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5 **IN THE COMPETITION**

Case No:1569/5/7/22

6 **APPEAL**

7 **TRIBUNAL**

8
9 Salisbury Square House
10 8 Salisbury Square
11 London EC4Y 8AP

12 Friday 21st July 2023

13
14 Before:

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16 Ben Tidswell

17
18 (Sitting as a Tribunal in England and Wales)

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21 BETWEEN:

22
23 **Instaplanta (Yorkshire) Limited**

Claimants

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26 V

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28 **Leeds City Council**

Defendants

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33 **A P P E A R A N C E S**

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36 Daniel Carall-Green (On behalf of Instaplanta (Yorkshire) Limited) Instructed by
37 TupperS Law

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39 Adam Aldred and Karen Blackmore (On behalf of Leeds City Council)

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42
43 Digital Transcription by Epiq Europe Ltd
44 Lower Ground 20 Furnival Street London EC4A 1JS
45 Tel No: 020 7404 1400 Fax No: 020 7404 1424
46 Email: ukclient@epiqglobal.co.uk
47

1 **Friday, 21 July 2023**

2 **(10.30 am)**

3 **Opening remarks**

4 **THE CHAIR:** Good morning, everybody. I just need to make the usual live stream
5 announcement. Some of you are joining us via live stream on our website, so
6 I start with the customary warning. An official recording is being made and an
7 authorised transcript will be produced, but it is strictly prohibited for anyone
8 else to make an unauthorised recording, whether audio or visual, of the
9 proceedings and a breach of that provision is punishable as a contempt of
10 court.

11 Good morning, everybody. Thank you for all the bits and pieces we received in
12 advance. Just as a starting point, perhaps we could just see whether the
13 agenda is good, or whether there is anything we need to add to that or we can
14 take off that, I don't know.

15 Mr Carall-Green, if you want to start giving any update on that or Mr Aldred, whoever
16 is best placed.

17 **MR CARALL-GREEN:** Yes, sir, thank you. I think I can confirm that there is no
18 disclosure application from the claimant. So that item, which was added as
19 a place holder on a just in case basis, doesn't need to be covered. But
20 otherwise I think the agenda is correct.

21 **THE CHAIR:** Yes, good, okay.

22 Mr Aldred, is that your understanding as well?

23 **MR ALDRED:** Yes, I concur. I know that you wanted to have an informal CMC,
24 insofar as you could. I suppose on that footing, taking your lead, perhaps we
25 could pick them off issue by issue.

26 **THE CHAIR:** Yes. I thought we might do that too, actually. I thought what we might

1 do is if we just read through the RFI request and then the disclosure request --
2 I think those are your applications, aren't they, so you are doing most of the
3 work, I expect. Perhaps if we do them one by one or possibly in smaller
4 groups -- because I expect there are some themes as well -- we can resolve
5 them as we go and perhaps at the end, work out what we do with them, if
6 there is anything that needs to be done, if that's sensible.

7 Just before we start, I would certainly find it helpful just to understand a little bit more
8 about where the parties are on two topics. One of those is market definition
9 and the other one is quantum. That's really because it seems to me they
10 underlie quite a lot of the requests that the defendants make, both in relation
11 to the question of information and disclosure. I just wanted to make sure that
12 we were all on the same page, more or less, with the way in which the case is
13 being put and answered on those points.

14 I just want to stress, I am not trying to pin anybody down in a way that would be
15 awkward here. Please don't feel constrained, that someone later is going to
16 say: well hang on, that's not what you said on 21 July. I just want to make
17 sure we have a reasonable understanding of how the parties are approaching
18 those points. Is that something we could sensibly do now, before we get into
19 the detail? I have a few questions, if it is helpful for me to lead off.

20 **MR ALDRED:** Yes. Well, Daniel?

21 **THE CHAIR:** Maybe if I could just start and direct the conversation a little bit and
22 you tell me where I go wrong, may be the way it goes. The claimant's case --
23 let's start with quantum. Actually, that's probably, I think, the most relevant for
24 a lot of these requests. As I understand the claimant's case, it is what I would
25 think of as being a pretty straightforward claim by the company for loss of
26 profit. That involves an assessment of the counterfactual revenue, which is,

1 broadly speaking, how many planters the claimant would have installed in the
2 counterfactual for what advertising revenue, and then there is an assessment
3 of counterfactual costs. So there is the capital costs for the planters, plus
4 there must be some work that's required in relation to the analysis of direct
5 and indirect costs, aren't there? Those are affected by volume. That then
6 gives you, your counterfactual profit. Then from that, as I understand it, the
7 way in which Mr Bosley has approached to it, I think, is to then deduct the
8 actual profits which include not just actually planter-driven revenue but,
9 indeed, all sorts of other revenue, do I have that right, Mr Carrall-Green?
10 Does that sound broadly right?

11 **MR CARALL-GREEN:** Yes, I think that is pretty much spot on, sir. One thing that I
12 should add that Mr Chisman-Russell has just pointed out to me and we said
13 this to the defendant, that Mr Bosley has noticed some arithmetic errors in his
14 report and has produced a tweaked version, so what the tribunal currently has
15 will be slightly amended, I think essentially through some changed maths but
16 it doesn't affect any of the principles you have just outlined.

17 **THE CHAIR:** I should say, I have just had a quick look at Mr Bosley's report and
18 really, I have read the summary and the sections on market definition and
19 quantum. I have not looked at his appendix which has all the numbers -- I am
20 not sure I even have it. I must have had it somewhere but I'm not sure I have
21 it in any of the bundles, just so you know, that's where I have reached with
22 that. That's helpful, thank you.

23 Mr Aldred, just in terms of -- my understanding is you are fully intending to challenge
24 the counterfactual analysis and no doubt you'll be saying that the number of
25 planters or the revenue or whatever it is, and the costs, would have been
26 different. I completely understand that. But is that the framework within which

1 we are working or is there a different way in which you are approaching it?
2 Are we all on the same page or is this a counter-approach for it?

3 **MR ALDRED:** The framework is essentially the same. What we have not
4 developed yet, in the evidence, is what that counterfactual number -- what
5 would be permissible.

6 **THE CHAIR:** Yes.

7 **MR ALDRED:** Having regard to the public duties of the council, public procurement,
8 state aid, subsidy control and the different thresholds and procurement rules.
9 Because it's one thing to have 50 planters or 40 planters, as Instaplanta
10 currently do. It's quite another to have 300-plus planters potentially creating
11 profits for an individual company of the sums that Mr Bosley is talking of and
12 not immediately trigger thoughts as to whether, actually, does that need to go
13 out to competitive tender? Would, for example, Instaplanta have won
14 a competitive tender, would other people want to compete with it?

15 So that really drives what the counterfactual figure looks like.

16 **THE CHAIR:** Yes. And that ties in, then, I think, to the -- there is something of
17 a dispute about your amended rejoinder, where that point about procurement
18 is made and there is some complaint that people don't understand what you
19 are saying. I think I now understand you are saying that is a potential
20 curtailment of the counterfactual -- the possibility of the number of planters
21 being put in the counterfactual. We will come back to that. That is very
22 helpful.

23 Is there anything at a general level, Mr Aldred -- I am just trying to explore where you
24 are unclear or lacking information in relation to quantum. At a general level, is
25 there anything unclear about the way the case is put that is a problem for the
26 defendant? We will come on to the requests, I know, but just in terms of

1 themes, without getting, as yet, into the RFIs and disclosure. Where are the
2 areas that you are bothered about that's missing?

3 **MR ALDRED:** The main issue relates to actually trying to work out, well, what are
4 Instaplanta's actual costs, split out between planters within Leeds, planters
5 elsewhere, and its other activity.

6 Mr Carrall-Green puts in his skeleton that Mr Bosley deals with this in the
7 appendices to the report, and there is, indeed, a line item in the schedules
8 that says "Instaplanta revenue by function", and the inference of that was it
9 actually breaks it down in that way. But, actually, when you look at what the
10 Revenue by function is when it's broken down, it's advertising planter sales,
11 one-off horticultural planter sales, litter picking contract, Morley Town Council,
12 I think that is, but it's not split out with regard to planters within Leeds and
13 planters outwith Leeds on that.

14 **THE CHAIR:** Yes, I understand, yes.

15 **MR ALDRED:** Oxera tell me that this is really quite important, to be able to actually
16 work out the analysis that they want and need to do, to actually work out what
17 potential underlying costs are. And the other issue, I suppose, on a broad
18 theme approach with regard to Mr Bosley's report, is he relies very heavily on
19 Mr Robinson's second witness statement. But neither Mr Robinson's second
20 witness statement nor Mr Bosley's report, actually drill down to underlying
21 documents.

22 So we have a real concern with the bold statements that have been, one, made by
23 Mr Robinson and certainly with regard to the counterfactual number, for
24 example, and then the reliance Mr Bosley places on that, without actually
25 seeing where the numbers and detail come from.

26 Whilst it's obviously helpful to have the company accounts which were provided later

1 in the day, we now know that there are management accounts which we
2 haven't yet seen. But even all of those, of course, were underpinned by
3 documents. It now turns out that those documents probably exist because the
4 bookkeeper sent them to the claimant and, alerted to that, they have found
5 the boxes.

6 **THE CHAIR:** Okay. That's helpful. Just to make sure I have understood what you
7 are saying, so in relation to the actual costs, I think there are a number of
8 different splits, aren't there? There is the Leeds and non-Leeds revenue.
9 There is the non-planter revenue because there are activities that are not
10 related to planters. I wasn't sure whether there is a sort of revenue point
11 which I think is the in Bloom revenue sharing point which you raised, which is
12 a similar point --

13 **MR ALDRED:** Yes, we don't yet understand the extent to which Instaplanta
14 essentially subcontracts with in Bloom, and there is a revenue stream
15 associated with that. There may not be relationships, but at the moment,
16 I don't think we understand that.

17 **THE CHAIR:** Just --

18 **MR ALDRED:** Sorry, sir. They have been deploying on behalf of in Bloom groups
19 over the time-frame, it's just we don't quite understand the relationship.

20 **THE CHAIR:** Yes, I understand. Just in relation to those actual costs, are you
21 saying -- one of the things, I think, that Mr Bosley says, is that you just deduct
22 the actual profit and so on. That analysis, it doesn't really matter how it's
23 made up. He, I think probably rightly, as a matter of principle, unless you tell
24 me otherwise, says if you have a counterfactual, you obviously have to take
25 off what was actually earned and he doesn't go through the process of
26 distinguishing between planter revenue and other revenue. Unless you tell

1 me otherwise, I think that is probably to your advantage because you are
2 getting the benefit of the deduction without any breakdown. So at that level, it
3 seemed to me, unless you are disagreeing, it doesn't really matter. But I think
4 you are saying there is a further point which is the question of the allocation of
5 costs and working out what the cost drivers are. Is that the point you are
6 making?

7 **MR ALDRED:** Yes. So you need to determine what the appropriate margins are,
8 having regard to whatever your counterfactual number is and that requires
9 understanding the base set of the actuals with sufficient knowledge and
10 understanding, so that when you do the calculation and say: actually, I am
11 about to make the right comparison over here, well, what's the right level of
12 magnification?

13 **THE CHAIR:** So it's not actually about what the amount of the actual profit is, or
14 indeed, the actual revenues and costs, it's about what you learn from analysis
15 of the current operation that you then apply to the counterfactual by way of --
16 because I think you are saying, as I understand it, that the current revenue
17 stream will include a whole bunch of different activities, all of which may have
18 different costs associated with them and, therefore, the direct costs of the
19 operation and the counterfactual may not be properly reflected by the direct
20 costs of the composite. That's broadly the point, is it?

21 **MR CARALL-GREEN:** Sir, may I (Overspeaking).

22 **THE CHAIR:** Wait a minute, please, just wait a minute. I will come to you. Just to
23 be clear with Mr Aldred, that's where we are? That's the point, is it?

24 **MR ALDRED:** Yes.

25 **THE CHAIR:** That's very helpful. Mr Carrall-Green, please do.

26 **MR CARALL-GREEN:** Sir, I just wanted -- it may be Mr Aldred should come back,

1 because I think the conversation was just proceeding on a small false
2 assumption, which is that the way that Mr Bosley approaches it doesn't take
3 into account the various different revenue streams. But actually it does,
4 because Mr Bosley is instructed to assume, for example, that the claimant
5 would not have diverted its operations to the litter picking business, in the
6 event that it was able to grow its planter business. So he does actually strip
7 out revenues that the claimant has, in fact, made and said in the
8 counterfactual it wouldn't have made those revenues, it would have done
9 planter business only.

10 So it may be -- yes.

11 **THE CHAIR:** Yes. I think that's the first point I made to Mr Aldred which he said
12 isn't the point he's concerned about. I think this is helpful, if we can just
13 pursue it a bit, before we get into the detail. This is not about the size of the
14 deduction that represents the actual revenue; it's about the determination of
15 the appropriate cost drivers and, therefore, the application on the proper cost
16 base in the counterfactual. We say if you look at the actual, that's the best
17 way to work out what the margin is and what the cost drivers are for putting
18 the planters in. But he's saying you can't do that, because on the current
19 accounts, it is confused because is there all sorts of other stuff going in there.

20 **MR CARALL-GREEN:** Yes.

21 **THE CHAIR:** So you need to be able to strip out planter-only activity in the
22 accounts, so you can then work out what the right replication of that is in the
23 counterfactual. Does that make sense? I think that's the point he's making.

24 **MR CARALL-GREEN:** It does. He only wants to load into the counterfactual the
25 costs that are directly associated with planters. He doesn't want to load into
26 the counterfactual, costs that are associated with something else.

1 **THE CHAIR:** Exactly. He wants to know that that costs analysis is a proper, pure
2 one --

3 **MR CARALL-GREEN:** And one thing (overspeaking)

4 **THE CHAIR:** -- yes.

5 **MR CARALL-GREEN:** One thing I would say is if we are loading costs into the
6 counterfactual which are associated with something else, then we are
7 artificially depressing our claim.

8 **THE CHAIR:** Is that right? Doesn't it depend a little bit on what the margin is on
9 those activities? Doesn't it --

10 **MR CARALL-GREEN:** If we say -- if our counterfactual is, for example, that we
11 would have installed such-and-such number of planters and they would have
12 cost such-and-such amount of money -- so our total revenue is some number
13 per year -- then in order to determine the profits that would have been made
14 in the counterfactual, we then say: what are the costs associated with our
15 business? If we, through some error or some omission or some brevity of
16 reasoning, load into those costs the costs that are actually associated with
17 litter picking, what we will do is we will actually be claiming for a smaller
18 amount. So there is a sense in which it is up to us to figure it out. If we have
19 not figured it out, then too bad for us. It is not for Mr Aldred to then try to
20 make our claim better.

21 **THE CHAIR:** This is helpful. I think we are making some progress, actually. Just
22 bear with me for a minute.

23 In relation to revenue, I don't think it matters because your revenue assumption
24 works simply from the £15 a week, doesn't it? That is built solely around
25 planters. So put revenue to one side. Then you come to the question of
26 when you set the counterfactual cost base, you then have to do a couple of

1 things. One, you need to bring into account the proper capital costs in relation
2 to planters -- again, I think that is pretty straightforward because we know
3 what that is -- then you have to look at the existing cost base and say: well,
4 how much of that is determined by -- well, a couple of things: how much is
5 that distorted by other activities, which I think is the point you just addressed;
6 and then there is the question of what are the drivers of variable costs or
7 direct cost that you then need to apply into the counterfactual? I think that's
8 where we have reached.

9 I have to say, I am not completely sure that it is the biggest point that is going to be
10 in the case but I do think it is a point we need -- if we could work the answer to
11 that point out, so we are clear about whether it matters or not and if so, how
12 we're going to deal with it, I think quite a lot of the disclosure items might
13 become a lot easier and RFI might become easier --

14 **MR CARALL-GREEN:** Yes, it might be helpful then, in that case, to identify the line
15 items. It is important for us to say that Mr Bosley has provided in his
16 spreadsheet, two detailed breakdowns of how the profits work.

17 **THE CHAIR:** Yes.

18 **MR CARALL-GREEN:** He provided what he calls the actual profits which is a sheet
19 in his spreadsheet, and that does in fact give, for example, the sales from
20 inside and outside Leeds. So he does give that.

21 **THE CHAIR:** He makes -- sorry to interrupt you -- an assumption about that, based
22 on what Mr Robinson told him, doesn't he?

23 **MR CARALL-GREEN:** Yes, he does, he makes an assumption about that. Then he
24 does give an actual cost analysis which breaks the costs down into, for
25 example, employee wages and salaries and so on and so forth. So I suppose
26 what we don't understand is what would be necessary to be broken out for the

1 purposes of doing a counterfactual analysis.

2 One thing we do say, sir, is Mr Bosley obviously has not found it necessary to do
3 that, so it doesn't appear to be the case that an expert needs to do that in
4 order to perform the calculation. Because, obviously, Mr Bosley has done so.
5 If the defendant wishes to say that that is something of a defective calculation,
6 because it hasn't done something that's required to be done, then I would
7 have thought that that would be a matter for submission at trial and not
8 a matter to clear up right now. Because it's not for Mr Bosley to supply
9 analysis or information for the other side's expert to do her work. He's done it
10 on the basis he thinks is reasonable and appropriate and proportionate. If
11 there are points of detail which the defendant thinks he's missed, they can say
12 so.

13 **THE CHAIR:** That's helpful. It seems to me there may be two points here we need
14 to address. One is the question of -- if I can use the expression
15 "methodology", without it being too loaded -- what the right methodology is for
16 determining this point we have narrowed in on. The second point is the extent
17 to which the defendant is entitled to test the assumptions inherent in that by
18 seeing documents and background information and then you get a disclosure
19 point.

20 I wonder whether -- in order to get to the second point, it seems to me we need to
21 know the answer to the first. I am not sure that any of us in this CMC are
22 going to know the answer to that. I wonder if it is a point the experts need to
23 be working out.

24 Maybe just to check, Mr Aldred, you had some input from Oxera, and I'm not sure
25 whether it was actually the person who's going to be giving the expert report
26 or whether it was somebody else, but had they actually seen Mr Bosley's

1 report, do you know, when they gave that input?

2 **MR ALDRED:** Yes. Karen Blackmore might be able to tell us if they have also seen
3 the appendices, because I don't know the answer to that.

4 **MS BLACKMORE:** Yes, they have.

5 **THE CHAIR:** That's helpful. Is there any mileage in the experts having a discussion
6 about how they are going to deal with this? I mean I take your points,
7 Mr Carrall-Green, but I don't particularly want to finally arrive at trial with the
8 experts doing this in a different way, unless there is actually a fundamental
9 difference in the approach, in which case, obviously, one will have to
10 determine that. But it doesn't seem to me the sort of thing that an expert
11 ought to disagree about, is it?

12 **MR CARALL-GREEN:** But we do have, of course -- we already have -- I am not
13 saying it should be the only opportunity, but we already have at least one
14 opportunity for the experts to meet and do the joint statement. If, for example,
15 it turns out that Mr Bosley met with Ms Chowdhury and said: yes, there
16 is actually a point of detail about the costs allocation that I should incorporate
17 into my calculations, and I now think that my analysis needs to be adjusted,
18 then he will be required to do so in the joint statement. So we have already --

19 **THE CHAIR:** Yes, but I think Mr Aldred would say: that's all very well, but I have an
20 expert report to file at the end of August, and how can I do that unless I have
21 the information that informs the experts? So I think the point is that might
22 come a bit late. We might just pause there and we can pick this up --
23 Mr Aldred, please?

24 **MR ALDRED:** I just add -- obviously, determining what the costs are is very
25 important. But with regard to revenue, of course, we need more, I think. But
26 I don't know for certain, so I don't want to say anything that's improper. But

1 you mention the £15 a week figure, but I don't know the extent to which that is
2 supported by documents in the record.

3 But the revenue, of course, is going to be driven by the number of planters and also
4 the vacancy rates, for want of a better expression. So there is potentially
5 a dispute over what the vacancy rates might look like, and that's a particular
6 area where we feel as though it's difficult to know, beyond sort of assertions in
7 Mr Robinson's statement, how that might look.

8 I know my expert hasn't asked for the bank statements, for example, but I think if we
9 come back to your point earlier, would there be any merit in the experts
10 having a conversation about how to actually get to the data that they want to
11 see, I think the answer is yes, there would be, because we have just learnt
12 that the bookkeeper kept lots of records, going back to the inception of the
13 business.

14 So, you know, for all we know -- and, of course, there were two other directors in
15 Hull, so who knows what other documents got into those boxes, whether it is
16 business plans or things like that. We just simply don't know. So there may
17 be something to be said for the experts conferring, having a view. I certainly
18 did it in one case, - 2 Travel v Cardiff Bus. We had reams of documents. In
19 fact, we had a warehouse full. Obviously, we are talking about a micro
20 business here, we understand that, but they do clearly have multiple boxes of
21 accounting documents. Perhaps if the experts had an opportunity to go and
22 look at them, and form a view as to what might be relevant, including the bank
23 statements, because some of those might be available electronically and just
24 be able to be whizzed off into Excel spreadsheets, then I think we might get
25 a long way into actually capturing the data that gives the tribunal something
26 solid to work with, come trial.

1 **THE CHAIR:** Just on that revenue point, there is evidence, of course, from
2 Mr Robinson in which he says: this is the price we charge because this is the
3 price we always charge. As I understand it, that's what he says. And he also
4 says "This is our current vacancy rate", and, obviously, there is -- so to the
5 extent that point is about what information is available -- in other words, what
6 the position is, so far as the claimant is concerned -- he seems to have
7 answered that point. I am coming to this in detail, I don't want to get into the
8 detail of these things just yet. So really, your point becomes a disclosure
9 point, doesn't it, I think, on those points?

10 **MR ALDRED:** Yes. To be clear, either we get it by way of further information, if
11 there's no disclosure, or we could get it by disclosure. But it would be better
12 to get it, because then we actually have something solid to work with.

13 **THE CHAIR:** Okay. That's been a very helpful discussion. Unless either of you
14 want to say anything further about that, I am obviously going to get into the
15 detail.

16 **MR CARALL-GREEN:** Can I just correct something I said? I need to correct
17 something I said earlier, which is I suggested that Mr Bosley had not teased
18 apart the various different costs, so as to allocate them between the planter
19 business and not. But Mr Chisman-Russell has just pointed out to me that
20 that analysis is, in fact, done on his actual cost analysis spreadsheet, where
21 he selects line items and says "Y/N" for yes or no, to determines whether or
22 not those costs are properly allocatable to the planter business.

23 **THE CHAIR:** That's done at a sort of level of accounting principal, effectively?

24 **MR CARALL-GREEN:** Exactly, yes.

25 **THE CHAIR:** What the cost driver would be, yes.

26 **MR CARALL-GREEN:** It could be, of course that Ms Chowdhury would say that

1 that's wrong and that, in her opinion, some cost should or should not be
2 allocated or should be allocated in a different way. But I just wanted to correct
3 what I said earlier because, in fact, it is the case that Mr Bosley has turned his
4 mind to this point and has developed a method for dealing with it.

5 **THE CHAIR:** That's helpful. Can I just ask you about the documents that have been
6 discovered recently which I saw in correspondence and Mr Aldred has
7 referred to. What is the position in relation to those? What is your
8 expectation about how the claimant is going to deal with those documents?

9 **MR CARALL-GREEN:** Our expectation is I think there are five categories of
10 documents which have been raised. I think I have to deal with them
11 separately.

12 **THE CHAIR:** Sorry, you are not referring to the requests now, are you?

13 **MR CARALL-GREEN:** No, I am referring to the documents that the claimant has
14 referred to in its response that says: can or can't we have them provided?

15 **THE CHAIR:** I am asking a slightly different question. I understood you had done
16 that -- that's my fault. I had understood that you, the claimant, has discovered
17 that its bookkeeper has kept more records than it thought. I am not sure what
18 the status of those documents is. I am just asking what the plan is.

19 **MR CARALL-GREEN:** Sorry, yes. So I think those documents I would bring from a
20 slightly wider pool because not all of the documents that the claimant has
21 referred to in correspondence as being capable of being provided, are with
22 the bookkeeper, there are others as well. But if we just stick with the
23 bookkeeper, then I think the categories of documents are the management
24 accounts, the bookkeeper's furlough spreadsheets and sort of the archive
25 boxes, although those are not actually in the bookkeeper's possession, having
26 been returned to the claimant.

1 There are then two further categories but let's move those to one side. As to the
2 management accounts, we expect that these can be simply provided where
3 they are pre-existing, but some management accounts are not pre-existing
4 because, in fact, they are not documents in the sort of English vernacular
5 sense of the words. They are just -- they need to be spat out of a database.
6 So the database can be instructed to spit them out, at which point they can be
7 provided, presumably in largely the same form as the ones that are
8 pre-existing. That's what we expect will happen with the management
9 accounts.

10 Then as to the bookkeeper's furlough spreadsheet, which we understand to be
11 a single document, single spreadsheet, that can simply be provided in the
12 normal course.

13 Then we have the archive boxes. I think that there is a discussion to be had here
14 about whether or not leafing through all of the receipts for compost and
15 planters and what have you, is a reasonable search and a proportionate
16 exercise in the context of this claim.

17 **THE CHAIR:** How many boxes are there, do you know?

18 **MR CARALL-GREEN:** We think there are eight. Eight boxes.

19 **THE CHAIR:** Eight boxes, yes. Okay.

20 **MR CARALL-GREEN:** We can't say what's in them, because they have not been
21 turned through. But we think on the basis of the discussion with the
22 bookkeeper and on the basis of what documents the bookkeeper would have
23 required for performing his work, that they will be, effectively, receipts,
24 invoices, all of the underlying information that then would have been input into
25 the bookkeeping software, in order to create the management accounts.

26 That's what we think those documents are. So -- I beg your pardon, it is 15 boxes.

1 15 boxes.

2 **THE CHAIR:** So the eight -- it's not eight, it's 15?

3 **MR CARALL-GREEN:** We are correcting that, yes. We now say it's 15 boxes, on
4 the best information.

5 **THE CHAIR:** Okay. That's helpful. You said there were two other categories.

6 **MR CARALL-GREEN:** The two other categories of documents to which we have
7 referred, but separate from the bookkeeper, are we have some invoices for
8 the planters.

9 **THE CHAIR:** The capital cost of the planters?

10 **MR CARALL-GREEN:** The actual capital cost. Not all of them, just some that we
11 have discovered through a reasonable search of the premises of the actual
12 Leeds office. And then we have the white board in the office.

13 **THE CHAIR:** Say that again?

14 **MR CARALL-GREEN:** The white board in the office.

15 **THE CHAIR:** Yes, I saw reference to the white board. Where there are strategies
16 supposed to be written out; is that right?

17 **MR CARALL-GREEN:** Exactly. We propose that inspection of that be given by
18 whatever convenient means the defendant would prefer. We can't send them
19 the white board, but they can see a picture or they can come visit or whatever.
20 A visit might be a little bit sensitive, so pictures will presumably be better, but
21 we can find some sensible way of giving this --

22 **THE CHAIR:** That's helpful. I don't think -- obviously, these things happen. Clearly
23 it's unfortunate that you have now found documents that should have been
24 disclosed when they were disclosed, but I think we should all accept these
25 things happen, particularly in this sort of litigation. But I don't think that
26 anything that has happened absolves your client from its disclosure

1 obligations.

2 **MR CARALL-GREEN:** No, sir, and our client takes its obligations seriously. Part of
3 the reason why these documents have been discovered is because we are
4 mindful of the continuing obligation of disclosure. So we will continue to
5 consider whether there are any documents that need to be disclosed.

6 **THE CHAIR:** In a way -- maybe there are a number of ways of doing this. The
7 management accounts seem likely to be really very helpful in relation to
8 a number of the points which Mr Aldred is making, and indeed, cover quite
9 a lot of the things that are on the list of requests, certainly for disclosure. So
10 no doubt we will come back to those in a minute.

11 In relation to the archive boxes, 15 boxes, I entirely understand your point about
12 proportionality but we are going to have to deal with them somehow. It may
13 be that we are going to have to be a little bit creative about that. Do you have
14 any reason to think that there is any privileged material in those boxes?

15 **MR CARALL-GREEN:** I don't. I don't. I can't guarantee that there isn't. But I don't
16 have any real reason to believe that there would be, because it would largely
17 be exchanges between the claimant and the bookkeeper. I think, sir, part of
18 the question around going through all of the invoices and all of the receipts is
19 that it's not clear why one would need to see those, when one has the
20 management accounts. Because as we understand it, these are documents
21 provided to the bookkeeper and then the bookkeeper has produced the
22 accounts or input them into the software for whatever is the process.

23 Of course, there could be mistakes in the way that the management accounts have
24 been produced, but there is a question about whether or not one really needs
25 to go behind the management accounts to examine whether or not the
26 bookkeeper has done every entry properly.

1 **THE CHAIR:** Yes. I understand the point. Mr Aldred, just, obviously -- you may
2 want to say something about all of that, but just trying to think about the
3 practicalities of it. One of the ways of dealing with the archive boxes is if you
4 think they are important and want to spend time looking at them, you can do
5 that. Would you insist on the claimant producing a list of those or would you
6 be happy to receive them --

7 **MR ALDRED:** I would not insist on the claimant producing that list. I think the right
8 way to approach that would be that -- and ultimately, what the person doing
9 the quantum analysis will want to do is do an audit, to try and cross-check the
10 management accounts have been prepared properly. That's a given, that
11 that's what they will try to do --

12 **THE CHAIR:** Sorry to interrupt you, is it a given, though? We are talking about
13 a case here, where the costs are dangerously in prospect of eclipsing any
14 value to the parties and is it really proportionate for somebody to go and
15 check the management accounts? I'm not sure that does necessarily follow
16 as a given.

17 **MR ALDRED:** I am thinking of an audit exercise. I don't know what they would want
18 to do, but I would imagine somebody would want to actually cross-check just
19 a sample, to make sure that it stacks up.

20 **THE CHAIR:** I am not sure I accept that, really. I think there are plenty of pieces of
21 litigation where the parties proceed on the basis of accounts that may or may
22 not be audited, without going back to the reference material. I really do
23 struggle to see why any of us are any better off by somebody finding that
24 there is a mistake in the management accounts.

25 **MR ALDRED:** The other important element with regard to the source material is
26 driving up what -- particularly with regard to duration and contract prices and

1 invoices and the period of time in which there is revenue associated with
2 a particular customer or whatever, or within a financial year. That helps
3 understand the revenue figures that we are going to be wanting to
4 understand. And, importantly, the vacancy figures.

5 **THE CHAIR:** That may be right, but the same point applies, though, doesn't it?

6 There is a point at which turning over every stone in this litigation is not going
7 to be in anybody's interest and particularly, Mr Aldred, your client at the
8 moment, of course, has not succeeded with its security of costs application,
9 so there's every prospect that win or lose, it is not going to be able to recover
10 any of these costs. And I think we are all acutely conscious there is pressure
11 on the finances of public authorities like your client. I am just wondering, is
12 that really the right way to deal with this bit of litigation?

13 **MR ALDRED:** In the same way it wouldn't be imposing on the claimants the

14 obligation to prepare that list of documents in respect of all this material, in the
15 same way I would expect Oxera, on the quantum team -- or if they delegate
16 that, to just simply go and see, well, actually, is there anything interesting in
17 those boxes? Are there any business plans from the inception of the
18 company? Are there any notes or minutes that the directors who were based
19 in Hull and have since retired, did they give the bookkeeper anything which he
20 has put in the boxes because they are Instaplanta related and he sent back to
21 Instaplanta?

22 There is likely to be a treasure trove of useful information in there. But granted, now

23 that we know there is -- was it 15 boxes? One will want to make sure that it's
24 proportionate. And indeed, there is probably -- I completely understand that
25 you don't want to have costs run away, having to deal with these 15 boxes,
26 but we do need to deal with them. They are disclosable boxes and likely to

1 contain many relevant documents.

2 **THE CHAIR:** Let's just park that for a moment. Obviously, we are going to come
3 back to the individual document requests. I think it seems to me, though --
4 just to try to draw a line under that -- it seems to me, obviously, you are going
5 to get the management accounts, Mr Aldred. They need to come, I would
6 have thought, pretty quickly. I would have thought on the face of it, it ought to
7 deal with an awful lot of the requests, and we can talk about them as we go
8 through them and see which it does and which it doesn't. It may be once you
9 have seen those, it is clearer to all of us as to whether or not you feel it is
10 necessary and proportionate to look at underlying material.

11 It may also be, Mr Carrall-Green, that somebody could spend half an hour looking at
12 these boxes and, actually, just trying to work out roughly what's in them, so
13 that at least some form of indication of their contents could be given. If they
14 are just a whole box of invoices put together in a bundle and not organised,
15 then that is really quite different than if it is a bunch of lever arched files with
16 indices and so on. I don't know if you know any answer to any of that, but at
17 least some degree of knowledge of contents might be helpful. It seems to me
18 that might be the way forward in relation to that particular issue.

19 **MR CARALL-GREEN:** Yes. We can certainly have somebody write a letter that
20 explains what's in there. I mean, it's difficult to know what it will say at the
21 moment. But we do expect it will just say at the moment, "Unorganised", or
22 "Roughly chronologically piled up loose leaf copies of receipts."

23 **THE CHAIR:** Okay. As I say, just to draw a line under that, when can you supply
24 those management accounts?

25 **MR CARALL-GREEN:** Monday, sir?

26 **THE CHAIR:** Yes, good. And if we were to say that by -- when do you think

1 somebody could produce just a desktop analysis of those, of what's in the
2 boxes? Shall we say Wednesday or Thursday next week? Is that possible?

3 **MR CARALL-GREEN:** Sir, we can offer two options in relation to that. It depends
4 whether the tribunal would be comfortable with the client itself doing that or
5 we can send a solicitor to you to do that. I think the solicitors are going to be
6 attending the premises on Friday, end of next week --

7 **THE CHAIR:** So there would be no additional cost incurred by the solicitor doing it,
8 because they are going to be there anyway?

9 **MR CARALL-GREEN:** Exactly, because I think they are attending on the client in
10 any event.

11 **THE CHAIR:** Mr Aldred, if we were to approach it on that basis, you get the
12 management accounts on Monday and you get a letter at the end of next
13 week or the beginning of the week after, which tells you roughly what is in the
14 boxes, then you will be able to make a decision about how you want to pursue
15 the other fifteen boxes. I am going to come to the list of the points. I am not
16 in any way ducking going through your list of requests, just to be clear. Just in
17 terms of the practical way to deal with this, is this satisfactory to you?

18 **MR ALDRED:** Karen, Ms Blackmore, if you are on the line, can you send me a text
19 just to confirm.

20 **THE CHAIR:** You want to take instructions, yes.

21 **MR ALDRED:** I will just get some of instructions through.

22 **MR CARALL-GREEN:** Can I just clarify one thing while you are taking those
23 instructions that may be relevant to those instructions, about whether or not
24 this is acceptable as a proposal? The management accounts that are
25 immediately available and will be forthcoming are the year-end management
26 accounts, the unaudited year-end management accounts and then there are

1 monthly management accounts as well. I think these will either need to be
2 collated or spat out of the system, the latter, so the system will be required to
3 produce its read out or its printout, and the bookkeeper will have to do that.
4 So it may be a few more days before the bookkeeper, in fact, responds and
5 provides those.

6 **THE CHAIR:** In that case, so far as I can see, the management accounts -- the
7 year-end management accounts are going to be, I would have thought, very
8 helpful to Mr Aldred, for the purposes he wants. Let's just get those to him.
9 Then if he wants to see -- maybe it would be helpful if the bookkeeper could
10 produce one of the monthly accounts and provide that as soon as he sensibly
11 can. If Mr Aldred's clients thinks those are helpful or Oxera thinks those are
12 helpful, then he may be asked to produce some more of them. Let's just take
13 it in stages and start with the yearly ones. Mr Aldred, back to you.

14 **MR ALDRED:** Just on the electronic version, if we can perhaps try to get Oxera
15 involved in that, because they might have a particular system they like that the
16 bookkeeper can then help facilitate in the way it is transferred, for example.

17 **THE CHAIR:** Yes, I am sure that the solicitors can liaise on that.

18 Mr Aldred, are you happy with that as an approach? You have some instructions?

19 **MR ALDRED:** I am happy with that. Yes, I do, I have the instructions and that's
20 fine.

21 I would also ask, because I heard it said that the furlough spreadsheet is available --

22 **THE CHAIR:** That presumably comes on Monday as well, does it,
23 Mr Carrall-Green?

24 **MR CARALL-GREEN:** Yes, we are fine with that.

25 **MR ALDRED:** Then I think we have the invoices for planters, which I think were
26 available. I would have thought there's likely to be various photographs of this

1 white board, presumably on Mr Simpson's and Mr Robinson's phone, by way
2 of history and the like. That might be quite useful. I don't know, but if I have
3 a white board in the office and I am about to go out and do some
4 maintenance, and if I wanted to remember which ones it was, I might take
5 a photograph on the phone.

6 **THE CHAIR:** In relation to the invoices, presumably, Mr Carrall-Green, that's
7 a Monday job as well?

8 **MR CARALL-GREEN:** I think it could be a Monday job. I don't think there are
9 pre-existing photos, so far as we are aware, but we will go into the office, take
10 the photo and send it.

11 **THE CHAIR:** Precisely. Obviously, you have been asked if you would ask your
12 client whether or not there are pre-existing photos. If there are, presumably
13 you will have to decide whether they are disclosable or not. So on the face of
14 it, I assume they would, but that's just part of your disclosure obligations. The
15 point has been made.

16 Just to be clear, you are going to deliver the year-end management accounts, the
17 furlough spreadsheet, the invoices for the planters and the photograph of the
18 white board on Monday. I am going to make an order to that effect, just to
19 make it clear that that is going to be done. Then in relation to the archive
20 boxes, you will produce a note or a letter or some sort of memorandum
21 describing the contents, on the basis of a review that takes no longer than half
22 an hour to look inside the boxes and identify the contents. So whoever is
23 doing it should understand that this is not a formal list, it is the best effort they
24 can do in half an hour, for the benefit of Mr Aldred's client to consider how
25 further it wishes to approach those boxes and we can obviously discuss that.

26 **MR CARALL-GREEN:** Is that to be done by the client or a solicitor, sir?

1 **THE CHAIR:** It's to be done by the solicitor, please --

2 **MR CARALL-GREEN:** Yes.

3 **THE CHAIR:** -- when they visit on Thursday. If they could have the note -- if it is
4 feasible to have the note done by the close of business on Friday. Is that
5 feasible?

6 **MR CARALL-GREEN:** Yes. We are otherwise engaged on Friday, as is Mr Aldred,
7 so it might have to be thereafter.

8 **THE CHAIR:** Yes.

9 **MR ALDRED:** So the following Monday or Tuesday would probably be fine.

10 **THE CHAIR:** Let's make it the following Monday. Close of business on the following
11 Monday. Okay, helpful.

12 Good, thank you. That deals with the outstanding documents we know about. I am
13 keen to move on. Just before we do that, I do want to talk a bit about market
14 definition, if you indulge me again, because that's been helpful in relation to
15 quantum for me if not for anybody else.

16 Market definition. I think, Mr Carrall-Green, your client's case is product: low cost,
17 small format, green advertising, targeted at small business, as I understand it,
18 and geographically, so Leeds Metropolitan District. That's it in a nutshell,
19 is it?

20 **MR CARALL-GREEN:** Yes.

21 **THE CHAIR:** Mr Aldred, I am not entirely clear what your client's case is on this.
22 Obviously, we don't have the expert report on it, Ms Chowdhury's report. But
23 I don't think it is particularly clear from the pleadings. Are you able to
24 elaborate a bit on it at the moment? As far as I can see, you do contest the
25 product market and you reject the geographical market but I wasn't entirely
26 clear why. Just to be clear, I only raise this because to the extent we are

1 going to have market definition discussions, I'd quite like to understand what
2 your case is, so that we can assess the relevance of any of the requests
3 you're making.

4 **MR ALDRED:** I understand your question. I have not familiarised myself enough
5 with Mr Bosley's report on the market definition side to know which way that's
6 going, and which way -- albeit very helpful to have heard it just now. I would
7 imagine -- I will just simply have to wait to see what Ms Chowdhury has to
8 say.

9 **THE CHAIR:** I don't want to push you. I won't push you any further. It does make it
10 a little bit more difficult as we come on to some of these points, to the extent --
11 and I am not entirely clear where you are relying on market definition to justify
12 some other requests. It becomes a bit difficult without actually knowing what
13 the case is. But we can deal with that as we go, I am sure.

14 **MR ALDRED:** Hopefully, we will have given that some consideration before we
15 made the request in the context of that. So hopefully -- I would prefer not to
16 try to come up with a broad approach.

17 **THE CHAIR:** I don't want you to do it on the hoof. I just wanted to see whether we
18 can refine it all. The problem -- I am sure you have given it consideration, but
19 the trouble is, if I am going to make any orders, it does need to be by
20 reference to the pleadings. It is quite difficult to do that if I don't know what
21 the case is. Obviously, if there is relevant material to the claimant's case,
22 then that is very clear and by virtue of having an expert report, we will be
23 absolutely clear what it is, to the extent we have looked at it and I have only
24 looked at this. That is very helpful.

25 Just one other point I wanted to make that comes out a little bit of the conversation
26 we have had. There is a sense of failure to spot the wood for the trees in

1 some of this. There really seem to be a large number of requests for things,
2 considerable duplication, some lack of clarity in some of that. It also seems
3 some of these things turn up in front of the tribunal when they have not been
4 raised fully in correspondence. That particularly seems to apply to some of
5 the criticisms of Mr Robinson. I may be wrong about that but I think
6 somebody said that. As I have noted, this is all adding to costs in this
7 litigation and it is not a piece of litigation which easily carries substantial costs,
8 for the reasons we have discussed.

9 I just wanted to raise -- this is not a point made to one side or the other, it's to both
10 parties. So the approach to pleadings which I am sure we will come on to.
11 There seem to be some technical points that I wasn't really sure had much
12 impact and we will deal with those in due course. I do think there is
13 a temptation -- perhaps a tendency on both parties to fall into quite a granular,
14 in the trench approach to this litigation and it is simply not a case that bears
15 that. I am certainly not comfortable to see it happen. I would much prefer to
16 see the parties concentrating on the issues that will actually drive value at
17 trial. If I could leave you with that thought, both in terms of the rest of this
18 hearing but also just generally, in the way in which this litigation is conducted.

19 That seems to me to be what we should be doing with a case where the value is
20 very, very tight compared with the likely costs. It's the only way, I think, that
21 proportionally and sensibly, the litigation can be conducted. I just park that
22 thought. I am not inviting any comment on it but I would like everybody to
23 give some thought to that as the approach.

24 So let's turn to the RFIs. I think that is your table A, Mr Aldred, if you would like to
25 help with that?

26 **MR ALDRED:** Table A. Just a couple of preliminary questions. I think we are only

1 dealing with the unshaded items, aren't we?

2 **THE CHAIR:** Yes. It seems there are two types of shading, I think, unless I have
3 misunderstood. Maybe it hasn't. Maybe I have misunderstood it but certainly
4 I have ignored the shaded items largely, other than having a quick skim
5 through them. Is that the right approach?

6 **MR ALDRED:** Correct. It is just the unshaded items.

7 So we have item number 1 is not being pressed.

8 **THE CHAIR:** You are not? Okay. So this is the list of those to whom the claimant
9 supplies at what price, the client list, you are not pursuing that?

10 **MR ALDRED:** Elsewhere we are pursuing who the clients are.

11 **THE CHAIR:** That's 25, is it?

12 **MR ALDRED:** Yes.

13 **THE CHAIR:** There is that overlap. So we can ignore 1. That's gone. Then we can
14 come back to the point at 25. That's helpful.

15 **MR ALDRED:** Then I think the next one is 8.

16 **THE CHAIR:** Yes.

17 **MR ALDRED:** The footnotes that Oxera -- well, Oxera drafted, so I think have
18 since -- and this is the information that they specifically want. I think they
19 say -- in fact, sir, if you are looking at the -- I am going to be working
20 alongside the list that came to the tribunal regarding expert certification. It's in
21 your bundle.

22 **THE CHAIR:** I have it separately, actually, yes.

23 **MR ALDRED:** You have it, perfect. Page 646 for others.

24 **THE CHAIR:** This is Mr Parot, is it, who's from Oxera, who is giving this information;
25 is that right? Am I looking at the right thing? I will just pull that up as well.
26 This is in response to our request -- the tribunal's request -- for confirmation

1 that Oxera had input into the requests?

2 **MR ALDRED:** That's absolutely right. Just bear with me. I will let you know
3 precisely who it was. I think Ms Chowdhury saw this – she was travelling at
4 the time --

5 **THE CHAIR:** Yes.

6 **MR ALDRED:** -- and this detail was provided by Ignacio Parot.

7 **THE CHAIR:** Yes. That's helpful, thank you. And he says -- well, firstly, just in
8 relation to the text at 8 itself, there was, as I understood it, an outstanding
9 point about the claimant's base of operations which has now been dealt with,
10 so we don't need to worry about the text in the box at 8 at all; is that right?

11 **MR ALDRED:** Yes. That's right. So we are moving now specifically with regard to
12 the footnotes.

13 **THE CHAIR:** You said both footnotes are key. I guess the question that springs to
14 mind is why do we need this level of detail when you have the accounts?
15 And, in fact, you are going to get the management accounts. Is it necessary
16 for the claimant to produce a fresh document which deals with all of this --
17 which no doubt would be quite time-consuming and laborious and require
18 some records which may or may not be available, when actually, you are
19 going to get a set of management accounts which I would have thought would
20 tell you quite a lot of the answers to these.

21 **MR ALDRED:** Sir, you may well be right. What he's asked for there, for example,
22 the utilisation of each planter, for example, and then this year -- or for as
23 many years as it is possible -- the income from the advertising with those
24 planters and advertising deals signed each year by Instaplanta, including the
25 location of the planters concerned and the period and the price.

26 The thing is, who is best placed? This is obviously key information required to, one,

1 not only determine what the revenue stream is -- and utilisation -- in the real
2 world, but also, what might it look like in the counterfactual. But the person
3 who is best placed to actually give that information will be Instaplanta
4 themselves, to the extent that it's not otherwise in the disclosure.

5 **THE CHAIR:** So if you have the management accounts -- I take your point about the
6 extent to which the annual accounts break this down, but if you have the
7 management accounts and they do provide a planter-only revenue and cost
8 line, then you get the averages of this, don't you? So you don't need this
9 information if you have that. Once you have the averages, you have the
10 answer, haven't you?

11 **MR ALDRED:** If you have averages and you know that they are -- I am not sure that
12 I am comfortable answering that without a little nudge from Oxera.

13 **THE CHAIR:** Yes.

14 **MR ALDRED:** You are right that, ultimately, people are going to be driving to and
15 hoping to achieve, (a), average figures which can then be relied upon which
16 might fluctuate from year to year, but an average figure you can then have
17 some confidence in when looking at the counterfactual world.

18 It may well be that the documents give us that, in which case, the request is
19 unnecessary. But another way of perhaps dealing with it would be with the
20 documents and perhaps encouraging dialogue between the respective
21 experts, insofar as the documents don't give it, and they can agree, one, what
22 Dr Chowdhury is aiming for and what Mr Bosley thinks is achievable, that with
23 a little bit more sort of cooperation at that level, we can get to the right
24 outcome. Because Mr Bosley will need also to consider it for the joint expert
25 report, so they might as well collaborate early.

26 **THE CHAIR:** It is really just about revenue, isn't it? I think as you identified earlier,

1 the two issues that you are entitled to challenge, I think, are obviously there is
2 a number of planters but there is a price which Mr Robinson is very clear
3 about. He says that's what he's going to do and clearly you want to check
4 that against what he has charged before and the utilisation. But I would be
5 surprised if that information wasn't easily extracted from the management
6 accounts. I would expect you would be able to get that out. It depends a little
7 bit, doesn't it, how these figures are disaggregated and it may be that it isn't
8 straightforward. I don't think there is any point in making an order for
9 somebody to go and construct all of this if we think it is in the management
10 accounts.

11 **MR ALDRED:** I agree. But I think it would be good to just simply have an indication
12 from you, sir, to the extent to which, if Oxera do want to continue to ask these
13 things, that they approach Mr Bosley and see if there is a way of them helping
14 each other get to the answers, without us having to come back to you.

15 **THE CHAIR:** I think I am very sympathetic to that. Obviously, we will see what
16 Mr Carrall-Green has to say about that. It may be interesting. Just before we
17 move on to see what Mr Carrall-Green says about that, can we just stick with
18 footnote 2. This is about other authorities, isn't it, as I understand it? I just am
19 not sure -- so what does this go to? Is this the same point about trying to
20 make sure you are clear about the cost base? I don't understand, really, why
21 this sort of information about other authorities has any relevance. It's not
22 getting your pointers --

23 **MR ALDRED:** It's relevant in two ways. One, revenue, and splitting it out. Because
24 the focal market is likely to be Leeds.

25 But if you do --

26 **THE CHAIR:** But the point is, Mr Carrall-Green's client says they are prepared to

1 give you credit for all of the revenue in the actual. So it doesn't matter. If we
2 are not constructing the counterfactual revenue from the actual, which we are
3 not doing, other than the question of utilisation which we just dealt with, then
4 I don't understand why any of this is relevant.

5 **MR ALDRED:** Two things. There may be, I don't know, but there may be a different
6 funding arrangement with other local authorities. So whereas I think the
7 evidence would suggest it is £15 a week on the planters that are within Leeds,
8 if there is a subcontracting arrangement between Instaplanta and other local
9 authorities, there might be a different revenue stream associated with that.
10 And that's interesting in another way, which is in this case, the claimant is
11 saying it's section 115E and that's the way to go. And I think we now have
12 evidence from Phil Mitchell and others to suggest that the arrangements for
13 installation of the planters in other local authorities nearby might have been on
14 a different footing.

15 **THE CHAIR:** That's certainly not the basis on which the request has been made, as
16 I understand it. There is no suggestion that goes to that. It seems to me that
17 that's a pretty circuitous route to get to that point, isn't it? If you want to know
18 whether the same provision of the Highway Act has been applied elsewhere,
19 I think there is an easy way of getting to that point. I just don't really
20 understand why an analysis of the revenue and the way in which this is
21 operated outside Leeds -- if it turns out that outside of Leeds, in some other
22 council, they have been paid more, then all that tells you is that that is likely to
23 be a different market, isn't it? If they are being paid the same, it validates the
24 number. I am not sure where it gets you. I am struggling at the moment to
25 see any relevance to any issue in the proceedings. I think there is the point
26 about 115E but as I say, I am not sure that's the best way to get to it.

1 **MR ALDRED:** I think it is, again, around trying to determine the correct approach to
2 determining what the revenue is within Leeds for planters.

3 **THE CHAIR:** Right. The answer to that is the management accounts, though, isn't
4 it?

5 **MR ALDRED:** Hopefully.

6 **THE CHAIR:** Okay. Look, Mr Carrall-Green, what do you say about these two
7 footnotes?

8 **MR CARALL-GREEN:** Well, I don't want to add very much, sir, because I think you
9 have probably canvassed all of it. But I do want to say that if the key issue
10 which we have just arrived at, is we want to determine what the revenue from
11 planters in Leeds is, then there is actually a fairly straightforward route to that,
12 which is Mr Bosley has made certain assumptions about that and I have said
13 in my skeleton argument that, if required, Mr Robinson will simply give a short
14 witness statement confirming that those assumptions are factually correct.
15 That's really the end of it.

16 **THE CHAIR:** Would you have any objection to Mr Bosley and Ms Chowdhury
17 arranging a meeting to discuss this particular aspect of how they want to deal
18 with -- how they think it should be dealt with in their reports?

19 **MR CARALL-GREEN:** It would be a costs issue, sir. Again, there seems to be
20 living with the edges of the analysis rather than really cutting to the core of it.
21 Mr Bosley has explained how he found the planter-only, Leeds-only revenue.
22 As I say, we can give the factual evidence to back that up. We are not, as we
23 sit here now, convinced that the additional costs associated with further
24 dialogue is necessary.

25 If it is considered necessary by the experts, then it's very difficult for me to gainsay
26 that.

1 **THE CHAIR:** I think that is the question. If they think that they would find it helpful
2 so that they are not either on parallel paths that don't meet and we end up
3 having to deal with this problem at trial, or, indeed, if they can, between them,
4 identify things that they need to see, in order to deal with it most efficiently,
5 that would seem to me to be saving costs rather than doing anything else.

6 **MR CARALL-GREEN:** Yes, sir, that's true. It is a judgment which I suppose it is
7 hard for us to make now. I am content to leave it in the hands of the experts
8 to say if they do need to do this, then they need to do it. We would ask them
9 to exercise a little bit of caution around that because the tribunal has just
10 pointed out that in this litigation, the perfect can be the enemy of the good. If
11 they can do a decent job without incurring additional costs, please could they
12 do that.

13 **THE CHAIR:** That is certainly understood and hopefully my observations about that
14 have been registered already.

15 Mr Aldred, anything else on this point?

16 **MR ALDRED:** No, that's in respect of footnotes 1 and 2.

17 **THE CHAIR:** That's helpful. I am going to rule on this point now. What I then
18 suggest we do is take a break for the transcriber just to have some time.
19 Actually, I think it would be helpful -- now that we have covered quite a lot of
20 ground, I think, it seems to me we now have a bit of a framework for some of
21 the rest of it. I wonder, Mr Aldred, if you might be able to take instructions as
22 to which of these you now want to pursue and focus on in this hearing. I'm
23 just conscious it's now getting on towards halfway through the hearing we
24 have allocated. So quite keen to move a bit faster. If you were able to clarify
25 which of these we can deal with in a similar way -- some of these issues are
26 replicated later and it would be helpful to move through them quickly.

1 **MR ALDRED:** I can say we are not pressing for 9.

2 **THE CHAIR:** We can do that when we come back. I will just now give a ruling on
3 this.

4 **RULING**

5 **THE CHAIR:** The request for information has been pursued as footnote 1 and
6 footnote 2. Footnote 1 deals with, largely, revenue information in relation to
7 planters in Leeds and particularly the utilisation and income from planters. It
8 seems to me that this information is likely to be ascertainable, at least on an
9 average basis, from the management accounts which the claimant has
10 committed to supply to the defendant. On that basis, it doesn't appear to me
11 that the somewhat laborious exercise which is contemplated by paragraph 1
12 is warranted or proportionate, and I am not minded to make an order to that
13 effect.

14 It is open to the defendant to revisit the question which underpins this, of the need to
15 identify particularly utilisation for planters in Leeds, if the management
16 accounts don't satisfy that request for information. Subject, of course, to the
17 points that I have already made in the course of this hearing about
18 proportionality and I hope my strong steer that this is not an exercise of
19 turning over every stone and that we will need to be satisfied with information
20 at a higher and aggregate level, perhaps, than we might find in other pieces of
21 litigation, where the costs and likely outcomes are different.

22 In relation to subparagraph 2, this is a request for information in relation to planters
23 placed with authorities outside Leeds. It is not clear at all to me why that is
24 relevant to any particular matter in these proceedings, and certainly not at
25 a level which would be proportionate. There is a point advanced by Mr Aldred
26 about whether there might be some application or non-application of

1 a particular statutory provision which is central to the dispute in applications
2 outside Leeds but it seems to me that this is not the way to deal with that
3 point, if the defendant wishes to pursue it. So I will not permit this request to
4 be made.

5 So that deals with those points. As I say, we will take a ten-minute break and come
6 back just after 11.50. Unless you need longer, Mr Aldred. Do you need any
7 longer to take instructions on this?

8 **MR ALDRED:** You said 15 minutes?

9 **THE CHAIR:** I can make it 15 if you'd like. Shall we make it --

10 **MR ALDRED:** I missed the duration you had in mind, sir.

11 **THE CHAIR:** I contemplated ten. I will give you 15 if you want it.

12 **MR ALDRED:** 10 should be fine.

13 **THE CHAIR:** We will come back in ten minutes' time, just after 11.50. If we can
14 move through more quickly, on the basis that, hopefully, that clarifies the
15 approach and the discussion we've had about management accounts, that will
16 make it easier, Mr Aldred, just to move more quickly through it. That will be
17 helpful. Thank you very much.

18 **(11.37 am)**

19 **(A short break)**

20 **(11.51 am).**

21 **THE CHAIR:** Yes, Mr Aldred.

22 **MR ALDRED:** Thank you, sir. Thank you for the time.

23 Continuing on the list --

24 **THE CHAIR:** Yes.

25 **MR ALDRED:** -- we are not going to press for number 9. Oxera is satisfied that
26 Mr Bosley has at least given them a steer as to what he's doing.

1 Then I think the next one is 23.

2 **THE CHAIR:** Yes. This was shaded but I think Mr Parot seems to have resuscitated
3 it; is that right?

4 **MR ALDRED:** That is correct.

5 **THE CHAIR:** It seems to me the way it is put is they expect the management
6 accounts, isn't it?

7 **MR ALDRED:** Let's **hope so**.

8 **THE CHAIR:** Yes. So we treat it on the same principle as footnote 1?

9 **MR ALDRED:** Yes, I think so.

10 **THE CHAIR:** Yes. Mr Carrall-Green, are you happy with that?

11 **MR CARALL-GREEN:** Yes, sir.

12 **THE CHAIR:** Yes, good. Okay, that's done.

13 **MR ALDRED:** Then I have 25.

14 **THE CHAIR:** Yes. I am curious as to this. I wasn't completely sure. We did touch
15 on this a bit earlier about the in Bloom clients. I don't know whether you are
16 able to cast any further light on it. I was unsure as to what it went through in
17 any respect. I am a little bit surprised to see the reference to adverse effect
18 on trade. Maybe you can educate me about that. What is this about? Just to
19 be clear, I understand the way this all works, I have read the witness
20 statements about In Bloom and so on, I just want to understand why this
21 information has any relevance to the claim.

22 **MR ALDRED:** Can I just check one thing, sir, if it is all right?

23 **THE CHAIR:** Of course.

24 **MR ALDRED:** It picks up in a number of ways. One, obviously, relates to revenue
25 stream and how it actually operates. Two, whether or not it's another access
26 to market point, so not through Leeds City Council but through the local In

1 Bloom groups, because they then procure planters from Instaplanta.

2 **THE CHAIR:** Is that a mitigation point then?

3 **MR ALDRED:** Yes. But it does - effectively with regard to access to market and the
4 degree to which there might be distortion and, therefore, adverse effect on
5 trade.

6 **THE CHAIR:** I see. Hang on a minute. So what would the adverse effect on
7 trade -- this is saying because of the abuse, the argument would be whether
8 or not, as a result of the alleged abuse, there was any effect on trade. You
9 are saying that this -- I don't really understand how that fits into your case.

10 **MR ALDRED:** If there is another access to market point on to the streets and
11 precincts of Leeds, then it's not necessarily coming through Leeds City
12 Council. They can go through the In Bloom groups.

13 **THE CHAIR:** I see. You would say there is no effect on trade because they can do
14 it another way?

15 **MR ALDRED:** Yes.

16 **THE CHAIR:** Okay.

17 **MR ALDRED:** But I am not positively advancing that case, sir. What I am saying is
18 we need to understand what's happening with these groups because we do
19 know that -- or at least the understanding is that Instaplanta is deploying on
20 their behalf.

21 **THE CHAIR:** Yes. I think Mr Robinson does say a bit about this, doesn't he? He
22 talks about it being a relatively small -- what more do you need than what he's
23 said? He's obviously given some information about this, because he does talk
24 about some of the clients, I think.

25 **MR ALDRED:** Well, which ones and when. So start dates, end dates.

26 **THE CHAIR:** Okay.

1 **MR ALDRED:** And, really, the relationship. Because we don't know -- certainly I live
2 in Yorkshire. The planters in my village don't have any advertising on them
3 but planters in other precincts around Leeds do. So the question is, what's
4 happening with that advertising revenue? Does it go to the In Bloom groups,
5 who then just simply pay Instaplanta for the planters, or does Instaplanta
6 install for them and derive the income from advertising on those planters? Or,
7 indeed, there may be other planters, where there is no advertising on them
8 because that was the preference of the In Bloom group. So, you know, it
9 might just simply be a sale and purchase and a maintenance contract.

10 **THE CHAIR:** I thought Mr Robinson explained all that. Do you need to know that
11 because it goes to quantum, or is that just your access to market point?

12 **MR ALDRED:** Two reasons. One, it goes to quantum, understanding that element.
13 And it's also, with regard to counterfactual and mitigation, is there another
14 route to market? I don't overplay that, but it is also the access to market point.

15 **THE CHAIR:** Okay, Mr Carrall-Green?

16 **MR CARALL-GREEN:** Yes, sir. We do struggle to understand exactly what the
17 request is driving at. Because Mr Robinson has explained what the In Bloom
18 groups are. They are volunteer organisations, they are not commercial
19 enterprises. Mr Robinson has suggested that they take up a small amount of
20 the revenue in the market because it looks like they effectively defray some of
21 their costs by participating in a little bit of advertising. I think he estimates
22 they take five per cent of the revenue in the relevant market.

23 **THE CHAIR:** Right.

24 **MR CARALL-GREEN:** But just to address what Mr Aldred has said. The access to
25 market point, if the In Bloom groups were to procure planters from Instaplanta,
26 then they would just be customers and that would show up in revenue data.

1 Then as to the effect on trade point, we don't understand how that works
2 because you would need permission under the relevant legislation to place
3 the planters. So we don't understand how the fact that a group of volunteers
4 has said: we would quite like some flowers on our street corner, has any
5 effect on the analysis or any effect on trade or any effect on the effect on
6 trade analysis.

7 The last point I would make is that Mr Robinson has explained how Instaplanta
8 generates revenue. It generates revenue from advertising. So unless it is
9 being suggested that the In Bloom groups advertise, then it is not clear in
10 what sense they would be clients of the claimant. So we are at a bit of a loss
11 on this request.

12 **THE CHAIR:** Just help me to understand this properly. When, as I understand it,
13 there are transactions, if we call it that, or an arrangement with an In Bloom
14 client, then Instaplanta derives revenue because there is advertising on the
15 planter and the In Bloom client might take a small portion of that, up to
16 5 per cent --

17 **MR CARALL-GREEN:** No, sir, I don't think that's -- how we read Mr Robinson's
18 evidence is, essentially, the In Bloom groups might -- a street of volunteers
19 might say: well, this place needs a splash of colour and so let's put something
20 on the street corner. Then they themselves would advertise for a local
21 business, so that they cover the cost of what they have spent. It is just a
22 charitable endeavour to make the neighbourhood look nicer.

23 The claimant generates revenue only from businesses advertising on its planters.
24 The way it works with the In Bloom groups is the in Bloom group come and
25 say: instead of us having the outlay of putting these flowers in the
26 neighbourhood and then having to pound the pavements looking for

1 a sponsor, we are just going to let you know that we would love to have some
2 chrysanthemums on the roundabout. And Instaplanta says: that is a good
3 idea.

4 Mr Robinson has called it the free planter scheme. I think that's a way of saying that
5 it is effectively free to the community but the advertising space on it is how he
6 then makes his money.

7 **THE CHAIR:** As I understand that correctly, you're saying that it's no different from
8 the economics of any other planter being placed but it is just that the route to
9 the siting is through the In Bloom invitation, if you like, to say: we would like
10 one there.

11 **MR CARALL-GREEN:** Mr Chisman-Russell has something he might want to
12 mention, sir, if we can double-check.

13 **THE CHAIR:** Yes, of course.

14 **MR CARALL-GREEN:** Yes. That's helpful. The economics are no different, except
15 for one extra possibility which is that in certain circumstances, if a claimant is
16 not using the space on the planter that he has placed at the invitation of the In
17 Bloom group to make its own revenue, it's possible that it will effectively allow
18 the In Bloom group to do its own advertising to generate some, if it wishes to,
19 money, for what is effectively a volunteer endeavour. But that is entirely
20 separate from the claimant's commercial activities. It is effectively
21 a concession made to a friend, a local neighbourhood organisation.

22 **THE CHAIR:** Yes, I see. So as a promotional or as a community minded gesture,
23 they would sometimes put a planter there that they did not actually put
24 advertising on, and allow the In Bloom group to take advantage of that to seek
25 advertising themselves?

26 **MR CARALL-GREEN:** Yes, sir.

1 **THE CHAIR:** I see, okay. So you say that there aren't really any arrangements with
2 the In Bloom groups that are of any relevance. Is that what you are saying?

3 **MR CARALL-GREEN:** Yes, sir. I think that is what we are saying. We think that
4 that ought to be clear from the evidence we have already put in.

5 **THE CHAIR:** Yes. Is there any point, Mr Aldred, in asking them to specify the start
6 and end dates? In a way it is really --

7 **MR ALDRED:** I mean, one way of dealing with this, so that we can get a handle
8 on it -- because we are not actually dealing with too many planters, as
9 I understand it. I think there are 40 within Leeds and 69, is that the figure,
10 outside of Leeds? I think that's what Mr Bosley says.

11 It would be very helpful to know who the customers are.

12 **THE CHAIR:** Why? What difference does it make? It doesn't make any difference
13 to your position at all, does it? I think what Mr Carrall-Green is saying, is he's
14 saying it is substantiated by Mr Robinson's statement. It's just the same as
15 any other commercial arrangement, the same as any other siting installation
16 of a planter, because Instaplanta goes, puts the planter down and seeks
17 sponsorship and the In Bloom group has nothing to do with it beyond that,
18 other than the invitation to consider it as a site, except for the occasional
19 situation where it is promotional or community spirited. Why does that have
20 anything to do with that, why does the identity of the invitee have anything to
21 do with it?

22 **MR ALDRED:** I suppose to address that point -- and I don't know if we are coming
23 up to it -- the location of the customers or even more specifically, I think we
24 have the location of the 40 within Leeds. I think that's been provided. But it
25 would be helpful to know where the 69 are. Because then that, certainly in
26 terms of market definition, gives you at least something to work out in terms of

1 the envelope of activity.

2 **THE CHAIR:** That's a separate request, isn't it?

3 **MR ALDRED:** Can I just check that? Yes, I think that's 30.

4 **THE CHAIR:** Okay. Why don't we cut 30 into (inaudible).

5 **MR ALDRED:** It's not cut.

6 **THE CHAIR:** 30 is the non-Leeds planter, isn't it?

7 **MR ALDRED:** Yes.

8 **THE CHAIR:** Really, Mr Aldred, unless you have anything else to say about 25, it's
9 just not plain to me why it has anything to do with the issues in the case. I just
10 don't understand what the point of it is.

11 **MR ALDRED:** Sir, I think we probably will have -- indeed, Mr Carrall-Green's
12 explanation and the reference back to Mr Robinson, perhaps we have all that
13 we need to get a handle on --

14 **THE CHAIR:** Let's do it on the basis that if, for any reason, your expert,
15 Ms Chowdhury, says that she needs this -- and I know it is not
16 something that Oxera had asked for, so it's not actually on the list of
17 things -- am I right about that?

18 **MR ALDRED:** He did add it to the list.

19 **THE CHAIR:** He does add it to the list. He does add it to the list. It's the one he
20 added by telephone but he doesn't give any reasons for it, so it doesn't really
21 take us any further, does it?

22 If there is some reason why they think it is essential for their report, they need to
23 come back and ask for it.

24

25 **RULING**

26 **THE CHAIR:** Having considered request 25 and the arguments of counsel, it's not

1 clear to me why request 25 goes to any issues in the proceedings which
2 would justify providing that information.

3 As explained by Mr Carrall-Green and in the witness statement of Mr Robinson, the
4 commercial arrangements aren't different where In Bloom group's clients are
5 involved, other than where there is a promotional or community-minded
6 activity which is an unusual and rare case, as I understand it. So it's not clear
7 at all why this information is necessary and I will not grant the application.

8 **MR ALDRED:** Thank you, sir.

9 **THE CHAIR:** Right. Where do we go next?

10 **MR ALDRED:** Have we dealt with 25?

11 **THE CHAIR:** Yes. That was 25, wasn't it?

12 **MR ALDRED:** Yes. It was 27. Let me just have a quick look, sir.

13 **THE CHAIR:** Yes.

14 **MR ALDRED:** I think 27 and 28, we have Robinson 2. They do not necessarily
15 address this in the type of detail that we would hope for. Perhaps one way to
16 approach this would be to say if there is anything more that Mr Robinson
17 wants to say about the decision-making process, or how they determine the
18 final price, would he please do so -- not now, but, you know, within a period of
19 time.

20 The alternative is we end up asking questions about this at trial, trying to elicit this
21 information. It seems to me that if there's any more meat on the bones that
22 Mr Robinson can put, it would be very helpful just to have it, so that the
23 experts are considering it.

24 **THE CHAIR:** Mr Carrall-Green?

25 **MR CARALL-GREEN:** Sir, I suspect that Mr Robinson doesn't want to say anything
26 more about it, because he's put in a 70-odd page witness statement already.

1 Our position on these two -- and I think we are dealing with 27 and 28 -- is
2 that they are enquiries into the internal thinking of the claimant when it comes
3 to setting its prices. That's evidence. That's evidence. It's not necessary for
4 counterfactual or quantum because we have the actual prices charged, and
5 Mr Robinson gives a clear explanation for that, as the tribunal has already
6 noted.

7 Mr Aldred is correct that if the defendant wishes to explore this at trial, it can do so in
8 cross-examination. We, for our part, don't understand why it is relevant to an
9 issue in the case, but if they wish to cross-examine on it, so be it.

10 **THE CHAIR:** Mr Aldred, I think you are realising it is something you are going to
11 have to pursue in cross-examination, unless Mr Robinson does want to say
12 any more and apparently he doesn't. So I don't know whether you want to
13 pursue the point any further, otherwise I will rule on that?

14 Okay. So those two are not pursued, 27 and 28.

15 30. This is the question of other local authorities, which we have touched on a bit,
16 haven't we, Mr Aldred?

17 **MR ALDRED:** Yes.

18 **THE CHAIR:** I suppose again, I don't know whether -- it sounds like you do want to
19 pursue it?

20 **MR ALDRED:** Yes. I think it would be sufficient to know the location of these.

21 **THE CHAIR:** Just in terms of why? This is one that Mr Parot doesn't touch on. So
22 I think this is put as being market definition and market dilemma. It's
23 counterfactual in assessing quantum which is obviously very broad. It's not
24 really clear to me how it fits into the case. I am not saying it doesn't, but it's
25 not clear.

26 **MR ALDRED:** I don't think when Mr Parot -- I don't know for certain but I don't know

1 whether he had spotted the 69 figure for the number of planters outside
2 Leeds. It wasn't apparent to me when I spoke to him.

3 Be that as it may. We have been able to do a map for the 40 within Leeds and, you
4 know, just simply being able to plot where the planters are in relation to
5 Leeds, in terms of market definition, I think that's clearly going to be helpful.

6 **THE CHAIR:** Helpful to the question as to -- so you are saying helpful because? As
7 I understand, Mr Robinson says the market is Leeds, primarily because -- and
8 Mr Bosley picks this up and I think gives this view -- primarily because of the
9 locality of the businesses and the local management of advertising for the
10 local businesses. Are you saying you want to know whether there are some
11 that are reasonably close to Leeds which might be considered sufficiently
12 interesting for local businesses? Is that the point?

13 **MR ALDRED:** Yes. It also goes to the question of mitigation and counterfactuals.
14 Because, you know, at the point at which you are having 300-plus planters in
15 Leeds -- I mean, that's their figure, but perhaps even before you get to that
16 level, you have a situation where you have the ability to just simply move
17 across.

18 Now I know it's not currently in their evidence. But simply knowing that, you know,
19 there is X number in Wakefield or X number in other places in close proximity
20 to Leeds, we will at least know it will be a snapshot as to the area of operation
21 for Instaplanta.

22 **THE CHAIR:** Mr Carrall-Green, that's not going to be too difficult a task, is it? Is
23 there any reason why that cannot be done relatively easily and quickly and is
24 there any reason, in principle, why -- it could arguably be relevant, I would
25 have thought, to market definition.

26 **MR CARALL-GREEN:** The answer to the first question is I think this can be done

1 relatively straightforwardly, if it is just done discursively. I.e. rather than just
2 say: we have such-and-such number of planters in such-and-such town --

3 **THE CHAIR:** Or the drawing --

4 **MR CARALL-GREEN:** A map or something like this.

5 **THE CHAIR:** I think Mr Aldred has narrowed his request, I think, so I think that's
6 what is being put.

7 **MR CARALL-GREEN:** If it was to involve drawing up maps and giving coordinates,
8 that's a completely different level of exercise. But two points on the
9 relevance. The first point is that it is somewhat difficult for the defendant to
10 press this point, in circumstances where they haven't even stated a case on
11 market definition, and they have not stated a case on geographic market
12 definition. So we say, in principle, they are not actually entitled to this
13 information because they have not done the basic work of even setting out
14 a case. That's my first point.

15 My second point is where the claimant operates is of only passing interest to
16 geographic market because either we operate in two neighbouring areas of
17 the same market, or we are operate in two neighbouring areas which are
18 neighbouring markets. Two supermarkets are typically, in UK competition
19 law, considered to be operating in two different geographic markets. The fact
20 they are there, doesn't actually help you. What helps you is an understanding
21 of the customers, who goes where and how far they want to travel. Those are
22 the issues addressed in Bosley one, those are the issues that should be
23 addressed in Chowdhury one. This is creating a distraction and is liable to
24 take up time at trial that we don't have --

25 **THE CHAIR:** Yes. Mr Aldred, anything you want to add?

26 **MR ALDRED:** I think we have pleaded mitigation on the footing that they could have

1 and should have been in adjacent markets.

2 **THE CHAIR:** Yes.

3
4 **RULING**

5 **THE CHAIR:** This is a request which was originally for wide ranging information
6 about planters in other local authorities other than Leeds. It has been
7 narrowed to provide a general description of the location of those planter
8 installations. It's said that this is relevant to, in particular, market definition
9 because the question of local advertising may extend beyond the Leeds
10 boundary, if local businesses perceive some value in that. Secondly, as
11 a matter of mitigation. Given that the information is available and can be
12 produced reasonably easily, I will grant this request in a limited way, so that
13 the claimant should provide details in general terms of the location of the
14 planter installations outside Leeds.

15 There is a question of timing on this. Mr Aldred, one assumes that for present
16 purposes, the points you make, the easiest thing to do would be to take
17 a snapshot now. Are you content with that?

18 **MR ALDRED:** Yes.

19 **THE CHAIR:** So, Mr Carrall-Green, the requirement will just be to say what is the
20 position now for the planters outside Leeds, give the general location. How
21 quickly can you do that?

22 **MR CARALL-GREEN:** In principle, Wednesday. But my suggestion, sir, would be
23 that if this information is going to be given by Mr Robinson, it makes sense for
24 him to wrap that up in the short witness statement we discussed earlier which
25 I think met with a favourable reception, confirming the accuracy of the
26 instructions that he's given to Mr Bosley. My suggestion would be that if we

1 are going to take up time on cost that it ought to be postponed until after next
2 Friday. The disclosure, I accept, is a different situation because we want to
3 get it to the defendants as soon as possible. But in my submission,
4 timetabling anything before next Friday is only for very urgent matters.

5 **THE CHAIR:** Understood. I think the concern is that Ms Chowdhury has this
6 information in plenty of time to consider it for her report. So as long as it is
7 done, I would I have thought, by the beginning of August, Mr Aldred, would
8 that make sense?

9 **MR ALDRED:** Yes.

10 **THE CHAIR:** I can't remember what day the beginning of August is. Tuesday 1st,
11 is it?

12 **MR ALDRED:** So we will say by Tuesday the 1st.

13 **MR CARALL-GREEN:** Tuesday the 1st.

14 **THE CHAIR:** What is next?

15 **MR ALDRED:** 31. All we are looking for now, because we know Instaplanta has
16 just Mr Robinson and Mr Simpson but we would like to know the hours they
17 typically work on Instaplanta business, so as to then be able to form a view as
18 to capacity in the counterfactual.

19 **THE CHAIR:** So the ability to service the 300 planters.

20 Mr Robinson does deal with this, doesn't he? Mr Bosley picks it up. Mr Robinson
21 deals with it at 54 and 58, where he says how long it takes to deal with
22 a particular planter, and therefore, how many hours it would take to deal with
23 all of them.

24 **MR ALDRED:** Yes.

25 **THE CHAIR:** And how many days and so on. Why do you need more than that? It
26 seems to me that that is actually reasonably --

1 **MR ALDRED:** Looking at what's feasible in the counterfactual world, it's also looking
2 at what's feasible by way of mitigation in the period. So, you know, if they are
3 lucky enough to be able to have a short working day, then that begs the
4 question, why not explore opportunities in adjacent markets more? So it goes
5 to the question of mitigation.

6 **THE CHAIR:** But he's already told you how much -- how long it takes to deal with
7 a planter. So what more do you need from that? I don't really understand
8 what information you want. Plainly, as I understand it -- just to be clear -- you
9 want to know how long it would take him to service all the planters and,
10 indeed, how much time he has at the moment. He's told you long it takes to
11 service a planter, therefore you can work out how much time he has, can't
12 you?

13 **MR ALDRED:** Yes. But is it typically an eight hour day they work, is it a six hour?
14 You know, it just gives Oxera the ability to understand the capacity that's
15 available there.

16 **THE CHAIR:** I understand the reason for it, Mr Aldred. It's just he's given you the
17 information. I don't understand what he's not given you that you need. It is 54
18 of his witness statement. Do you have that? Let's look at 54 and 58 of his
19 witness statement.

20 I think 54 is actually something. 54 is the time it takes to install it. It's not really
21 about the time spent, so that's not a particularly helpful reference. 58, I think,
22 is the -- I think I must have -- 58 onwards, isn't it? He talks about the -- yes,
23 I am sorry, 54 onwards, he talks about installation. Actually, 55 in particular.
24 He says it takes 15 minutes to unload and plant a planter. So that tells you
25 about estimation. And it says a bit more about it there in 56 and 57 and 58
26 onwards. He's quite detailed about the explanation of how long it takes. 60, it

1 takes one person, on average, five minutes to tend to a single, one metre
2 square planter. Group the planters together, he talks about January 2023 did
3 twelve planters, so it tells you about what happened during the day. I don't
4 understand what more information you need about that.

5 **MR ALDRED:** Sir, I won't press it.

6 **THE CHAIR:** Okay.

7 **MR ALDRED:** Because all these requests were made before we had Robinson 2 --

8 **THE CHAIR:** I understand that. Just to be clear -- no doubt it will come back when
9 we talk about disclosure as well -- clearly there are some things that have
10 happened since these applications were made. That doesn't, I think, detract
11 from two points. One is, I think, a lot of these applications are really quite
12 granular. I think there is a question as to whether they are proportionate.

13 The second is whether they needed to be pursued today. I mean, we are now two
14 hours into a hearing, whereas in fact, the ones that are not pursued --
15 particularly after some of the discussion -- could perhaps have been dealt with
16 in a different way. Just to make that point, Mr Aldred. This is back to the
17 question of whether this case can be run, like some other bits of heavy
18 litigation that can't and so I think we just really need to be on top of these
19 points and deal with them in a slightly different way. Anyway, let's keep
20 moving.

21 **MR ALDRED:** Well, anyway, that finishes what we want to ask for on annex A.

22 **THE CHAIR:** So 37, that's, I think, a duplication anyway with number 8, isn't it?

23 **MR ALDRED:** Yes.

24 **THE CHAIR:** And 37 you are not pursuing.

25 **MR ALDRED:** Yes.

26 **THE CHAIR:** 38, they are being withdrawn, presumably, because of the

1 management accounts --

2 **MR ALDRED:** Yes, I think we now have -- well, 39, we are about to see that the --

3 **THE CHAIR:** The (inaudible) prior details, yes.

4 **MR ALDRED:** The bookkeeper's ledger.

5 **THE CHAIR:** And 38, just to be clear, you are withdrawing that, pending -- that's the

6 same as footnote 1. You are withdrawing that --

7 **MR ALDRED:** Yes.

8 **THE CHAIR:** Okay, that's very helpful. Good. So that is it on annex A?

9 **MR ALDRED:** That's it on annex A.

10 **THE CHAIR:** Right. I am hopeful we are going to move quite quickly through annex

11 B. Because, actually, an awful lot of annex B is about management account

12 information. But that may prove to be overly optimistic. Are you able to tell us

13 which of these are still alive?

14 **MR ALDRED:** I did get an opportunity with regard to instructions. I am wondering

15 whether a sensible way of trying to deal with this is to say: well, let's see what

16 we find in the management accounts, and then these boxes.

17 **THE CHAIR:** Certainly, I would encourage you to do two things. One is to focus on

18 the things that really matter --

19 **MR ALDRED:** Yes.

20 **THE CHAIR:** -- and, secondly, to entirely adopt that approach in relation to anything

21 that goes to the costs and revenue issues. So does that mean you are not

22 going to pursue those today, any of these?

23 **MR ALDRED:** If I could simply ask that it be stood over pending the -- not pursuing

24 today. We will revisit after seeing the management accounts and we've had

25 the opportunity to explore these boxes.

26 **THE CHAIR:** Yes. I don't want to prolong this any further, but there are some things

1 in here which are not related to costs and revenue. It may be worth just
2 picking those up and getting rid of them.

3 **MR ALDRED:** Yes.

4 **THE CHAIR:** 1, 2 and 3, it seems to me -- I don't know whether you want to pursue
5 those. They may well be valid complaints but I am not really sure that the
6 world is going to be (overspeaking)

7 **MR ALDRED:** This sort of touches upon discussion that you had with Mr Bowsher
8 at the first case management conference, which is we want to know the
9 universe of documents with which we are dealing, so that we know what the
10 shape of the trial bundle will be and nobody is taken by surprise.

11 But just taking a pragmatic approach, we do know that there were -- we had this
12 particular SARs document, for example, 550 pages. But that wasn't the only
13 sort of product, if you like. There were Freedom of Information Act requests
14 and others. So there is just a universe of papers there that have not actually
15 been captured in the claimant's list.

16 **THE CHAIR:** They are slightly different from what's actually said. The complaints in
17 1, 2 and 3 are about the nature of the existing list, the way in which the side
18 items are dealt with, and then documents which I think are documents which
19 they say you provided to them in pre-action disclosure. So they don't need to
20 disclose that. Just focus on those for a minute. You may have some other
21 points about --

22 **MR ALDRED:** I am happy not to pursue them. Well, what we need to consider is
23 how are we going to deal with the fact that the initial list was, you know,
24 missing things that we otherwise knew existed and ought to be there? Of
25 course, now we have another 15 boxes of material.

26 **THE CHAIR:** That's entirely fair. But it's not the point that one's addressed here, as

1 I read it, unless I have misunderstood it, it is about identifying documents in
2 a convenient manner and order and concisely as possible. This is about the
3 format of the list --

4 **MR ALDRED:** Yes.

5 **THE CHAIR:** It may be entirely clear for you to make a separate point, which is, is
6 everything included and then turn up a whole lot of extra material. That's
7 entirely fair but I just want to get these out of the way if we can. There is no
8 point in standing them over if we're going to have --

9 **MR ALDRED:** Do we need -- we have asked them for documents. We have sent
10 them across, we are going to have to start thinking about preparing that trial
11 bundle, possibly. So I think it's enough to really flag that there were deep
12 issues --

13 **THE CHAIR:** I understand. You have schedules -- on that basis, yes. Sorry, go on.

14 **MR ALDRED:** And we will really need to think about, you know -- and perhaps
15 instead of producing a list, actually start to start producing a chronological trial
16 bundle --

17 **THE CHAIR:** Yes.

18 **MR ALDRED:** -- as and when documents are identified. For example, the 15
19 boxes, once we have an idea of what's in them, somebody might -- like I did
20 with 2 Travel v Cardiff Bus, Cardiff Bus' legal team were able to go in to have
21 a look around this warehouse and the agreement was just simply: if you see
22 anything that you like, take two photocopies of it, one for me and one for you.

23 **THE CHAIR:** Yes. I did float the idea that that may be a way of dealing with the
24 boxes. I think we parked that for the meantime because we are going to see
25 whether your management accounts and the brief description help with that.

26 I understand the point you are making about failing concerns. I think the trial bundle

1 point is a good one but, of course, that's the claimant's responsibility in the
2 first instance anyway, to prepare that. I just want to be clear. I think you have
3 registered your complaints on 1, 2 and 3. You are not pursuing them now?
4 Or do you want to stand them over? I am not going to stop you arguing them
5 later. I just don't want to stand over anything that really can help things.

6 **MR ALDRED:** Let me just --

7 **THE CHAIR:** Are you bothered by the background noise here? Can you hear
8 background noise?

9 **MR ALDRED:** It is fine, sir.

10 **THE CHAIR:** Good. I am afraid we have major construction, as I'm sure you know
11 from previous visits. They seem to be quite busy today. I am sorry if there is
12 a bit of noise.

13 **MR ALDRED:** I think in terms of case management, sir, it's for you to form a view as
14 to what's, you know, proportionate in the context of this action.

15 **THE CHAIR:** On that basis, I think I'm not going to make an order about 1, 2 and 3.
16 I am not going to stand them over either. So let's take them off the list. It
17 seems to me that it is not proportionate to deal with any of that.

18 The question of the next point, I think, is -- the compromise agreements, item 5.
19 Compromise agreements, the defendant. I don't really understand what this is
20 about. Are these compromise agreements with the defendant?

21 **MR ALDRED:** I think I would have to take instructions. I suspect you are right, and
22 we are not going to press for that.

23 **THE CHAIR:** It is a bit odd, isn't it? If you need them, they just don't seem to me to
24 go to quantum at all. So there's no point in leaving them on a stood over list,
25 is there, unless there's a reason why you need them?

26 **MR ALDRED:** Sir, 5 can go.

1 **THE CHAIR:** Yes.

2 **MR ALDRED:** Then 4 stays.

3 **THE CHAIR:** 4 stays because there is a potential quantum point there.

4 **MR ALDRED:** Yes.

5 **THE CHAIR:** 5 goes. There is actually a duplicate 5 but it seems to run into 6 as
6 well which is about a bank statement. So that's clearly quantum. So that's
7 fine, we have stood that over. 7 is income outside the Leeds area. We stand
8 that over. The funding -- I don't know whether you do want to pursue that?
9 I think Mr Robinson explains that there wasn't any.

10 **MR ALDRED:** I think they said the business was to be self-funding. So I am happy
11 to let that go.

12 **THE CHAIR:** Yes, thank you. Then 9, Covid grants. Do you want to leave this on
13 the basis you're still expecting material?

14 **MR ALDRED:** We are looking forward to seeing what the bookkeeper produced in
15 his schedule.

16 **THE CHAIR:** Yes.

17 **MR ALDRED:** So we are likely to see it, and there might be something that comes
18 out of that.

19 **THE CHAIR:** Yes.

20 **MR ALDRED:** We are told there are no contracts of employment.

21 **THE CHAIR:** We are into that territory then, aren't we, whether you have any reason
22 to advance -- we shouldn't accept Mr Robinson at face value.

23 **MR ALDRED:** There is just the two of them. We have no reason to doubt that.

24 **THE CHAIR:** Yes. This is presumably a cost information point. So it is a stood over
25 point --

26 **MR ALDRED:** It's just stood over because for the moment, we are not sure whether

1 the lease we have and the figures that we are seeing --

2 **THE CHAIR:** Yes.

3 **MR ALDRED:** There is a slight disconnect there.

4 **THE CHAIR:** Yes, I understand. We can move quite quickly, can't we, through 13,
5 14, 15, 17 and 18, and indeed -- actually, all the way through to 20, it seems
6 to me, are all costs revenue-type quantum can all be stood over; is that right?

7 **MR ALDRED:** Yes.

8 **THE CHAIR:** So 21 to --

9 **MR ALDRED:** This is supposed to be the black board, I think.

10 **THE CHAIR:** Exactly yes. This is partly -- yes, this is partly this point that we
11 discussed in the context of the RFIs too, isn't there? What the basis is for
12 siting these things. Do you wish to pursue those?

13 **MR ALDRED:** Yes. But I suspect they will be in the boxes. Insofar as they exist.

14 **THE CHAIR:** Yes.

15 **MR ALDRED:** Because they clearly -- Mr Robinson and Mr Simpson -- have no
16 record of them being around at the moment. But they may well be in the
17 boxes.

18 **THE CHAIR:** Yes. We will leave them on the list for now and I think we're saying
19 23, 24, 25, 26, 27, all seem to fall under the umbrella of, potentially,
20 management accounts.

21 Mr Carrall-Green, we have gone through that rather quickly. Hopefully you have the
22 gist. Is there anything in there that you are unhappy about, and are you
23 comfortable with the idea that we stand this over, on the basis we will see
24 whether the management accounts deal with it all?

25 **MR CARALL-GREEN:** Yes.

26 **THE CHAIR:** Good, thank you. So that's the position then. I think that's clear.

1 Hopefully somebody has a good note of that, as to what is and isn't stood
2 over, so we don't have to argue about that next time.

3 Is that it in relation to the disclosure annex B?

4 **MR ALDRED:** That was annex B. Nothing else, sir, from me.

5 **THE CHAIR:** Very helpful, thank you very much.

6 Can we move on? I think next on the item list is Mr Robinson and his witness
7 statement. Mr Aldred, there is a very long list of things that are complained
8 about in relation to Mr Robinson. I quite understand -- I have to say, having
9 read it, it is not the easiest of the statements to navigate. And actually, not
10 least I think, it is probably slightly unhelpful that it is dealt with by issue rather
11 than in a chronological form. So I think there may well be a basis to say at
12 least that.

13 But it does seem to me that we are simply not going to go through those lists of
14 paragraphs, I hope, and see what complies. If there is anything in there that
15 really bothers you that you think needs to be dealt with now because either it
16 provides a lack of clarity for trial preparation or because you think it's
17 absolutely clear now, it shouldn't be in there, I am very happy to deal with it.
18 But I would really encourage you to focus on anything that really matters that
19 we need to deal with now.

20 **MR ALDRED:** Sir, I don't want to pre-empt what Mr Bowsher might have to say.

21 I think we certainly wouldn't be abandoning any of the points. We have put
22 down a marker with regard to the statement. It would have been nicer, had it
23 been compliant in all respects from the off. But in terms of this case, and
24 proportionality, you know, we would at least have something from him. But
25 I don't think there's any reason why, given there is something like 30-odd
26 paragraphs which Mr Simpson could speak to, and which Mr Robinson

1 currently speaks to, effectively, on his behalf -- I understand the point with
2 regard to, well, if that's his understanding, that's not quite hearsay. But it's
3 a question of how it's being put and there is an awful lot which is not direct
4 evidence.

5 You know, Mr Simpson has, obviously, already given a witness statement, so he
6 could just simply speak to those paragraphs, for example, and be tendered for
7 cross-examination.

8 **THE CHAIR:** Yes. As to your first point, obviously you can and no doubt will make
9 submissions at trial about the weight of anything that you say is hearsay.
10 Indeed, I am sure you will, as advised, think about how cross-examination and
11 things like speculation, et cetera -- none of that is being taken away from you
12 by not pursuing the point now. I want to be very clear about that.

13 In relation to Mr Simpson and any further statement, it does seem to me that is
14 a matter for the claimants. If they choose not to do that, then they may put
15 themselves at peril in relation to the evidence that they have called and I think
16 that's really the point, that you're inviting them rather than suggesting there is
17 anything more I could do, aren't you?

18 **MR ALDRED:** Yes.

19 **THE CHAIR:** Mr Aldred.

20 **MR ALDRED:** No, no, that's fine, sir.

21 **THE CHAIR:** Mr Carrall-Green, do you want to say anything about all of this?

22 **MR CARALL-GREEN:** No, sir. So far as I understand it, that's the end of that.

23 **THE CHAIR:** Okay, good, thank you.

24 Next item, I think, is responsive witness statements.

25 The question I think, Mr Aldred, I have for you here is what is it that you actually want
26 to say here? Obviously, if you have things you want to say, particularly if they

1 are important for Ms Chowdhury, then clearly they have to be dealt with in
2 some way.

3 **MR ALDRED:** Yes.

4 **THE CHAIR:** One of the alternatives I've wondered is whether if you feel there is an
5 evidential basis that needs to go in -- here we have some quite, I think, helpful
6 material from Mr Rogers, don't we, as to how the economics work and so on.
7 But if there is material which is consequential on what Mr Robinson says that
8 you feel is within the council's knowledge, then one way of dealing with that is
9 to put that into Ms Chowdhury's instructions and, of course, you can then
10 follow the same line as adopted by the claimants, like the claimants you can
11 put in a witness statement to confirm the instructions. I am offering that as an
12 opportunity. Part of the reason is I just don't want to open up a door to
13 a whole lot of witness statements which are, actually, anything other than
14 speculation or argument. If there is something the council clearly wants to
15 say and needs to say in order to state the evidential base then obviously it
16 must do so.

17 **MR ALDRED:** Sir, you will recall the first case management conference and we set
18 out our directions.

19 **THE CHAIR:** Yes.

20 **MR ALDRED:** Nobody suggested reply witness statements. In part, I would
21 suggest that made sense in the context of requests for information and an
22 order that there be responses on a date, because the type of material that you
23 would want to drill at would have become available, indeed, before discovery
24 and before doing witness statements.

25 So we are in a situation where, indeed, a large proportion of the -- large swathes of
26 the information that we were trying to get at, particularly with regard to the

1 counterfactual, were not available on an open basis, and we pressed many
2 times for it on an open basis.

3 Indeed, the applications of 6 June for specific disclosure and for responses to the
4 further information, both made provision that the defendant be permitted to
5 submit supplemental witness statements to respond to matters raised for the
6 first time in the claimant's evidence. So this application that we are dealing
7 with has been before the tribunal for nearly two months.

8 **THE CHAIR:** Yes. Just to be clear, I think the observations I made earlier were
9 intended to make it plain -- obviously, subject to anything that
10 Mr Carrall-Green has to say -- if you are in the position where you need
11 particularly to set the evidential basis for Ms Chowdhury, or indeed, there are
12 matters which are important for trial which need to go into the witness
13 statements, then it seems to me then you should have that opportunity. But
14 I am just not clear what they are. I don't really understand why it is that --
15 particularly in relation to -- sorry, just to let me finish -- particularly in relation
16 to quantum and the counterfactual, it's not clear to me why the defendant
17 would have anything to say about what the claimant might or might not have
18 done as by way of direct --

19 **MR ALDRED:** But we might have something to say about what the defendant could
20 do.

21 **THE CHAIR:** Yes.

22 **MR ALDRED:** Claimant rather. What the claimant could do.

23 **THE CHAIR:** The claimant, precisely.

24 **MR ALDRED:** It comes back to the point -- and I rather suspect that we will need to
25 put in a witness statement dealing with if you have a private business using
26 public land, seeking to make this type of money and deploy this number of

1 advertising spaces, does the council have to think in terms of is that actually
2 permissible and do they need to put that out to public tender.

3 **THE CHAIR:** That's a legal point, isn't it? It's not a factual point. Either they have
4 that obligation or they do not?

5 **MR ALDRED:** Yes. But I think if you had somebody in the procurement team
6 saying what the thresholds were, and what the council would have done over
7 the relevant time and how they would have reacted, I think that's a relevant
8 consideration.

9 **THE CHAIR:** Well, it is matter for you. But it would seem to me to be a slightly odd
10 thing to do, to put in a witness statement, expressing a view which was not
11 consistent with legal obligation. So if were you to come along and say to us:
12 we would have done this, but in fact, that doesn't match your legal obligation,
13 that doesn't feel like a particularly persuasive position. I am expressing no
14 view on the underlying argument but it seems to me that's really another way
15 of saying it. This is just a legal point, isn't it?

16 **MR ALDRED:** I quite like the attractiveness of your proposal, at least when it comes
17 to the public procurement issues, of simply stating that, given the instructions
18 to Ms Chowdhury. That, I think, could work.

19 But certainly Mr Mitchell and Mr Rogers and others have comments on what they
20 have seen in Mr Robinson's witness statement. I have yet --

21 **THE CHAIR:** Well, comments are slightly different, aren't they? Comments are
22 different from evidence. I am just anxious to avoid -- just to be absolutely
23 clear with you, what I am really anxious to avoid is another round of witness
24 statements in which Mr Rogers comments on Mr Robinson because he
25 says -- which is effectively argument rather than evidence. I am not going to
26 find any of that helpful and it is just a waste of money.

1 **MR ALDRED:** Yes. But also part of the factual matrix that we need to deal with is
2 what did the council understand they were dealing with when they set out the
3 2017 process, for example, by which, you know, Instaplanta could deploy
4 planters within Leeds, compared to what they are now saying was their hopes
5 and their ambitions. And the effect that would have had on how they saw
6 things. And --

7 **THE CHAIR:** Well, yes.

8 **MR ALDRED:** But the thing is, it has been suggested to you that, you know, it will
9 give you lengthy, enormous witness statements and thousands and
10 thousands of additional documents or whatever. We can keep it tight and
11 very specific and just come up with a responsive statement so at least it's on
12 the record and it can be dealt with at trial properly.

13 **THE CHAIR:** One of the things we could do is -- and I float this as an idea which we
14 will test with Mr Carrall-Green -- I could give you permission to put the
15 statements in, subject to argument about their admissibility. So you file them
16 and then we can have an argument later about whether they have any place
17 in the trial.

18 **MR ALDRED:** I think that's what I propose in paragraph 45, to the same effect,
19 except that 12 August is a Saturday, so maybe the 11th.

20 **THE CHAIR:** I think it is slightly the other way round. There is no presumption
21 that -- it may be a reverse form of filing. So we will probably say you have to
22 make it good, if you like. If you want them in -- and, of course,
23 Mr Carrall-Green does not object to it -- probably amounts to the same thing. I
24 think I am a little bit reluctant just to open the door completely, without an
25 understanding of what it is.

26 Let's see what Mr Carrall-Green has to say. What is your response to that,

1 Mr Carrall-Green?

2 **MR CARALL-GREEN:** Sir, if I can break my response into five.

3 **THE CHAIR:** Yes.

4 **MR CARALL-GREEN:** The first submission is that there is a big hole here, which is
5 the one that the tribunal has identified which is that the defendant doesn't say
6 either who it wants to call or what it wants them to speak about. That's
7 a serious omission, given what we have already had in these proceedings.
8 The tribunal originally directed the defendant to identify witnesses by name,
9 with reference to paragraph numbers in the pleadings and explaining what
10 issues they would speak to.

11 Now we seem to be bypassing that. There's no reason why the defendant should
12 not be held to the same standard now as it was before. You have asked
13 Mr Aldred and in fairness to him, he has given a couple of answers. And the
14 answers are these: first of all, there is a point about public businesses on
15 private land and putting the contract out to tender. Now, on that, the tribunal
16 has already observed that that's a legal point. But there is actually a broader
17 point here. I will have to come to this in the amended rejoinder. This is
18 a surprise new element of the defendant's case. So we have never
19 understood this to be part of the defendant's case before. If the position was
20 that we had effectively been wrongly rejected as a tenderer, then we would be
21 in the TCC, making a claim under the public procurement laws. We don't
22 understand this case, it's never been explained, it's never been pleaded and it
23 can't constitute justification for evidence, either in principle, because it is
24 a legal point or on the basis of the pleadings(?).

25 So that's the answer to Mr Aldred's first suggestion. His second suggestion is that
26 his witness statements have comments on Mr Robinson's witness statement.

1 That's plainly not a good reason. Those comments should be put to
2 Mr Robinson in cross-examination. So that's the answer to that.

3 **THE CHAIR:** If I may just interrupt you. I think the point that Mr Aldred is making is
4 that because the defendant's witness statements were done without sight,
5 obviously, of Mr Robinson's statement, Mr Robinson now says some things
6 which actually prompt -- comments --

7 **MR ALDRED:** It was a loose expression, sorry, sir.

8 **THE CHAIR:** I was going to say not necessarily a particularly specific expression
9 but certainly the thrust of it is designed that if they have further evidence to
10 give on, for example, the 2017 arrangement which emerges because of what
11 Mr Robinson says, which may be -- just say, for example, I have no idea so
12 speculating -- but may be just, say, it was said -- Mr Robinson says at
13 such-and-such a meeting, he said X, Y and Z and actually, it's not true -- and
14 that obviously wasn't dealt with in the first round statements because they
15 didn't know what Mr Robinson was going to say, it seems to me right that they
16 should have the opportunity to make it plain that they disagree with that.
17 That's the territory we are talking about. In a way, I am not sure we are going
18 to know what we are dealing with until we see it, are we?

19 **MR CARALL-GREEN:** That may well be the case. But that is every case. There is
20 no case before any court in the jurisdiction where everything that the claimant
21 is going to say in their statement has already been prefigured in
22 correspondence and the pleadings, otherwise there'd be no need for the
23 statements, so everything --

24 **THE CHAIR:** Yes, but in a lot of cases, we would have reply evidence, wouldn't we?
25 We're trying to keep it pretty slim here. In most cases you would --

26 **MR CARALL-GREEN:** Exactly. So that then says are the points raised, do they just

1 apply the additional unbudgetted costs of putting in responsive witness
2 statements? And the answer to that is we have not had a single suggestion
3 about what the issue is which might require that responsive evidence. We
4 just don't know.

5 **THE CHAIR:** Well, that's their (inaudible) point. Keep moving through your -- yes.
6 Sorry, you said five points. That is number 1.

7 **MR CARALL-GREEN:** I will get faster. Number 2 is that the defendant's approach
8 to evidence has already been overgenerous. We have six witnesses to
9 cross-examine at trial. So it is just me. So we are already at the point where
10 we are strained almost to breaking point. And according to the defendants,
11 I'm supposed to cross-examine all six of them in a day. So, of course, we
12 don't object to the supplemental witness statement plugging an obvious gap in
13 the evidence. Of course. So if Ms Chowdhury requires instructions and says
14 "I need to know what your budget is for this", that is supplied in response.
15 Formally, there has to be a witness statement to back that up, fine, we
16 understand that but we are very concerned that what's going to happen is we
17 are going to be put to enormous effort at trial, and to spend a lot of time at trial
18 that doesn't need to be spent, resolving an issue (inaudible) of speed of this
19 size and value. That's my second submission.

20 The third submission we have already covered. So that's good news.

21 The fourth submission is that this way of doing things is completely normal. So the
22 defendant already has an opportunity to respond to a lot of the things that are
23 raised in Robinson 2, insofar as they fall within the expert evidence. So if
24 what we are talking about here is things that come down to counterfactual and
25 quantum, then responsive factual evidence is just the wrong -- (inaudible)
26 essentially, the core of my fifth submission as well which takes all of the

1 unfairness or ambush aspect out of this. Because all of the counterfactual
2 and quantum issues can be dealt with adequately by Dr Chowdhury. That's
3 the proper way to do it.

4 **THE CHAIR:** Was there a fifth or was that it?

5 **MR CARALL-GREEN:** Yes, that was the fifth one. The third one, I ended up not
6 dealing with the third one because of what we already said.

7 **THE CHAIR:** That's helpful, thank you very much.

8 Mr Aldred, anything else?

9 **MR ALDRED:** As you rightly said, sir, reply evidence is par for the course in many
10 cases. You know, the defendant will keep it tight. It's not going to be
11 discursive. It's just if there's a suggestion that something was said at the
12 meeting and the witness says something different was said at the meeting,
13 that's the type of material that we would hope to cover in the responsive
14 witness statements and we certainly need to deal with the counterfactual.
15 And I think I am with Mr -- it's just simply if we can do that by way of
16 instructions to Dr Chowdhury, then, you know, I am very happy with that.

17 **THE CHAIR:** Yes, good, thank you.

18
19 **RULING**

20 **THE CHAIR:** So this is a dispute about whether the defendant should be entitled to
21 file responsive evidence to the witness statement of Mr Robinson; the second
22 witness statement of Mr Robinson.

23 The claimant resists that on the basis that it is not clear what evidence and by whom
24 that evidence should be given. That it is already the case that the defendant
25 has six witnesses and has put in considerable factual evidence which has to
26 be dealt with by the claimant's team, and that there is the ability for the

1 defendant to respond through expert evidence.

2 In relation to the factual basis on which Dr Chowdhury is instructed to provide her
3 expert report for the defendant, it is obviously important that that is made clear
4 to her. That can be done by way of instruction. In the first instance, I direct it
5 should be done so, where any factual basis does not currently appear in the
6 witness evidence. If necessary, and if required by the claimant, that can be
7 supplemented by a formal witness statement.

8 To the extent that the defendant wishes, as advised, to provide further responsive
9 evidence in relation to items of disputed fact which arise out of Mr Robinson's
10 second statement, it should prepare draft statements. They should be
11 limited -- Mr Aldred referred to keeping them tight -- so they should only deal
12 with matters of real significance to the case and they should be, strictly,
13 evidence within the knowledge of the deponent and not in any way
14 speculative or argumentative.

15 Those witness statements will then be subject to discussion at the pre-trial review
16 which is scheduled for 6 October. Any objection from the claimant as to their
17 admissibility or propriety can be considered then and the tribunal will rule at
18 that stage as to whether or not they are to be deployed at trial.

19 What dates, Mr Aldred, were you suggesting for this? I think somewhere I saw
20 11 August; did I see that?

21 **MR ALDRED:** I did say 11 August, sir. But that was in anticipation that one or two
22 other steps might have been pushed along.

23 I should probably take instructions on it. But can we --

24 **THE CHAIR:** Why don't you do that. We can come back on it. I am not sure it is
25 terribly time sensitive, unless Mr Carrall-Green tells me otherwise. As long as
26 you have had plenty of time to consider them before the PTR,

1 Mr Carrall-Green.

2 **MR CARALL-GREEN:** That's one point of clarification I would ask for, is if the
3 defendant is going to be able to see this, it is only fair for the claimant to be at
4 liberty to do this as well. I am not saying that is necessarily the intention but
5 I don't want the claimant to be treated differently from the defendant insofar as
6 it wishes to put in responsive evidence.

7 **THE CHAIR:** I am sure that makes sense. Mr Aldred, you would have no objection
8 to that? So in that case, the order should apply to both, if so advised. And
9 the same regime would apply, Mr Carrall-Green, to your responsive witness
10 statements as well, if any.

11 What about the dates? Shall we come back to it at the end, if you need to take
12 instructions on it?

13 **MR ALDRED:** I am just sending out a note, sir. Thank you, sir.

14 **THE CHAIR:** I am just conscious of the time. So we have two options, on the face
15 of it, which is subject to agreement from the transcription writer. We could
16 keep going for a little while if we think we are going to finish this last -- really
17 the pleading point, isn't it, that we have to deal with and some costs argument,
18 no doubt. I am reluctant to do that unless we think we are going to finish
19 within 30 minutes, if the transcriber is willing to accommodate that.

20 And maybe I should check whether the transcriber is willing to accommodate that
21 because it otherwise leaves us with the other option. Is that something you'd
22 be happy to do, transcriber? Thank you, we really appreciate that.

23 The other option is we could break and come back at 2 o'clock, if you'd prefer to do
24 that. It depends a bit on how long you think we are going to be. I am hopeful
25 we can go through the pleadings issues fairly quickly.

26 **MR ALDRED:** I think we can deal with it quickly, sir.

1 **THE CHAIR:** Have you bought into that, 30 minutes?

2 **MR CARALL-GREEN:** I am less enthusiastic but I am very willing to give it a go.

3 **THE CHAIR:** It is really your application, isn't it?

4 **MR CARALL-GREEN:** It is, sir. On the amended rejoinder, it is my learned friend's

5 application.

6 **THE CHAIR:** Of course.

7 **MR CARALL-GREEN:** But it is --

8 **THE CHAIR:** As to the costs, yes, of course.

9 **MR CARALL-GREEN:** It is his amended pleading.

10 **THE CHAIR:** I think we will give it a go. If we can try to keep it focused and get it

11 done in 30 minutes. Let's move straight into that, then. Again, I think I would

12 say that both of you, can we please focus on what really matters here. There

13 seems to be a couple of points that are reasonably technical and I would

14 prefer not to spend time on them, if it is possible.

15 **MR CARALL-GREEN:** Sir, if it assists, I can probably zero in on the points that

16 matter.

17 **THE CHAIR:** That would be really helpful, if you wouldn't mind.

18 **MR CARALL-GREEN:** Yes, sir. The critical point here is what I have already

19 alluded to, which is applicable public procurement rules, state aid and

20 subsidiary control regimes. The new paragraph 3E.

21 **THE CHAIR:** Yes, fine.

22 **MR CARALL-GREEN:** I am sorry, I can stop there, or I can say something about it,

23 depending on how you want to handle this.

24 **THE CHAIR:** I will let Mr Aldred open up. Are you saying that you are not so

25 bothered about any of the rest or are there some other ones you want to

26 spend some time on? It is really where you want to spend the time.

1 **MR CARALL-GREEN:** If I had to drop the list to one, it would be just 3E. If I was
2 able to bring in two more, then it would be the amendment to
3 paragraph 3.(e), which is about the estoppel and it would be the new
4 paragraph at 3(g)(2), which is about various obligations.

5 **THE CHAIR:** 3(g)(2) Yes. So we have 3E, 3.(e) and 3(g)(2). Is that right? If I may
6 say so, I think that is a helpful shorthand because I was not convinced by any
7 of the other points you were making. So that is just quite a helpful steer.

8 **MR ALDRED:** So we have 3E and the other?

9 **THE CHAIR:** 3(g)(2)

10 **MR ALDRED:** 3(g)(2). The thing with regard to the 3(g)(1) and 3(g)(2), is they have
11 just moved down the page. Because they were there as 3C and 3D or am
12 I missing something?

13 **THE CHAIR:** I thought that was the case too. I see my note on it. Can you remind
14 me where the rejoinder is in the CMC bundle, the amended rejoinder? I did
15 have it and I seem to have lost it.

16 **MR CARALL-GREEN:** It is there, sir.

17 **MR ALDRED:** It is in the applications --

18 **MR CARALL-GREEN:** It is called annex C. I think that's why it may not be
19 immediately easy to spot.

20 **THE CHAIR:** Do you have the page number? 248, that's the old one.

21 **MR ALDRED:** I will have it, just bear with me. It is 456.

22 **THE CHAIR:** That's helpful, thank you.

23 Mr Carrall-Green, I think that's right, isn't it? When you look at 3(g)(1) and (2), they
24 are just replicating what was in 3C and D?

25 **MR CARALL-GREEN:** That's absolutely right. It may be if the tribunal takes the
26 view that it doesn't have to subject these amendments to the normal scrutiny

1 because they are effectively just moving from one place to the other, then
2 I suggest we move on. My submissions only are engaged -- yes.

3 **THE CHAIR:** I think that is the position. I think the reordering of them in the same
4 paragraph strikes me as being not a basis for you to complain about a new
5 pleading, if I can put it that way.

6 **MR CARALL-GREEN:** In that case I will suggest we just move on to my number 1
7 suggestion.

8 **THE CHAIR:** Yes.

9 **MR CARALL-GREEN:** Paragraph 3E.

10 **THE CHAIR:** Exactly, yes.

11 Mr Aldred, I think the point that's being made -- or two points that are being made
12 about this, as I understand it, which I must say appear to be reasonably valid,
13 at least at face value, one is that this seems to be a new point, unless you are
14 telling me it has come in quite late and, really, is this the right place to put it,
15 I suppose is the point. The second is that it is not entirely clear to me -- I think
16 it is clearer now, you explained it earlier on but not entirely clear, obviously, to
17 the claimant so far, what you are actually saying here, and whether this is a
18 sufficiently clear pleading. Is that a helpful place to start with those two
19 points?

20 **MR ALDRED:** Well, I think what we are doing is in the amended reply, there was
21 concern that one of our RFIs was unclear. I don't want to have to pull it out,
22 sir, I am sorry.

23 **THE CHAIR:** I am not sure we have those in the bundle.

24 **MR ALDRED:** Sir, we have it. It hangs on the RFIs. But there is also -- you know,
25 it's not a new point. I think it's in our very first response to the letter before
26 action.

1 **THE CHAIR:** But is it in your defence? I think that's the point being made. It's not in
2 your defence, is it? I may be wrong about that, but I am not sure it is.

3 **MR ALDRED:** I am just seeking to find --

4 **THE CHAIR:** Actually, I think I have a vague recollection it may be obscurely
5 referred to in your defence.

6 **MR ALDRED:** It always has been in the forefront of my mind, sir. I rather hope that
7 I have not lost it.

8 **THE CHAIR:** No, I think I may be being unfair. It may well be that you had some
9 reference to it which is now much clearer. I think that's part of the objection.

10 **MR ALDRED:** What we wanted to do was make it abundantly clear what we were
11 talking about. I think there was that complaint that it wasn't clear. So it must
12 be in the defence, because there was a request for information in respect of it,
13 and then we've given a response to that, and then they asked us for more
14 information about the response -- or they challenged the response, saying it's
15 still unclear, and then we've pleaded this.

16 **THE CHAIR:** So you can probably trace that back, and then maybe
17 Mr Carrall-Green will want to do that.

18 So the second point as to what it actually means, you did say something about this
19 at the beginning of the hearing and, indeed, it came up in relation to
20 responsive witness statements as well. I think what you are saying is that
21 there may be, as a result of the circumstances, a legal obligation to engage
22 either procurement or subsidy rules of some sort, so that actually, the council
23 would not have had a free hand to allow the installation on the sort of number
24 of planters that's being suggested. That's the point, is it?

25 **MR ALDRED:** Absolutely.

26 **THE CHAIR:** That's what that is saying. Obviously, we are not going to get into the

1 merits of it now.

2 **MR CARALL-GREEN:** Well, we may or may not need to get into the merits. Part of
3 the test on amendment is real prospect of success.

4 **THE CHAIR:** Just to be clear, I have not quite finished, other than to see whether
5 there is actually a reasonable argument there. I completely understand the
6 point. Are you suggesting that -- you are going to argue that it is not passing
7 that test and that we need to --

8 Sorry, Mr Aldred, it was a question for Mr Carrall-Green.

9 **MR ALDRED:** Sorry.

10 **MR CARALL-GREEN:** Yes, sir, I think I will put it like this: on the basis of the
11 pleading and, indeed, all of the evidence as it is currently framed, there's no
12 suggestion -- there is indeed no pleading that there was ever a contract
13 between the claimant and the defendant for the supply of planters or an
14 attempt to enter into a contract. I do say that this doesn't have a real prospect
15 of success because it is inconsistent with the entire structure of the
16 defendant's defence. It's a completely new way of analysing the entire
17 situation, one which relies on the idea that the claimant approached the
18 defendant to supply services, but this is entirely absent from both our
19 pleadings, their pleadings, our witness evidence and their witness evidence.

20 So unless the defendant proposes that there now be a complete re-pleading so that
21 they are allowed to introduce a new case on public procurement, we are then
22 allowed to plead back, they have to put in witness evidence on it, we have to
23 put in witness evidence on it, then, yes, there is no pleaded or evidential basis
24 on which this can go to trial.

25 Now one can look at that from a case management perspective and say it's not really
26 a real prospect of success argument because that's more of a legal question,

1 but whichever way you cut it, this doesn't work.

2 **THE CHAIR:** I think as I understood the way Mr Aldred put it earlier, I don't think
3 he's putting it on a contractual basis. I do think it probably is a somewhat
4 novel argument -- but I am not going to say completely novel -- I think the
5 point is being made that because of the subject matter, the use of public land
6 for private purposes, it somehow falls within the regulation and indeed
7 possibly other provisions like the Subsidy Control Act.

8 We haven't got those pieces of legislation in front of us, and indeed, I would have
9 thought it was quite a complex question. So I agree we are not going to get
10 into the question as to whether or not, novel or not, Mr Aldred's argument is
11 sustainable, at least to the threshold test.

12 **MR CARALL-GREEN:** Sir --

13 **THE CHAIR:** I've asked him to confirm that. But I don't think we are in the territory
14 you are talking about of the resetting the sort of basis on which the claimant
15 dealt with the defendant. Is that correct, Mr Aldred?

16 **MR ALDRED:** No, I can confirm that, sir.

17 **THE CHAIR:** Yes.

18 **MR CARALL-GREEN:** That's good because what that does, that's clarificatory
19 because it means that the public procurement aspect of this pleading has now
20 been dropped. Now we are talking about state aid and subsidies. So that's
21 helpful. So the three prongs, one is now gone, let's settle that. So that means
22 that --

23 **THE CHAIR:** When you say "settled it", I am not sure Mr Aldred will agree to that.
24 I am not sure whether it is (inaudible) to describe that if it is contested.

25 **MR ALDRED:** Mr Bowsher, of course, knows a thing or two about public
26 procurement, certainly a lot more than I do. But the principle is, as soon as

1 you have certain levels of private activity on public land which is being
2 facilitated by a public body such as the council, then it will have requirements,
3 some of which are based on thresholds which if they are met, then it has to go
4 through a tendering exercise, potentially, and so it could easily engage the
5 public procurement rules, if and to the extent that it -- or state aid or subsidy
6 control. I don't want to be drawn into it further without Mr Bowsher.

7 But this was dealt with at the very outset in our response to the letter before action.

8 **THE CHAIR:** Yes. Mr Carrall-Green, I think just to be absolutely clear, we are not
9 going to resolve today what the procurement regulations say about this, or
10 indeed, what the subsidy control and state aid regime might have been. We
11 are just not in a position to do that.

12 **MR CARALL-GREEN:** Of course. I don't suggest that we would. But the point I do
13 make is that as is well illustrated by this discussion, this is clearly quite
14 a complex and interesting area. I don't for one minute begrudge Mr Aldred for
15 making interesting and complicated legal arguments in which I am just as
16 interested as the next man. But the point is, how are we going to take this
17 through to trial? The answer is this is a defence and it needs to be properly
18 particularised and set out in a defence. They need to specify what are the
19 state aid rules on which they rely, what are the public procurement rules on
20 which they rely, what are the subsidy acts on which they rely, what are the
21 thresholds to which they refer, what is the aid, what has been procured, what
22 subsidy has been provided --

23 **THE CHAIR:** You can ask him for that, of course, can't you? You can ask Mr Aldred
24 for that information. I don't think you have done it. Now that it is clear, isn't
25 the correct way forward for you to make your request for further information if
26 you wish to? It seems to me that it is -- certainly my provisional view is it is

1 a question of law. There may be some facts associated with it, Mr Aldred
2 seems to think it might be, but broadly speaking, there is no reason why you
3 shouldn't ask for further clarification and get it.

4 **MR CARALL-GREEN:** If I may --

5 **THE CHAIR:** Yes.

6 **MR CARALL-GREEN:** -- the chain of events doesn't stop there. But the answer to
7 that immediate question, sir, is no, it's not for me to make a request for
8 information. He has to set out a properly particularised pleading, so if he fails
9 to particularise, it's not for me to help him fix his pleading by making RFIs at
10 my expense, it is for him to do a proper job in the first place.

11 **THE CHAIR:** You are completely right, Mr Carrall-Green. That is a technical point,
12 isn't it? We are not in the business of technical points in this tribunal and
13 particularly not in this case. I just want to get to the quickest point possible.
14 Maybe Mr Aldred is going to be able to volunteer some more particulars, but
15 I would just like to get to the point where I completely understand your need to
16 understand this, and let's try and get to that point. But I'm more interested in
17 the technical sequence of this.

18 Mr Aldred, are you willing to provide some particulars about that?

19 **MR ALDRED:** Of course, we weren't in a position to know what might be engaged
20 until we knew what the proposed counterfactual was.

21 **THE CHAIR:** I think it's not a question about what happened until now, the question
22 is to the extent that it is now said that you could do better than this --

23 **MR ALDRED:** We can definitely do better now. My proposal would be to make sure
24 that that is put to, now, Ms Chowdhury, with the assistance of the -- with the
25 defendant's procurement department. We will deal with that. At the same
26 time we send it to Ms Chowdhury, I can send it to the claimants.

1 **THE CHAIR:** Yes. Just to put down a marker, I am not entirely sure why it is an
2 expert point. I still maintain my provisional view that it is a legal point. But
3 you are free to disagree with me and do it a different way. Let's not argue
4 about it. I just put down the marker for you that --

5 **MR ALDRED:** To explain, just to say that if it means that the counterfactual would
6 be this figure and not that, or if it was that, then it opens up these --

7 **THE CHAIR:** Yes, I understand. That's the premise of it.

8 **MR ALDRED:** Just so you understand that.

9 **THE CHAIR:** But, actually, what Mr Carrall-Green wants is some more specificity
10 about what you are saying the legal position is.

11 **MR ALDRED:** We can do both. We will do both at the same time because that is
12 appropriate.

13 **THE CHAIR:** So the way forward, I think, is for me not to give you permission on
14 this yet, because you are going to re-draft it. But on the assumption that if
15 you provide an expanded and particularised pleading, then you will get
16 permission and we will deal with that in the papers. If the claimants have any
17 objection to that, then we can deal with that in writing.

18 **MR CARALL-GREEN:** Sir, could we potentially agree in advance that if this is done
19 satisfactorily, that we can dispense with any extra pleading from us?
20 Because, effectively, we will want to respond to these points, but I don't want
21 to get into a fifth pleading. Because I don't suggest that that is what anybody
22 wants.

23 **MR ALDRED:** I think, to help avoid that, I'd like to submit that you allow in this
24 pleading and we will just simply provide voluntary particulars by a date.

25 **THE CHAIR:** No, I think Mr Carrall-Green is right. I think if you are applying for
26 permission, you should set it out properly. I think you have accepted that this

1 can be sent, and so I think you should do that. I am not sure the answer to
2 Mr Carrall-Green's point is if you want to know what he says about this point,
3 which one could argue could have been set out more clearly in the amended
4 defence, then obviously, he would deal with that in his reply but I am not in
5 a hurry to encourage further pleadings.

6 Maybe the answer, Mr Carrall-Green, is that you just provide us with a short note
7 which will have the status of a pleading but just deals with anything you want
8 to say about this as a matter of pleading.

9 **MR CARALL-GREEN:** Yes, I suppose we should just be clear one way or the other.

10 What I don't want to do is get in a situation where I am shut out from saying
11 things at trial because I have not put them up in advance.

12 **THE CHAIR:** Absolutely. So the way we will deal with this then is at the moment,
13 I am not going to give you permission, Mr Aldred, but I think you should
14 assume you are going to get it, provided you provide some decent particulars
15 on this. When that is done, the claimant will have an opportunity to comment
16 and make any further objection if they so wish, hopefully not. At that stage we
17 can give permission for the amendment.

18 Then consequent on that, the claimant will have the opportunity to provide a short
19 responsive document to it, just making it plain if there are any further pleading
20 points you wish to erase. You can call it whatever you like, Mr Carrall-Green,
21 a supplemental reply, however you want to describe it, but the main thing is
22 just to keep it tight and cost effective.

23 Just on dates, Mr Aldred, when could you provide those further particulars?

24 **MR ALDRED:** I think it should definitely be available for the PTR and I need,
25 obviously, to get instructions from the relevant people within the procurement
26 departments and the like. But that's already in hand because we wanted that

1 material available for Dr Chowdhury. So should we aim to have -- well, you
2 will want to have it in enough time to give some thought as to the
3 supplementary reply. If we aim for two weeks before the PTR?

4 **THE CHAIR:** Can you make it a little bit -- I think if we make it three weeks before.

5 **MR ALDRED:** Okay.

6 **THE CHAIR:** Then, Mr Carrall-Green, if you have any objection, you need to let us
7 know within a week of that, whatever those dates are. Obviously, if you have
8 no objection, it would be helpful to have your responsive document within a
9 sensible period before the PTR. I suppose at least a week before. If there is
10 a dispute about it, then we may need to resolve it at the PTR.

11 **MR CARALL-GREEN:** Yes, sir. I should say the other thing I would ask to be held
12 over is that if any matters are raised in this amended order, in this expanded
13 pleading, that require factual input -- I don't wish the tribunal to make that
14 ruling on this now, but I just want to hold the point open that if factual matters
15 are raised, then our witness may have to deal with them in a supplementary
16 witness statement. Because of course --

17 **THE CHAIR:** Yes.

18 **MR CARALL-GREEN:** -- none of the witnesses deal with any factual material
19 having to do with this at the moment.

20 **THE CHAIR:** Yes, absolutely, it's open to either party really. Mr Aldred has the
21 advantage, in the sense that he knows what he's going to say and has the
22 opportunity to put some evidence in if he thinks that is relevant and
23 permissible. I accept, Mr Carrall-Green, you don't have that advantage, so
24 clearly, you will have to have some responsive opportunity if that becomes
25 necessary. I think that's clear, Mr Aldred, and I don't think there's any
26 argument about that.

1 **MR ALDRED:** I am content with that, thanks sir.

2 **THE CHAIR:** So that's clear. So can we just deal with 3.(e). This is the point about
3 estoppel. I think in one respect, I think you are making quite a minor
4 amendment to this paragraph, Mr Aldred. That's just it has been there for
5 a while. On the other hand, I think it's being said that it's -- I'll perhaps
6 describe it again as a novel point because it's said by Mr Carrall-Green that
7 the estoppel claim is actually part and parcel -- effectively a defence to what
8 has been made so it's the sort of shield and not a sword point. That is, again,
9 clearly not a point that I think we are going to deal with --

10 **MR ALDRED:** I rather think the real meat in the sandwich will be -- even trying to
11 make good an estoppel argument is a real challenge. So that's going to be
12 the meat in the sandwich. The question then is -- and of course, estoppels
13 can be sort of a blunt sword and a sharp shield. I think that's the expression.
14 It is usually raised by way of reply. I accept that. Indeed, when I suggested
15 otherwise, I was probably going too far.

16 But, you know, it will still be the case that we will probably be safer trying to think in
17 terms of what are those facts. Do those facts -- whatever they are -- that are
18 found, how does that impact my analysis under competition law and that's
19 ultimately the question. If you decide that it is outwith the scope of
20 section 47A, then it may well just be -- deal with factually and then the
21 question arises as to whether or not, as a matter of law, you know -- whereas
22 on the basis of representation or alleged agreement or common
23 understanding, we can't rely on something. But that, I think, should be formed
24 in your mind, as a tribunal who is custodian of section 47A, as -- I do not think
25 it does any harm to have the pleading there.

26 **THE CHAIR:** I think I have to say, I am not sure I completely follow the argument. It

1 seems to me the gateway into the tribunal is a Chapter 2 claim which clearly
2 falls under section 47A. And the points that are being raised, there are any
3 number of points that might be raised as to the nature of abuse and whether
4 or not it will apply, which seems to me would have a similar character, while
5 not necessarily being --

6 **MR ALDRED:** It's --

7 **THE CHAIR:** (Inaudible) point. So I am struggling a bit with it. But I don't want to
8 persuade you from what is no doubt an interesting point.

9 Mr Carrall-Green, the problem I think I have with this as an objection is that it really
10 isn't a new point. They have just changed the introductory wording of it. Are
11 you really persisting in the objection?

12 **MR CARALL-GREEN:** I am with you with that, sir. And I think the same point
13 I made a few minutes ago applies, which is that if the tribunal takes the view
14 that -- if the amendment is just housekeeping, it doesn't need to apply the
15 normal -- then I suggest we don't get into it.

16 **THE CHAIR:** That's helpful, thank you very much.

17 So I think, as I understand it, that is the extent of discussion required about the
18 rejoinder. So the amendments have permission, save for that point in 3E,
19 which is for further work, as we have discussed.

20 The costs point here which I think is actually a point going to costs in the amended
21 defence -- this is you, Mr Carrall-Green, isn't it?

22 **MR CARALL-GREEN:** Yes, sir.

23 **THE CHAIR:** It seems to me this is quite a messy point, because on the one hand, it
24 is quite clear that the defendant went beyond just the limitation point, to the
25 extent that is relevant anyway. But it is also quite clear that in your amended
26 reply, you added a lot of material that was not necessarily responsive to the

1 amended defence. So the question becomes, how does one deal with that?

2 I am not sure that that is a very easy thing to deal with on a summary basis.

3 **MR CARALL-GREEN:** It's not very easy, sir, and the tribunal is entitled, if it wishes
4 to, to take a broad brush view. But if the tribunal considers that it's not
5 appropriate and it is a matter for detailed assessment, then that is also an
6 order that can be made.

7 **THE CHAIR:** Yes. It did seem to me that it would be possible to have an argument
8 about how much of the reply -- well, there are two questions, aren't there?
9 One is you could seek to persuade me that it doesn't matter how much of the
10 reply goes beyond responsive to the defence because you would say it is in
11 reply to the RFI, you could say that's good enough. But I am not sure -- I am
12 not aware of any authority on that. You may have some but I don't think it's in
13 the bundle.

14 If that's not the case, then, obviously, I would say on the face of it, you probably
15 ought to be entitled to the responsive material but not necessarily to the
16 non-responsive because of the exercise of splitting that up. I would have
17 thought that is more appropriately done at trial or after trial. Certainly, if one
18 looks at Taylor, that's exactly what happened at Taylor. It was sorted out after
19 trial.

20 **MR CARALL-GREEN:** Yes.

21 **THE CHAIR:** So my sort of provisional view on this has really been I would rather
22 park this -- subject to anything Mr Aldred says, it seems to me the usual
23 wording should clearly apply to that bit of your reply which is properly
24 consequential on any part of him in defence, but I would be reluctant to take it
25 further than that today, and those would, of course, be costs in any event, as
26 things stood.

1 Mr Aldred?

2 **THE CHAIR:** Go, on Mr Carrall-Green, you finish.

3 **MR CARALL-GREEN:** Sir, I think what's being suggested is that there be -- please
4 tell me if I have misunderstood, sir -- that the assessment be kicked off to
5 a later stage, a more appropriate stage after trial. That all of the costs be
6 made but with an open question about whether or not -- what is properly
7 responsive, ie whether the RFI material is within the responsive bucket or
8 not?

9 **THE CHAIR:** That's right. If it isn't, how much of your reply is actually properly
10 responsive, yes.

11 **MR CARALL-GREEN:** Yes.

12 **THE CHAIR:** Mr Aldred, what's your view on that?

13 **MR ALDRED:** I don't have -- you know, the usual order for costs of and occasioned
14 by an amendment falls against the party who has made the amendment. But
15 as I pointed out in the skeleton, the amended reply goes further than it did, in
16 terms of responsiveness. So that's one point.

17 But of course, they have amended the reply in ways that aren't responsive, which
18 means I am entitled to the costs of and occasioned to the amended reply, to
19 the extent to which it wasn't responsive.

20 **THE CHAIR:** Clearly, I think the real point about Mr Carrall-Green's application is
21 that -- well, firstly, he's made an application -- I don't think you have -- and
22 secondly, he wanted it summarily assessed and I am declining to do that. So
23 clearly, your arguments as to what you are entitled to, as a consequence of
24 what's happened with your reply, remain open to you, it seems to me, and
25 I am not going to make an order about that because that should be dealt with
26 at the appropriate stage. I think the question is whether you have any

1 objection to the treatment as I think neatly summarised by Mr Carrall-Green,
2 which I was encouraging towards, which is we don't actually deal with this
3 point now, other than it is clear that to the extent that the amended apply is
4 responsive to the amended defence, he should have his cost. But that
5 question needs to be sorted out at some later stage. He's made an
6 application to that effect and I am declining the summary that --

7 **MR ALDRED:** Fine.

8 **THE CHAIR:** Okay, thank you. So that is that point.

9 The last point, of course, is costs. I don't know whether either of you wishes to make
10 any applications or observations in relation to the costs of today? Just setting
11 the scene on that a little bit, it seems to me that quite a lot of has happened
12 along the way which might justify both of you seeking costs from the other,
13 and it is not a very attractive option to think about how one disentangles all
14 that and gets to a sensible place. So my immediate reaction is that the costs
15 of the CMC should most properly be costs in the case, but I am prepared to
16 hear your submissions to the contrary on that if you wish to pursue it.

17 Obviously I am not going to making any summary awards because I don't have any
18 cost schedules, but if you wanted to deal with it in writing then you would be
19 welcome to do that as well. On a summary basis I could consider and deal
20 with any schedules. But that's where I am at the moment.

21 Mr Aldred, they are mostly your applications. I am not sure what you are going to
22 say about the success ratio of them, but do you want to say anything?

23 **MR ALDRED:** Maybe I need to get an instruction on that.

24 **THE CHAIR:** We will go to Mr Carrall-Green first, while you are doing that.

25 Mr Carrall-Green, what's your position?

26 **MR CARALL-GREEN:** Sir, I think we would be -- I say this subject to a caveat -- but

1 we would be content to go with costs in the case, save that if Mr Aldred does
2 press for his costs then I reserve the right to say something in response to
3 that.

4 **THE CHAIR:** Yes. So you will avoid the argument as long as the argument can be
5 avoided, yes.

6 **MR CARALL-GREEN:** Precisely.

7 **THE CHAIR:** Mr Aldred?

8 **MR ALDRED:** I am still just waiting for those instructions, but I have to say that
9 seems a sensible approach to me.

10 **THE CHAIR:** The other thing we could do is if -- really we are going to have to stop
11 now because I think it is unfair to continue -- so we can leave it on the basis
12 that if you get instructions to the contrary, Mr Aldred, then clearly things move
13 on and will have to be dealt with in writing.

14 I do wonder whether that would be proportionate, because obviously that's going to
15 involve a lot of time and effort. I am pretty sure it will be clear to you that
16 identifying winners and losers is not entirely straightforward for much of this,
17 because of what has happened in relation to later disclosure, because of the
18 number of requests that weren't permitted and so on, and the reasons for that.
19 So it is going to be quite messy I would have thought, so I leave that with you
20 if you want to pursue it.

21 **MR ALDRED:** Thank you, sir. I am happy to leave it there.

22 **THE CHAIR:** Good.

23 Just a couple of tidying up points. We did talk about the experts meeting and
24 discussing. I do propose to make an order that the experts should consider
25 whether a discussion about, firstly, the treatment of revenue and costs in the
26 counterfactual, and secondly, the information that would be helpful to

1 progress that issue would be helpful, and in those circumstances to meet --
2 and I would suggest they do so by no later than 11 August -- on the basis if
3 that was something either of them thought was helpful. Not both of them, if
4 either of them thought it was helpful, they should do that. That will give
5 Dr Chowdhury plenty of time in relation to any information that needed to be
6 provided. That's my suggested order. Is there any reaction to that?
7 Mr Aldred?

8 **MR ALDRED:** Sir, the experts should consider discussion as you described,
9 whether it would be helpful and they should meet by 11 August?

10 **THE CHAIR:** If either of them concludes it would be helpful, yes.

11 **MR ALDRED:** meet or MS Teams?

12 **THE CHAIR:** Telephone or video would be fine, yes.

13 **MR ALDRED:** Yes. I know that Dr Chowdhury was away when we last tried to --
14 well, she was just heading to the airport. I don't know when she's back, but
15 I suspect I would have to check that date, sir.

16 **THE CHAIR:** Of course. What we could do is we could put it as a provisional date.
17 If it doesn't work for the experts -- I was just keen that there should be some
18 opportunity for engagement for them and that should happen in advance of
19 Dr Chowdhury's report being due, if that is possible. We can leave the date
20 with you, but in terms of the intent you are signed up to that?

21 **MR ALDRED:** The intent, yes. I will encourage it.

22 **THE CHAIR:** Mr Carrall-Green, what is your view?

23 **MR CARALL-GREEN:** Yes, sir, we are grateful.

24 **THE CHAIR:** So if I make that order, and I will leave it as 11 August but subject to
25 any dates you wish to propose to vary to because of the expert availability.

26 **MR ALDRED:** Thank you.

1 **THE CHAIR:** I think in terms of next steps: obviously Dr Chowdhury's report in the
2 beginning of September; I think the experts' joint statements due by 27
3 September; then we have the PTR on 6 October. I think that is it in terms of
4 the items on the "to do" list. Is that right, nothing else that I am missing?

5 **MR ALDRED:** No. We have already dealt with the boxes and the different pieces of
6 paper coming across.

7 **THE CHAIR:** Yes. And the claimants have reserved their position as to further
8 disclosure application as well. I have that registered.

9 Anything else that we should be dealing with, Mr Carrall-Green? Anything else you
10 want to address?

11 **MR CARALL-GREEN:** No, sir. We can always write to the tribunal if anything
12 comes up.

13 **THE CHAIR:** Good, thank you.

14 Mr Aldred, anything else?

15 **MR ALDRED:** No.

16 **THE CHAIR:** I just want to reinforce the point I made a bit earlier about
17 proportionality. I have banged this drum quite hard so I know I don't really
18 need to say very much, but obviously my message that the parties should be
19 focusing on their best points, both at the interlocutory and at the trial stage,
20 seems to me to be critical if this case is going to be run proportionately, and
21 that is not my perception of the way it is run at the moment.

22 If I feel that it's necessary, I may well direct that the parties need to meet and discuss
23 how they are going to run the case. I would like to see a change in approach
24 if that's something the parties can manage. If they can't, then we are going to
25 have to talk about how it is going to be run, because we really can't go into
26 a five-day trial with this sort of approach that has every stone turned and

1 every point taken and fought about, particularly in correspondence. So it is
2 really about taking a pragmatic approach, focusing on the issues that matter
3 and making sure the trial is focussed on those issues.

4 If the tribunal can help, we are very willing to do so. I am very happy to have these
5 sort of CMCs, or even on a more informal basis if that is helpful. I appreciate
6 that still costs quite a lot of money and also may be an encouragement for
7 people to create disputes. So I am a little bit nervous about that, but I would
8 hate to think that if we could resolve things quickly and we didn't that cost
9 and time was spent. So do bear that in mind if you feel that we can assist, but
10 hopefully that message about proportionality and focus is, I am sure, well
11 understood by all the parties.

12 Just to say thank you to everybody for all the preparation for the CMC. If we don't
13 see you before, we will see you on 6 October.

14 **MR ALDRED:** Thank you, sir.

15 **THE CHAIR:** Thank you very much.

16 **(1.40 pm)**

17 **(The hearing concluded)**

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