

1 IN THE HIGH COURT OF JUSTICE No. 8690 of 2011
2 CHANCERY DIVISION
3 COMPANIES COURT
4 IN THE MATTER OF COROIN LIMITED
5 AND IN THE MATTER OF THE COMPANIES ACT 2006

6 Royal Courts of Justice
7 The Rolls Building
8 7 Rolls Building
9 Fetter Lane
10 London EC4A 1NL
11 Thursday, 26th April 2012

12 Before:
13 MR. JUSTICE DAVID RICHARDS

14 BETWEEN:

15 PATRICK MCKILLEN
16 Petitioner

17 - and -

- 18 (1) MISLAND (CYPRUS) INVESTMENTS LIMITED
(A company registered in Cyprus)
 - 19 (2) DEREK QUINLAN
 - 20 (3) ELLERMAN CORPORATION LIMITED
(a company registered in Jersey)
 - 21 (4) B OVERSEAS LIMITED
(a company registered in the British Virgin Islands)
 - 22 (5) RICHARD FABER
 - 23 (6) MICHAEL SEAL
 - 24 (7) RIGEL MOWATT
 - 25 (8) COROIN LIMITED
- Respondents

AND

IN THE HIGH COURT OF JUSTICE Claim No. HC 11 C03437
CHANCERY DIVISION

BETWEEN

PATRICK GERARD MCKILLEN
Claimant

- and -

- (1) SIR DAVID ROWAT BARCLAY
- (2) SIR FREDERICK HUGH BARCLAY

1 MR. MACLEAN: My Lord, there are a number of issues which
2 obviously arise out of your Lordship's judgment this morning.
3 Obviously there is a serious issue in relation to the costs of
4 this whole exercise, which we would wish to raise with you
5 today. Your Lordship has held that in relation to the attempt
6 to exclude this material from the lay clients, as a matter of
7 law it was quite unsustainable and as a matter of fact there
8 was no conceivable basis for it. That sort of hopeless
9 misguided application in ordinary civil litigation ought to be
10 visited with an order for indemnity costs, all the more so in
11 litigation of this nature. We will be inviting your Lordship
12 to make an order for indemnity costs against Mr. McKillen on
13 that issue.

14 Your Lordship has similarly dismissed the application
15 for this matter to be heard in private in relation to
16 Mr. McKillen's cross-examination, again on a basis which
17 indicates that it was, in our submission, quite unsustainable.
18 In those circumstances, we will be asking your Lordship to
19 make an order for indemnity costs against Mr. McKillen in
20 relation to that.

21 We have not had the opportunity to prepare a detailed
22 bill of costs in relation to these matters. The indications
23 are from my solicitors, and I can hand your Lordship up
24 a letter in due course, if your Lordship wishes to see it,
25 which I think has gone to Herbert Smith, that we would

- 1 (3) MISLAND (CYPRUS) INVESTMENTS LIMITED
 - 2 (4) ELLERMAN CORPORATION LIMITED
 - 3 (5) B OVERSEAS LIMITED
 - 4 (6) MAYBOURNE FINANCE LIMITED
 - 5 (7) THE TRUSTEES OF THE SIR DAVID AND SIR FREDERICK BARCLAY
FAMILY SETTLEMENTS
 - 6 (8) RICHARD FABER
 - 7 (9) MICHAEL SEAL
 - 8 (10) RIGEL MOWATT
 - 9 (11) NATIONAL ASSET LOAN MANAGEMENT LIMITED
- Defendants

10 (Computer-aided transcript of the Stenograph Notes of
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15 MR. PHILIP MARSHALL QC, MR. RICHARD HILL QC, MR. GREGORY
16 DENTON-COX and MISS RUTH DEN BESTEN (instructed by Messrs.
17 Herbert Smith LLP) appeared for the Petitioner/Claimant.

18 MR. STEPHEN AULD QC, MR. MICHAEL FEALY and MR. MICHAEL d'ARCY
19 (instructed by Messrs. Quinn Emanuel Urquhart & Sullivan LLP)
20 appeared for Derek Quinlan.

21 MR. KENNETH MACLEAN QC, MR. SA'AD HOSSAIN and MISS EMMA JONES
22 (instructed by Messrs. Weil, Gotshal & Manges) appeared for
23 Misland (Cyprus) Investments Limited, Ellerman Corporation
24 Limited, B. Overseas Limited and Maybourne Finance Limited.

25 MR. JOE SMOUHA QC and MR. EDWARD DAVIES (instructed by Messrs.
Ashurst LLP) appeared for Richard Faber, Michael Seal and
Rigel Mowatt.

LORD GRABINER QC and MR. EDMUND NOURSE (instructed by Messrs.
Weil, Gotshal & Manges) appeared for Sir David Barclay and
Sir Frederick Barclay.

MR. ROBIN DICKER QC and MR. WILLIAM WILLSON (instructed by Messrs.
Hogan Lovells International LLP) appeared for National Asset
Loan Management Limited.

MS. VICTORIA JOLLIFFE (represented the Media).

PROCEEDINGS
DAY 18

1 estimate our costs, and I say the Weil parties in relation to
2 this, at around £92,000-odd in relation to the two days.

3 These applications have required a significant amount of
4 attention on our side and a significant deviation from
5 actually getting on with this trial. That is also a matter
6 which your Lordship ought to bear in mind when deciding what
7 ought to be done in relation to the costs of this application.

8 There is the costs aspect of this, which we do press.
9 There is also what happens next in relation to all the
10 documents and how we proceed with the trial. I think it
11 follows from your Lordship's judgment that the material which
12 we have been fed in relation to the various aspects under the
13 regime of confidentiality are now no longer subject to that
14 regime and of course are subject to the provisions of the CPR
15 as to use. We obviously need to make that clear, and that
16 that is the position, as I think it quite follows from your
17 Lordship's judgment. Quite when we are going to get to grips
18 with this in terms of further dealings of the trial, perhaps
19 we need not address right now, because I know your Lordship is
20 anxious to get on with the rest of the trial.

21 For my part, I have been working on the material; but
22 I cannot say as to precisely when I am going to be in
23 a position to deal with Mr. McKillen when he comes back to
24 give evidence. I would like to make those points to your
25 Lordship. First of all, we want our costs on an indemnity

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1 basis. Perhaps I would let others have their say in relation
 2 to that, and no doubt they would.
 3 We are also going to ask for a payment on account in
 4 relation to those costs. There is no reason why Mr. McKillen
 5 should not be able to pay a substantial portion of those sums
 6 within seven days.
 7 LORD GRABINER: I have nothing to add, but we respectfully adopt
 8 all the points that have been made by Mr. Maclean.
 9 MR. AULD: So do we. We do have a costs bill, and it is about the
 10 same level of Mr. Maclean. I would only add that in
 11 Mr. Quinlan's case, the application is possibly even more
 12 hopeless than that against Mr. Maclean's client.
 13 MR. SMOUHA: We make the same application. May I just add one
 14 point in relation to it. Bearing in mind that we have since
 15 the beginning of term had a series of applications which have
 16 had the effect that only one day of sitting days has been
 17 occupied with the taking of evidence, we are concerned about
 18 what has become a pattern of applications being made which
 19 prove to be unsustainable, which are then either retreated
 20 from or, in so far as determined, are rejected. We have had
 21 the position in relation to Al Mirqab. We have had the
 22 amendment applications and now the confidentiality
 23 applications.
 24 As is clear from your Lordship's judgment and as was
 25 clear to us when we saw the letter of yesterday, the

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1 suggestion that the application appeared to become bound to
 2 fail because of the information Lordship communicated in
 3 relation to the patent judges is simply incorrect. To say
 4 that the application appeared to be unprecedented was apparent
 5 from the fact that my learned friend was not able to cite to
 6 your Lordship any authority which showed that there was a
 7 precedent for it.
 8 What we are concerned about is that the pattern is one
 9 of making applications which are in effect road tested at
 10 considerable expenditure of time and money, putting your
 11 Lordship to a great deal of trouble, to see, as it were,
 12 Micawber-like whether they might attract some favour from your
 13 Lordship -- and then they disappear.
 14 That would be a matter of concern at an interlocutory
 15 stage. For this to be happening during the course of an
 16 expedited trial where there is, for all the reasons your
 17 Lordship knows, and in fact the precise reasons that your
 18 Lordship expedited the action, a real urgency to get on in
 19 relation to the position of the company being stopped, my
 20 Lord, we have real concerns about that.
 21 It is for that reason, not only that we say an order for
 22 indemnity costs is appropriate, that it is appropriate
 23 unusually, during the course of a trial, to make an order for
 24 a payment on account in order perhaps to try and communicate
 25 to Mr. McKillen that this is not the proper approach.

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1 I do ask your Lordship also to bear in mind a particular
 2 concern about the way in which the protraction of the length
 3 of the trial may be used or may be perceived by Mr. McKillen
 4 to be to his advantage. Can I just remind your Lordship of
 5 the document that I asked your Lordship to look at in the
 6 confidential disclosure? It is in the Weil file with their
 7 skeleton, at page 83.
 8 MR. JUSTICE DAVID RICHARDS: Yes, I remember.
 9 MR. SMOUHA: You recall that. My Lord ---
 10 MR. JUSTICE DAVID RICHARDS: You think there may be some buying of
 11 time going on?
 12 MR. SMOUHA: My Lord, yes. As I say, it is not an appropriate way
 13 to proceed to make applications and then to consider, as it
 14 were, in the course of them, after hearing either what your
 15 Lordship says or hearing arguments from the other parties, to
 16 then sort of take stock and then communicate to the court that
 17 actually, now, three days on, the application is not pursued.
 18 I do ask your Lordship to bear in mind that of course
 19 there is one thing we are talking about, which is the
 20 occupying of time in court and of your Lordship's time. Each
 21 of these applications generates a huge amount of work on all
 22 of our parts in terms of not only preparing for it but your
 23 Lordship will bear in mind that we came into the
 24 confidentiality club last Wednesday and had a massive learning
 25 exercise in terms of understanding what had been going on and

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1 trying to assimilate a huge amount of evidence as well as
 2 gearing up for the application.
 3 These are fundamental ways in which essentially the
 4 trial is being diverted. We have a concern about it being
 5 derailed in that way. We say that it is appropriate for your
 6 Lordship just to take stock of where we are and, in so far as
 7 your Lordship can, at least in relation to this aspect, to
 8 mark it by saying that actually, in relation to these matters,
 9 Mr. McKillen should be paying as he goes. We have again an
 10 estimate of our costs. We are not asking your Lordship to
 11 make a summary assessment; it would be a question of ordering
 12 a payment on account.
 13 MR. JUSTICE DAVID RICHARDS: Mr. Willson?
 14 MR. WILLSON: We have nothing to add.
 15 MR. JUSTICE DAVID RICHARDS: Ms. Joliffe?
 16 MS. JOLIFFE: My Lord, as I understand it, you indicated in your
 17 judgment on 28th February that the media should be allowed to
 18 make representations or may wish to make representations.
 19 MR. JUSTICE DAVID RICHARDS: I forget whether I did it then; but
 20 I certainly did it last week.
 21 MS. JOLIFFE: In my submission, it is important that the media do
 22 challenge these kinds of applications which have a direct
 23 bearing on their ability to report proceedings. It does,
 24 however, cost money for them to do so. In the circumstances
 25 such as these where the application has been dismissed, and

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1 I adopt the submissions of my learned friends in respect to
 2 that, I would ask you to consider making an order for the
 3 claimant to pay the media's costs.

4 MR. JUSTICE DAVID RICHARDS: Are you able to tell me whether any
 5 sort of rule of thumb-type practice has developed in similar
 6 applications?

7 MS. JOLIFFE: I am afraid I am unable to assist you. It would be
 8 unusual, but it is also unusual for the media to have to sit
 9 through two days of argument before they get to make what are
 10 fairly standard submissions on law.

11 MR. JUSTICE DAVID RICHARDS: Thank you very much. Mr. Marshall?

12 MR. MARSHALL: Can I just deal first with the suggestion that
 13 there is some attempt at obtaining further time or some
 14 attempt to extend the trial, or something of that nature.
 15 That is certainly not the case. We are as keen as anyone to
 16 try to get through the trial as soon as we can. We are the
 17 ones who applied for an expedited trial, for it to be
 18 concluded as quickly as possible, having regard to the
 19 position in which the company finds itself and, in particular,
 20 having regard to the position with the debt due to MFL.

21 This is all happening at the stage of the trial where we
 22 are in the process of cross-examining some of the key
 23 witnesses. I can assure your Lordship that I would like
 24 nothing better than to have had the time to prepare for that
 25 cross-examination rather than dealing with these interlocutory

1 viewing the disclosure application perhaps as not being as
 2 strong as it once was thought to be in the light of the
 3 evidence that was served, rather has pressed forward with the
 4 application that has been dealt with.

5 MR. JUSTICE DAVID RICHARDS: No, I am sorry, I do not think this
 6 is quite representing the position, Mr. Marshall. I made it
 7 very clear, and I have always made it very clear, that any
 8 continuation of a confidentiality regime for trial had to be
 9 justified and you had to justify it. It was not a case of the
 10 respondents having to disengage the confidentiality regime.
 11 The onus must lie on you. It is not a question of Mr. Maclean
 12 putting this, that or the other forward. I made clear on
 13 Monday that I wanted to hear the confidentiality application.
 14 I made clear on Wednesday last week that I was of the view
 15 that all these issues of confidentiality should be heard
 16 together. Clearly, by the beginning of this term, they had
 17 become urgent because we were now getting within sight of the
 18 time when we would be dealing with this part of the trial.
 19 I think that is all that needs to be said about where we have
 20 got to where we are.

21 MR. MARSHALL: Yes. All I am suggesting is that the way this was
 22 brought on was as a result of applications being made at the
 23 very end of the last term.

24 MR. JUSTICE DAVID RICHARDS: I really do not see that this
 25 matters. We have had two days on this application this week.

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1 matters. I do not accept and completely reject the suggestion
 2 that we have in some way sought to disrupt the progress of the
 3 trial.

4 The timing of this has arisen actually as a result of
 5 the application which was made -- I think it was made actually
 6 in the form of an issued application or service of an
 7 application at some time around midnight on the penultimate
 8 day of the hearing at the end of last term. Then there was
 9 the debate the following day as to the timing at which various
 10 interlocutory applications were going to come on.

11 I just remind your Lordship, at that point, that the
 12 thing which was said to be terribly urgent was not this aspect
 13 but it was rather the disclosure application which
 14 Mr. Maclean's side wanted to make for further material in
 15 connection with the Al Mirqab negotiations and the wider range
 16 of materials which are still to be determined in the
 17 application that is still outstanding. That was what was said
 18 to be extremely pressing. I think your Lordship indicated at
 19 that point that there were certain aspects that were not so
 20 pressing and, indeed, this one, the part that we have dealt
 21 with now, in fact was not necessarily going to be the first on
 22 the agenda. That is why a different timescale was given under
 23 the directions for different evidence to be served at
 24 different times.

25 What has actually happened is that Mr. Maclean, no doubt

1 If you had not wanted to make the applications, you need not
 2 have persisted in them. Whether an application was served at
 3 midnight or five o'clock in the afternoon, or whenever it was,
 4 a couple or two or three weeks ago, is really beside the
 5 point.

6 MR. MARSHALL: I am only making the point because we have not been
 7 trying to disrupt any proceedings ----

8 MR. JUSTICE DAVID RICHARDS: I am not, for a moment, suggesting,
 9 Mr. Marshall, that you are trying to disrupt anything. The
 10 suggestion is, but it is just a suggestion, that Mr. McKillen
 11 is trying to buy some time for some reason. None has been
 12 suggested to me.

13 MR. MARSHALL: That is certainly not the case, and there is
 14 nothing that has been done that could possibly support that
 15 one. He was the one who made the application to expedite the
 16 trial, supported of course by the company's evidence and
 17 position that it took at the very first hearing. It was an
 18 application that we had made.

19 MR. JUSTICE DAVID RICHARDS: My recollection is that the impetus
 20 came from me, actually; but, anyway, never mind, that is going
 21 back a bit.

22 MR. MARSHALL: I am sure we can get the transcript. Mr. Hill was
 23 there rather than me.

24 MR. JUSTICE DAVID RICHARDS: It really does not matter.

25 MR. MARSHALL: Our position has always been supportive of having

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1 the matter determined as quickly as possible. That has been
 2 our position all the way through.
 3 In terms of costs, I accept of course that we have not
 4 been successful. We of course must pay the costs of the
 5 process that has taken place. There is nothing in my
 6 submission that takes, however, the application out of the
 7 ordinary. Mr. McKillen had a genuine concern regarding his
 8 personal financial information and his dealings with the third
 9 party funders. Your Lordship was persuaded that there was
 10 a risk at an earlier stage.
 11 Given that real concern and the position as it then
 12 stood, in my submission, it could not be said to be out of the
 13 ordinary for Mr. McKillen to have made an application for the
 14 continuation of that regime in the light of the material that
 15 he has seen.
 16 Your Lordship has of course, in the end, held that there
 17 is no real risk in the light of the materials that had been
 18 deployed. I do submit that the materials that have been shown
 19 to your Lordship, and which have been referred to in the
 20 judgment, is by no means a usual situation in the context of
 21 litigation for one party to be effectively going behind the
 22 other's back in order to acquire his debts or to act in the
 23 way in which the Barclay interests have been doing so in this
 24 case.
 25 In my submission, it is perfectly understandable for

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1 Mr. McKillen to wish to preserve confidentiality in the light
 2 of those circumstances and for him to have had genuine bona
 3 fide concerns regarding it. I do submit to your Lordship that
 4 although he has ultimately been unsuccessful in the
 5 application, that is not a basis for any form of indemnity
 6 costs order.
 7 What did happen in terms of the hearing is that your
 8 Lordship will recall that the first round of skeleton
 9 arguments in regard to confidentiality, I think, came from
 10 Mr. Maclean's side at the end of last week. One notes from
 11 that material that Mr. Maclean at that stage had not
 12 identified Al Rawi or the principles set out as determining
 13 the matter then. That particular aspect was only highlighted
 14 in the course of the other skeleton arguments that came in
 15 a little later, in particular that of Mr. Smouha.
 16 Of course, that has proved to be very important material
 17 for your Lordship's decision. Of course, during the course of
 18 the hearing your Lordship did indicate to all parties the
 19 research that your Lordship had carried out with other judges
 20 and which did have an impact, certainly on our approach, in
 21 the light of that. The indication from some of the
 22 intellectual property cases ----
 23 MR. JUSTICE DAVID RICHARDS: All it was was that nobody knew of it
 24 happening. You did not know of it happening and nobody knew
 25 of it happening. I thought that if anyone knows it, these

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1 people will. It does not mean it has not happened, but nobody
 2 knows it has happened. I really fail to say, I am afraid, the
 3 particular significance of that information. It is useful
 4 information because it confirms what appears from the cases
 5 actually, that it has never happened. The thought that it has
 6 a decisive effect -- I find very surprising.
 7 MR. MARSHALL: The matter has developed obviously in a very short
 8 period of time. Material which was not focused on right at
 9 the outset has become much more of a focus. In the light of
 10 that focus, it has become clear in terms of what relevant
 11 principles need to be applied. In the light of that and the
 12 developments during the course of the hearing, we considered
 13 that particular point.
 14 I do submit to your Lordship that that is not conduct
 15 which would warrant any form of order for costs beyond the
 16 normal order for costs. It is a responsible approach, in my
 17 submission, to the way in which the submissions developed in
 18 relation to it and the information that came to light. It is
 19 not an application, therefore, in my submission, that needs to
 20 be dealt with other than by a standard order.
 21 In relation to the questions of summary assessment,
 22 payments on account, that sort of thing, we have had a hearing
 23 which has extended beyond a day.
 24 MR. JUSTICE DAVID RICHARDS: I do not think I am being asked to
 25 summarily assess it.

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1 MR. MARSHALL: Also we are dealing with significant sums, so there
 2 are various reasons for why that would not be appropriate.
 3 In relation to payments on account, again, in my
 4 submission, my Lord, that is a highly unusual course to take
 5 in the context of an ongoing trial and hearing. We also have
 6 only received the information regarding the sums in question
 7 -- very recently indeed. I think the earliest we got was
 8 during the course of yesterday afternoon of an indication that
 9 some application would be made. Schedules, I think, have only
 10 been appearing very, very recently indeed. The figures we are
 11 talking about are very significant sums of money.
 12 At the end of the day, your Lordship obviously should
 13 bear in mind that in relation to costs, you do have the
 14 ability to obtain interest on the costs at the end of the day
 15 to compensate for any delay or time that goes in terms of
 16 interval between when they are incurred and the date for
 17 payment, which is a significant factor in determining whether
 18 any payment on account should take place. There is no
 19 suggestion that Mr. McKillen would not be able to meet a costs
 20 order at the end of the day.
 21 In my submission, the right approach to take, in line
 22 with certainly my own experience anyway, is that the costs
 23 obviously can be awarded to the defendants; but the question
 24 of what actually happens overall in terms of assessment of
 25 costs, and so on, should all be worked out in the usual way

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1 after the conclusion of the trial. There is no reason to
 2 depart radically from that course in this particular case.
 3 Can I just add one further matter? We obviously just
 4 wanted to have an opportunity to consider your Lordship's
 5 judgment. We would like an opportunity to get instructions in
 6 connection with it -- we have not had an opportunity to do
 7 that -- before anything happens in the light of it; just
 8 a short opportunity, I am not asking for a long period of
 9 time. We are at twenty-past twelve now. If we could have an
 10 opportunity to do that before we re-start ----
 11 MR. JUSTICE DAVID RICHARDS: You mean with a view to whether you
 12 are going to ask for permission to appeal?
 13 MR. MARSHALL: There would be that matter and also how we address
 14 the question of Mr. Cunningham's sixth witness statement and
 15 the impact in connection with that. There are a number of
 16 things that we would like an opportunity just to consider. We
 17 would like an opportunity to do that before anything further
 18 takes place, recognising that, on Mr. McKillen's part, it is
 19 an important matter to him and that is indeed why he made the
 20 application in the first place. He would not have done it
 21 unless he thought that there was a genuine concern, and it was
 22 a matter of importance to him.
 23 MR. JUSTICE DAVID RICHARDS: Yes, very well.
 24 On the question of costs, it is accepted on behalf of
 25 Mr. McKillen that he must pay the costs of this unsuccessful

1 any great opportunity of looking in detail at that
 2 application.
 3 MR. MACLEAN: I am not going to urge your Lordship to deal with it
 4 so long as it is understood, clearly on the other side, that
 5 because I am not urging your Lordship to deal with it now, it
 6 is somehow said that I have abandoned it, or anything else.
 7 MR. JUSTICE DAVID RICHARDS: The answer must therefore be that it
 8 should be heard when Mr. Auld's witnesses are finished, if it
 9 at that stage remains a live issue.
 10 MR. MACLEAN: There is the issue in relation to the Cunningham 6
 11 witness statement which, for my part, I am happy to park until
 12 a convenient moment, but it is not my application.
 13 MR. JUSTICE DAVID RICHARDS: Very well. Mr. Smouha?
 14 MR. SMOUHA: My Lord, in relation to my learned friend asking for
 15 time, there are in fact two parts, as I understand it. It
 16 sounds as though he is implicitly in effect saying that if
 17 there were a permission to appeal application, that may
 18 involve questions of, as it were, holding the ring. I would
 19 certainly want to have something to say about that. The
 20 question of Cunningham 6, in a sense, is separate from that.
 21 Can we just have some clarification about how much time
 22 this is and if any application is to be made, when it is that
 23 it will be made and ----
 24 MR. JUSTICE DAVID RICHARDS: For what, sorry?
 25 MR. SMOUHA: For permission to appeal.

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1 application. As regards whether the costs should be assessed
 2 on an indemnity or a standard basis, if the application had
 3 been simply for restriction so that the parties could not have
 4 access to the documents, I would have regarded the application
 5 as a serious candidate for indemnity costs. I do not think
 6 I would regard it in the same way so far as the application
 7 for a hearing in private is concerned. It is quite
 8 impractical to award costs on two different bases of
 9 assessment for the same hearing. On balance, I think the
 10 correct outcome is to award costs on a standard basis.
 11 I do think, because this is a discrete issue, because it
 12 has taken up a good deal of time from everyone's point of
 13 view, that it is an appropriate case in which to order
 14 a payment on account. I do not think that we can deal with
 15 that now, but that can be perhaps dealt with in the course of
 16 tomorrow if schedules have been provided.
 17 That, I think, deals with the application, subject to
 18 anything further Mr. Marshall wishes to raise with me.
 19 Mr. Marshall, the short answer is "yes" to your request
 20 for a little bit of extra time to consider quite what happens
 21 next. In terms of having got that far, are we agreed that the
 22 next matter on the agenda is Mr. Auld's witnesses?
 23 MR. AULD: Yes, subject to the disclosure application.
 24 MR. JUSTICE DAVID RICHARDS: I was only going to raise that. You
 25 may or may not be surprised to hear that I have not had

1 MR. JUSTICE DAVID RICHARDS: Two o'clock. That is what
 2 I understood.
 3 MR. MARSHALL: We are keen to get to Mr. Quinlan as soon as
 4 possible.
 5 MR. JUSTICE DAVID RICHARDS: We will deal with these
 6 consequentials at two o'clock and then proceed with
 7 Mr. Quinlan's evidence, if that is agreeable.
 8 MR. MARSHALL: Can I also just have time as well just to consider
 9 the position of the application for costs on the part of the
 10 representative for the press because ----
 11 MR. JUSTICE DAVID RICHARDS: I am sorry, I did not make that
 12 clear.
 13 MR. MARSHALL: I was not aware that any such application was going
 14 to be made because there was no threat or warning of any kind
 15 that they might be seeking costs by attending. That is a new
 16 development, which I have not had an opportunity to consider
 17 either. My inclination would be to resist that, but I will
 18 have to get instructions as to what the position is going to
 19 be.
 20 MR. JUSTICE DAVID RICHARDS: Is that something you can do at two
 21 o'clock?
 22 MR. MARSHALL: Certainly, my Lord.
 23 MR. JUSTICE DAVID RICHARDS: Ms. Joliffe, I will give Mr. Marshall
 24 that opportunity. I will rise now and we will resume at two
 25 o'clock.

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1 (Adjourned for a short time)

2 MR. MARSHALL: May I just say that we are not proposing to appeal
3 against your Lordship's judgment.

4 Could I just address one other matter I had not
5 addressed before the short adjournment, which was the
6 application for costs on the part of Ms. Joliffe. There are
7 just four short points in connection with that, if I may.

8 First, we do oppose payment of those costs. First, we
9 did not of course join the press to the proceedings, nor did
10 we invite their attendance. They have attended voluntarily.
11 Secondly, as Ms. Joliffe herself accepted, it is not the usual
12 course and it is not, therefore, something that we anticipated
13 that we would have to cover those costs.

14 The next point is that of course sometimes the press are
15 involved more substantively because the parties have agreed
16 between themselves that the hearing should be in private, or
17 alternatively there are restrictions on publicity regarding
18 the proceedings which, more directly, affect the press. Of
19 course then one might expect the press to have a more
20 substantive involvement. Here, the respondents were of course
21 very fully represented and did all argue the issue of open
22 justice, and points concerning it, very fully without the
23 press necessarily needing to come along.

24 The final point is that the points raised in the end
25 have been really points of law. Mr. Dodd submitted them to

1 indication of what in principle your Lordship was in favour of
2 and what your Lordship might have more trouble with and might
3 need argument.

4 In that light, we are going to trim down the schedule
5 further in terms of what is relied on. We will be circulating
6 that to Weil Gotshal hopefully today. The hope would be that
7 it can either be agreed between the parties; or if there is
8 any further argument, it will be very narrow indeed.

9 MR. JUSTICE DAVID RICHARDS: I am grateful. Mr. Auld?

10 MR. AULD: Mr. Quinlan is the next witness. Just before calling
11 him, does your Lordship have two pages of corrections to his
12 witness statement, which I will need when he is in the
13 witness-box?

14 MR. JUSTICE DAVID RICHARDS: I do.

15 MR. MARSHALL: Can I just say that there may need to be a little
16 bit of re-arrangement with myself and Mr. Smouha before we get
17 underway.

18 MR. JUSTICE DAVID RICHARDS: Just start doing that; and while
19 Mr. Quinlan is taking the oath, obviously remain seated. Why
20 not do that now before Mr. Quinlan is sworn and just organise
21 yourselves.
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23
24
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1 you in writing. In our submission, there is no reason why
2 a similar course could not have been taken in relation to
3 those represented by Ms. Joliffe.

4 For those reasons, we do submit we should not have to
5 cover those particular costs.

6 MR. JUSTICE DAVID RICHARDS: Thank you, Mr. Marshall.

7 In the circumstances of this particular application,
8 I propose to order that you do pay the costs of Ms. Joliffe's
9 clients. The press attended because I said they should be
10 given notice of the application and because I anticipated that
11 they would have a separate interest to bring to bear from that
12 of the respondents. In the event, I think that is right and
13 I consider the assistance I have received from Ms. Joliffe to
14 have been -- well, I am grateful to her for her assistance.

15 In all the circumstances of this case, and it is not to
16 say the same would be in other cases, I think it is right that
17 her clients' costs are paid. That is what I shall order.

18 Thank you. Mr. Hill.

19 MR. HILL: Can I just mention Cunningham 6?

20 MR. JUSTICE DAVID RICHARDS: Yes, indeed.

21 MR. HILL: My learned friend Mr. Maclean kindly indicated that for
22 his part he was happy to park Cunningham 6 until a convenient
23 moment. Your Lordship will recall that on Monday, I indicated
24 that we were not relying on parts of it. We then had some
25 argument about the remaining parts, and your Lordship gave an

1 MR. DEREK MICHAEL QUINLAN, SWORN
2 EXAMINED BY MR. AULD

3 Q. Mr. Quinlan, do you have bundle C2 in front of you?

4 A. Yes.

5 Q. You should also have next to you, I think, two pages of minor
6 corrections you wish to make to your witness statements. Are
7 those on the desk of in front of you?

8 A. Yes, I have them.

9 Q. In C2, Mr. Quinlan, could you go first, please, to tab 17. Is
10 that your first witness statement in these proceedings?

11 A. Yes, it is, my Lord.

12 Q. If you look at the page numbers on the bottom right-hand
13 corner of the bundle, and go please to 319A, just confirm,
14 would you, for the court that that is your signature which you
15 attached on 27th February this year.

16 A. Yes, it is.

17 Q. While having that document open, could you look at the first
18 page of the correction document and go first, if you would, to
19 paragraph 55, which you will find on page 274 -- do you have
20 paragraph 55?

21 A. Yes.

22 Q. At the moment, the opening words read: "Within a few days".
23 I think you wish to alter that to: "Within about three
24 weeks". Is that right?

25 A. That is correct.