. There is some degree of trade-off
32 between instructing a firm with more competition expertise and the rates that go with
33 that----

34 THE PRESIDENT: Yes.

1 MR WOOLFE: -- against instructing an additional junior. One has to, in a sense, look at the
2 overall amounts of the costs budget when assessing the proportionality of costs. That is the
3 only further point I would make in that regard, Sir.

4 THE PRESIDENT: Yes, thank you. I think the surveyor's cost has now dramatically changed.

5 MR WOOLFE: Yes, Sir, I should say the £20,000 was a pure estimate.

6 THE PRESIDENT: I understand that, and so that means that your overall budget is now, because
7 for the £20,000, it is----

8 MR WOOLFE: That has come down to £6,500. We anticipate----

9 THE PRESIDENT: Is it £6,500?

10 MR WOOLFE: £6,500 at that stage. We were anticipating needing to add a further £6,250 for
11 experts at the trial stage. In a sense, there is some £7,250 coming out in total.

12 THE PRESIDENT: So £7,250 instead of----

13 MR WOOLFE: Sir, on p.4 our surveyor instead of----

14 THE PRESIDENT: £24,000.

15 MR WOOLFE: £24,000, it should be £6,500. Then at the trial phase, so on p.6, you will see that
16 there are disbursements of £1,300 for experts. That is line 20 on p.6, but nothing is entered
17 for experts' fees for their report at line 19, and we anticipate that there needs to be a further
18 allowance made. In respect of our expert economist, we apologise, that is an oversight. In
19 respect of the surveyor it is because the fee structure is such that there will be something for
20 the report and something for attendance. So there needs to be £6,250 added for that.

21 THE PRESIDENT: How much?

22 MR WOOLFE: £6,250.

23 THE PRESIDENT: That breaks down as to what between surveyor and economist?

24 MR WOOLFE: I am sorry, Sir, I am afraid I do not have those figures immediately to hand.
25 I think it is roughly two to one economist to surveyor. I think it is roughly £2,000 for the
26 surveyor and £4,000 for the economist.

27 THE PRESIDENT: So the net effect then is - is that right, we take off £10,500 for the overall
28 budget. For the £24,000 we substitute £7,250, and then we add a further £6,250?

29 MR WOOLFE: No, Sir, for the £24,000 we substitute £6,500.

30 THE PRESIDENT: £6,500, sorry.

31 MR WOOLFE: That is a loss of £17,500.

32 THE PRESIDENT: It is £6,500 and £6,250.

33 MR WOOLFE: That is right, which, by my arithmetic, would make the - what the after trial costs
34 would be would depend on what comes off for counsel.

1 THE PRESIDENT: I see, so it is £12,750 was added on, and £24,000 comes off?
2 MR WOOLFE: Yes, which I think is £11,250.
3 THE PRESIDENT: £11,250, yes. So your total is then £310,846, I think.
4 MR WOOLFE: Yes.
5 THE PRESIDENT: So that is the surveyor. Your expert economist---
6 MR WOOLFE: Sir, that is on p.4, the actual fee.
7 THE PRESIDENT: £49,000 plus £4,000 odd for attending trial?
8 MR WOOLFE: Yes.
9 THE PRESIDENT: As opposed to the £30,000 for the Claimant.
10 MR WOOLFE: That is right, Sir.
11 THE PRESIDENT: It is said that that is rather expensive. Is there anything you want to say
12 about that?
13 MR WOOLFE: The accurate comparison, Sir, is between - if you are looking at Mr Williams'
14 fees at p.4, you will see that although £49,000 is the output, that includes £2,800 odd in
15 respect of both a conference, a joint meeting and a joint statement. Those are comparable to
16 the amounts for the Claimant's economist. The actual comparison, once you look at their
17 expert report and taking out the costs of conducting a survey, *per se*, is with the £43,942,
18 which is Mr Williams' costs simply for his report. So, yes, there is a difference between the
19 two, but they are not wholly incommensurate. You have got to assess the costs budget as a
20 whole. That is what Mr Williams is charging, it is what my client will be paying. It is not,
21 in itself, an unreasonable sum for a substantial report of this nature.
22 In terms of looking, for what it is worth, at the survey, it may well be that the Claimant's
23 economist is getting some benefit and interchange with the survey company.
24 THE PRESIDENT: The other question I have was the amount you have got in for
25 ADR/settlement discussions. It seems very little has been incurred so far, but it seems quite
26 a high estimate, especially as your solicitors' time is rather less per hour.
27 MR WOOLFE: Yes. It is perhaps helpful to look at the actual number of hours that it is
28 suggested have been incurred on settlement. On p.6, you will see that the bulk of it comes
29 from 32 hours of partner time. That is a decent allowance, as one can see. Sir, can I just
30 explain about settlement? If one is thinking of settlement of this case, it is not simply a
31 matter of saying, "We will pay you the money". It will be a matter of the Claimant
32 potentially being allowed to do things on an ongoing basis.
33 THE PRESIDENT: Yes.

1 MR WOOLFE: Those are points of detail that need to be negotiated in quite some detail. You
2 will have seen the Settlement Agreement----

3 THE PRESIDENT: Last time.

4 MR WOOLFE: -- last time. That is a fairly substantial and detailed agreement that has to be
5 negotiated, and also instructions taken in the Community, and the detail and practicality of
6 it considered. In that context, 32 hours of time is not excessive, and indeed it will only be
7 payable if it is, in fact, incurred.

8 THE PRESIDENT: Of course. The other question is the pre-action costs. I am trying to
9 understand the extent of pre-action time spent. What does that relate to in terms of pre-
10 actions before the proceedings were launched? I can understand the Claimant was having
11 pre-action costs, but that degree of Defendant's pre-action costs is rather unusual.

12 MR WOOLFE: There was a substantial pre-action letter, a long and detailed pre-action letter, and
13 a response was made to it. You will also need to take advice on it. The pre-action stage,
14 the claim was being put not only on the basis of Chapter I, but also on Chapter II, and it was
15 necessary to take advice both on the competition points and on the landlord and tenant
16 points.

17 THE PRESIDENT: The advice, counsel's advice is £10,000. There is £35,000, which is a huge
18 amount of solicitor time.

19 MR WOOLFE: Substantial costs were incurred in considering the points, and also instructing
20 counsel, and so forth, and absorbing, advice and then dealing with the response. These are
21 incurred costs.

22 THE PRESIDENT: No, no, I am not suggesting there is anything misleading about it. What
23 I have to decide is what is a proportionate amount for what has happened. Counsel's advice
24 and other disbursements, £10,000, then responding to a letter, taking client's instructions,
25 and so on, it still seems, at what are, as you point out, very reasonable hourly rates, a huge
26 amount of time.

27 MR WOOLFE: There were also, as I understand it, some discussions between the parties.

28 THE PRESIDENT: Thank you.

29 MR WOOLFE: Sir, the other point, did you want me to address you on the point Mr O'Regan
30 makes about the overall hours incurred generally, and whether or not there should be -
31 I think in his skeleton argument he said that one would expect the Claimant to spend
32 substantially more time than the Defendant.

33 THE PRESIDENT: I am not sure why one necessarily would spend more----

34 MR WOOLFE: It would be on trial bundles.

1 THE PRESIDENT: Pre-action, I would, because they were considering whether to bring the case
2 and how to formulate it, and so on, but once the action starts in a case of this nature I would
3 not expect there to be a great discrepancy, so no, you need not.

4 MR WOOLFE: Thank you.

5 THE PRESIDENT: Mr O'Regan, is there anything you want to say in response to that?

6 MR O'REGAN: Yes, Sir, just briefly on a few points. In relation to number of counsel, as my
7 learned friend put to you, this is primarily a competition case. There is obviously the issue
8 of the interpretation of the lease. That is not particularly a complex landlord and tenant
9 issue. It does not raise any issues under the Landlord and Tenant Act, for example, it does
10 not relate to whether there has been any breach of the lease, it is purely an interpretation
11 point, and an interpretation of one clause, 9.1, and it is a fairly straightforward question, or a
12 simple question that may have complicated answer, which is: what are the activities of a
13 bird park open to the public in December 2011?

14 THE PRESIDENT: There might be some other questions on the approach to interpretation.

15 MR O'REGAN: There is the interpretation question, which will largely be determined on the
16 expert evidence, I would expect, with some additional factual evidence. It certainly, in my
17 submission, would not justify an experienced senior junior being in attendance for four days
18 to address the Tribunal on that matter. Indeed, I will be appearing alone, and will deal with
19 that matter, despite not being a property law expert.

20 One accepts the question of proportionality and, as you have rightly observed, Sir, this is an
21 important case for both parties - the Claimant in relation to this being her livelihood, this is
22 how she earns her living, or at least attempts to earn her living; and obviously for the
23 Defendant, as my learned friend puts to you, this is the Estate where they live, so it is
24 important for them as well. So one needs to be proportionate and four days of senior junior
25 counsel time, in my submission, simply is not proportionate, particularly in a case where the
26 Defendant's solicitors are experts in property law matters.

27 I take no issue with Ms McAndrew's time as such, for the reasons my learned friend has
28 given to you.

29 In relation to the partner rates, yes, Burges Salmon's rates are higher than those of Loxley,
30 one would expect that. One is a national firm based in Bristol, doing national level work,
31 the other is a firm based in rural Gloucestershire, doing a very different kind of work, but
32 one needs to look also at the hours. The number of partner hours in this case for the
33 Claimant - I am not going to take you through them, Sir - are low. This case has been
34 predominantly run by a director, so below partner level, with the assistance of either a

1 senior associate or an associate, and, of course, Burges Salmon are doing significantly fewer
2 hours. The parties obviously decided to run this case in different ways. There is no
3 criticism of that and it is entirely appropriate.

4 In relation to the surveyor, the remaining point on that, Sir, is that £6,250 for attendance at
5 trial does seem slightly high.

6 MR WOOLFE: Sir, just to clarify that that was for both the economists and the surveyor.

7 THE PRESIDENT: That was both experts.

8 MR WOOLFE: The surveyor is about £2,000.

9 MR O'REGAN: I am grateful, and I will not take that point any further, Sir. In relation to the
10 economist, Mr Johnson's time of £30,000 net of the survey costs includes report, conference
11 and the joint statement, so he is considerably less at £30,000 than Mr Williams at about
12 £54,000.

13 In relation to pre-action costs, Sir, my learned friend is entirely right that there was
14 extensive correspondence. There was a lengthy letter of claim - I cannot remember, 15, 16
15 pages - which was met with an equally lengthy and robust response, to which there was a
16 further response of some length. So it is not unexpected there will be costs. The main issue
17 I would have, Sir, is at p.2 of the Defendant's document, is the amount of partner time and
18 duplication. There is £13,000 odd for a partner at £250, and then another small amount of
19 the rate increase, that is about £14,000 in all. Then there is another £12,000 for another
20 partner. So the majority of work was being done by two partners who apparently are not
21 competition specialists, so it would seem there is a degree of duplication there. That is a
22 relatively minor point in the overall scheme of things, considering our pre-action costs are,
23 as one would expect, higher.

24 So, unless I can assist you further, Sir.

25 THE PRESIDENT: Yes. Thank you very much. I will deal with that now.

26 (For ruling, see separate transcript)

27 THE PRESIDENT: The next item that we have to consider is disclosure. The Tribunal made an
28 order on 21 March. I think, Mr O'Regan, it has been said that as regards disclosure of
29 management accounts, your client has disclosed quarterly accounts just for a short period,
30 and what is asked for is the same degree of disclosure for the rest of the period.

31 MR O'REGAN: I think, if you take tab 5 of the bundle for today, Sir----

32 THE PRESIDENT: Yes, there is the letter of 18 April.

33 MR O'REGAN: That is right, Sir, yes, the second paragraph. That sets out the position. In
34 summary, the Bird Park has used various bookkeepers and accountants at various times and

1 does not have a complete set of books itself. That is what Burges Salmon say, and the
2 Claimant has disclosed what she currently has in her possession and control, some of which
3 she has obtained from third parties. It is not clear to me which those are but it must be one
4 or more of the bookkeepers. She is continuing to make further enquiries of others, who
5 would have advised her in the past and would, to the extent they still exist, have those
6 documents.

7 THE PRESIDENT: We are talking about a period of some, what, nine years?

8 MR O'REGAN: Eight and a bit years, yes.

9 THE PRESIDENT: I do not know how many different bookkeepers there are. How long does it
10 take to get answers from her bookkeepers? We are on quite a tight timetable to trial.

11 MR O'REGAN: That is appreciated, Sir.

12 THE PRESIDENT: And I understand Burges Salmon wrote that letter on 18 April. We are here
13 effectively a week later, and what is the position now?

14 MR O'REGAN: Sir, if I could take instructions? (After a pause) My instructions are, Sir, that
15 the Claimant herself has made further enquiries of the individuals, but those instructing me
16 cannot tell me who they are at the moment, but it must be one or more of her current or
17 former accountants or bookkeepers, and we obviously, Sir, will----

18 THE PRESIDENT: Can you tell me this - I am sorry to interrupt you, but can you just tell me
19 this: it is slightly odd to have quarterly management accounts just for that short period. Did
20 she have - even if she has not got copies of them now, I understand that - quarterly accounts
21 prepared subsequently or is she only, since March 2012, having annual management
22 accounts? She must know that, even if she has not got the accounts.

23 MR O'REGAN: I apologise, but may I take further instructions? (After a pause) I think the
24 position is, Sir, that the Claimant's records are not in a state that one might expect them to
25 be. You obviously do not have the disclosure that has been given, but there is an index of
26 documents behind the letter. That will show that she produced, Sir, annual accounts. They
27 are obviously not audited, but are professionally prepared. There are summaries of daily
28 takings for a period between 2011 and the start of 2012, which were my understanding of
29 the records that she did keep. It seems they are not being kept any longer. Then there is a
30 gap, and then it would appear that she has been using till roll receipts, effectively using her
31 till as a calculator or an adding machine of some sort, and at the end of each year producing
32 a summary that shows a breakdown of admissions, the amount from the shop for catering
33 and sales of bird food for some reason described separately.

34 THE PRESIDENT: Yes.

1 MR O'REGAN: I think the difficulty is that there may not be more, but obviously, understand
2 our duty of ongoing disclosure, we will redouble that effort.

3 THE PRESIDENT: Did she stop using Bookkeeping Services Limited in March 2012 - is that the
4 position?

5 MR O'REGAN: It seems that until 2012 she was using a company called Lyn Niblett
6 Bookkeeping Services.

7 THE PRESIDENT: Sorry, that is the full name, is it, Lyn Niblett Bookkeeping Services?

8 MR O'REGAN: Yes. That takes one down to number 15. Then in 2015 she was using a
9 company called Leonis, who are at tab 16, and then we see who has done the accounts since
10 then.

11 THE PRESIDENT: I have not obviously seen it, so----

12 MR O'REGAN: No, Sir, but----

13 THE PRESIDENT: There is a limited extent to which we can explore this, but I think those
14 instructing you, Burges Salmon, should raise this with your client and write at the beginning
15 of next week to the Defendant's solicitors just explaining who were the accountants she has
16 been using since Lyn Niblett Bookkeeping Services Limited ceased to act for her and
17 whether they prepared anything other than annual accounts and this sales analysis.

18 MR O'REGAN: Yes, Sir, the annual accounts will tell us who prepared this, so that will be a
19 starting point for enquiry. It seems to me the appropriate thing is that each of them should
20 produce to her what they have on their file.

21 THE PRESIDENT: Yes. She is entitled to ask for it if it was supplied to her before, even if she
22 did not keep a copy.

23 MR O'REGAN: Yes, Sir.

24 THE PRESIDENT: Can that be done - as I say, timing here is now getting quite tight - so that at
25 least there is a clearer picture presented to the Defendant, by the end of next Wednesday.
26 That should give you time enough. That is 1 May. So by the end of 1 May, you provide a
27 letter to the Defendant just explaining what kind of accounting service she got over the
28 period since March 2012, and what accounts were kept, even if she has not got copies of
29 them.

30 MR O'REGAN: Yes, Sir. She is entitled to ask for them and they will be obtained.

31 THE PRESIDENT: Yes. Mr Woolfe, would that meet your - I do not want to make it an earlier
32 date than that because she may have to go to different people.

33 MR WOOLFE: Exactly. Just looking at the annual accounts, I see reference to Leonis and also
34 Nicholas Curran Limited. So there seem to be a couple of people.

1 THE PRESIDENT: Yes.

2 MR WOOLFE: One would expect records that they hold on her behalf essentially to be within
3 her control. If she finds that they hold them and at least discloses to us their existence by
4 stating they exist and then we will try and----

5 THE PRESIDENT: Yes, you obviously do not need every bookkeeping record, but you want any
6 summaries or quarterly statements.

7 MR WOOLFE: Exactly, Sir, and ultimately if, in fact, they do not exist, they do not exist.

8 THE PRESIDENT: Yes, so we will say by Wednesday, 1 May, close of business. That is,
9 I think, the first item that I notice.

10 Can I also ask you, Mr O'Regan, the zoo licence, which was para.18, those licences, when it
11 says "as renewed", the point being that a licence would expire and you have to get a new
12 one, I expect, at certain points. They are time limited.

13 MR O'REGAN: That is right, Sir, yes.

14 THE PRESIDENT: We want to be sure that each licence covering this period has been disclosed,
15 not just the current one.

16 MR O'REGAN: There is one of 2008, which I think is annexed to the claim form. The next one
17 then would have been 2014, and then the current one if they last for six years each, which is
18 my understanding.

19 THE PRESIDENT: I see.

20 MR O'REGAN: We will check there are not any intermediate ones, Sir.

21 MR WOOLFE: That was my understanding.

22 THE PRESIDENT: I see, so we have got the two relevant ones, fine. Thank you. Then I think
23 the Defendant ask by para.4 of their skeleton, Mr Woolfe, for a list of food, drink and other
24 items for each year, or a list of all such items as are currently sold by the Claimant. I can
25 see a list of items currently sold. That can be provided, I think, for each year.

26 MR WOOLFE: Sir, so far as there is an issue on this, if those documents exist and can readily be
27 located by a reasonable search, we think they should be disclosed. It is entirely possible
28 they may not be accessible, and one should not expect the Claimant to carry out
29 unreasonable searches for them, but simply if it is known that they do exist and where they,
30 or they may be incorporated in the management information, we would like to have them.

31 THE PRESIDENT: Yes.

32 MR WOOLFE: If it is an unduly difficult request then that may not be appropriate, but certainly a
33 current list, as it is, would be desirable.

1 THE PRESIDENT: When you say “items”, in terms of food, we have dealt with the question of
2 the menu and tariff, the current menu and tariff, being sold, are you talking about the non-
3 food items here?

4 MR WOOLFE: Sir, yes, essentially a stock list for the----

5 THE PRESIDENT: Non-food items, yes. Mr O’Regan, I think a stock list of non-food items
6 currently being sold would be very helpful.

7 MR O’REGAN: If there is a stock list, Sir.

8 THE PRESIDENT: I think, if there is not, it would probably be sensible for your client to just
9 prepare a list.

10 MR O’REGAN: I think the further particulars----

11 THE PRESIDENT: You have put things in the further particulars. Let me just have a look at
12 those. I think I asked about this last time. How much more do you want than that,
13 Mr Woolfe? We do not need to know how many of each are sold, or how many of each are
14 carried. It is really the character of them.

15 MR WOOLFE: It is simply that these are - for instance, to take one example, “prints and
16 artwork”. There would be quite a variety of things there, quite a variety of things sold in
17 “prints and artwork”. Simply having a detailed list - one would imagine what one does, if
18 you have got a till, one normally needs to have in a modern till system a list of the items
19 being sold with prices attached to them. That is normally the way it does. It should not be
20 unduly difficult, and if it exists it is not----

21 THE PRESIDENT: No, if it exists, if the stock list exists, it can be disclosed.

22 MR O’REGAN: If it exists, it can be disclosed.

23 THE PRESIDENT: It will be disclosed. If it does not - this is not Tesco - they will not
24 necessarily have a bar scanner computer record of stock being run down and being re-
25 ordered, and so on.

26 MR WOOLFE: They may do, they may not do. This is a request for disclosure, not formally a
27 request for further information.

28 THE PRESIDENT: You have heard the request. I think, if it exists, it should be disclosed. I will
29 not make an order, but the point has been made.

30 MR O’REGAN: I am grateful, Sir.

31 THE PRESIDENT: Similarly, if there were past lists. This is something that will be obviously
32 clarified also in the site visit when we will see the sort of things that are being sold.
33 Anything else from you, Mr Woolfe, that you are seeking?

34 MR WOOLFE: On disclosure, no, Sir.

1 THE PRESIDENT: I do not think you have any disclosure requests - is that right?
2 MR O'REGAN: No, none remain, Sir.
3 THE PRESIDENT: Can I just raise one point----
4 MR O'REGAN: One point has come to mind, Sir.
5 THE PRESIDENT: Sorry?
6 MR O'REGAN: If I may say, Sir, it comes to mind, if the Claimant is required to produce that, it
7 would be appropriate to have the same information for the Defendant.
8 THE PRESIDENT: A stock list?
9 MR O'REGAN: Yes, Sir.
10 THE PRESIDENT: And we are talking about non-food items.
11 MR WOOLFE: Sir, on the same terms----
12 THE PRESIDENT: On the same basis, yes.
13 MR WOOLFE: -- assuming we have it, we will supply it.
14 THE PRESIDENT: Yes. Nobody is being asked to sit down and prepare one if it does not exist.
15 There were some matters of disclosure raised by the Tribunal, to which, Mr O'Regan, your
16 solicitors responded, and that is the email that is at tab 7 of the bundle.
17 MR O'REGAN: Is it tab 6 you are looking at, Sir, tab 7 is the Defendant's solicitors?
18 THE PRESIDENT: This is Loxley.
19 MR O'REGAN: They are both Loxley, Sir, yes.
20 THE PRESIDENT: I am sorry, Mr Woolfe, this is your client. This is referred to in, I think, the
21 defence. The first one, the letter, I think is referred to, in fact, in the claim form, we have
22 noticed, Mr O'Regan, and I think you, therefore, ought to have a copy of it.
23 MR O'REGAN: We do not have a copy of it, Sir. Its existence is known about because it is
24 referred to in a subsequent letter of 19 February 2013 from Hallmark Hulme back to Blake
25 Laphorn, referring to their letter of that date. I do not know if that letter is yet before the
26 Tribunal, Sir, the one of the 19th.
27 THE PRESIDENT: The claim form at para.10, there is reference to some communications, and at
28 para.42, that is the letter of 19 February, and is that the one refers to----
29 MR O'REGAN: Yes, it is, Sir. We have seen it, but none of those letters are before the Tribunal.
30 Perhaps an appropriate way forward is----
31 THE PRESIDENT: I do not think the 19 February letter is with us either, is it?
32 MR O'REGAN: It is not referred to in an annex, Sir, so I assume not. It may be that we have all
33 missed that.
34 THE PRESIDENT: And that, I think, may be----

1 MR O'REGAN: We should look again at those.

2 THE PRESIDENT: -- the response to the 15 January letter, which is the one we have been asking
3 about. Somebody drafted this, and it looks as though they had the letters in front of them.

4 MR O'REGAN: That would have been me, Sir.

5 THE PRESIDENT: Yes, so can you have a look for that exchange of correspondence.

6 MR O'REGAN: That is the ones in paras.42 and 43.

7 THE PRESIDENT: In para.42, the letter of 15 January, and the response of 19 February.

8 MR WOOLFE: If I can assist, Sir, the response of 19 February was one of the documents which
9 we did provide with our defence under the order, and that is at tab 12 of the documents from
10 the defence. That refers to the letter of 15 January 2013. That is how it was known that
11 such a letter exists. Sir, we have the 19 February one, but neither side, I understand, has a
12 copy of the 15 January one that we know about.

13 THE PRESIDENT: Yes.

14 MR O'REGAN: It may be, Sir, looking at this, there is some other correspondence in there which
15 also has not been either expressly referred to or disclosed. Perhaps we ought to have that as
16 well.

17 THE PRESIDENT: Excuse me.

18 MR O'REGAN: Perhaps we ought to have that as well. It is paragraphs, I think, paras.42
19 through 44, there is a reference to there being further communication. So that the Tribunal
20 has a complete set one ought to go back and----

21 THE PRESIDENT: I think it ought to be disclosed. Whether the Tribunal needs it or not, I do
22 not know, but I think the parties between them ought to have a complete set, and then you
23 can decide whether they are relevant to either of your cases.

24 MR O'REGAN: Yes, Sir.

25 THE PRESIDENT: What I want to avoid, even if it is a rather tedious discussion at this point, is
26 that we are in the middle of a hearing and a letter turns out to be potentially significant, and
27 it then takes two days to find it, which is not clearly something one wants to happen.

28 MR O'REGAN: Yes, Sir.

29 THE PRESIDENT: So I think it is a question of both sides now looking for that correspondence
30 over that period and making sure it is disclosed to the other.

31 MR WOOLFE: Just on that, Sir, this is the correspondence between January and March 2013 that
32 is----

33 MR O'REGAN: May, I think, probably, to be on the safe side, or maybe July.

34 THE PRESIDENT: Well, May it was granted, but----

1 MR O'REGAN: I think, Sir, if one looks at the claim form, the next letter that is expressly
2 referred to is in para.45, I think it is, which is 9 July.

3 THE PRESIDENT: I think this is the exchange of letters that went up to the commencement of
4 the High Court proceedings, so it is really the 2013 correspondence.

5 MR O'REGAN: Yes, Sir.

6 MR WOOLFE: So, in a sense - I do not know if there will be an order - but essentially the parties
7 to co-operate to try and generate a complete set of that correspondence in 2013.

8 THE PRESIDENT: Yes, to be disclosed.

9 MR O'REGAN: Yes.

10 THE PRESIDENT: And then you can decide whether it is relevant. If neither of you wishes to
11 rely on any of it then it does not have to be included in the trial bundle. So that is the first
12 one.

13 The one referred to in the defence at para.28, Mr Woolfe, the last sentence of that
14 paragraph:

15 "when the Defendant became aware that Mr Meigh might have been selling drinks
16 in contravention of his lease, the Defendant wrote to Mr Meigh asking him to
17 desist."

18 It does appear that that letter was an exhibit to the witness statement of the Abbot, which
19 was, I think, appended, in fact, to the claim form, but it is your client's witness statement.

20 MR WOOLFE: My understanding is that it was not exhibited to that statement. If it was, we can
21 have further----

22 THE PRESIDENT: We have not seen obviously the exhibit, but if we look at para.92, which is
23 tab 20 in the claim form bundle, we have the witness statement of Father McLoughlin----

24 MR WOOLFE: Who is now the Abbot, Sir.

25 THE PRESIDENT: Who is now the Abbot, yes. And in his witness statement, if you go to
26 para.92----

27 MR O'REGAN: Sir, I may be able to short-circuit the process. I think it is at p.29 of the exhibit.
28 I do not have the exhibit.

29 THE PRESIDENT: Here it says it is at p.138 of the exhibit. It does say, "At p.138 of my Exhibit
30 is a letter from the Abbot to Philip dated 12 June 1984." That does appear to be the letter,
31 does it not?

32 MR WOOLFE: Sir, we will check. We will provide, in any event, a copy of the letters referred
33 to at para.92 of the statement.

34 THE PRESIDENT: And para.93.

1 MR WOOLFE: Yes, we will provide the letters if we can locate them, or explain if they cannot
2 be, for some odd reason.

3 THE PRESIDENT: This was a witness statement in the High Court. I would have thought you
4 would still have copies of them.

5 MR O'REGAN: We will provide this.

6 THE PRESIDENT: The last one has been provided. Is there anything else on disclosure from
7 anyone? The next matter is, I think, survey. We have a detailed proposal from Oxera,
8 which was provided, and then we got yesterday afternoon a critique from Economic Insight.
9 Mr Woolfe, it is not very helpful to get that so late before this hearing.

10 MR WOOLFE: Sir, no, I apologise for that. It is, in part, due to the interposition of Easter, the
11 way it has fallen. Nonetheless, I accept that it would have been better had it been provided
12 earlier, and I do apologise.

13 THE PRESIDENT: Because ideally one would want to sort this out today, and clearly we cannot
14 because Mr Johnson is going to have to digest this. Is Mr Johnson here?

15 MR O'REGAN: He is sitting behind me, Sir, yes.

16 THE PRESIDENT: Is he in a position to instruct you to respond, because the sensible thing is
17 that the two experts possibly should meet to talk about this and try and get some measure of
18 agreement. What one wants to avoid a whole challenge to the methodology at trial, as
19 opposed to them just giving their different interpretations of the result. I cannot remember
20 the name of the Defendant's expert.

21 MR O'REGAN: Mr Williams, Sir.

22 THE PRESIDENT: Mr Williams has raised fundamental points about the survey, which I am
23 sure Mr Johnson would want to think about and may have answers to some of them, and
24 may accept that certain changes are, if not appropriate, at least not objectionable.

25 MR O'REGAN: Well, Mr Johnson has in the limited time available provided me with some
26 preliminary observations and, as Mr Johnson is behind me, we have spoken about it briefly
27 this morning. It seems that the issues really, as you observed, Sir, are to do with
28 methodology and then what weight would be given to it at trial. We would agree that it
29 would be inappropriate and unfortunate if that were to effectively potentially derail the trial.
30 That would not be in anybody's interests.

31 THE PRESIDENT: Do you want to - I do not think Mr Williams is here?

32 MR WOOLFE: Unfortunately, no, Sir.

33 THE PRESIDENT: If you would like to relay any general observations, but I do not think I am in
34 a position to decide anything at the moment. It may be that a meeting between them and

1 see to what measure of agreement they can come, and if there has to be a further short
2 hearing that may be necessary with both in attendance, and then it is a question of who
3 should bear the cost of that, given that this came so late. You tell me what you can about
4 Mr Johnson's comments.

5 MR O'REGAN: I think, Sir, as we clearly cannot resolve this now and in any event I do not think
6 it would be appropriate for the Tribunal to tie itself up with micro-managing what questions
7 are being asked. It is a matter of weight. Clearly, Mr Johnson is open to constructive
8 comments and we will be constructive with Mr Williams, so we can avoid any debate at
9 trial. Clearly we will not necessarily be able to agree everything with Mr Williams.
10 Ultimately, this is the Claimant's survey. Obviously she takes the risk, if one wants to put it
11 that way, of at trial objection being made to it, but it is being designed in order to respond to
12 effectively the Claimant's pleaded case. Some of the observations seem to relate to
13 questions related to the Defendant's pleaded case, particularly on matters such as what is
14 convenience food and a substantial meal, they can decide whether that is something that is
15 really capable of definition. That really is the Defendant's case.

16 We will be constructive. We do not think there is a need for a complete restructuring of the
17 survey, but clearly if it is necessary and helpful then it will reflect the 'purchase journey', as
18 it being put, of the respondents.

19 One needs also, I think, to bear in mind the practicality of this survey. The respondents are
20 not going to want to spend 20 minutes, having finished their lunch or visit to the Bird Park,
21 particularly with small children in tow, answering very long questions where they are given
22 20 choices. That is not going to be practical or necessarily appropriate in a case of this
23 nature.

24 The real issue, Sir, on that, I think, is one of timing.

25 THE PRESIDENT: Yes. You want to do it over a Bank Holiday weekend and a weekday, as
26 I understand it.

27 MR O'REGAN: That is right, Sir.

28 THE PRESIDENT: There are two Bank Holidays coming up. Which is the Bank Holiday you
29 would like to do it?

30 MR O'REGAN: We would intend to do it on the next Bank Holiday, which is the weekend after
31 next, which I think is Saturday, 4 May through Monday, 6 May. To some extent,
32 I understand from Mr Johnson, that would - 'pilot survey' is not really the right word - if
33 issues were to arise from it, one would recalibrate the survey in order to then continue on

1 the following weekday or the following Saturday, whichever it is. If no issues arise, then
2 we would use that information in the final results.

3 In order to achieve a survey of next Saturday, so the 4th, one really needs to close down the
4 survey ideally by the end of tomorrow, because it is going to take the survey company a few
5 days to formulate things at their end - I am told about two to three days in total - certainly
6 no later than Monday. So that would really constrain what is achievable if we are to
7 maintain the date of the 4th. The date of the 4th is important, Sir, because we are clearly in a
8 timetable, and have expert reports due on 7 June. The following Bank Holiday is, I think,
9 25th to 27th.

10 THE PRESIDENT: That is right, yes.

11 MR O'REGAN: That, of course, is only about eight to ten days or so before reports are due. So
12 that would be probably too late to maintain that timetable.

13 THE PRESIDENT: It could be that we would not have another Bank Holiday----

14 MR O'REGAN: There will not be another Bank Holiday until the end of August.

15 THE PRESIDENT: -- but another Sunday could be used.

16 MR O'REGAN: Yes, Sir.

17 THE PRESIDENT: I think, Mr Woolfe, you have produced this late. Is your expert,
18 Mr Williams, able to meet Mr Johnson tomorrow or Monday?

19 MR WOOLFE: He is available tomorrow, Sir. There are two things: first of all, there should be
20 a meeting without any lawyers being involved in any way shape or form.

21 THE PRESIDENT: Yes, I think it should be a without prejudice meeting. Is Mr Johnson
22 available tomorrow?

23 MR O'REGAN: He is available tomorrow morning, Sir. I think it would need to be by
24 telephone, because Mr Johnson is in Oxford tomorrow, but certainly something can be
25 discussed.

26 THE PRESIDENT: Yes, it can be done by telephone or by Skype.

27 MR O'REGAN: I do not think the lawyers can really assist greatly.

28 THE PRESIDENT: I also think it should be without prejudice so that they can speak freely. I am
29 sure that Mr Williams will bear in mind the point that Mr O'Regan has made, that having a
30 20 minute questionnaire will mean most people will say, "No, thank you", and walk off. It
31 has got to be fairly short.

32 MR WOOLFE: Or indeed that may itself skew who responds.

33 THE PRESIDENT: Yes. Of the points made, it is not for me to interfere with the design of the
34 survey. I did think one point made, namely, "Whether, if the Bird Park was not available,

1 the respondent would still have visited the monastery?" may be a worthwhile question to
2 ask.

3 MR O'REGAN: In relation to using the shop or the café, I do not think the monastery, as such, is
4 open to the public. One can visit the church, I think.

5 MR WOOLFE: The chapel is, but I am not sure about the rest of it.

6 Sir, could I make a couple of brief points? Mr O'Regan said it all goes to weight. Some of
7 this does not. It is a question of whether issues are tested for or not - for instance, whether
8 they are substitutes or complements, which can be significant. So only the----

9 THE PRESIDENT: By 'weight', I think what he means is that if you were able to criticise it, you
10 can say it is not helpful on the point the Tribunal has to decide.

11 MR WOOLFE: Perhaps we are going in the same direction, Sir, but in respect of the distinction
12 between convenience and non-convenience, I appreciate that is our terminology, but
13 nonetheless there is a distinction in the claim between things they currently sell and things
14 they would like to sell, and that may----

15 THE PRESIDENT: That should be brought out. I think that will all come out in the discussions
16 between them, and they are both experienced gentlemen who will approach this sensibly.
17 I think, for present purposes, what I need to do is to give you permission to adduce the
18 results of the survey at trial, subject to the two experts communicating, I will say by the end
19 of Monday, to discuss without prejudice what amendments might be made to the draft
20 attached to Mr Johnson's statement of 15 April; and of course, all the responses must be
21 disclosed.

22 Is there anything else I can usefully do about the survey?

23 MR WOOLFE: Sir, no, I do not think so.

24 THE PRESIDENT: I would hope - it is not really, as I say, for me to hear argument about the
25 questions and say it should be this or should be that, ultimately it is for the Claimant to
26 decide, and then, if criticised at trial, to persuade the Tribunal that their survey is valuable
27 and can be relied on, and relevant. On what is one of the Whitford questions, I think,
28 namely, whether the cost is justified in the context of the case, I am quite satisfied that it is.

29 MR O'REGAN: I am grateful, Sir.

30 THE PRESIDENT: I think that is all we can usefully do about the survey today.

31 I think, as the next item, Mr Woolfe, in your skeleton you are seeking to amend your
32 defence.

33 MR WOOLFE: Sir, perhaps I could explain that. You will recall in your last order, Sir, there was
34 a direction that the Claimant should serve further particulars, and there be liberty for us to

1 serve further particulars in response. The amendments are purely that we think those are
2 best integrated into the defence, essentially because they said in respect of food, gifts and
3 events what they are doing and what they would like to do in a bit more detail, and we need
4 to clarify in a sense how that relates to our position in respect of what is permitted under the
5 lease, then how that works for market definition and then on restriction of competition. It is
6 simply that it may be more understandable if it is all done in one place. This has been
7 drafted. The reason we have to wait a bit longer, Sir, is we would like Ms Fitzgerald to
8 have a look about what is said about the lease. I am afraid she is not back until Monday and
9 will look at it then.

10 THE PRESIDENT: Yes.

11 MR WOOLFE: I can assure the Tribunal, having drafted it, these are not wholesale amendments.
12 We are not changing our case. It is just integrating this point about the further particulars.
13 If it would help you, I can talk you through why the changes are being made so that I can
14 give some reassurance.

15 THE PRESIDENT: No, I do not think that is a sensible use of time. I do not think equally it is
16 right to give you, as it were, leave or permission to amend your defence without seeing a
17 draft because there might be something that Mr O'Regan would object to. I think the
18 appropriate thing is that by Wednesday of next week you serve the draft amended defence
19 on the Claimant, if that would fit in with your timetable.

20 MR WOOLFE: Yes, Sir, that is fine.

21 THE PRESIDENT: If there is no objection - what would be a reasonable time to look at it?

22 MR O'REGAN: I think, looking at my diary for next week, Sir, I would need probably until
23 either the Monday or the Tuesday of the following week, subject to my availability on
24 something else.

25 THE PRESIDENT: If we say the following week, which is 7 May. If there is no objection then
26 you have permission to amend, or to the extent that there is no objection you have
27 permission to amend. I would be surprised if you objected to everything anyway.

28 MR O'REGAN: No, Sir, one would obviously seek to be constructive.

29 THE PRESIDENT: So you will try and be sensible about it. Can we deal with it like that?

30 MR WOOLFE: Yes, I think that is sensible, given the nature of the----

31 MR O'REGAN: If it is an amendment to a formal pleading, one might necessarily then need to
32 make consequential amendments.

33 THE PRESIDENT: To the reply.

1 MR O'REGAN: Either to the reply or the claim form, depending on what issues are raised. It is
2 purely hypothetical at the moment, Sir, and we can address that if necessary one way or
3 another.

4 THE PRESIDENT: I think I will give you until the----

5 MR O'REGAN: I think 4 pm on 7 May, Sir, would be fine.

6 THE PRESIDENT: Would be for your objection and for amending your reply, if I say 4 pm on
7 8 May, would that be all right?

8 MR O'REGAN: Let me check my diary, Sir.

9 THE PRESIDENT: Let us see until Friday.

10 MR O'REGAN: Yes, Sir, I am engaged on the 9th, it would need to be.

11 THE PRESIDENT: It is a reply, so let us say the 10th because it has to be served on you, so 4 pm
12 on the 10th for any consequential amendment to the reply.

13 MR WOOLFE: Assuming no objection, Sir.

14 THE PRESIDENT: It is arising out of your amendment.

15 MR WOOLFE: I only say, my only concern is----

16 THE PRESIDENT: The amended defence, if it is amended, yes. It is consequential upon the
17 amendments to the defence.
18 I think that is all before we get to trial timetable as far as I could see from what was
19 provided to me. Is there anything else before trial timetable?

20 MR O'REGAN: Not from our side, Sir, no.

21 MR WOOLFE: Not from me, Sir.

22 THE PRESIDENT: Can we then look at the timetable. There is a proposal attached to
23 Mr O'Regan's skeleton at Appendix 1. I am grateful to both sides for the significant
24 measure of agreement. 7 June for experts' reports to be filed and exchanged. Witness
25 evidence, the question of whether it can be a little earlier than that. It might be desirable to
26 have it a bit earlier.

27 MR WOOLFE: Sir, that is our position. We are not rigidly fixed to this, but we did suggest a
28 date of 17 May, but it could be the 24th. We just think it would be helpful for the experts to
29 have some visibility of the witness statements.

30 THE PRESIDENT: It is usual for the factual evidence to come before the experts' reports, and it
31 is just a question of timing. Could it come, Mr O'Regan - the 17th might be a bit soon, but
32 for 24 May?

1 MR O'REGAN: I think that should be possible. I would need to take instructions to the extent
2 that anything is being decided on our side. (After a pause) Yes, Sir, 24 May, that is fine,
3 that is a Friday.

4 THE PRESIDENT: For the witnesses of fact. Therefore, any evidence in reply can equally come
5 earlier. Instead of 14 June, could that be by 7 June?

6 MR WOOLFE: Sir, I have thought about that, and I think that should be fine. Although the
7 experts then will not have seen all the reply evidence, the advantage in them seeing in a
8 general sense what the evidence looks like, I do not think they necessarily need to have seen
9 every single reply point.

10 THE PRESIDENT: They will have seen it by the time they meet.

11 MR O'REGAN: Yes, Sir.

12 THE PRESIDENT: So 7 June. Experts' joint statement 21 June, 25 June trial bundles, that all
13 seems sensible to me, and I am content with that.

14 The additional thing to be programmed is the site visit. It is an advantage for us to have
15 seen all the evidence before. It would suit all three members of the Tribunal if that were on
16 19 June. Is that a difficulty for anyone? Counsel are not required to attend. The solicitors
17 may want to be there.

18 MR O'REGAN: As far as I can tell, Sir, there is no issue with that date, no.

19 MR WOOLFE: My instructions are that any date is fine by us.

20 THE PRESIDENT: We will say the 19th. We can sort out the timing. I think we will be driving
21 there, so that is a detail, but 19 June will be the site visit.

22 I think that covers us up to trial.

23 Can I say something about trial bundles because we are not having a PTR, and how they
24 might be prepared. I think we want one pleadings bundle, excluding attachments. That
25 would be in one bundle. I think the second bundle should be the leases and licences,
26 including Chorley's licence or lease.

27 MR O'REGAN: That is obviously a confidential document. I do think in terms of confidentiality
28 we should discuss how we would deal with bundles, or just have them marked up as being
29 confidential.

30 THE PRESIDENT: I think prepare confidential bundles. The bundles are not, I think, open to
31 public inspection anyway. It is when things are referred to in open court.

32 MR WOOLFE: Yes, Sir, the only risk from experience is if matters are confidential from the
33 witness, which I believe (inaudible) from Miss Meigh, but I would suspect the best thing is
34 to have an integrated set of bundles in a sensible order for counsel and the Tribunal, and in

1 terms of the witness bundle we can perhaps discuss having confidential documents removed
2 from that and placed in a confidential bundle for the witness. Then it minimises the risk
3 that they turn up something accidentally.

4 THE PRESIDENT: If you want to have the Chorley's documents----

5 MR O'REGAN: So we have two versions of a witness bundle - one is non-confidential, one is
6 confidential.

7 MR WOOLFE: What I was thinking perhaps is to have a single bundle, which includes
8 confidential information in a logical order. There is a single bundle in the witness box, but
9 the confidential documents have been removed from it with a place holder inserted in the
10 relevant tab and a separate confidential bundle for the witness.

11 THE PRESIDENT: I will leave it to you to sort that out. We need not incorporate it in an order,
12 but I think bundle 2 should be leases and licences. Bundle 3, inter party correspondence,
13 and correspondence that is - I am not talking about current correspondence about this
14 Tribunal case, but the correspondence going back many years that we have just been
15 looking at sourcing some of those documents.

16 I think bundle 4 could be the extracts from the Defendant's board of trustee minutes. It may
17 be a very small bundle. Then bundle 5 to be the financial documents. It might have to be in
18 two parts, the Claimant's and the Defendant's, 5A and 5B. Bundle 6, other
19 contemporaneous documents, zoo licences, menus, publicity material for events, etc, etc.
20 I do not know if you want the High Court pleadings, but if you do they should be in a
21 separate bundle, the High Court case that settled, which would be bundle 7. That seems to
22 me to cover most of the documents, as I understand them.

23 MR O'REGAN: I think so, Sir. Just in clarification on bundle 7, that would include the
24 Settlement Agreement presumably?

25 THE PRESIDENT: The Settlement Agreement has become a sort of licence, has it not, of how
26 things have developed.

27 MR O'REGAN: We can put it in either place, Sir.

28 THE PRESIDENT: I would put it in bundle 2.

29 MR O'REGAN: Yes, Sir.

30 THE PRESIDENT: You may not need bundle 7 at all. I do not know how the case will be run.

31 Bundle 8, witness statements, and bundle 9, the expert reports and joint statements.

32 Whether you want a bundle of the survey separately, or whether it is just that the results will
33 be analysed in the expert reports and the experts will have all the background stuff, but we
34 need not see it, I leave that to you.

1 MR WOOLFE: May I raise one further question about exhibits to witness statements. Do you
2 want separate exhibit bundles, or to have it integrated in the sense of the witness statements
3 annotated by reference to the trial bundle?

4 THE PRESIDENT: I would much rather have the exhibits in the main trial bundles, so if the
5 witness refers to a letter, that is in the correspondence bundle rather than having it as
6 annexes. It is also highly desirable because you can have then the two bundles open
7 together, which you cannot when it is an attachment. So there should be no exhibits with
8 the witness statements. If it is possible in the time to have marginal cross-references to
9 where the exhibit is, that is very helpful.

10 Is there anything else?

11 MR O'REGAN: So that would be an annotation, Sir, effectively?

12 THE PRESIDENT: An annotation in the margin. When a witness statement says p.27 of exhibit
13 such, someone has the unenviable task of going through it and saying bundle 4, p.38.

14 MR WOOLFE: That is helpful.

15 THE PRESIDENT: Is there anything else at all? It does make a lot of difference to have bundles
16 sensibly organised for everyone. The Référéndaire is reminding me, authorities to be
17 provided with your skeletons. You might need another day or two, a joint bundle of
18 authorities, which is not actually covered in the timetable. You will want to have seen each
19 other's skeleton arguments, but if we could have by - we are starting on Monday...
20 One possibility which occurs to me, which might suit everyone, is actually to start the
21 hearing on the 16th.

22 MR WOOLFE: That would be fine from our point of view, Sir.

23 MR O'REGAN: Yes, and from mine, Sir.

24 THE PRESIDENT: I think that is what we should do. Let us start on 16 July, so that gives you
25 that little extra time on bundles, and if you can lodge bundles of authorities by 4 pm on
26 Thursday, 11 July - joint bundle of authorities.

27 MR WOOLFE: Sir, that seems to me eminently doable.

28 MR O'REGAN: Yes, Sir.

29 THE PRESIDENT: Is there anything else that we need to deal with today?

30 MR WOOLFE: Not from our point of view.

31 MR O'REGAN: No, Sir.

32 THE PRESIDENT: I think costs in the case would be sensible.

33 MR O'REGAN: Yes, Sir.

34 THE PRESIDENT: And there will be liberty to apply on any of these matters.

1 Mr O'Regan, can you draw up a draft order on this occasion? I think that would be helpful.
2 MR O'REGAN: Yes, Sir.
3 THE PRESIDENT: If you send it in draft to Mr Woolfe, he will check it when received.
4 MR WOOLFE: Certainly, yes, Sir. On the points that you said would not be in the order, just to
5 ensure we have a shared understanding of the details of those, that would be helpful.
6 THE PRESIDENT: Anything else to deal with? Thank you all very much for your sensible co-
7 operation and assistance in this matter. Save for any application made under liberty to
8 apply, I do not expect to have any direct involvement or engagement until the site visit,
9 which the full Tribunal will make.
10 MR WOOLFE: Thank you very much for your time today, Sir.
11 MR O'REGAN: Thank you, Sir.
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