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IN THE COMPETITION
APPEAL TRIBUNAL

Case No. 1178/5/7/11

Victoria House,
Bloomsbury Place,
London WC1A 2EB

16 December 2011

Before:

LORD CARLILE OF BERRIEW
(Chairman)
MARCUS SMITH QC
PETER FREEMAN QC

Sitting as a Tribunal in England and Wales

BETWEEN:

2 TRAVEL GROUP PLC (IN LIQUIDATION)

Claimant

- v -

CARDIFF CITY TRANSPORT SERVICES LIMITED

Defendant

CASE MANAGEMENT CONFERENCE

APPEARANCES

Mr. Michael Bowsher QC, Ms Anneliese Blackwood (instructed by Addleshaw Goddard LLP) and Mr. Adam Aldred (of Addleshaw Goddard LLP) appeared for the Claimant.

Mr. Colin West (instructed by Burges Salmon LLP) appeared for the Defendant.

1 THE CHAIRMAN: I just have a preliminary point to make to all parties. I do not know what the
2 parties' legal advisers do on weekday evenings in December, but, given how long there has
3 been since this matter was last before the Tribunal, and I speak merely for myself, I take a
4 pretty dim view of documents of stupefying prolixity being given to the Tribunal
5 electronically, which was helpful, on the afternoon before a hearing like this. It is not going
6 to happen again in this case, please. Any document that is not before the Tribunal two clear
7 days before a hearing, which means three days before the hearing, will not be read until the
8 Tribunal sits. The likelihood is that the party that is guilty of late delivery will pay any
9 additional costs incurred. As it happens, I and my two colleagues, have read in the time
10 available the documents that were delivered yesterday, albeit, in my view, their stupefying
11 prolixity.

12 I would also ask that if anybody is going to deliver further documents in this case which
13 contain a summary, please can the summary be put at the beginning of the document, not at
14 the end of the document, because it gives a road map for reading the document and enables
15 one to pick sections.

16 That is my grumble and I have got it off my chest. Does anyone want to say anything about
17 that.

18 MR. BOWSHER: We will comment in a moment when it comes on to some of those relevant
19 points.

20 THE CHAIRMAN: I must say, I think both are guilty of what I have complained of, as is plain
21 from the correspondence.

22 MR. BOWSHER: When we get to the relevant parts I will make some observations.

23 THE CHAIRMAN: Very well. Can we park issues of disclosure just for a moment and deal with
24 some other matters, if we can? There is no pressure of time today; we can sit all day if
25 necessary. I think it might be helpful if I made some provisional suggestions and then if
26 you wish to you can argue to the contrary and of course we will exercise our judgment.
27 Can I start with the defendant's application to strike out aspects of the claim? Our
28 provisional view is that that is best dealt with at trial because it may well be that a strike out
29 application will take a great deal of time at this preliminary stage, but will not take up much
30 extra time at the trial. So that is an indication - does anyone want to say anything about
31 that?

32 MR. BOWSHER: Sir, we are certainly content. We have not done appearances, but you will
33 have gathered that Ms Blackwood has joined our team.

34 THE CHAIRMAN: She is very welcome.

1 MR. WEST: Sir, you may have seen that we have, in fact, put in a response to the allegations we
2 said should be struck out in the evidence of Mr. Brown, notwithstanding that we said it
3 should be struck out. On that basis we are content to accede to the suggestion that the
4 question whether this is within the Tribunal's jurisdiction be dealt with at the trial.

5 THE CHAIRMAN: Thank you. Plainly at the trial an issue we have to consider is whether certain
6 assertions fall within the infringement findings; it is classically an issue for the trial. Thank
7 you. So that is that dealt with; we are doing very nicely at the moment.

8 The next issue: the defendant's application to admit the expert evidence of Dr. Gunnar
9 Niels. On the previous occasion I expressed some concerns but did not make an order about
10 expert evidence, and it is important that the expert evidence be kept within reasonable
11 proportions. We recognise too that if the defendant's expert evidence is admitted that
12 creates a sequential consequence. That said, provisionally it seems to us that we should
13 admit the expert evidence of Dr. Niels. If there is expert evidence in reply to be served it
14 must be done promptly, and this is a case in which we would expect any experts to meet
15 well ahead of the trial and produce a document setting out which issues really remain live;
16 there is a heavy responsibility on the experts, if there are experts on both sides, to do that.
17 Any comment?

18 MR. BOWSHER: Sir, we would ask to make some representations to you on that. We would ask
19 you to reverse your provisional finding.

20 THE CHAIRMAN: Right, well we will hear that argument later, but you have an indication of
21 the pre-argument thoughts.

22 The defendant's application for the late admission of the witness statement of David Brown
23 - is any issue being taken in reality about this?

24 MR. BOWSHER: No, so long as there can be some supplemental responses, but that arises in any
25 event in terms of responding to some other matters of evidence.

26 THE CHAIRMAN: Yes, but in principle the evidence of Mr. Brown is admitted?

27 MR. BOWSHER: Yes.

28 THE CHAIRMAN: Admitted in evidence, that is? (Laughter) The clarification of the status of
29 Stephen Harrison's evidence. It seems to us that Mr. Harrison is a factual witness with some
30 specialist knowledge, not an expert witness. Does anybody want to say anything about
31 that?

32 MR. WEST: Well we will come on to address this, it is to be argued out, but we are not entirely
33 sure what the difference is between those things, if we have to put our expert's evidence to

1 Mr. Harrison in cross-examination because his views are being accepted as having weight
2 as evidence in the case.

3 THE CHAIRMAN: Okay, well we will have argument about that. The valuation of the Swansea
4 depot, provisionally we do not see any need for the Tribunal to make any order in relation to
5 the valuation of the Swansea depot, it is up to the parties what you do about valuation of the
6 Swansea depot. Does anyone want to say anything about that?

7 MR. WEST: We agree with that. The only point I was going to mention - I do not know if the
8 Panel has received a letter this morning from the shareholders? It does refer to this briefly
9 at the end. Mr. Francis explains that he has given disclosure of all documents relating to the
10 Swansea depot, prior to its acquisition by Messrs. Francis and Short, that is to say when it
11 was owned by 2 Travel. Then in relation to documents post-dating that development he
12 says any further assistance he can give he is happy to provide. So there is no need to raise it
13 with the Tribunal but there may be some further disclosure from Mr. Francis, some
14 documents relevant to this.

15 THE CHAIRMAN: It is not a matter for the Tribunal, but this is a document of perfect
16 conciseness, it is not of stupefying prolixity and therefore we were able to read it quickly
17 and understand it. Disclosure of material on the OFT's file. Working backwards,
18 transcripts of evidence provided by the defendant to the OFT during the investigation. Our
19 understanding is that disclosure has been given of those documents?

20 MR. BOWSHER: Yes, we received that yesterday.

21 THE CHAIRMAN: Good. Documents provided by third parties to the OFT during the
22 investigation. We understand that that is being dealt with by the OFT apparently, on the
23 assumption that the word "currently" has any credence in the OFT.

24 MR. BOWSHER: I am not sure about the adverb, and I cannot remember whether that was the
25 adverb used in their email. Given the way that this has marched since it was first raised in
26 April. If the Tribunal can do anything to move from "currently" to "expeditiously" that
27 would be rather good.

28 THE CHAIRMAN: "Currently" implies running does it not, from the etymological root, so
29 "pedestrianly" might be better, it is being dealt with "pedestrianly" by the OFT. The
30 Tribunal would certainly wish for them to move from "pedestrianly" to "expeditiously" I
31 am sure.

32 The first group – documents provided by the claimant to the OFT during the investigation
33 but of which it no longer retains any copies. The Tribunal's understanding is that the OFT is
34 dealing with this matter perhaps "pedestrianly" but even more "pedestrianly" because there

1 are some data protection issues which have to be determined. You are shaking your head. I
2 understand exactly why you are shaking your head, Mr. Bowsher. I will shake it with you
3 but they are apparently dealing with it.

4 MR. BOWSHER: I do not know whether now is the time to make this observation but Cardiff
5 Bus must presumably have also copies of these in their custody, and they could simply
6 disclose them, but I suppose their answer will be: "Ah, well, until we know that the OFT are
7 happy there is some potential for recourse." I would be interested to explore that further
8 because the trial is getting frighteningly close. We did not really press this when we raised
9 it nine months ago, but this has gone from "Would this not be good to sort out?" to "This
10 has to be sorted out urgently".

11 THE CHAIRMAN: Right. "Witness summons, the production of documents by Cardiff
12 Councillors and other connected individuals." Under Rule 23 an application can be made
13 for the production of documents. I do not think an application has yet been made under
14 Rule 23, has it?

15 MR. BOWSHER: It has not been specifically made under Rule 23 but the Tribunal can make that
16 application of its own initiative and that application in our submission is really linked into
17 the disclosure issues, and it depends a little where we reach on the disclosure issues.

18 THE CHAIRMAN: Our provisional view is if anybody wants to apply for documents from those
19 sources they should make an application under Rule 23, and if they make that application
20 we will deal with it accordingly. "Location of the trial and possible site visit" is the heading
21 I have next.

22 We have already determined that the trial will take place in March, March 12th at the Cardiff
23 Civil Justice Centre. For those who have never visited it, it is conveniently situated on the
24 inner ring road in the city of Cardiff; car parking not provided but available nearby.

25 We, at the moment, would need a little bit of persuading as to whether there really needs to
26 be a site visit, as to what a site visit would add. What we do think is that there should be
27 before us in good time agreed timetables of all relevant services and all relevant routes. If
28 there are not timetables as such on relevant routes, at least the starting and finishing time of
29 buses on those routes, together with the quantity of buses on the route in given slices of the
30 day. The sort of thing, in other words, that I see on the bus stop in Theobald's Road when I
31 am catching the 38 bus home, perhaps with a little more sophistication, but that is the
32 essential material. A map or maps, agreed, and we would like to see such passenger data as
33 are available. Any problem about that? No.

1 When I made my comment about a site visit, we know there are some video clips, which I
2 think are evidence in this case, if anybody wants to make a short video of any essential
3 areas then by all means do so. If we are going to have video equipment in court - I am
4 sorry, it is a rather old-fashioned term, is it not, "video equipment" – if we are going to have
5 the relevant equipment in court then seeing a short film of whatever you want to show us
6 will not delay us unduly. It is a matter for the parties.

7 Timetable: I think we have already set out a timetable. If there is to be any application for
8 a variation in the timetable, we would ask for those applications to be set out in writing and
9 hopefully they can be dealt with, if there are any, in written form. What we do say is that
10 we require every piece of paper to be filed with the Tribunal before the beginning of March
11 so that we have a fair chance of reading at least the relevant parts. Also, do not forget that
12 everything has to be transported to the Principality.

13 MR. BOWSHER: With that in mind, and I am sorry to interject, would the Tribunal like to
14 consider whether it would want its files in A5 or A4 format, or some other format? It will
15 be something to liaise on later as to how you would like it.

16 THE CHAIRMAN: Perhaps that could be liaised with the administration. My answer to that is
17 that we would ideally like them in whatever format and in electronic format, if at all
18 possible, preferably not PDF in so far as that is possible. We are going to come to the
19 limitations of PDF, I think, when we deal with disclosure in a few moments time, or the
20 problems with PDF.

21 So far as bundles are concerned, the defendant's proposal is that trial bundles should be
22 prepared by late December or early January so they can be cross-referenced in the skeleton
23 arguments, and the core bundle should be prepared based on the documents referred to in
24 the skeleton arguments and lodged by the end of February. That seems to us to be a
25 sensible course to take. Does anyone want to say anything about that? No, right.

26 The costs of the application for security for costs: our provisional view is that that issue
27 should be dealt with at the end, but if anybody wants to address argument to us of course we
28 will hear it.

29 Any proposed amendments by the claimant to the sums claimed in the claim form in the
30 light of accounting evidence: if amendments are to be made our provisional view is that
31 they should be made by the end of this year, by 31st December. It is a question of changing
32 the figures, is it not, really. I would have thought that would be nearly ready now anyway if
33 you want to do it.

34 MR. BOWSHER: You have the letter at tab 14, p.582.

1 THE CHAIRMAN: What paragraph were you looking at?

2 MR. BOWSHER: The letter where we set out our re-calculation of the claim. That represents the
3 numerical amendment to our claim. We are happy to review it and make a written
4 application to the Tribunal if that is necessary, but the way we looked at it, we made the
5 claim in the way we did in the original claim form. To a large extent, the numbers go down.

6 THE CHAIRMAN: What you are saying is that this letter is the updated ----

7 MR. BOWSHER: That is the updated quantum of the claim. We waited until we had seen
8 Mr. Good's report so that we could try and make sure that we had taken that into account.
9 It is true to say that we ought to look again to see if there are any points that arise out of the
10 experts' meetings. I think they had their first meeting yesterday. I am sorry, they did not
11 meet yesterday ----

12 THE CHAIRMAN: Sorry, they?

13 MR. BOWSHER: They did not meet yesterday. They did not meet yesterday but it was
14 postponed until next week. It may be there are some further qualifications to that. I would
15 invite the Tribunal to treat that letter as our statement of quantum at present. Obviously, if
16 the experts agree something and we wish to take on board that agreement, I would suggest
17 that it is likely, if the Tribunal would want to, as it were ----

18 THE CHAIRMAN: Any comments on that, Mr. West?

19 MR. WEST: We, for our part, do not require the claimant to jump through the hoop of amending
20 its pleading, we are content for it to be set out in a letter in this way.

21 THE CHAIRMAN: That is very helpful. Thank you, Mr. West.

22 I think, apart from disclosure, that covers most of the issues. As we are coming to
23 disclosure next, I wanted to raise with you, Mr. Bowsher, an issue that had occurred to me
24 as I have been reading the documents in this case – and please do not take this as a criticism
25 of your case, because it is not, it is just a reflection on what we are going to need. I am not
26 sure that I have seen documents which amount to the sort of accounts one would expect, or
27 accounting material to be available to a company if the company is wishing to establish its
28 continuing viability. I have in mind particularly the sort of accounts that are statutorily
29 required under s.221 of the Companies Act 1985 which, you will be aware, requires a
30 company to keep accounting records sufficient to show and explain its transactions and such
31 as to disclose with reasonable accuracy at any time the financial position of the company at
32 that time, and to ensure that the directors are enabled to ensure that any balance sheet and
33 profit and loss account comply with the requirements of the Act so as to establish an
34 appropriate form and content of the company accounts and otherwise.

1 You may be able to point me to documents that do comply with those requirements, but it
2 would seem to me at first blush to be a reasonable starting point that a Tribunal which is
3 required to look at the viability of a company should be able to see documents complying
4 with that part of the Companies Act 1985.

5 MR. BOWSHER: That is a helpful indication. There are about 30 lever arch files of documents,
6 which are likely to comprise the bundle. That includes a considerable amount of accounting
7 information and I certainly do not have that with us today and nor would I be in a position,
8 even then, unless I had really prepared myself to be able immediately to lay my hands on
9 each and every relevant document. Perhaps I should say no more at the moment. There is a
10 considerable amount of material which certainly addresses those matters.

11 THE CHAIRMAN: Well we know that the liquidators had to get how many boxes of material –
12 200 plus boxes of material – one would expect the basic documents to be among those.

13 MR. BOWSHER: Perhaps I should not say any more at the moment.

14 THE CHAIRMAN: If I can just slightly flesh it out. I have experience, as it happens, as a non-
15 executive director of a company, and if I want to see a snapshot of the state of the company
16 at any given time it is generally available at the press of a button and would include
17 budgets, forecasts, management accounts, accounts for the year to date, that kind of
18 material. I think the Tribunal will be expecting to see that kind of material and it would be
19 surprising if it was not available. Do you want to say anything about that Mr. West?

20 MR. WEST: The position is that the last statutory accounts for the company were prepared in
21 2003, there were then interim results published to February 2004, all that is, of course, prior
22 to the infringement. I have set out in my skeleton what the claimant's own expert says
23 which is that there are no reliable management accounts on which he can base his view.

24 THE CHAIRMAN: Well that is why I have raised this issue. I read that and it seemed to me an
25 unusual situation on the face of it if that is right – I do not know if it is right.

26 MR. WEST: The Tribunal is not going to have that documentation because it does not exist, and
27 that is also noted in the OFT decision.

28 THE CHAIRMAN: Well I am not convinced, Mr. West, that it does not exist, because in the
29 liquidator's boxes, heaven only knows what there is.

30 MR. WEST: We have been through those boxes for the purposes of disclosure and the documents
31 are not there.

32 THE CHAIRMAN: Yes, thank you. The other issue I wanted to raise about disclosure is that I
33 have in front of me the list of documents dated 15th August 2011, the standard disclosure
34 form, the defendant's document, it looks like this.

1 MR. WEST: Yes, I have mine to hand.

2 THE CHAIRMAN: I do not think you will need the actual document for the points that I am
3 going to raise. The document is signed by Cynthia Ogbonna, finance director of the
4 defendant. The document is signed by Miss Ogbonna, and it says:

5 “The defendant has carried out a search of electronic documents created during the
6 period 1st May 05 to 31st March 06.”

7 It is not clear who carried out the search but it appears not to be Miss Ogbonna. Then it
8 refers to an electronic search. The electronic search has been done by the use of 31 key
9 words among which there are four groups. It is a relatively small list of key words and I
10 have two questions about that. The first question is: to what extent did the claimants
11 contribute key words to that search? My second question is: when the electronic search was
12 carried out, did the electronic search facility used throw up only electronic documents, or
13 was it capable also of throwing up PDF and TIF documents? My experience of key word
14 disclosure searching is that far from all the software available for such searches, it throws
15 up PDF documents and therefore it is possible that the keyword search did not reveal any
16 PDF documents which would include attachments to emails for example. So I am just
17 concerned about the extent and adequacy of the electronic searching that was carried out. I
18 do not know if Mr. West can help with that? You may have to take instructions.

19 MR. WEST: My instructions on that specific point are that the programme used was capable of
20 searching PDF documents. On the first point the claimant suggested some further keyword
21 searches post-dating the disclosure statements and some further such searches were
22 undertaken. As I understand it, the claimant is not asking for any more key words now.

23 THE CHAIRMAN: Yes, we are slightly troubled by the fact that the person who signed the form,
24 and this was why I mentioned the name earlier, did not undertake the search. It is just a
25 question about whether this electronic searching has been a true disclosure exercise. Of
26 course, it depends upon the size of the databases that were searched, of the drives that were
27 searched. Generally speaking, keyword searching throws up less than 10 per cent of the
28 total documents in the databases, and then identifies something like 10 per cent of those
29 thrown up as being discloseable, so it is quite a narrow searching process. I have come
30 across this elsewhere, and I am just concerned that we do not run into difficulties at trial
31 because the searching exercise has been less – “complete” is not the word because it cannot
32 be complete – less full than it could otherwise have been.

33 MR. SMITH: If I could just supplement that for Mr. West to deal with when he addresses
34 disclosure. I was troubled to contrast, when I read it last night, the list of documents that

1 the Chairman has just referred to and the description of the disclosure process in the
2 statement of Mr. Pheasant. What we seem to have is a disclosure statement by Miss
3 Ogbonna dated pursuant to the order of the Tribunal made by the Chairman dated August
4 2011 in which Miss Ogbonna says she has been directly involved in a search of documents
5 on behalf of the defendant: "I have had responsibility for the co-ordination of this search in
6 compliance with the defendant's obligations ..."
7 and then it sets out the parameters of that search, and it makes it very clear that the
8 parameters of that search are being defined by Rule 31 of the CPR. When one comes to the
9 statement of Mr. Pheasant he describes three sets of searches. The primary search is one
10 done in 2005 when the defendant received a s.26 notice from the OFT. It is clear from
11 paras.20 and following of Mr. Pheasant's statement that a search was conducted back in
12 2005, not by Miss Ogbonna but the PA to the directors, Toni Kemp, and that exercise
13 appears substantially not to have been revisited for the purposes of 2011 disclosure.
14 Granted there are the further hard copy and electronic searches described in paras.36 and
15 following of that statement of Mr. Pheasant, but the fact is that the standard disclosure
16 statement seems to be deficient in two respects: first of all, the statement by Miss Ogbonna
17 that she was directly involved in the search of documents is, at best, incomplete, because it
18 would appear that a significant amount of the searching was done by Miss Kemp.
19 Secondly, the implication that the standard of the search was the CPR Rules applicable in
20 August 2011 also appears not to have been correct, in that the standard of the search was
21 whatever Rules the defendant considered governed in 2005 in response to an OFT s.26
22 notice.

23 I flag those now. I do not need an answer to those now but it would be helpful if those
24 points could be addressed in the course of submissions.

25 THE CHAIRMAN: Yes, and perhaps para.33 of Mr. Pheasant's statement could be given some
26 attention as well, which relates to what has happened to the documents since that time.

27 There seems to have been a migration issue, if I can put it that way. Thank you, Mr. Smith.

28 I think that is everything that we wanted to cover at this stage. I do not know how you
29 would like to deal with argument now. It is really up to you.

30 MR. BOWSHER: We are happy to deal with the applications in whatever order is convenient for
31 the Tribunal, and it may be convenient to start with disclosure. That will take some time
32 perhaps.

33 THE CHAIRMAN: Disclosure is the major issue, yes.

1 MR. BOWSHER: It is a major issue. I may have missed, as the Tribunal was going through
2 matters of timetable, one point of timetable which I do not think has been specifically dealt
3 with in your summary, the supplemental witness statements. Perhaps that is a date we can
4 think about at the end of the day. That may depend on the outcome of some of these
5 applications.

6 THE CHAIRMAN: Very well.

7 MR. BOWSHER: It is certainly true that the material regarding this disclosure application is now
8 voluminous, I certainly would not contradict the Chairman's view on that. The difficulty
9 that we are in, and this is the reason why I said I was going to come back to it later, is that
10 we have sought to raise these issues in correspondence over the last few weeks. We
11 received a detailed response, as you will have seen, earlier this week, although we are not
12 necessarily content with it, and then received Mr. Pheasant's witness statement which
13 purports to answer the matters as they stand – I think it was after ten o'clock on Wednesday
14 night that we first got it. I should say that I, for my part, have certainly not been able to
15 follow through each and every one of his points. Some of them one can see, "Oh, yes, we
16 accept that, he is probably right on that", but there are a considerable number of points in
17 that evidence which I am simply unable, within the time, to say with confidence that I know
18 the answer to and know where the matters are. A great deal is left open and unsatisfactory
19 following that statement, and I do have detailed comments prepared yesterday by those
20 instructing me, which I told them not to send you.

21 THE CHAIRMAN: Thank you.

22 MR. BOWSHER: A lot of those comments are, "We need to follow this up further".

23 There is a fundamental problem with the way in which this disclosure has been handled. I
24 am afraid that we, for our part, given the timing of Mr. Pheasant's statement, do not feel
25 that either we or the Tribunal have yet got to the bottom of it. There may be a number of
26 ways of dealing with that. Regretfully, if we were to be in a position to help the Tribunal
27 paragraph by paragraph with Mr. Pheasant's statement I think we would have to say we
28 would have to come back another day because we have simply not had time to get to the
29 point of being able to make those sorts of detailed submissions. I am not asking for that,
30 what I am asking for is that we have an order in the terms we asked for yesterday, which is
31 really a tweaking of the original order we asked for attached to our statement. It may be not
32 the best, but given the advancing timetable and the advance of Christmas, we would not
33 want, as it were, the best to be the enemy of the good here.

1 THE CHAIRMAN: So this is the draft order received annexed to your instructing solicitor's
2 letter of yesterday?

3 MR. BOWSHER: Of yesterday, yes, and that, as you will see, is an amended version of the order
4 which we had originally supplied last week.

5 MR. FREEMAN: Mr. Bowsher, I do not want to interrupt your flow, but as you are presenting
6 your arguments it would be very helpful to me certainly if you would try and indicate to
7 which aspects of your claim the documents you think may not have been disclosed bear.
8 That would be a constant theme which would be helpful. You may say you do not know,
9 but any indications you can give would be helpful.

10 MR. BOWSHER: A headline point will be that we may not know, but there may be obvious
11 areas of concern.

12 THE CHAIRMAN: Just looking at para.1 of your draft order, we are in a bit of cleft stick, are we
13 not, because Mr. Pheasant's statement received yesterday purports to answer most, if not
14 all, of the questions that are set out in para.1 of your draft order?

15 MR. BOWSHER: I absolutely accept that. What we sought to do, and yesterday's letter was
16 intended to be helpful and to try and be realistic and say, "We have made our applications,
17 life has moved on, this is trying to draw the threads together". Of course, the moment we
18 tried to draw the threads together they fell apart again because we got Mr. Pheasant's
19 statement, and that is what we have not been able to deal with.

20 It seems to us that there remains an overarching concern about the way in which this
21 disclosure has been conducted, because documents are continuing to come out. It does not
22 seem that, *prima facie*, it has been done in the manner either that it was said to have been
23 done or that is compatible with any particular set of rules.

24 THE CHAIRMAN: So this essentially your draft order, para.2, is it not? You are saying that
25 para.1 is a matter for further discussion, possibly, but para.2 summarises material you are
26 asking for in any event?

27 MR. BOWSHER: In any event, yes. It might be helpful before I go into some of the detail, can I
28 indicate some of the headline areas to which the documents may relate. If I can, to some
29 extent, address Mr. Freeman's remarks as a generality rather than do it on a bit by bit basis,
30 because I do not think we will know bit by bit how this works.

31 Can we just stand back for a moment and think about what our case is and where the key
32 points are. You will have the overall timetable, although it may be helpful just to run
33 through those key dates again. The OFT finds there is an infringement from April 2004 to
34 February 2005. Alan Kreppel was managing director up until 1st April 2004, and we learn

1 from Mr. Brown's statement that he was the managing director, who was the "designer" if I
2 can use that word, of the programme which was ultimately the subject of the adverse
3 decision.

4 The 2 Travel licence was revoked on 24th December 2004, but its appeal was upheld in
5 February 2005, it went into liquidation 20th May 2005. We are told now, as a result of a
6 specific disclosure issue that litigation was contemplated in October 2008, which seems a
7 strange date to pick, I have to say; we get that because of an assertion of privilege in respect
8 of a document that is referred to by Dr. Niels. The decision itself was 18th November 2008,
9 and we filed our claim in January.

10 This case raises a number of issues including quantification issues, and the raw
11 quantification issues will, in part, be matters arising out of 2 Travel's own documents, but
12 there are a number of overarching issues which Cardiff Bus has sought to put in issue.
13 First, they say that their infringement, however heinous it was, did not cause us to go out of
14 business. Now, we have a number of answers to that, but if I give you two of them. First,
15 we say that, as a matter of law, we will contend that where a party is found to have
16 committed an intentional breach of competition law with the intention of excluding a
17 competitor from the market then the defendant should be treated as liable as having caused
18 the damage which it intended to cause.

19 For that purpose, we have the OFT's finding but it is necessary to explore what it is and the
20 extent to which Cardiff Bus actually intended to cause the outcome which it did achieve.
21 The intention and effect that Cardiff Bus was looking for was relevant and, for example,
22 that may arise at at least two levels. At the high level what Mr. Kreppel or Mr. Brown
23 thought they were trying to achieve and how they implemented that policy through middle
24 management, may all reveal information about what they intended to achieve. That is all
25 relevant because, of course, the extent to which they actually sought to achieve this will be
26 crucial and it goes further than that because they will, no doubt, have considered, what the
27 effects of their actions would be.

28 THE CHAIRMAN: What does intention add to effect?

29 MR. BOWSHER: If I am right as a matter of law it may be decisive. If they intended to achieve
30 something then they should be deemed to have caused all that they intended to cause, much
31 as if this were the tort of deceit, or an economic tort, it is absolutely central.

32 MR. FREEMAN: Can I just understand this? If they intended to put your clients out of business
33 then whether their conduct actually caused your clients to go out of business, then they are
34 still deemed to have caused it. Is that your position?

1 MR. BOWSER: We have pleaded that in the claim form, yes, as a proposition of law. I
2 understand that will obviously be the subject of some argument, but it is therefore
3 appropriate to explore in detail what their intention is. Yes, to an extent we have what the
4 OFT says but it will be necessary to go beyond that because, of course, a number of
5 different findings may be made about what was, in fact, intended.
6 Also, of course, it would be relevant to know in planning to put 2 Travel out of business,
7 and it seems fairly clear that that is what they were doing, they will, one assumes, have
8 considered what the actual effects on the ground were, what were the effects on routes?
9 There are a number of other points on causation, that is not the only hook on which we hang
10 our causation case, but we do hang our hat very much on the intention aspect – a very
11 important part of our case.
12 There is then a raft of points about the way 2 Travel’s business would have developed – did
13 develop and would have developed. That, of course, may come right down to quite a micro
14 level – what actually was happening on the bus routes? It will be relevant to look at what
15 these routes are, how they operated and who were the customers? Who were the travellers
16 and how were they being affected? Again, there will be material, we presume – one
17 presumes that if one is going to be competent about trying to set about an anti-competitive
18 programme you probably go away and actually look for some feedback and consider how it
19 is working. We know - and I will just take you to one document in a moment – that they
20 were reviewing the operation and the effectiveness of the programme. One of the things we
21 need to know is: what did they know about what was going on? That will be right down to
22 middle-management level, the sort of custodians who they did not search we have asked for
23 in the list.

24 THE CHAIRMAN: I have a recollection of an email in 2004 – I cannot put my finger on it now –
25 but presumably you would rely on that as being evidence of the effectiveness of what they
26 were doing?

27 MR. BOWSER: Yes. That is certainly one of them. The one I was going to take you to, if I
28 can take you to just one, tab 16 p.851 – this is a document which I do not think we got in
29 disclosure. (After a pause) I am afraid I am easily confused when it comes to disclosure.
30 This is a document which was given to us but it was not, interestingly, given to the OFT
31 pursuant to the s.26 notice, and I just give this as a useful example. When we come to look
32 at ----

33 THE CHAIRMAN: This is exactly the document I had in mind; this is precisely the email I had
34 in mind.

1 MR. BOWSHER: Then we are *ad idem*, I probably do not need to take it any further. You have
2 seen the point and that is exactly it. Just to follow that through we can see that they are
3 having weekly meetings of DBW, we can see who three of them are: KSS, we know who
4 that is, do we not? Karen Stafford-Smith of course. We know they are having weekly
5 meetings to discuss developments and agree any strategic changes. I do not know what that
6 involved, but one would imagine that if one was going to be competently anti-competitive,
7 that will mean that we have not got enough of their custom yet; people are still persisting in
8 getting on to 2 Travel buses. It is absolutely crucial to know how it was working or not
9 working because that will go to the question, which we say is obviously going to be crucial
10 here, namely, how we would have been able to develop the routes. We do not accept, and
11 we have evidence on this from Mr. David Fowles, and Mr. David Fowles deals with this
12 and it has been developed further by Mr. Good, we do not accept that customers simply
13 always get on the first bus that arrives. There are a number of issues which need to be
14 explored, and how those buses actually were operated and how those operations were
15 changed is crucial to that part of the causation and quantification case.

16 To pick up Mr. Freeman's response – I am not sure I am going to be able to say every single
17 step along the way which document may or may not go to that – but when we look at that
18 list of custodians a number of them are those individuals, other middle management, they
19 are the sorts of people who will have that implementation information – if it still exists –
20 which would be crucial. I am reminded that one of the slight oddities which we have not
21 got to the bottom of is that we are told by Mr. Brown that Mr. Kreppel stopped having any
22 involvement on 1st April, and that was why I gave you 1st April date a moment ago. Mr.
23 Brown tells us in his witness statement that he ceased being MD on 1st April 2004, but he
24 still seems to be not just copied in but actively involved in the programme. He has never
25 been a custodian for the OFT or any other search. It is pretty remarkable. I do not know
26 quite who took the decision but it is pretty remarkable that when responding to the s.26
27 notice that no one looked for documents from the person who actually designed and
28 initiated the whole scheme. I am not going to make any observations about whether or not
29 what was done did or did not comply with s.26, it is of no interest to us particularly,
30 although it may become relevant perhaps on exemplary damages, but what is crucial, of
31 course, is that they say that was sufficient. That is the basis upon which they say they
32 comply with their disclosure obligations. It is obvious, whatever it may be under the
33 Competition Act, it is obviously deficient as a means of dealing with disclosure for the
34 purposes of this Tribunal. It may very well be that the answer is that we know Mr. Kreppel

1 has nothing left, and we have looked at it, but again the answer we get from Mr. Pheasant –
2 I am sorry, I am dancing around a little bit but I have been trying to organise my thoughts in
3 the light of Mr. Pheasant last night, and I am not sure I have got them all quite as structured
4 as they should be. A number of the points we get about Mr. Kreppel and others is “We do
5 not think he would have anything anyway”. Well, have you asked? Have you searched?
6 These are the crucial matters which need to be addressed. It does not seem that ----

7 THE CHAIRMAN: Well we are back to Mr. Smith’s point, are we not? We do not even know
8 who carried out the search, at least until we are told.

9 MR. BOWSHER: So there are a number of really crucial causation issues. To go back to Mr.
10 Freeman’s point about what the documents go to, the suggestion has been made that we are
11 only interested about exemplary damages; that would not be true, but it is obviously also the
12 case that, if we are in exemplary damages’ territory, and that will be a point for argument,
13 then the tenor and terms of some of these communications will be crucial. If, for example,
14 it was intended not to comply with the s.26 requirement, that may be crucial.

15 Just let us wind back a little, I do not know whether the whole Tribunal has had the
16 enormous pleasure of reading the entirety of the OFT decision, but one of the things you
17 will recall is that the OFT said “We have not found evidence about what, in fact, was
18 achieved in terms of putting them out of business.” Just wind back – that email we just
19 looked at the OFT never saw. We do not know what the OFT would have thought about
20 that document, for example, and if we are going back to questions about what the OFT
21 should have been able to find, which of course is crucial in this case because the findings of
22 the OFT are the starting point. If, in fact, Cardiff Bus did not comply with the law, and this
23 is where the scope of s.26 may become relevant, then that may be a factor in deciding
24 whether or not exemplary damages should be awarded, because an intentional breach of
25 competition law by Cardiff Bus, not only in breach of competition law itself, the substantive
26 obligation, but then to conceal it, to thwart the investigation – I am not saying that is what
27 has happened, but if that is what has happened then we certainly would be in exemplary
28 damages territory, and a considerable award would flow from it. We find it surprising that
29 Cardiff Bus is not rather more embarrassed about all of this than it appears to be, to be
30 honest, because it is pretty shocking the way in which this has been dealt with.

31 I am reminded by Mr. Aldred – the depths of my forgetfulness know no bounds – that on
32 that email we were just looking at 852, if you turn the page the first bit of the email ----

33 THE CHAIRMAN: I have read that.

1 MR. BOWSHER: I did not understand this, maybe the Tribunal understands it, but when they say
2 on the top of that: “One minute they’re working to the pad, the next minute they’re being
3 told to fight the competition”. The “pad” is the timetable, and that obviously affects the
4 quantification, how 2 Travel would have developed. It would be pretty odd if this were the
5 only email of this type.

6 Those are the heads to which the documents go. I may have to take a bit too long on this
7 disclosure anyway, and if I, at each point, indicate which documents may go to which head
8 it may take a little bit ----

9 MR. FREEMAN: I am sorry, I was not proposing that you did that. I would just like to know, in
10 very broad terms, where this is heading in relation to your claim. So far I have got intention
11 and causation, monitoring and exemplary damages.

12 MR. BOWSHER: And possibly also quantum. There may be some quantum material because we
13 may be able to determine questions about how many buses there were. There may be
14 material which corroborates our quantum observations.

15 It is pretty all-encompassing in short. We have reached a difficult point in this application
16 because, as I say, we have not yet absorbed all that Burges Salmon have now put forward in
17 Mr. Pheasant’s witness statement, but we are very concerned about where we have reached.
18 We are not yet in the territory of saying they have failed so that the defence should be struck
19 out and we should enter judgment. We are not making that application, at least not yet. In
20 order to understand what has happened, there does need to be a full explanation as to how
21 this was dealt with. That was what para.1 of our order was intended to go to. It seems to
22 us, in terms of procedure, where this is going, procedurally it is going into some
23 considerable difficulty because we have got a trial coming up and I have got to start writing
24 the skeleton next week. Where this is going to is seriously disrupting our ability to make a
25 claim.

26 In terms of where we can go usefully, we will be making the following observations at trial:
27 in so far as our ability to make our case is affected by the deficiencies in disclosure,
28 document retention, and so forth, we will be inviting the Tribunal to make presumptions in
29 our favour. We will be inviting the Tribunal to take into account the long standing
30 presumptions. There was some good Latin that my junior dug out yesterday which I will
31 not try – *omnia praesumuntur contra spoliatores* (I do remember it). We will be inviting
32 the Tribunal to have regard to its own jurisprudence in this regard. In cartel cases, where, of
33 course, it is well established that where there is little evidence, the lack of evidence itself

1 may encourage the Tribunal to, as it were, be bold in making findings against the
2 wrongdoer – *JJB*, for example.

3 In practical terms, we would not normally feel it necessary to ask for witness summonses
4 from all these individuals. One of the reasons why we make the witness statement
5 application – while we indicated that and we make that application – is because we are
6 trying to cut through the situation and say, “If you have not actually made proper searches
7 for all these documents from all these individuals, maybe the only way to cut through this is
8 for the Tribunal to summons the individuals”, and we will find out what they have got that
9 way. It may be that they do not have anything after all this time, but we are just trying to
10 look at what practically can be done to mitigate the situation.

11 The reason why we have got here, before I get on to the detail, is important. We were told,
12 and you, Mr. Chairman, were told at the last CMC, that the disclosure process was
13 comprehensive. We had been told that in correspondence. That was the basis upon which
14 we proceeded. You had the list to hand a moment ago. I cannot remember what the page
15 number is. If you have the third page of that – I cannot remember where it is in the bundle.

16 THE CHAIRMAN: Paragraph?

17 MR. BOWSHER: On the third page, where it says, “I have control of the documents numbered
18 and listed here” – it is where the objection is stated. Then, “say what your objections are”,
19 para.3. Then the last sentence:

20 “To the extent that documents contained in the OFT’s files are documents
21 provided to the OFT by the defendants, such documents appear in the list at
22 schedule 2.”

23 That is the balanced statement that is made.

24 At the last CMC we expressed concern about the scope of the documentation that had been
25 disclosed, although we were not able to put our fingers on it. You quite properly said, “I
26 would like you to get on with making your application”. Taking that into account we
27 started to understand what had been disclosed. It took quite a while to do so because it
28 involved wading through quite a lot of documentation, and that led to the first substantial
29 letter, the 16th November letter. We were trying to understand where we had got to on that.
30 It is a long and detailed analysis but it is making observations such as, “We do not
31 understand how you can only have one email from Mr. Kreppel”, and things like that.
32 The history then moves on.

33 The CMC made its order on 13th October. The relevant passage is at p.186 of the bundle,
34 and that produced documents on 31st October, which are at p.203. That produced a list

1 headed "Supplemental list of documents on the OFT file provided by Cardiff Bus not
2 previously disclosed".

3 THE CHAIRMAN: Page 205, yes.

4 MR. BOWSHER: They say that in the letter. It is worth just going back to the letter to see what
5 they say. The second paragraph, half way down, there is "Accordingly":

6 "Accordingly, the documents falling within the scope of paragraph 2(a) of the
7 Order that have not yet been disclosed are those documents that were not
8 disclosed because they were not deemed to fall within the scope of standard
9 disclosure (i.e. they were not relevant to the issue in dispute). These documents
10 are now disclosed ..."

11 Just pausing there, that seemed quite important to us, because that amounts to a substantial
12 new scope of disclosure of OFT documents which we thought we had received, or we
13 thought had been identified in the list. I just took you to the passage in the list where they
14 refer to OFT documents. We are now being given a very large number of additional
15 documents, including documents which, frankly, one cannot think how they could possibly
16 not be relevant. They include, if you look at the list, tickets, maps, changes of service
17 details, route costing reports. I have not read them, I do not know what is in them.

18 THE CHAIRMAN: I am taking it that the reference to para.2(a) is a reference to para.3?

19 MR. BOWSHER: Good point.

20 THE CHAIRMAN: Just for clarification.

21 MR. BOWSHER: It must be.

22 THE CHAIRMAN: I was puzzled about that.

23 MR. BOWSHER: It is a good point, and I had not thought about it.

24 For the first time we begin to understand that there are substantial additional documents that
25 we are not seeing. You will have gathered from the tenor of the correspondence that our
26 first assumption was a wrong assumption. Our first assumption was that the disclosure was
27 being given on an incorrect approach to relevance. When we see these documents we think,
28 "Are they doing this, are they doing the old trick of defining relevance the way they would
29 like relevance to be", which you sometimes see from solicitors. You say, "That is not a
30 relevant issue because I have decided it is not relevant, therefore I am not going to treat it as
31 an issue for the purposes of disclosure, therefore, I am not going to give disclosure". That is
32 not what they did. That was our first port of call, which may be a wrong approach, but one
33 has certainly seen it in other cases. There is correspondence about that. We get a
34 confirmation, "No, that is not what we are doing". If it is a pleaded case, they are treating it

1 as a pleaded issue, even if, when it comes to submissions, they are going to tell you it is
2 irrelevant, which is absolutely fair and proper.

3 That was our first trying to understand how these documents could suddenly come out of
4 the woodwork.

5 MR. FREEMAN: Again, I do not want to interrupt your flow, but just to take a point on that, you
6 could understand a situation where the defendants took the view that something might be
7 relevant to the issue, but it was relevant to the issue of infringement rather than loss and
8 damage. That could be an explanation.

9 MR. BOWSHER: It could be an explanation. It is not the issue. As it turns out, it is simply not
10 the issue. They told us everything had been disclosed from the OFT, or at least that was our
11 understanding.

12 THE CHAIRMAN: It transpired to not be so.

13 MR. BOWSHER: Yes, that is another interesting point to develop, but not now. We set out our
14 concerns as a result of an analysis of what we had got in the 16th November letter. I do not
15 propose to take you through it, you have no doubt had a chance to look at it. You will have
16 seen it in detail and life has moved on. In a way, the quickest way of getting a grip of what
17 we were then saying is to look at the headings of the letter. It is the letter at p.224. That is
18 where we set out our concerns, and we identify what we call obvious gaps. This is the way
19 traditionally one tries to grapple with what appear to be deficiencies in disclosure. You
20 identify the obvious gaps and try and follow up how it happened. We identify, and it is
21 useful just to look at it for this purpose, at p.229 a long list of people who it seemed to us, at
22 least potentially, might be custodians. We set out all those obvious gaps.

23 On p.250 we get the reassurance to some extent, but what we get is the statement which
24 really causes us to now understand what has happened – para.3, p.250:

25 “... we made it clear in our letter dated 12 September 2011 that there were
26 likely to be numerous documents identified as part of the Section 26 Search that
27 were not provided to the OFT (since they were not requested in the section 26
28 notices) but would be relevant to these proceedings. The fact that there are a far
29 greater number of documents disclosed to you than were provided to the OFT in
30 response to the various section 26 notices simply confirms the comprehensive
31 and wide ranging nature of the Section 26 Search which identified documents
32 relevant to 2 Travel, the white services and competition generally, not just
33 documents that would respond to the section 26 notices.”

1 That, with respect, does not actually address what has happened. That is suggesting, “Well,
2 you should not have been surprised that more were disclosed to you than were provided to
3 the OFT”. I can understand that to some extent. That does not address what was said in the
4 list, because the list was telling us, “All the relevant OFT stuff is listed”. So it just does not
5 fit with what we are being told on 17th November. I am afraid you have to excuse us for our
6 brains only going at a certain pace on this side of the court, but it is beginning to dawn on us
7 what has happened. To cut it short, what has happened is that they have simply assumed
8 that what was done in pursuance of the s.26 search in respect of documents up to May 05
9 was a sufficient search. That search was done, they have the product of that search, that is
10 what has to be produced. Perhaps the undercurrent of that is, “That is all there is anyway”.
11 I think that is what we may be being told, “It is tough anyway because if it was not
12 produced pursuant to the s.26 notices it will have disappeared by now anyway”.

13 None of this was explained to us at the outset and it frankly is not a satisfactory way of
14 going forward, and just bear in mind again Mr. Kreppel was not even searched.

15 THE CHAIRMAN: This is still effectively para.2 of your draft order, is it not?

16 MR. BOWSHER: Indeed.

17 Mr. Collingwood-Cooper and Mr. Curtis have spent longer with these documents than is
18 probably good for anyone, and I apologise if the product is long and burdensome. I
19 certainly do not necessarily enjoy wading through it all in great detail, but we have reached
20 a point where, short of going through – we have got through Mr. Pheasant’s evidence. This
21 is where I am concerned that I do not take too long ----

22 THE CHAIRMAN: You would rather not at the moment.

23 MR. BOWSHER: I would rather not at the moment, not least because I suspect I would be
24 wasting the Tribunal’s time because it is going to be a step by step analysis. I think I know
25 the answer, but on the other hand I have not checked each and every limb of it. I have not
26 had a chance to sit down with Mr. Collingwood-Cooper and understand what ----

27 THE CHAIRMAN: So cutting to the chase, what you are asking is an order in the form of your
28 draft para.2, and then you wish to consider further whether you want to pursue an
29 application in relation to what is currently the contents of para.1? Is that right?

30 MR. BOWSHER: Yes, I think that is fair.

31 THE CHAIRMAN: On which obviously we have to hear Mr. West.

32 MR. BOWSHER: Because what we need to look at is if and insofar as the Tribunal should be
33 asking for a witness statement from someone to explain what was done and how it was
34 done, in order to, as it were, make a fair description of what that is, it would be proper for

1 me to go away and consider what the terms of that should be with a bit more care. I can
2 give you the headlines, which are: Cardiff Bus was subject to an ongoing OFT
3 investigation. It seems to have done its own searches at the time for documents. It seems
4 that lawyers were not involved in that search, certainly not outside lawyers. It seems to us
5 from that point one should, from a Cardiff Bus perspective, have expected that there would
6 be proceedings such as this, and that whatever document retention policy there was should
7 have reflected that. It seems that there may or may not have been any policy at all and what
8 has happened is simply individuals, and you will have seen it in the evidence, individuals
9 have just gone on and done their own thing, the way we all do with our own documents.
10 There does not seem to be any methodical policy at all. We do not know what the outcome
11 of this is. There has been a change of IT systems sometime in about 2006, we do not know
12 where the PCs are, no effort has been made to tell us where the PCs are, no effort has been
13 made to try and recover the hard drives or the back up tapes, or memory sticks – 2006, what
14 did we use for memory, I cannot remember. Whatever it is, given the circumstances one
15 would expect to see some explanation along those lines.

16 We do not know, and perhaps this is the starting point, I am reminded, we do not actually
17 know what it was that Cardiff Bus thought it was looking for at the time of the s.26
18 investigation. That may be a crucial starting point: what did it think it was looking for
19 under s.26, and how does that relate to what it ought to do now? The answer, which is
20 given, I think, at one point by Mr. Pheasant was: “What we did in s.26 is not what the CPR
21 in 2011 requires”, well of course not, but that does not mean that what the CPR requires in
22 2011 is not required in these proceedings. If the answer is: “The documents have gone”
23 well we need to find out what that is and it should have been listed accordingly; the list tells
24 us nothing.

25 MR. SMITH: Mr. Bowsher, I hesitate to interrupt, but reading paras. 1 and 2 of your order and
26 really following on from the Chairman’s point, it does seem that they are rather alternatives
27 in the sense that were you to be given an order in the terms of para.2, which is effectively
28 requiring the defendant to revisit disclosure altogether, surely if that exercise were done in
29 the terms you seek, including, I note, recovery of data from back-up tapes, then does the
30 exercise that you seek under para. 1 not really fall away, because what you will get is a
31 disclosure statement no doubt signed by Mr. Pheasant articulating exactly what searches
32 have been undertaken, what data has been restored and what has been found. He will then
33 know precisely the scope of the search and, albeit late, the problem will be cured.

1 THE CHAIRMAN: What is not produced but you then say should have been available, becomes
2 the subject of, I think you used the term ‘presumptions’, I prefer ‘inferences’.

3 MR. BOWSHER: That is probably largely the case, and to some extent it depends what comes
4 out of the para.2 process – if I can call it that. The only reservation I think I would note is
5 that if and insofar as one is concerned with what in fact was done in 2005 at some point we
6 may have to ask someone. Now, what one might expect to do perhaps in High Court
7 proceedings would be to put in a request for information. It may be that we will be having
8 to cross-examine Mr. Brown. We do not know how far Mr. Brown knows the answers to
9 these questions; he may not be the right person to ask – as Mr. Smith has identified, he did
10 not sign the disclosure statement, and there may be a trail to follow here. Insofar as the
11 actual process itself it may be relevant, first, to the scope of any inferences, because what
12 was or was not looked for may tell us what in fact has disappeared, or what never existed,
13 and that may be an important distinction. That is one aspect to it. Also, if and insofar as we
14 get to that last stage, the exemplary damages stage, the what did or did not happen question
15 in 2005 the point my matter, but in terms of Ms Blackwood and I starting to prepare our
16 skeleton argument we need the para.2 process done pronto.

17 THE CHAIRMAN: All right. Mr. West?

18 MR. WEST: Can I rewind slightly, if I may. At the last CMC, a lengthy disclosure application
19 was intimated by 2 Travel but was not brought forward, and I reserved the right to object if
20 we found ourselves in the position several months down the line of arguing about something
21 which could and should have been raised then, and the Chairman, Lord Carlile, specifically
22 told Mr. Aldred that any application should be made promptly. In fact, there was no further
23 correspondence on this point until 7th November, as Mr. Pheasant says in para. 65 of his
24 statement. Disclosure took place in August and there is now little over a month until 2
25 Travel’s skeleton argument, as Mr. Bowsher points out. But 2 Travel is now apparently
26 seeking an order that Cardiff Bus, in effect, go back and do disclosure again.
27 The points which have arisen since the last CMC are not, in fact, new points. They were all
28 explained by Burges Salmon in its letter of 18th August, which I think is at p.39 of the
29 exhibit to Mr. Collingwood’s statement.

30 MR. SMITH: I am sorry, where is that in the CMC bundle, Mr. West?

31 MR. WEST: So this is actually prior to the disclosure statement of 12th August. I am sorry, it is
32 p.39 of the exhibit to Mr. Collingwood’s statement.

33 MR. SMITH: But where do I find the exhibit, Mr. West?

34 MR. WEST: I do not know, is the answer, there are no hearing bundles as such.

1 MR. SMITH: It is not in the CMC bundle then?

2 THE CHAIRMAN: It is at p.56 of the CMC bundle.

3 MR. WEST: I am afraid the exhibit to Mr. Collingwood, which I have been working from, is a
4 very largely duplicative of what is in this bundle, so we may have some difficulties finding
5 things. But this is prior to the disclosure statement, and you will see that it sets out at para.3
6 the search carried out for the OFT investigation. It says: “Our client had extensive
7 disclosure obligations to the OFT under the various Section 26 Notices.” It provides copies
8 of the notices. “... the extent of disclosure requested was wide ranging and extensive and
9 encompassed documents covering the period 1 April 2003 to 30 April 2005.” “ ... criminal
10 penalties may be imposed on both the company and its officers for not complying ...” “Our
11 client understandably took its disclosure obligations ... very seriously ... to ensure that it
12 was in a position to comply fully with its obligations, it undertook a comprehensive search
13 for documents relating to the White Services and 2 Travel rather than more narrowly
14 looking for documents that might fall within some of the OFT’s specific requests.” My
15 learned friend says we have never told them what the search was for, but we told them back
16 in August, so documents relating to the White Services and 2 Travel. “This included a
17 comprehensive search of both hard copy and electronic documents as ----“

18 THE CHAIRMAN: Are we going to be told who carried out this search?

19 MR. WEST: This is stated in correspondence. The five custodians searched for their own
20 documents and the process was co-ordinated by the PA to the Board, Miss Kemp.

21 THE CHAIRMAN: So it was not a disclosure search carried out by any lawyer?

22 MR. WEST: That is correct. The searches themselves were carried out by Cardiff Bus, but
23 advice was given by Burges Salmon to Cardiff Bus about the way it should go about
24 searching for documents.

25 MR. SMITH: And, Mr. West, how in para.3.3 of this letter did your client satisfy itself the results
26 of the search carried out in 2005 reflected a 2011 proper disclosure process? What steps
27 were taken in order to satisfy oneself?

28 THE CHAIRMAN: You see, Mr. West, what concerns me, and possibly my colleagues – I have
29 read this letter on two or three occasions, I expressed some concerns I had right at the
30 beginning of this hearing - albeit the concern about this process was not expressed promptly
31 and lack of promptness has been the characteristic of this case so far, I think, nevertheless,
32 if there is a situation in which there is a realistic possibility that the disclosure/search
33 process carried out so far does not have full disclosure, and I use the word in its most

1 objective sense, 'integrity' then is it not essential that a proper disclosure process is carried
2 out, supervised by the solicitors, I am afraid?

3 MR. WEST: It is the view of those instructing me that the search carried out in 2005, and they of
4 course have seen the product of that search, and they advised at the time, is sufficient to
5 satisfy Cardiff Bus' disclosure obligations in relation to the period prior to 30th April 2005.

6 THE CHAIRMAN: Well it may very well be that a further disclosure search exercise produces
7 not a jot more, nevertheless, the issue has been raised that it may not have that full objective
8 integrity and if the Tribunal feels that that is a realistic possibility then are we not driven
9 into the corner of requiring a further process to be carried out? Is that not right?

10 MR. WEST: The first point is as to the adequacy or otherwise of the search which took place at
11 the time. Let us not forget that 27 lever arch files of documents have been disclosed, that is
12 an enormous quantity of documents. This is not a case in which very little has come to
13 light.

14 The second point is: what, if anything, would be served by carrying out a further search
15 now, particularly in relation to the custodians who have been identified.

16 THE CHAIRMAN: There are a whole load of new custodians who have been identified who may
17 be very material, that is the proposition?

18 MR. WEST: That is the proposition but there is simply no evidence to make it good.

19 THE CHAIRMAN: What about Mr. Kreppel for example?

20 MR. WEST: Well the evidence about Mr. Kreppel is that when Mr. Kreppel left the employ of
21 Cardiff Bus he provided to his successor, Mr. Brown, all documents in Mr. Kreppel's
22 possession which could be necessary for the ongoing business of the company and
23 otherwise he cleared his desk. So the suggestion would have to be that Mr. Kreppel, who
24 was retiring, took away with him documents to do with the White Services as some sort of
25 souvenir. It is simply hard to believe that that is true, and the evidence as to what happened
26 to documents when individuals left has been provided.

27 THE CHAIRMAN: But I notice from the search terms used, Mr. West, that there are only two
28 names in the search terms that were used: "Fowles" and "Francis". Now, for what it is
29 worth in my experience of electronic searches in complex cases – my experience as a
30 practitioner – is that one of the first things that is identified as a search term is a list of
31 relevant names. That has not been done here.

32 MR. WEST: Well, as I said, there was a process between the parties whereby 2 Travel suggested
33 any further search terms that it wished to be carried out and that was carried out at the time
34 of the last CMC.

1 THE CHAIRMAN: And they were all adopted?

2 MR. WEST: Well there was certainly no application for any more.

3 THE CHAIRMAN: But the search was carried out? The list of search terms in schedule 1 to this
4 letter, is that a list incorporating the search terms that were supplied by the claimant?

5 MR. WEST: No, because that happened afterwards.

6 THE CHAIRMAN: You will have to help me, where do we find the result of the further search
7 carried out using the claimant's search terms? Mr. Bowsher looks as though he is about to
8 leap from the slips.

9 MR. BOWSHER: Can I just make this one point in clarification before we go too far. I think our
10 understanding is that the search terms were certain terms being used in the search for the
11 post-April/May 05 documents, and this is where I think I have now finally understood,
12 because the previous search is what it is. It is given different terms in the correspondence.

13 MR. SMITH: Mr. West, just to assist, I think Mr. Pheasant actually makes this extremely clear in
14 his statement. It is a very helpful statement. If one looks at Mr. Pheasant's statement,
15 starting at para.28, we have a description of what Mr. Pheasant has been told by Mr. Brown,
16 and Mr. Brown says, "instructed the PA to the directors, Toni Kemp, to carry out a search"
17 – that is para.28. Then para.29 we see that in addition to reviewing hard copy folders, Toni
18 Kemp sought to identify relevant electronic documents by searching for emails and
19 documents held electronically by each individual on their PCs:

20 "I understand that a combination of search terms and manual reviews were
21 used. The search terms used included words such as 'competition' and
22 '2 Travel' ..."

23 Then it says that the words used were deliberately wide so as to capture as many documents
24 as possible that could be relevant. There is no list provided in the statement.

25 When one goes on to look at the description of the further electronic searches – that is
26 para.43 of Mr. Pheasant's statement – we see that a further search was carried out for
27 documents between May 2005 and 31st March 2006. As I understand it, the search terms
28 that the Chairman has been adverting to were used for the purposes of this search but not
29 the earlier stage.

30 MR. WEST: That is correct, yes.

31 MR. SMITH: So we do not actually know what terms.

32 THE CHAIRMAN: The only search terms we have are the search terms in schedule 1. There
33 were two searches. There are some issues about duplication, which is standard in some
34 circumstances, but that is all the material we have got.

1 MR. WEST: Miss Kemp has now left the employment of Cardiff Bus, which is, I assume, why
2 no further information has been given about the specific search terms.

3 THE CHAIRMAN: I understand what you say about Mr. Kreppel, he retired, and presumably he
4 would have left most of the relevant things behind as he cleared his desk. Nevertheless,
5 Mr. Kreppel was the managing director and, on the face of it, it is a bit surprising to find
6 that the name “Kreppel” was not fed in as a search term along with “Fowles” and “Francis”,
7 just as a matter of common sense.

8 MR. FREEMAN: If I may just add to that, you have to explain why he was copied in on an email
9 on 24th May if he retired on 1st April.

10 MR. WEST: Mr. Brown explains in his statement he assumed the role as “Managing Director
11 Designate” at the beginning of April, and there was then a handover period before
12 Mr. Kreppel finally left, which I think was at the end of May.

13 THE CHAIRMAN: We do not even a “Boolean” search type description, which contains the
14 name “Brown” – “Brown” and something would, at first blush, have seemed a blindingly
15 obvious search term to put into a disclosure process.

16 I am bound to say, Mr. West, and I am sure I have made this all too obvious, I do not
17 question the good faith of the search of course, but I do have a concern about its adequacy.
18 That is obviously worrying because this Tribunal does not want to run into disclosure
19 difficulties at a trial that has been set down for ten demanding and tight days in the middle
20 of March, which is not so far away now.

21 MR. WEST: As I said, the key words have not been raised again for the purposes of this CMC,
22 so that is why I am perhaps not in the best position to answer those questions.

23 THE CHAIRMAN: We have got to do justice, have we not? We have got to ensure that this is a
24 fair trial.

25 MR. WEST: We do, but those instructing me, and indeed my clients, are very concerned about
26 the costs of all of this disclosure process. It is enormously expensive, and if we are asked to
27 go away and do it again we are obviously concerned that the costs of that will escalate. If it
28 is a question of writing to Mr. Kreppel and asking if he has any documents, that is perhaps
29 something we could do. I was going to come on to the fact that 2 Travel has written to the
30 non-executive directors of Cardiff Bus at the time and they have received some responses
31 which are nil returns. These letters are annexed to Mr. Pheasant’s statement. One can see
32 the sort of return which might be expected to come back at p.1 of the exhibit to
33 Mr. Pheasant. That is not in the bundle, I do not believe.

1 THE CHAIRMAN: When I received an electronic copy of Mr. Pheasant's letter I was not able to
2 print off the exhibits. In fact, I was not able to view them. We have them. Exhibit?

3 MR. WEST: Page 1 is the first one, Mr. Timothy Davies, who was a non-executive:

4 "It being so long ago I do not recall any discussions regarding it, neither do I
5 have any records of meetings. I would be of no help to the Tribunal."

6 There is something similar at p.4 from Councillor Cathy Pearcey:

7 "I was a director from 04 to 08. Since I left the board I have little recollection
8 of any of the matters which have been brought up. I did not keep any of the
9 board's papers. Therefore, I do not think I will be of any help to you regarding
10 this matter."

11 THE CHAIRMAN: Does all of this not illustrate the potential importance of the electronic
12 searches. One cannot possibly expect the councillor for Gabalda to remember something of
13 this kind that happened in her role as a non-executive director n years ago, and n is a
14 growing number. The electronic search process might throw up documents sent to
15 Councillor Catherine Pearcey.

16 MR. WEST: Again, it is important to bear in mind what is going to be searched if there is a
17 further search now. There was a replacement of Cardiff Bus's computer systems in 05/06.
18 Previously there had been a number of remote PCs. That was replaced with a centralised
19 system. All individual users of PCs were asked to identify any documents they wished to
20 migrate over, and those were migrated over. Everything else was destroyed and the
21 computers have been recycled, a point which again we told 2 Travel, although Mr. Bowsher
22 says we have not told them what happened to those machines.

23 There are limits on the size of the mail boxes used by individuals within Cardiff Bus, as a
24 result of which they are regularly cleaned out. What purpose will be served in those
25 circumstances by going back and searching for documents relevant to the facts in these
26 proceedings which happened in 2004? Again, if a request is made that we add some key
27 words and go back and look at the central server and see if any further documents are
28 produced, again perhaps a limited exercise like that can be carried out. Redoing the
29 disclosure searches is something we are very keen to avoid.

30 I am reminded that the custodians whose electronic documents were searched at the time
31 would be the individuals with whom any communication with the council, for example,
32 would take place. If there ever were a document which would support Mr. Bowsher's
33 submission in support of his claim for exemplary damages that this infringement was
34 somehow carried out with the connivance of or at the instigation of the council, that would

1 be a document between the council and the executive directors and not, for example, the
2 depot manager of some bus depot. Those documents were all searched at the time and
3 nothing further would be produced by looking at the documents held by the custodians
4 listed in para.2 of the order.

5 I should also say something about the OFT documents referred to by Mr. Bowsher, because
6 that again is not a game changer. The documents which he says ought to have been
7 disclosed the first time round, but were not on grounds of relevance, but then were disclosed
8 pursuant to the specific disclosure order which required us to disclose everything, are
9 documents which relate in the main to the liveried services. So he referred to timetables, for
10 example. Those are timetables that are liveried services. That is why they were not
11 relevant at the time and they only came to be disclosed pursuant to a specific disclosure
12 order which was not limited to a concept of relevance.

13 The other documents were covering letters and emails to the OFT which again are not
14 relevant here.

15 If I can just deal with a couple of further points made by Mr. Bowsher. He says it is
16 necessary to explore the intention of Cardiff Bus. Of course, there is a finding by the OFT
17 that Cardiff Bus intended to exclude 2 Travel from the market. I am rather surprised to hear
18 my learned friend saying he needs to explore that issue, because there is a binding finding in
19 his favour from the Tribunal. An attempt by 2 Travel to go beyond what the OFT found in
20 its decision is, of course, a recurring theme of my learned friend's submissions. I should
21 point out, however, that the intention was to exclude 2 Travel from the market, which was
22 defined as the "Cardiff market". It was not an intention to put 2 Travel out of business.

23 That is an important distinction to bear in mind.

24 Mr. Bowsher also took you to p.851 of the bundle to make some points about our
25 disclosure. This is the email on which he relied and on which I have a couple of
26 submissions to make. The first submission is that when one looks at the individuals who
27 received this email, Messrs. Dexter, Worsell and Heath were all custodians. Mr. Kreppel
28 was not, because by the time of the 2005 search he had left the company. This was a
29 document during the handover period, to which I referred.

30 There is a letter attached to Addleshaw Goddard's letter of yesterday, a letter sent to the
31 OFT, which is quite useful on these alleged competition meetings to which this email refers.
32 That is at the annex to Addleshaw Goddard's letter of yesterday – I am afraid I do not know
33 where that is.

34 THE CHAIRMAN: Which annex, is it?

1 MR. WEST: It is the very last document in the exhibit or annex to that letter. It is not paginated,
2 I am afraid, but it is a letter from ----

3 THE CHAIRMAN: Is that signed by Mr. Beale?

4 MR. WEST: Mr. Beale, yes.

5 THE CHAIRMAN: It is a letter of 20th October 2006.

6 MR. WEST: To the OFT.

7 THE CHAIRMAN: To the OFT from Noel Beale.

8 MR. WEST: The point I wish to pick up is on the third page of the letter at (e), second bullet
9 point, which refers to these very meetings:

10 "To the best of David Brown's knowledge these meetings took place, and the
11 meetings recorded by David Brown and Peter Heath on the same dates were the
12 same meetings. The topics covered in the meetings concerned the setting up of
13 the 'no frills' services. These meetings took place during a handover period ..."
14 that is a point I have made –

15 "... when David Brown was managing director designate, and were operational
16 in nature, primarily focusing on the logistics of establishing a new service,
17 different from the existing service in a number of respects, including having its
18 own fleet, its own non-uniform drivers, and separate fares. David Brown has
19 confirmed that at these meetings he clarified the importance of ensuring that the
20 services were operated legally, safely and professionally and within the law.
21 Following the introduction of the services there was no further requirement for
22 these meetings which then ceased."

23 So when my learned friend says that this email at p.851 is a smoking gun to show there
24 must be more meeting notes somewhat, the answer is that the meetings ceased once the
25 White Services started operating. That is what we told the OFT in 2006, and to have lied
26 about it would have landed Mr. Brown in prison.

27 My submission is that the 2005 searches were sufficient to meet the disclosure
28 requirements. Those instructing me have satisfied themselves of that and it is very unlikely
29 that further searches now will produce further significant discloseable documents. We
30 would not object to a non-onerous requirement, for example writing to Mr. Kreppel, or
31 perhaps one or two further keyword searches, but in my submission the prospect of further
32 relevant documents coming to light as a result is absolutely minimal. That is all I was
33 going to say on disclosure.

1 MR. SMITH: Mr. West, just assuming an order in the terms of para.2 were to be made, would the
2 defendant be able to carry out the exercise by the date envisaged in para.2, namely 30th
3 December 2011? Sorry, it is a slightly contingent question but it would help to know the
4 answer.

5 THE CHAIRMAN: Mr. West, do take instructions – tell me when you are ready. (After a pause)
6 I was just going to put to you this: if the paragraph 2 exercise, as I will call it, was carried
7 out, presumably all the search terms to be searched could be placed in one file in which
8 case, although it would involve reading a lot of documents, the computer product would not
9 take long to produce, because in effect if good software is being used, you would produce
10 one hyperlinked response? I am not using the right technical terms, but I think you know
11 what I mean.

12 MR. WEST: Yes, if you are referring to keyword searches of the central server, yes, carrying out
13 the searches themselves is a *quasi* automatic process, and the documents can then be put in
14 a file; how long they then take to review ----

15 THE CHAIRMAN: That is another matter.

16 MR. WEST: -- depends on how many there are.

17 THE CHAIRMAN: Yes.

18 MR. WEST: To answer Mr. Smith's point, it really depends on precisely what we are required to
19 do. Some of these individuals have left the company so it may be a question of writing to
20 them. Others have not left the company and so it would be possible to raise with them
21 directly whether they might have any hard copy documents, for example.

22 THE CHAIRMAN: Before you sit down, Mr. West, do you want to deal now with any issues that
23 you want to raise concerning the claimant's disclosure?

24 MR. WEST: That can be dealt with extremely briefly because there is only one point and that is
25 any further documents held by the liquidator concerning the financial position of the
26 company.

27 THE CHAIRMAN: That is the point I put to Mr. Bowsher, in effect.

28 MR. WEST: Yes. At the last CMC there was an order to produce a summary which was
29 produced. That was a document which had been specifically drafted and we would like to
30 see any documents on which that is based. In Addleshaw Goddard's letter of yesterday at
31 para. 7.15 it seems to be admitted that there are such documents.

32 THE CHAIRMAN: Let us have a look at that.

33 MR. WEST: What it said at 7.15 is:

1 “You are now seeking disclosure of the liquidator’s documents supporting that list.
2 Should such an order be granted we would propose to provide them together with a
3 statement seeking to collage and categorise ...”

4 so there is more out there. It is obviously discloseable and has not been disclosed to date
5 and we would simply like to have it. It does not seem to be being opposed positively
6 anyway.

7 THE CHAIRMAN: Yes. Mr. Bowsher, as far as those documents are concerned, there cannot be
8 much of an argument against their disclosure, can there?

9 MR. BOWSHER: Yes, in the sense it is a question of proportionality. There are some files of
10 documents from which that summary was produced and I am sure we can produce those.

11 THE CHAIRMAN: Mr. Aldred is looking worried!

12 MR. BOWSHER: The problem is, of course, what happens at a liquidation is sometimes the
13 company just stops and there is then a lot of raw material that lies behind that, which is just
14 where the company was, as it were, the day it stopped. If I can just take instructions?

15 THE CHAIRMAN: Whilst Mr. Bowsher is doing that, Mr. Freeman has a question for you, Mr.
16 West, if you do not mind?

17 MR. FREEMAN: Simply this, Mr. West: on the list of custodians in the draft order are there any
18 that you have comments on as being really unnecessary, partially unnecessary, or do you
19 take that list as ----

20 MR. WEST: I would say all of them.

21 MR. FREEMAN: Well, I appreciate that is your position but can you grade them at all? You
22 have mentioned the non-executives ----

23 MR. WEST: Yes.

24 MR. FREEMAN: They are in a great category of their own, 16. 1 to 15 – we have talked about
25 Mr. Kreppel.

26 THE CHAIRMAN: If you want to take instructions and come back to us later, because I am sure
27 we are not going to complete this in record time.

28 MR. WEST: If I can just make one other point on the time it would take to comply with para.2? I
29 said before that searching the central server would be relatively straight forward, that does
30 not apply if the search extends to the other media storage devices referred to in para. 2. So
31 if we have to go through Cardiff Bus trying to find all memory sticks, DVDs and CDs and
32 so on, that is quite a time consuming process, and there will not be any documents on those
33 anyway because, as I understand it, they were transferred to the central server when the
34 central server was established.

1 THE CHAIRMAN: If all the documents on DVDs, sticks, portable hard drives and other
2 implements, were transferred to the central server all that is required is a short statement to
3 that effect, is it not – if it be the case.

4 MR. WEST: The point being made to me is if there was any question of having to preserve the
5 metadata on all of these storage devices we will have to go and find them all and image
6 them, and that will take time and it will cost a lot of money.

7 THE CHAIRMAN: Sorry, the metadata being?

8 MR. WEST: The data on the stick which records when files were put on there, taken off and
9 amendments made to them, and so on, which is potentially discloseable information.

10 MR. SMITH: Indeed, Mr. West, and this is the difficulty because in certain parts of Mr.
11 Pheasant's statement he says laptops that are abandoned are wiped and simply do not
12 contain any data whatsoever now.

13 THE CHAIRMAN: But they will contain the metadata.

14 MR. SMITH: Well, they may do, it depends on how the laptops have been treated. Sometimes
15 one can completely wipe the thing so the hard drive contains absolutely nothing. But if that
16 is the case then of course the disclosure statement will simply say that. But if, perchance,
17 there is a laptop that has not been wiped in that way such that the Metadata does exist or, as
18 I rather understood from your answer a moment ago, there is a memory stick that contains
19 data, and also of course the question of back-up tapes which is mentioned in 2(b), the
20 purpose of my question was to get a sense for the time frame in which not simply the easy
21 elements of the order could be done in but actually all the elements of the order, were such
22 an order to be made.

23 MR. BOWSHER: (After a pause) Dealing with your question about financial material. There are
24 files of the creditor material which that summary – you know the summary I am referring
25 to?

26 THE CHAIRMAN: Yes.

27 MR. BOWSHER: -- was based on, and we can certainly disclose that. That explains what that
28 description is describing.

29 THE CHAIRMAN: You heard what I said earlier, Mr. Bowsher, it must be in the claimant's
30 interests to disclose a trail of accounting material that shows that proper accounts were
31 being kept, because a company cannot lawfully function without them.

32 MR. BOWSHER: We have noted what has been said. I am not going to take that any further.

33 MR. SMITH: Mr. Bowsher, just to assist, we started out with a description of the large number
34 of boxes that had comprised the claimant's disclosure, the 200-odd boxes, are we to

1 understand that there is actually a significant amount of accounting material that does not
2 fall within those 200-odd boxes to be disclosed?

3 MR. BOWSHER: I think what we are talking about here is the sort of information the liquidators
4 would not normally produce. It is the sort of material that comes forward from the creditors
5 from which BDO have produced that summary description which was produced pursuant to
6 the early order. Certainly, on the question of the accounting material, if it is there it should
7 be in the boxes that we have and we will look.

8 THE CHAIRMAN: Does either of you want to raise anything connected with the letter dated
9 today that we received from Mr. Francis, Mr. Short and Mr. Fowles – it is Mr. Francis’
10 letter in fact. Any issues arising from that letter that either side would like to draw to the
11 Tribunal’s attention? The answer may well be “no” but I thought you should have the
12 opportunity of saying so.

13 MR. BOWSHER: No, in the sense of those three issues the only one that is still live for today is
14 Mr. Harrison, I think, because the other two we are either parking or agreeing.

15 THE CHAIRMAN: Are there any other issues that we need to hear representations upon?

16 MR. BOWSHER: In the case generally, yes. Let me just get the list. It was Dr. Niels I wanted to
17 make representations about. My learned friend wanted to address you on Mr. Harrison. The
18 OFT documents have sort of dealt with themselves.

19 THE CHAIRMAN: Well let us start with Dr. Gunnar Niels?

20 MR. BOWSHER: There are maybe a couple of points I could reply to Mr. West on but I do not
21 know if there is anything you particularly wanted me to pick up. Maybe I could just reply
22 on one specific point, it really goes back to Mr. Freeman’s earlier question on intention.
23 My learned friend is right that the finding is that Cardiff Bus intended to exclude us from
24 the market. We are obviously looking at the intention to go a step further and put us out of
25 business. You may have seen from some of the documents – I cannot remember – that
26 Cardiff Bus were taking a very active interest in our financial position and clearly
27 appreciated that our case will be that they foresaw one consequence of what they were
28 doing, and maybe one goal which they could achieve was to exclude us from the market and
29 push us out of business. Just to flesh out, that is why it is important to look at disclosure,
30 what the extent of the intention? We are not just taking the OFT finding, we are indeed
31 going further and saying that it seems to us that they certainly intended to push us out of the
32 market and they knew that at least a foreseeable consequence of that, or possibly they
33 intended that the consequence of that would be that we went out of business.

34 THE CHAIRMAN: This is an exemplary damages point, is it not?

1 MR. BOWSHER: And also a causation point going back to the beginning.

2 MR. FREEMAN: You are stuck with the OFT decision that you have. I almost had the
3 impression at one stage that you were wishing there was a slightly different or better or
4 fuller OFT decision, but there is not. We are stuck with it.

5 MR. BOWSHER: The decision is what it is, absolutely, but we are seeking to develop a case that
6 shows what they were really intending.

7 MR. FREEMAN: "They" being Cardiff Bus, not the OFT?

8 MR. BOWSHER: Cardiff Bus, not the OFT, exactly.

9 THE CHAIRMAN: I feel an oxymoron coming on here.

10 MR. BOWSHER: I just thought I should clarify that point. My learned friend was sort of pooh-
11 poohing what I was saying, but, in effect, what he was saying actually puts his finger on at
12 least part of the issue.

13 Dr. Niels: I do not know whether you have had a chance to look at his report. The issue
14 that we are talking about here is, in our submission, not a question of economics. It is about
15 customer behaviour. One should not assume that just because this is a competition law case
16 that one needs to have a competition economist. I did prepare copies from Dr. Niels' own
17 textbook of this year where he makes that very point. Basic competition law can be done by
18 basic competition lawyers, or even more sophisticated competition lawyers. The issue that
19 he addresses is really customer behaviour. It is the question about how people did or would
20 be expected to have behaved in response to buses and their operations, how the customer
21 base develops and responds. That is about customer behaviour. Dr. Niels, when you look
22 at his statement, is clearly a very distinguished economist with many years of experience.
23 When it comes to the matters in question the relevance of his experience is that he is
24 experienced in giving expert evidence in bus cases. He does not, for example, give any
25 indication that he has carried out any academic studies as to how the bus industry works or
26 bus consumers work, he does not have practical experience of the bus industry or the way in
27 which bus consumers operate.

28 As I said, to say that someone has given expert economic evidence in a case about a
29 particular industry makes that person no more an expert in that industry than it does, say, to
30 say that a construction lawyer is an expert in construction just because he has done a lot of
31 construction cases.

32 THE CHAIRMAN: That is a matter of weight, is it not?

1 MR. BOWSHER: It is more than weight. It goes to admissibility. If you are not an expert you
2 simply are not giving expert evidence. It is not just a question of weight. I agree, it does
3 also go to weight. If Dr. Niels' report is admitted, we will make that point further.
4 What he actually seeks to do is not really rely on any academic analysis or dispassionate
5 analysis as to how customers behave in bus markets. What he is really trying to do is to rely
6 on a number of findings from the Competition Commission investigation, which may or
7 may not be a very fine piece of work, but it is not admissible evidence. No part of it is
8 admissible evidence. No finding in it is admissible. What he is doing in a number of parts
9 of his investigation is effectively trying to evidentialise findings from the CC and saying,
10 "As the CC said, this is the way it is", and inviting the Tribunal simply to accept that that is
11 the proper evidence.

12 One can give a number of examples of that. When one gets into the body of his report, if I
13 just give you a few paragraph references, and they are not comprehensive, but 3.25, 3.26,
14 3.35, 3.54. When it comes to the crucial points, his observation is, "Here is a quotation
15 from the CC, that is the position". That raises a number of problems. As a matter of law, it
16 seeks to introduce into evidence something which is not evidence and could not properly be
17 evidence. We are not in any position to test the CC's work and how it actually would apply
18 in our case. The CC's investigation exists for a different purpose. It may be that it is
19 making relevant observations, it may not be, but to simply put this before us and say that we
20 have to treat it as being right is, in our submission, not a fair or proper way of dealing with
21 this matter.

22 It puts us, frankly, in an invidious position where we will have to attack Mr. Niels, but, in
23 fact, what we will be doing is attacking the CC's investigation without having any ability to
24 actually get into the material which led to any particular conclusion or consider how it is or
25 is not applicable in our particular case.

26 THE CHAIRMAN: Is this not what happens frequently with expert evidence. Often an expert
27 will quote the work of Professor Frankenfurter and say, "As a result of the researches done
28 by Professor Frankenfurter I come to the following conclusion". If it is a mere *argumenta*
29 *ad majoram*, then it takes the court no further, but if it is founded on a decent academic
30 foundation then it may take the case further, and that is a matter for weight, not
31 admissibility, surely.

32 MR. BOWSHER: With respect, it is certainly for weight, but it is also for admissibility. This is a
33 question of, should, in fact, at this stage an order be made for expert evidence? This
34 application is made at this point when it has already been twice already (at each of the

1 previous CMCs), and the consequence of this is serious. It will put us in a position where
2 we effectively have to attack and face the CC's investigation. We may say ----

3 MR. FREEMAN: Mr. Bowsher, surely that is not quite right, is it? The CC, although I have
4 forgotten everything that ever went on there, I do not think the buses investigation is
5 finished. These are not conclusions. They are not findings, they are observations ----

6 MR. BOWSHER: They are provisional findings.

7 MR. FREEMAN: Provisional findings, which can change. What we are being offered is
8 Dr. Niels' view of what may or may not have gone on in the Commission, combined with
9 his other expertise. As my colleague says, it is his opinion we might be interested in, not
10 taking what the CC has said as its investigation unravels as being conclusive proof of
11 anything.

12 MR. BOWSHER: Indeed so, but when one is considering – can I just follow that through – if an
13 order is made for Dr. Niels to be admitted in evidence, as a matter of practice, it puts us a
14 very significant disadvantage.

15 MR. FREEMAN: That is a different point, and I understand what you are saying about that. You
16 are attacking the weight and the admissibility as a matter of principle.

17 THE CHAIRMAN: I am a veteran of the *Enron* case. In the *Enron* case we were required to hear
18 economists' evidence which was founded on certain predicates the economists had taken
19 about the nature of the market in carrying coal to Newcastle, if you will forgive me putting
20 it that way, carrying coal to power stations. One was required to test the solidity or
21 otherwise of those foundations. Nevertheless, the witness was giving evidence as an
22 economist, who had applied econometric techniques to his analysis.

23 MR. BOWSHER: I absolutely understand that. Can I just develop why this is a problem for us.
24 It is a problem for us in this case, and I would remind you that everyone on this bench is
25 funded on a CFA. We have secured assistance from KPMG to provide some forensic
26 accountancy. They obviously are not on a CFA, they could not properly be. To obtain
27 funding for them is not straightforward. That is a significant understatement. If the
28 defendant is to have economic evidence then we will have to have our own economic expert
29 if only to assist us in demonstrating that Dr. Niels is not taking the matter any further
30 forward from an economic perspective. I simply at this point do not know how we will be
31 able to secure the funding or secure an expert who is prepared to proceed on the rather
32 novel funding basis that will have to be put in place for that individual. It certainly is not
33 going to be done quickly. People do not immediately say, "Yes, I will definitely do that".
34 It took us, I am not sure how long ----

1 THE CHAIRMAN: I understand.

2 MR. BOWSER: This is not a threat or anything, I know confidently that we will not be in a
3 position, for example, to produce any responsive economic evidence for a number of weeks.
4 We will not be in a position, for example, to have our own economic evidence by the time
5 we do our skeleton. I can be fairly confident that is not going to happen. We do have some
6 in-house economic expertise within Addleshaw Goddard, but we cannot possibly rely upon
7 that individual as an expert witness, because that is a person within Addleshaw Goddard
8 who is ----

9 THE CHAIRMAN: I understand. Given the application to admit Dr. Niels' evidence has been
10 fairly late anyway, the defendants can hardly complain if it takes you some time to produce
11 the response, and therefore a supplementary skeleton.

12 MR. BOWSER: I am much obliged for that indication. Our position is that at this late stage, I
13 simply do not know even whether we will get an expert. I know that can sound like
14 pleading, but it is not the usual situation where one ----

15 THE CHAIRMAN: We understand that position.

16 MR. FREEMAN: Your position is that we should not need an economist. If we do need one, you
17 need one.

18 MR. BOWSER: Exactly, if only to be able to demonstrate from an economic perspective why
19 that economic evidence may take the matter outside the scope of useful economic evidence.
20 Given the timing of the application and given what we say is the evidently nil weight, but at
21 the very least slender weight of this material, we say that on balance the Tribunal should
22 exercise its discretion not to admit expert evidence now.

23 THE CHAIRMAN: Understood.

24 MR. BOWSER: I should clarify one matter, unless I may have slightly confused matters. There
25 is an individual within Addleshaw Goddard, who is an economist, and we will have to
26 consider whether his financial arrangements with Addleshaw Goddard make it appropriate
27 for us to use him as an expert. That just illustrates the knots that one can get into in this
28 area.

29 THE CHAIRMAN: All experts are paid by someone in the end.

30 MR. BOWSER: Absolutely. You will understand, there is simply no point in us putting up an
31 expert for whom the first question is, "You are benefiting from a CFA in this case, are you
32 not?" and the cross-examiner sits down.

33 THE CHAIRMAN: This is not a jury trial.

34 MR. BOWSER: Yes, but it would be quite a good point.

1 THE CHAIRMAN: Thank you.

2 MR. WEST: The point that Dr. Niels' evidence is not admissible I find rather surprising. If it is
3 true of Dr. Niels, it must also be true of Mr. Good. It follows that there would not be any
4 evidence before the Tribunal ----

5 THE CHAIRMAN: I do not think you need trouble us with the admissibility, Mr. West.

6 MR. WEST: So far as concerns timing, the claimants have known since 11th November when
7 Dr. Niels' report was served that it was going to be put before the Tribunal in one form or
8 another, either as an annex to Mr. Haberman's report or as a separate report. They must
9 have given some thought to how they intend to deal with it.

10 I would also make the point that the Tribunal's order from last April envisaged that there
11 would be two experts before the Tribunal – one accountancy expert and one valuation
12 expert. Neither party has, in the event, submitted expert valuation evidence. The result of
13 our application is that there will be permission for two experts on each side, which is what
14 was always envisaged anyway. I adopt the point that if further time is needed, because of
15 the time which it would take to produce a response then further time can be given and
16 supplemental skeleton arguments can be served.

17 THE CHAIRMAN: Right. Anything else?

18 MR. BOWSHER: The only other point, I think, is my learned friend's point on Mr. Harrison, if
19 we are going to develop that, and supplemental witness statements. I should say we would
20 contemplate putting in supplemental witness statements in any event to meet Mr. Brown,
21 and there is a point in Mr. Haberman's evidence which needs to be addressed. He has made
22 some suppositions of fact which we need to respond to. Obviously, if Dr. Niels puts in
23 evidence, again there are factual issues that he is talking to, or issues to which part of our
24 response is a factual response.

25 THE CHAIRMAN: Sorry, Mr. West?

26 MR. WEST: Would you like me to address Mr. Harrison's evidence?

27 THE CHAIRMAN: Yes.

28 MR. WEST: I would like to start by looking at the PwC report, which Mr. Harrison wrote, which
29 is clearly a central document in this case, and that is annexed to the claim form at tab 4. The
30 point of particular importance today begins at p.16 of the numbers at the bottom, "New
31 Routes". This is the section of the report that deals with the new routes 2 Travel was
32 proposing to set up, and this is extremely important material. What Mr. Harrison says here
33 is that:

1 “It was explained above that the short term strategy, now that four depots have
2 been established, is to increase revenue by ensuring that all the buses used on
3 school runs have infill routes between the school runs.

4 In addition, following market research commercial routes have been registered on
5 the main corridors in Swansea and Cwmbran.

6 Management refers to these phases as Phase 1, Cardiff and Llanelli.

7 There are 20 school runs in Cardiff. Commercial infills have been registered along
8 the main corridors.

9 Four subsidised routes have been won from the Llanelli depot.

10 The table opposite summarises the new routes ...

11 Vehicle Utilisation he then deals with. Then if we can skip over that down to Cardiff, he
12 says that the Cardiff routes are all infill.

13 “The gross margin is therefore higher than phase 1 or Llanelli as most of fixed
14 costs covered by the contracted school routes.”

15 He then says, over the page on the last bullet point:

16 “Thereafter, they are projected to generate a contribution of approximately £1
17 million per annum, once optimum revenues are generated.”

18 Then over the page again, down at 21 he says:

19 “During 2005 the 20 infill buses in Cardiff are expected to account for 50% of the
20 growth”.

21 That is 50 per cent of the £1 million he referred to on p.18. So his view was that there
22 would be a contribution of half a million pounds a year from Cardiff. This was based on an
23 assumption that the new Cardiff routes would obtain a market share of 30 per cent. The
24 reference to that is p.17 – I skipped over it and I should not have done – it is just above the
25 word “Cardiff”, the last bullet point under “General”.

26 “It is assumed that the new service will attract 30% of all the passengers using the
27 corridors by month 6. Brand loyalty is minimal in this industry.”

28 So 30 per cent market share leading to a contribution in Cardiff of half a million pounds a
29 year. That is absolutely central to the issues on this quantum trial, and I would like just to
30 show you very briefly what Dr. Niels says about it, now that his evidence has been
31 admitted. I am not sure again where you will find his report. On the point about market
32 share, this is dealt with by Dr. Niels at para. 3.58 to 3.62, which is p.17: “The Growth of 2
33 Travel’s market share”.

1 “2 Travel refers to PwC report which states that 2 Travel would be able to attract
2 30 per cent of all the passengers. Brand loyalty is minimal.

3 As discussed in section 3(b) the most appropriate approach to assessing market
4 shares in a hypothetical situation is to consider the relative frequency of services. I
5 have read the witness statement of Stephen Harrison, the relevant partner, he does
6 not explain how 30 per cent was arrived at.

7 The witness statement of Mr. Fowles does refer to the same logic that I have used
8 to infer hypothetical market shares, i.e. by reference throughout the frequencies.

9 Mr. Good refers to his witness statement, however it is my understanding that Mr.
10 Fowles refers only to specific sections of the corridors, in particular those at the
11 outskirts, whereas both PwC and Mr. Good apply the 30 per cent to the entire
12 corridor. This approach is incorrect since it does not consider the fact that there
13 are other Cardiff Bus operations that cover parts of the same corridors, which
14 would constitute viable alternatives for those passengers travelling on those parts
15 of the corridors.

16 Section A3.1 in appendix 3 to this report sets out Cardiff Bus’ registered frequency
17 on each section of the five relevant corridors as well as that of 2 Travel. It shows
18 that Cardiff Bus run at between 6 and 23 services an hour on 117 ...”

19 And he goes on to explain the position on the other routes.

20 “Using the assumption that a passenger would board the first bus that arrives at the
21 bus stop as discussed above, and that the services and passengers are distributed
22 evenly, 2 Travel might reasonably have been expected to attract on average around
23 18 per cent of passengers across five corridors. This means that PwC’s assumption
24 that 2 Travel could have expected to attract 30 per cent was over optimistic.”

25 Then there is quite an interesting footnote, 29 where Dr. Niels
26 says:

27 “Indeed, if PwC had taken 18% rather than 30% as the market share in month 6, its
28 own calculations would have shown the infill services to be barely covering their
29 costs. The revenue in October 2004 would have been approximately £1,150 rather
30 than £1,920 compared with the cost figure of £1,035 (a gross margin of 6% rather
31 than 46%)...”

32 So the 30 per cent figure is an absolutely crucial issue. I will not go through it now, but Dr.
33 Niels also takes issue with the assumption that the school bus contracts would cover the
34 costs of the infill services. He points out that from an accounting perspective there should

1 be an allocation of costs and the result of that is to make the infill services loss making,
2 whatever happens. Dr. Niels also disagrees with PwC's figure of £500,000 a year on the
3 Cardiff routes. His figure, which is set out in the summary at the beginning of his report,
4 para. 1.20 is that 2 Travel would have obtained additional revenues of between £2,000 and
5 £70,000 on the Cardiff routes, if the White Services had not operated, prior to an allocation
6 of common costs, but after an allocation of common costs the routes would have been loss
7 making to the extent of between £132,000 and £175,000.

8 THE CHAIRMAN: Mr. West, forgive me for interrupting, but I am just concerned about where
9 this is taking us really. Are we not now discussing an issue which the Tribunal will have to
10 adjudicate upon in due course, or are you applying for Mr. Harrison's evidence to be
11 excluded, or are you – as it seems to me – making a submission as to the weight to be given
12 to Mr. Harrison's evidence.

13 MR. WEST: I am not making either of those submissions. The submission which I am trying to
14 tee-up is that the issues to which Mr. Harrison's evidence goes are the absolutely crucial
15 issues in this case, which is why this point matters so much to my client. We have not
16 actually looked at Mr. Harrison's evidence yet, but perhaps we should look at that next, and
17 again I will take you to it as briefly as I can. I have it in tab 1 of what is called trial bundle
18 A, and what he says about the PwC Report starts at para. 16 on p.3. He says:

19 “The First PwC Report contains projections and, as with any set of projections,
20 there are no guarantees of how this will turn out, as circumstances may change.
21 That said, at the time, I had no reason to believe that these were foolhardy or
22 ridiculous projections, quite the contrary; these were regarded as having been
23 derived following a thorough and systematic process, which gave a credible basis
24 for projections of future performance. Put another way, I would not have included
25 these figures in the report, if I knew them, or expected them to be incorrect.”

26 Then at para. 17 he says that one reason for his confidence in the figures was his impression
27 of Mr. Fowles.

28 THE CHAIRMAN: Just pause for a moment, I want to re-read that. (After a pause) Yes.

29 MR. WEST: Then at para. 30 he deals specifically with the 30 per cent:

30 “Another key assumption underlying the First PwC Report was that new routes
31 ‘will attract 30% of all the passengers using the corridors by month 6’. This
32 appears on page 14 of the report. Again, I had discussions with Mr. Fowles about
33 this key assumption. I was satisfied at the time that this was an important but
34 achievable assumption. Indeed, I believed that there was an opportunity to reduce

1 this time period, as there would be no significant customer loyalty to create inertia
2 to prevent change.”

3 There are just two further brief references in here I would like to show you. At para 37 he
4 deals with the second PwC report, we can skip over that. Then at para. 48 he is dealing with
5 2 Travel’s insolvency – the heading is “Reasons for the failure of 2 Travel”:

6 “Throughout, the management strategy was based on expansion, particularly in
7 Cardiff. In my opinion, the basis of management’s strategy was sound and, if it
8 had been able to open up these routes, its fortune would have been markedly
9 different. The company could have gone on to become a profitable business.”

10 Then just finally, paras 50 to 55, he goes through Cardiff Bus’ reasons for saying that the
11 infringement did not cause the insolvency and he says in his opinion they are not right.

12 THE CHAIRMAN: In that last section he switches from giving what is clearly contemporaneous
13 evidence, or contemporary evidence, to giving an opinion. This is where he comes closest
14 to giving expert evidence, is it not – this last section?

15 MR. WEST: One can draw a distinction between what he says earlier and what he says here.

16 This, at the end, is not dealing with any opinions he held contemporaneously. Where one
17 looks at what he says about the PwC report, for example, there are two ways in which one
18 could accept that evidence. One could accept it simply as Mr. Harrison saying: “This is
19 what I thought at the time” and if that is all it means it is not contentious, and indeed it may
20 be that Mr. Harrison does not even have to come along; we do not dispute that he assumed
21 these projections were accurate.

22 We have no case that he must have known at the time he drafted the PwC report that it was
23 all wrong, and there is no difficulty about it. But, if this is accepted as evidence that the
24 PwC report was actually right, and would have been achieved in practice, absent the
25 infringement, it is much more difficult. The importance of that distinction in practice is
26 shown by how one would have to then cross-examine Mr. Harrison because if that is what
27 his evidence means I will have to put to Mr. Harrison the whole content of Dr. Niels’ report,
28 and indeed Mr. Haberman’s report, to say that “Although you may have thought these were
29 true at the time, Mr. Harrison, you were wrong about that. The assumptions underlying
30 your report were not well founded, you did not have the right information to make them,
31 and the PwC report would never have reflected reality even if the infringement had not
32 occurred.”

33 The difficulty then is that I will be asking the Tribunal to prefer the evidence of my experts,
34 Dr. Niels and Mr. Haberman, to the expert evidence being adduced by a Member of the

1 Tribunal. That gives rise, in my submission, to an obvious appearance of bias. There are
2 no cases which I have been able to find in which this precise point has arisen of whether a
3 Member of a Tribunal, albeit not sitting on the Panel hearing the case, can appear as an
4 expert witness effectively before the Tribunal.

5 THE CHAIRMAN: You are aware that none of the members of the Tribunal as constituted have
6 ever met him.

7 MR. WEST: I was not aware of that.

8 THE CHAIRMAN: Well that is a fact. That is one of the reasons for the constitution of the
9 Tribunal – I am right, am I not, that that is the case.

10 MR. SMITH: Yes.

11 MR. FREEMAN: It is certainly true in my case.

12 THE CHAIRMAN: And in mine. One of the reasons why the Tribunal has been constituted in
13 this form is because we have been very careful to ensure, given that this case exists, that
14 none of us have met Mr. Harrison, even in a social setting or at a training meeting. I think
15 you would be struggling on the appearance of bias.

16 MR. WEST: I do not accept that, and I would like to show you an authority about it in a minute.
17 If any of you had met Mr. Harrison I might perhaps have a stronger case in a way, but it
18 would also be an easier case in a way because it could be resolved by the relevant member
19 of the panel simply recusing himself, whereas, given the point we actually have, any
20 member of the panel hearing Mr. Harrison giving expert evidence as another member of the
21 panel would face the same difficulty.

22 I do not want to take a lot of time up on this but I would just like to show you the nearest
23 two authorities which I will take briefly ----

24 MR. SMITH: Mr. West, I hesitate to interrupt, but just so I understand exactly your position, is it
25 your position that but for the fact that Mr. Harrison is a member of the Tribunal there would
26 be no problem about the admissibility of his evidence, the only problem is his membership
27 of the Tribunal?

28 MR. WEST: If he were not a member of the Tribunal I probably would not be making the
29 application. I might be making it only on the basis that it is duplicative and therefore I
30 should not have to make the same cross-examination twice, but I certainly would not have a
31 bias point.

32 THE CHAIRMAN: Show us the authority that you have in mind.

1 MR. WEST: Before I do, I think legally the answer is in the Civil Evidence Act 1972 which says
2 that a witness of fact can give expert evidence on any matter in which he happens to have
3 expertise.

4 THE CHAIRMAN: I should tell you that I am also a veteran of the *BAA* case.

5 MR. WEST: That is also in this bundle.

6 THE CHAIRMAN: I thought it might – in which I sat with the President, in which I am
7 disappointed to tell you that we were overruled but we examined this whole issue of
8 apparent bias in the most exhaustive and exhausting form.

9 MR. WEST: The Competition Commission case is in tab 1 of this bundle. It is in there just
10 because it is the most recent summary of the authority on apparent bias. In the light of this
11 case ----

12 MR. FREEMAN: I am a veteran of this case too – does that debar me from hearing what you are
13 going to say?

14 MR. WEST: Not at all. Effectively the test is rather circular. It is there is an appearance of bias
15 if a reasonable person were to assume there was an appearance of bias. The case I was
16 going to show you is *Medicaments (No. 2)* at tab 2, another competition case, interestingly.
17 What happened in this case is that there was a case before the old Restrictive Trade
18 Practices Court in which there was a panel of three hearing the case, one of whom,
19 Mr. Justice Lightman, was the judge, and there was an economist member referred to here
20 as R, Dr. Penelope Rowlatt. The parties were the DGFT on one side and various
21 pharmaceutical industry bodies on the other. The DGFT had an expert called Mr. Zoltan
22 Biro, who worked for Frontier Economics. While the case was going on, Dr. Rowlatt
23 applied for a job with Frontier Economics. She disclosed that to all the parties, whereupon
24 the pharmaceutical industry bodies who did not have Mr. Biro applied for the whole
25 Tribunal to recuse themselves. Dr. Rowlatt did not help her case by undertaking not to
26 apply for another job with Frontier Economics for two years. The panel refused to recuse
27 themselves, but the Court of Appeal recused on appeal.

28 The relevant paragraphs are towards the end of the judgment, the last two pages beginning
29 at 728:

30 “94 We do not consider that the reasoning of the court would have left the fair
31 minded observer confident that Dr. Rowlatt had forgotten Frontier’s role as
32 experts in the case when she applied for a post with them. It is, indeed, hard to
33 credit that, had she had this fact in mind, she would have made the application,
34 only to appreciate no sooner had she done so that it was inappropriate. But it is

1 equally hard to credit, for the reasons given by Ms Bendall, that Dr. Rowlatt
2 could have lost sight of the fact that Frontier were providing critical expert
3 evidence in the case.”

4 It then goes on to say:

5 “95 What concerns would the remarkable facts that we have set out above raise
6 in the mind of a fair minded observer? The Restrictive Practices Court is, in
7 this case, going to have to resolve a fundamental conflict of economic analysis
8 between rival economic consultants.”

9 That is why I showed you the point about 30 per cent, and so on.

10 “Ms Bendall stated that her clients considered that Dr. Rowlatt had, by making
11 her application for employment to one of these consultants, indicated a
12 partiality to them which could not be undone. We consider that the fair minded
13 observer would be concerned that, if Dr. Rowlatt esteemed Frontier sufficiently
14 to wish to be employed by them, she might consciously or unconsciously be
15 inclined to consider them a more reliable source of expert opinion than their
16 rivals.”

17 THE CHAIRMAN: I notice that in the report of the Court of Appeal hearing in *Competition*
18 *Commission v. BAA Limited* that case is not listed as one of those that was referred to. I am
19 a bit puzzled by that because I have the clearest memory of the *Medicaments* case being
20 referred to in argument in, I think it was, this very court room.

21 MR. WEST: I am not sure I can explain it.

22 THE CHAIRMAN: Does *Medicaments* provide any principle that is different in any way from
23 the test described in the first paragraph of the headnote and taken from the decision of the
24 House of Lords in *Porter v. McGill*?

25 MR. WEST: Not at all. I rely on it simply as an example of the application of that test in facts
26 somewhat analogous to ours.

27 THE CHAIRMAN: So what you are saying is that the fair minded and informed observer, having
28 considered the facts, would conclude that Mr. Harrison, having been appointed a member of
29 this Tribunal, but never having been seen or spoken to knowingly by any of these three
30 members of the Tribunal, would conclude that there was an apparent bias?

31 MR. WEST: That is right. Of course, in this case, the *Medicaments* case, the application for a job
32 was not made to Mr. Biro, it was to his institution, to the company of which he formed part.
33 That link between a member of the Tribunal and that company, albeit not the individual,
34 was sufficient to give rise to an appearance of bias.

1 The other case I was going to show you makes the same point on slightly different facts.
2 That is at tab 3, a case called *Howell v. Millais*. In this remarkable case Mr. Justice Peter
3 Smith, I think it was, applied for a job with Addleshaw Goddard and had been turned down
4 and was not terribly happy about it. He was then the judge on an application at which a
5 partner of Addleshaw Goddard was a party, Mr. Howell. Addleshaw Goddard applied to
6 Mr. Justice Peter Smith to recuse himself and he refused.

7 THE CHAIRMAN: The consequence of your submission, of course, is that the Competition
8 Appeal Tribunal cannot hear this case?

9 MR. WEST: It can hear the case as long as Mr. Harrison is not permitted to give expert evidence.

10 MR. SMITH: But, Mr. West, he having conceded that his evidence is significant, that would
11 surely do a significant injustice to the claimant's cause. Is the Chairman's point not right
12 that the Tribunal simply cannot hear the matter?

13 THE CHAIRMAN: We have read Mr. Harrison's evidence. We have read his statement for what
14 it is worth, whatever that may be.

15 MR. FREEMAN: Why does he have to be an expert? We would still be attaching weight, or not
16 attaching weight, to his evidence as to facts at the time of his report, whether he is expert or
17 not.

18 MR. WEST: Those facts are largely uncontentious. There is no difficulty about that. I accept the
19 PwC report is admissible as a document as far as it goes. When we get into disputing or
20 debating whether the assumptions in that document would, in fact, have been achieved in
21 practice, the correct individuals, the correct witnesses, to engage in that dispute are the
22 independent experts appointed by each side. My learned friend has an independent expert
23 who can talk about the PwC report and why, in his opinion, it would have been achieved.

24 THE CHAIRMAN: Are you saying that there is no objection to Mr. Harrison being called as a
25 witness of fact, but the moment he steps up to being an expert witness then the objection on
26 the basis of apparent bias engages?

27 MR. WEST: Correct.

28 MR. FREEMAN: The fair minded observer would regard this change from being a witness on
29 fact to a witness on opinion as being a crucial step – that is your point?

30 MR. WEST: Yes, it is absolutely crucial. It may be that he is not even required to come if he is
31 simply a witness of fact, because his evidence is not contentious. The order I am seeking is
32 that his evidence should be accepted as factual evidence only. If he were to come along and
33 express an opinion in the witness box I would simply say, "Mr. Harrison, there is a ruling

1 that you are not here as an expert and I am not going to cross-examine you about what you
2 have just said”, and the difficulty goes away.

3 THE CHAIRMAN: We will certainly consider the point, but I must say I am troubled by it. Here
4 we are, in the Competition Appeal Tribunal, the Tribunal has, over months now, because
5 this is certainly a point we had in mind, taken the step to ensure, and I was consulted about
6 this at an early step, that this group of three members was insulated completely from any
7 contact with Mr. Harrison. That is on the record and it is true. Yet the fair minded observer
8 would see an appearance of bias?

9 MR. WEST: Clearly.

10 THE CHAIRMAN: Would the fair minded observer not say, “It could not have been dealt with
11 more fairly by Mr. Dhanowa”, who is sitting in front of me, “the Registrar, and by the
12 President, Mr. Justice Barling, than it has been”? Does this not give the appearance of
13 fairness, not the appearance of bias? I am sorry, I have provoked Mr. Dhanowa now. This
14 was the only way we could have dealt with it, as Mr. Dhanowa has just reminded me. Is
15 this not the appearance of fairness being turned into the appearance of bias?

16 MR. WEST: The way that it can be dealt with fairly is by ruling that Mr. Harrison’s evidence is
17 factual evidence only.

18 MR. SMITH: Mr. West, two questions: first of all, it would follow from your argument that if
19 there was a dispute on fact as regards Mr. Harrison’s evidence, his evidence also ought to be
20 excluded and not heard – is that right?

21 MR. WEST: That is a much more difficult point, which fortunately does not arise.

22 MR. SMITH: I would like to hear your answer nonetheless.

23 MR. WEST: I do not know what the answer is to that. It may be that there is simply no solution
24 to that point.

25 MR. SMITH: My second question, and there may also be no answer to that, but again I would
26 like to hear what you have to say, is this: suppose we took the view that although this is
27 factual evidence, clearly it must be because that is all that Mr. Harrison is, he otherwise
28 would be regarded as *parti pris*, he cannot be an expert. Aside from his relationship with
29 the Tribunal, he is a witness of fact, but he is giving opinion evidence that in the mouth of
30 another could be regarded as expert. Were the Tribunal to see value in that, your position is
31 that it has simply got to be excluded?

32 MR. WEST: My position is that to the extent there is a debate about the PwC report and whether
33 it was right or wrong, it should be decided on the basis of the Tribunal’s view of the relative
34 experts and not on the basis that the Tribunal thinks that Mr. Harrison is terribly

1 creditworthy and he knows what he is talking about, and therefore the Tribunal accepts the
2 30 per cent figure, for example.

3 MR. SMITH: As we have seen, what Mr. Harrison is doing is saying, “This figure appears in the
4 PwC report is for the following reasons”, and he is bound to expand upon why it is that the
5 figures were included in the report, which is surely bound to include a whole range of
6 factors as to why it is that he considered this figure to be credible. Is it not going to be next
7 to impossible to distinguish between the factual evidence that he gives about the assessment
8 he made, for instance, for the people who are running the claimant and what you might say
9 is expert opinion?

10 THE CHAIRMAN: I take it that Mr. Harrison is an accountant? Is he an accountant?

11 MR. WEST: He was a partner at PwC, so yes.

12 THE CHAIRMAN: That is why I asked the question. It does not mean that he is necessarily an
13 accountant, he could be a management consultant.

14 MR. WEST: I believe he is an accountant.

15 MR. BOWSHER: He is a retired accountant.

16 THE CHAIRMAN: A retired accountant, thank you very much. I am sorry, I interrupted you.
17 Please answer Mr. Smith.

18 MR. WEST: In my submission, there is a clear distinction between factual and expert evidence
19 and the Tribunal can accept the evidence – not accept it – can consider the evidence so far
20 as it is factual. So far as concerns the basis of the PwC projections that can be dealt with by
21 the experts. They can look at the material upon which it was based and decide whether that
22 material supports those conclusions.

23 THE CHAIRMAN: You have made your point, very skilfully, if I may say so, and we will
24 obviously give it due weight.

25 MR. WEST: It is perhaps not necessary to go to this additional case, but the only point I was
26 going to make is that in this case the judge had never actually come across the partner of
27 Addleshaw Goddard who was a party to the proceedings, but that did not matter, because
28 there was a link between the judge and the firm and that made it inappropriate for him to
29 hear the case. The fact that he did not know the individual was neither here nor there.
30 The point I make is a serious one. The claimant’s skeleton argument says it is just mischief
31 making. It seriously is not. If this point, the 30 per cent point, for example, were to go
32 against my clients and it were held that the routes would have produced £500,000 of
33 damages because Mr. Harrison’s evidence is terribly reliable and he knows what he is

1 talking about, there would be a real sense of grievance and injustice on this side of the
2 court. In my submission, that is perfectly understandable.

3 MR. SMITH: Mr. West, I am sorry to press on this, but could I ask you to look at Mr. Harrison's
4 statement in tab 1 of trial bundle A, and just take as an example, para.17 of that statement.
5 What we see here is an explanation from Mr. Harrison, for what it is worth, of his
6 confidence in the projections was his impression of Mr. Fowles, and he is setting out here
7 why he felt the projections included in the PwC report had his confidence, and he explains
8 that one of the reasons was his impression of Mr. Fowles.

9 This seems to me to be factual evidence, would you not say?

10 MR. WEST: Yes.

11 MR. SMITH: But factual evidence that goes beyond simply saying you read the figures in the
12 PwC report, there you are, for what they are worth that is what the PwC report says. What
13 he is saying is these figures deserve additional credence because Mr. Fowles was a very
14 competent fellow.

15 MR. WEST: As I say, there are two ways in which one can read this. One can read it simply as
16 saying: "That is what I thought at the time", and it is not disputed that that is what he
17 thought at the time, or one can read it as setting out that that is actually true.

18 THE CHAIRMAN: It is some distance, in this context at least, from being expert evidence. He is
19 saying, basically: "Mr. Fowles was a good bloke, and he knew an awful lot about buses
20 which I do not. This is not something I was doing as an auditor, which is my professional
21 expertise, I was helping out with certain predicates which were basically what Mr. Fowles
22 and some other people at the company told me."

23 MR. WEST: Yes, I am much less worried about this paragraph than the preceding paragraphs,
24 because one witness' opinion about whether another witness is a good chap or not really
25 does not take matters much further.

26 MR. SMITH: Well, Mr. West, I think your proposition is in grave danger of proving too much, is
27 it not? Because let us suppose you are right, and we are liable to be unduly influenced by
28 the fact that Mr. Harrison is a Member of the Tribunal, surely we will be saying, if you are
29 right, I read that he is saying: "I, Mr. Harrison, am an expert in auditing and accounting",
30 we will obviously attach weight to that and, as a result of attaching weight to that, we will
31 say "yes", Mr. Fowles, was a competent fellow and, as a result of that, we will be saying:
32 "This figure in the PwC report deserves additional credence", not necessarily as a question
33 of expertise, but simply and purely as a question of fact. That brings me back to the
34 question I am afraid I am going to have to press you on, even though you regard it as a

1 difficult one, which is: what happens if there is a factual witness who is in a position like
2 Mr. Harrison where there is an impossibility in reconstituting the Tribunal so as to have no
3 connection with him, does one exclude even factual evidence?

4 MR. WEST: I think the answer to that must be “no”, and one can think of an obvious example:
5 for example a High Court Judge happens to witness a road traffic accident, and a claim is
6 then brought in the High Court about the road traffic accident, and the High Court Judge
7 then appears to give evidence about it. Clearly he must be entitled to give that evidence,
8 there cannot be a fair trial otherwise. If the evidence is largely non-contentious there may
9 not be a problem. If it is really put to the High Court Judge that you ought not to be
10 believed on your evidence, there is a problem, but there does not seem to be any solution.

11 THE CHAIRMAN: But there is a solution, and the solution is avoiding the appearance of bias. I
12 think this is now becoming a circular argument, frankly. We have the point.

13 MR. WEST: There is a solution in this case and it is to regard Mr. Harrison as a witness of fact.

14 THE CHAIRMAN: We understand that.

15 MR. FREEMAN: Is it as simple as that though? A commitment at this stage to regard his
16 evidence as evidence of fact I can see that getting awfully woolly as we get into a two week
17 hearing, there will be issues which stray across the border.

18 MR. WEST: What it will mean is that I, or whoever is cross-examining, will not be putting the
19 content of my expert witness reports to Mr. Harrison in cross-examination.

20 MR. FREEMAN: I appreciate that and you have said that, but when we are talking about at test
21 for apparent bias, which is the notional opinion of an informed bystander, you are in a very
22 grey area and the bystander may not see things quite as clearly as you do. So I am not sure
23 your solution is a solution.

24 THE CHAIRMAN: Given that, I do not myself see that there is necessarily any distinction to be
25 drawn between whether he is a witness of fact or an expert, given that the three Members of
26 this Tribunal would not know Mr. Harrison if we fell over him in the street. The only point
27 is: does his membership of the Tribunal mean that there is an appearance of bias which
28 would offend the sensibilities of the fair minded observer? Well we have to make a
29 judgment on that, do we not? The arguments have been fully ventilated.

30 MR. WEST: But coming back again to the example of the High Court Judge, something else
31 which is in this bundle, which might be interesting to look at, is the terms and conditions of
32 High Court Judges, at tab 5, which is obtained from the Department of Justice website.
33 What it says at “2” is:

1 “A High Court Judge shall not practise as a barrister or solicitor or be indirectly
2 concerned in any such practice ... The Lord Chancellor also regards a judgeship as
3 a lifetime appointment. Any offer of appointment is therefore made on the
4 understanding that appointees will not return to practice.”

5 THE CHAIRMAN: Well that is peculiar to High Court Judges, it does not apply to Circuit
6 Judges, for example. They can now return to practise.

7 MR. WEST: The reasoning and thinking behind it is that for a High Court Judge to appear in
8 front of the Tribunal of which he was formerly a Member (not currently) would give rise to
9 an appearance of bias.

10 MR. FREEMAN: So on that basis it would not make any difference if Mr. Harrison resigned as a
11 Member of the Tribunal, the damage is done according to your proposition? We have this
12 sort of implied, cherished value we place on his evidence.

13 THE CHAIRMAN: Is the premise of what you just said right? The prohibition on a High Court
14 Judge returning to practise is statutory, as it says. I do not know what the rationale for that
15 statutory provision is, but that is a statutory provision.

16 MR. WEST: Well we have s.75 in the preceding tab, but the statutory provision refers to the
17 Judge providing legal services while he is a Judge. After he retires all you have is the
18 eyebrows of the Lord Chancellor, and of course, Mr. Justice Laddie was prepared to put up
19 with the raising of the eyebrows, and went back to practise – the only Judge as far as I am
20 aware who ----

21 THE CHAIRMAN: Sir Henry Fisher before him. Sir Henry Fisher was the son of an Archbishop
22 of Canterbury, it provoked Mr. Justice Melford Stevenson to the comment: “What would
23 his father have said if one of his vicars had gone to work as a bookmaker?” Indeed, the
24 position now has changed of course.

25 MR. WEST: There was a consultation in changing the position in 2006 as a result of which the
26 Lord Chancellor decided not to change the position.

27 THE CHAIRMAN: The position has changed as far as Circuit Judges are concerned.

28 MR. WEST: Circuit Judges may be so.

29 THE CHAIRMAN: A former Circuit Judge may now appear as a barrister on the circuit in which
30 he was a judge.

31 MR. WEST: But not, presumably, while he is still a judge on that circuit.

32 THE CHAIRMAN: No, of course; I understand the distinction. I feel we have done this one and
33 I notice it is now 10 past 1 and the lunch is going cold.

34 MR. WEST: Sorry about that.

1 THE CHAIRMAN: Do not worry. We will adjourn in a moment. Are there any other issues that
2 need to be ventilated?

3 MR. WEST: I was going to come back, I think on custodians, and the length of time it would
4 take for us to do the searches, if I may, at 2 o'clock.

5 THE CHAIRMAN: Right. We will adjourn then, shall we, until 10 past 2 and we will resume
6 then. Thank you both very much.

7 (Adjourned for a short time)

8 THE CHAIRMAN: Mr. West, just so we are clear what you are asking for in relation to Mr.
9 Harrison, of course one of the options that is available to the Tribunal is to transfer the case
10 to the Chancery Division of the High Court. Are you asking us to do that?

11 MR. WEST: I have not taken instructions on that particular point, I can do so. (After a pause) I
12 am sorry, I cannot answer that now, we would need to discuss it with the client.

13 THE CHAIRMAN: Had that not been anticipated as a possibility, were we to accede to your
14 submissions in relation to Mr. Harrison?

15 MR. WEST: I am sorry, it had not been specifically considered, but I will certainly endeavour to
16 respond on that within the next day.

17 THE CHAIRMAN: Right. Mr. Bowsher, do you want to say anything, except an emphatic "No,
18 thank you" in relation to submissions that were made before lunch?

19 MR. BOWSHER: Unless there are any particular questions that the Tribunal wishes to raise, we
20 reject them, you know our position.

21 THE CHAIRMAN: Yes.

22 MR. BOWSHER: We set it out in our skeleton and I stand by that. There is a great deal that we
23 could say but I do not know that it would take the matter very much further.

24 THE CHAIRMAN: And were Mr. West to apply under – is it Rule 48?

25 MR. BOWSHER: I think it is, yes.

26 THE CHAIRMAN: -- to transfer the case to the Chancery Division, which could of course
27 transfer it back to us if it wished, what would your position be?

28 MR. BOWSHER: We would not wish that to happen, I think it would be fair to say. The
29 situation which might be the least worst of a number of evils would be if you were to decide
30 not to accede to my learned friend's application, they were to decide, as I think they would
31 be compelled to do, that they had to act upon that immediately and go to the Court of
32 Appeal expeditiously next month ----

33 THE CHAIRMAN: Plainly they would, yes.

1 MR. BOWSER: They would have to do it in January, we might then have to chew over what
2 seemed the right thing to do. We would have to look at timings and so forth, what the
3 relative advantage was, but our starting position is “no”, we do not want it to go to the
4 Chancery Division, we are where we want to be. It might turn out to be the least worst
5 option, but it depends on a number of variables that I cannot really predict.

6 THE CHAIRMAN: Mr. West, you ask, and of course will be given, time to think about that. If
7 you do wish to make an application to have this matter transferred to the Chancery Division
8 then we would want it as soon as possible. I think we would have to have such an
9 application by 1300 hours on Monday next, and it would be our intention, subject to any
10 objection to deal with that on paper.

11 MR. WEST: I have heard that and noted it.

12 THE CHAIRMAN: Right, now what is next.

13 MR. WEST: We have been considering, over the short adjournment, the question of further
14 searches, how long they would take and the submissions we would wish to make as to the
15 form of order, so it might be useful to turn up my friend’s paragraph 2. It seems to us it is
16 important that the order is clear as to precisely what we are obliged to do and going through
17 the various categories, looking first at the devices or machines on which information might
18 be held, documents might be held, my instructions are that all PCs from the period prior to
19 2005 have been recycled, so there are no PCs now from that period which could be
20 searched. Any information from those PCs which has been retained is on the central server
21 already. Laptops, those instructing me do not believe that there are any but we cannot say
22 that for sure so we will check for those. Memory sticks, I am told were not in use at this
23 period in Cardiff Bus so there will not be any of those. CDs and DVDs I am told there may
24 be a few. I am also told that it will not take terribly long to find those devices, if there are
25 any; it will be a matter of a day or two.

26 So far as the back-up tapes are concerned the position is that when the central server was
27 introduced in 2005/6 the back-up system took the form of tapes for about two or three years.
28 It was then replaced by an automatic back-up to a hard drive rather than to tapes. The tapes
29 themselves were kept for a period of a few months and were then disposed of. The way that
30 the back-up system operates is that it records all electronic documents and keeps them for
31 30 days and then deletes them. So on the automatic hard drive back-up system there will be
32 only documents from the last 30 days, therefore there will not be any documents falling
33 within this order. I would therefore ask that we do not have to search for PCs, memory
34 sticks, or back-up tapes because there is nothing falling within that category.

1 Then, looking at the custodians and the necessity for further electronic and hardcopy
2 searches, a number of these custodians have left Cardiff Bus, and I can tell you which ones
3 they are if necessary, but so far as those custodians are concerned, there are no hard copy
4 files relating to them any more, neither do they have any email accounts. The only hard
5 copy search we can do in relation to those custodians would be to write to them asking if
6 they have any documents. As far as electronic searches are concerned, the people who have
7 left no longer have email accounts. It is possible that some of them may still have a folder
8 on the central server which can be copied over. Beyond that the only electronic search we
9 can do in relation to these custodians would be to search for documents with their names in
10 them. For example, that might be thought appropriate with Mr. Kreppel, but as far as the
11 others are concerned, it must be doubtful whether it is likely to produce any relevant
12 documents, searching, for example, under the name of Mr. John. Simply putting "John"
13 into the system is likely to produce huge numbers of documents which have got nothing to
14 do with this.

15 THE CHAIRMAN: If you put "Greg" plus "John" into the system?

16 MR. WEST: That would then produce all documents which had anything to do with Greg John.
17 Again, the Tribunal may wish us to do that, simply identifying all documents which these
18 individuals had anything to do with and then applying key word searches later to the
19 documents so retrieved.

20 We do think it is important to clarify what the key words are because we do not want to find
21 ourselves coming back and arguing about this again. They are not currently set out in the
22 draft. We can certainly use the ones which have been used before, plus any others which
23 my learned friend wishes us to use, depending on what they are. "Kreppel", for example,
24 may be one which he might wish us to search for. I think they do have to be specified in the
25 order, or some process set up for them to be identified.

26 So far as metadata is concerned ----

27 THE CHAIRMAN: What was going through my mind, and a similar issue has been raised by
28 Mr. Smith, is that there has to be some way of identifying the key search word terms to be
29 used. Presumably, Mr. Bowsher, your side will supply some key search terms within reason
30 and these can be applied with liberty to apply if they are not agreed? We will have to rely
31 on the claimants to use discretion in the number of key search terms that are supplied.
32 Mr. Aldred is nodding helpfully.

33 MR. BOWSHER: Yes, indeed, we have some ideas about how that might be done. It is always a
34 problem with search terms. Getting the right range is always tricky.

1 THE CHAIRMAN: Yes, using more than a total of about 60 search terms becomes impracticable.

2 MR. SMITH: Mr. Bowsher, when can you do that by?

3 MR. BOWSHER: We can do it next week.

4 THE CHAIRMAN: 13.00 on Monday, but we will not set out in the order what the key search
5 terms are.

6 MR. WEST: As far as metadata is concerned, the proposal is that any electronic documents
7 discovered would be disclosed as electronic documents and that would preserve any
8 metadata. It has been pointed out to me that there is actually no point in doing a key word
9 search for these names and then applying the other key word searches to the product of that
10 search, because the key word searches have already been applied, or will be applied, to the
11 whole system. So that will not add anything.

12 THE CHAIRMAN: I think one of the aspects that I would like us to add to the order that is going
13 to emerge is that the defendants provide a short chronology of what has happened to all
14 electronic media, including computers, forms of media storage, DVDs, CDs and so on,
15 because there may be issues at the trial as to what has happened to, for example, emails, and
16 it would be helpful to have that focused upon at this stage rather than when we get to the
17 trial.

18 MR. WEST: I have heard that. I believe that is set out in Mr. Pheasant's statement, but we can
19 provide a chronology.

20 THE CHAIRMAN: We just need it to be put into typed form.

21 MR. WEST: I think where I had got to is I am still not entirely clear how these names of
22 custodians tie in with the electronic search. Are their names to be key words in their own
23 right? Is that what is intended? I can see that with Mr. Kreppel, but with the others that
24 seems likely to produce an awful lot of irrelevant documents.

25 THE CHAIRMAN: What I was trying to suggest before was that if you would create Boolean
26 search term which might be "Greg" plus "John", in inverted commas or in square brackets,
27 or however the system takes Boolean search terms, then you will narrow it down
28 considerably because it will only search documents in which "Greg" and "John" appear.

29 MR. WEST: Is the idea that those documents are then to be searched again by reference to the
30 other key words, or are those documents to be disclosed or reviewed for relevance?

31 THE CHAIRMAN: On the face of it, those documents, once they have been put into what should
32 be a hyperlinked file, should then be searched by the use of the key search terms.

1 MR. WEST: The point those instructing me are making is that the key search terms are going to
2 be applied to the whole system, so separating out in advance documents relating to Greg
3 John does not advance matters.

4 THE CHAIRMAN: That may be right. What do you say, Mr. Bowsher? That sounds sensible.

5 MR. BOWSHER: I am not sure that I understand how their files are sorted. As always, our
6 understanding is moving on. We had understood from August that there still existed some
7 old laptops, because they told us as much in their 8th August letter, at para.5.67. If they are
8 now saying it is either on the central server or nothing, because everything else has been
9 sent, including the hard drives of these PCs were recycled, they did not even keep them,
10 then presumably what one can do is either search the entire server by reference to the
11 subject key words, because that would get everything regardless of the custodian; or if you
12 have to identify custodians in order to narrow it down, then it is a question of having an
13 appropriate list. I would have thought an appropriate list of custodians would be the five
14 they have used previously for the post-May 2005 search, plus the nine which we identified
15 as ----

16 THE CHAIRMAN: What is the point of using a list of custodians if you are using the key search
17 terms anyway?

18 MR. BOWSHER: I have come across systems, I have been told, where you have to identify
19 which library you are looking in. If you are looking in the whole server then you do not
20 need to have names as key search terms at all. It is only if you need to sort out which
21 library you are in is that appropriate. As you will have gathered, I am not an IT expert.

22 THE CHAIRMAN: Mr. Smith?

23 MR. SMITH: As I understand the draft to be, you have got a list of persons who you designate as
24 custodians. It may be that that is, given what Mr. West has said, an irrelevance because
25 there is simply one *corpus* document to be searched. I did not, for my part, understand
26 para.2(b) to be suggesting that these names necessarily form part of a key word electronic
27 search. It seems to me, for my part, that the Chairman's suggestion that you provide a list
28 of terms by Monday, and it can then be agreed together with any other parameters for an
29 electronic search, is probably the most sensible way forward.

30 MR. BOWSHER: I think that must be right. Obviously the intention of the list, because you will
31 see we refer to other things like old laptops, and so forth, we had assumed, because we had
32 been told as much, there were old laptops. If Amanda Canterbury has an old laptop then it
33 was appropriate to ask Amanda Canterbury, "What has happened to your old laptop?" In
34 my submission, that ought to be covered off, but it is a conversation that may be very short.

1 MR. WEST: Can I just clarify the relevance of the custodians to electronic searches? So far as
2 we are searching the central server, they do not have any because the whole server will be
3 searched. When it comes to individual email mail boxes they are then relevant because it
4 will be those individuals' email mail boxes which are searched. Individuals who have left
5 their employment with Cardiff Bus no longer have individual Cardiff Bus email accounts.

6 THE CHAIRMAN: If somebody has left and there is material to their former email accounts in
7 the server, then applying the key word search terms will throw up the relevant documents,
8 will it not? In other words, you do not need to use their names because the key search terms
9 will produce the potentially relevant documents. Everyone behind you seems to be nodding
10 in agreement.

11 MR. WEST: Well I am sure they are right.

12 THE CHAIRMAN: Or they may be shaking their heads in consternation, I do not know.

13 MR. WEST: I am not sure the hypothesis that there are emails on the central server is correct, but
14 if it were correct the conclusion would follow.

15 THE CHAIRMAN: Well if they are not on the central server they are not anywhere.

16 MR. WEST: They are in the individual email accounts, or email mail boxes of those individuals.

17 THE CHAIRMAN: On their own computers. Well, who knows? If there are emails in existence
18 they will be on the email servers as well.

19 MR. WEST: There may be a separate email server. It is not on their own computers.

20 THE CHAIRMAN: I think we have to be practical about this, do we not? The aim of the
21 exercise is to produce proper disclosure from what is available, and we will devise an order
22 which will be founded upon the use of key search terms. So if we could have those key
23 search terms by lunch time on Monday that will enable us to draw up an appropriate order,
24 please.

25 What about 2c: "Documents relating to the entry onto the Cardiff Bus market and
26 subsequent withdrawal from it of Cardiff Bluebird and Allisters, and also d?"

27 MR. WEST: Maybe that can be accommodated by the keywords which are used if someone
28 wants to make "Bluebird" a keyword. I am told it is vanishingly unlikely that documents
29 from 1995 will still be there.

30 THE CHAIRMAN: But it plainly has some materiality, does it not?

31 MR. WEST: Yes, of course, there has already been a search for ----

32 THE CHAIRMAN: Under the existing key search words, yes.

1 MR. SMITH: But, as I understand it, Mr. West, the search that was done in response to the OFT
2 request for disclosure was time limited so as not to include documents either arising from
3 1999 or 2001, so these are effectively new searches to that extent?

4 MR. WEST: That is right, and that raises the question of the time period to which the search will
5 apply because currently this draft says: "Prior to 2005", the OFT search began, I think, in
6 April 2003, search period. We would certainly prefer to limit it to the period beginning in
7 2003, perhaps with the exception of these categories at c and d.

8 THE CHAIRMAN: I must say I am struggling with the relevance of c. If there is evidence that
9 Cardiff Bluebird were predated out of the market, presumably you can obtain that evidence
10 in a more conventional way?

11 MR. BOWSHER: It is an issue which has been raised and it is relevant as to what may have
12 happened to these companies. I would not have thought it was going to take very long to
13 look for that material. I think the point my learned friend raises about the 2003 to 2005
14 range is much more relevant to the scope of the search. It is probably right, this is not going
15 to be the onerous part of this search, and if it exists it ought to be disclosed and it is
16 proportionate to do that. That would be our simple point, but I take your point. If there is
17 more evidence we will look for it elsewhere, but that does not obviate the need for them to
18 go and look, is our submission, it is not a real burden.

19 THE CHAIRMAN: Provided it is relevant.

20 MR. BOWSHER: Provided it is relevant, but that is not the burdensome part of this order.

21 THE CHAIRMAN: Well what is the relevance of Bluebird in 1995, 10 years earlier, and Allisters
22 in 1999?

23 MR. BOWSHER: There may have been a pattern of behaviour ----

24 THE CHAIRMAN: You do not know; this is a fishing expedition.

25 MR. BOWSHER: It is something that is actually dealt with in the evidence of Mr. Jones, which I
26 think we may have looked at on the last occasion. It is not a fishing expedition, the
27 impression given by those in the bus market is that Cardiff persisted in dealing with new
28 entrants in this way.

29 THE CHAIRMAN: You have got your finding.

30 MR. BOWSHER: It is not a finding, it is in evidence. If there is material that goes to that, it is
31 material which, in our submission, ought to be disclosed. I think we could lose sight of the
32 bigger picture if we focus too much on that.

33 MR. SMITH: Mr. Bowsher, what start dates do you propose for the exercise?

1 MR. BOWSHER: Just as we started on Bluebird I was thinking about the date, which I think is
2 the bigger picture. (After a pause) 2003 feels about right, but I am not quite sure which day
3 and month – is that something we could come back to you? I certainly do not want to go
4 way back before 2003, but perhaps we should just consider whether there is a particular
5 date or month that we should be treating as the start date.

6 THE CHAIRMAN: All right. If you want to make any representations on that you have until
7 lunchtime on Monday.

8 MR. BOWSHER: Indeed.

9 THE CHAIRMAN: Anything else?

10 MR. SMITH: Mr. West, just to return to the question of custodians, and email accounts. Clearly,
11 trying to work out how the defendant's IT system works is not an exercise we are
12 particularly keen to involve ourselves in now. But if there are separate email accounts,
13 independent of the central server, then it might well be important that they be searched.
14 Clearly, you will say that of the persons listed in 2b a number of them are no longer with the
15 company, but would that difficulty be capable of being dealt with by an order stating that
16 you treat the following as custodians for the purpose of that search or explain in detail why
17 such persons are no longer custodian and, if so, how documents in his or her custody were
18 dealt with when that person ceases to be a custodian. Might that meet the difficulty?

19 MR. WEST: It may well do, yes.

20 THE CHAIRMAN: Anything else anyone wants to ----

21 MR. WEST: Can I just clarify the timing of this? My learned friend is to provide his keywords
22 by Monday. When are we to attempt to agree them, or are we to simply to proceed on that
23 basis unless we object?

24 THE CHAIRMAN: Well, hopefully they can be agreed very quickly. What we are going to do is
25 provide you with a ruling on the appearance of bias point and an order, and we will not do
26 either today, we will do both before Christmas. So if we could have an agreement on the
27 key word searches hopefully by the end of Monday, then we will be able to react
28 accordingly.

29 I just wanted to ask for one further clarification, is there still an application for an order in
30 terms of para.3c of the draft order, Mr. Bowsher?

31 MR. BOWSHER: Yes, we got that this morning – or yesterday, I have seen it anyway.

32 MR. WEST: We are concerned about the current deadline for complying with the disclosure
33 exercise, 30th December if the keywords themselves are not going to be agreed now until the
34 end of Monday we do have a concern about being able to meet 30th December deadline?

1 THE CHAIRMAN: 31st December?

2 MR. WEST: I am told that should be fine if we do manage to agree the key words on Monday.

3 THE CHAIRMAN: All right – liberty to apply anyway. Very well, thank you – both, all – very
4 much indeed.

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