

IN THE HIGH COURT OF JUSTICE
BUSINESS & PROPERTY COURTS
OF ENGLAND AND WALES
BUSINESS LIST (ChD)

BL-2020-001343

BETWEEN:

- (1) LONDON CAPITAL & FINANCE PLC (IN ADMINISTRATION)
(2) FINBARR O'CONNELL, ADAM STEPHENS, HENRY SHINNERS, COLIN HARDMAN AND GEOFFREY ROWLEY (JOINT ADMINISTRATORS OF LONDON CAPITAL & FINANCE PLC (IN ADMINISTRATION))
(3) LONDON OIL & GAS LIMITED (IN ADMINISTRATION)
(4) FINBARR O'CONNELL, ADAM STEPHENS, COLIN HARDMAN AND LANE BEDNASH (JOINT ADMINISTRATORS OF LONDON OIL & GAS LIMITED (IN ADMINISTRATION))

Claimants

- and -

- (1) MICHAEL ANDREW THOMSON
(2) SIMON HUME-KENDALL
~~(3) ELTEN BARKER~~
(4) SPENCER GOLDING
(5) PAUL CARELESS
(6) SURGE FINANCIAL LIMITED
(7) JOHN RUSSELL-MURPHY
(8) ROBERT SEDGWICK
(9) GROSVENOR PARK INTELLIGENT INVESTMENTS LIMITED
(10) HELEN HUME-KENDALL

Defendants

Transcript of proceedings made to the court on

Day 16 - Monday, 18 March 2024

The claimants are represented by Mr Stephen Robins KC, Mr Andrew Shaw & Mr Philip Judd

Michael Andrew Thompson (D1) is represented by Miss Anumrita Dwarka-Gungabissoon

Simon Hume-Kendall (D2) & Helen Hume-Kendall (D10) are represented by Mr Warwick KC & Mr Russell

Elten Barker (D3) settled and is not appearing

Spencer Golding (D4) is debarred from defending the claim

Paul Careless (D5) and Surge Financial Limited (D6) are represented by Mr Ledgister & Mr Curry
Russell-Murphy (D7) and Grosvenor Park Intelligence Investments Limited (D9) appear in person

Robert Sedgwick (D8) appears in person

Housekeeping

MR ROBINS: My Lord, the first item on the agenda to which I understand your Lordship has agreed should be addressed first relates to the order that was filed for sealing last Friday. I don't know if your Lordship has had a chance to look at that? It is in the familiar terms.

MR JUSTICE MILES: Yes.

MR ROBINS: Subject to any questions your Lordship might have, we would invite your Lordship to seal that order.

MR JUSTICE MILES: Sorry, just give me a second. Yes, just so that there is no mystery about it, Mr Robins, do you just want to say what it does in very broad terms so that members of the public can understand?

MR ROBINS: Yes. It is a Tomlin Order that stays the proceedings against the second and tenth defendants, save for the purpose of enforcing the confidential settlement terms that have been reached between them.

THE COURT CLERK: Apologies, the call has disconnected. Do you mind giving some time?

MR ROBINS: Sure.

MR JUSTICE MILES: Let's just pause for a moment to allow that to happen. (Pause).

I think what I am going to do is just rise for a minute until this is sorted out. Then we can restart.

(Conversation off the record)

MR JUSTICE MILES: We will rise now for a moment to allow this technology to be sorted out.

(10.35 am)

(A short break)

(11.01 am)

MR ROBINS: My Lord, the camera had been fixed. It now seems to be broken again. An image of the courtroom will flick on to the top of the screen every now and then to replace the blue box but it doesn't seem to be a consistent picture. For our part on this side of the court, we have no problem with the suggestion that the link should be audio only. I am not sure a visual of the courtroom really adds much.

I suspect it would be really for your Lordship and, ultimately, potentially for your Lordship's clerk to communicate with the two defendants who are relying on the link to see if they would object to an audio-only link to the courtroom.

MR WARWICK: My Lord, if it helps, I very briefly canvassed with this side of the room and nobody objects here either.

MR JUSTICE MILES: Okay. Is that right, as far as we can tell, that the camera is not working again?

THE COURT CLERK: It flickers, as counsel said.

MR JUSTICE MILES: It is really Mr Sedgwick and Mr Thomson who I am really concerned with and the suggestion, as you have heard, is whether they are content for it simply to be a normal link without the visual.

THE COURT CLERK: I will contact them through the link.

MR JUSTICE MILES: Right. I am afraid to say I am going to rise again while this happens, because it may take a few minutes. I apologise for the problems.

(11.03 am)

(A short break)

(11.18 am)

MR JUSTICE MILES: We will carry on.

MR ROBINS: My Lord, I was describing the draft Tomlin Order. It provides in the recitals that the claimants, on one part, and the second and tenth defendants, on the other, have agreed to the terms set out in a confidential settlement deed, copies of which are held by the parties' legal representatives.

In the operative parts, paragraph 1, it provides for the claims against the second and tenth defendants to be stayed, except for the purpose of enforcing the terms of the settlement deed.

In paragraph 2, it provides for the freezing injunctions and proprietary injunctions against the second and tenth defendants to remain in place pending compliance with the terms of the settlement deed.

In paragraph 3, it provides in the usual way for the parties to have liberty to apply to enforce the terms of the settlement deed without the need to issue fresh proceedings.

In paragraph 4, it provides that there should be no order as to costs. The settlement agreement, in other words, covers all the territory.

And in paragraph 5, it deals with service. So, as I said before the technical difficulties, it is in the standard form that I think one would expect to see in these circumstances and we would invite your Lordship to approve it and seal it.

MR JUSTICE MILES: Right. Mr Warwick, do you -- presumably, there is nothing really to say about this?

MR WARWICK: Yes my Lord, nothing to add. I am grateful to my learned friend for the summary.

MR JUSTICE MILES: Okay. I will make that order. And that means that the case against the second and tenth defendants has been compromised.

Is there, in relation to -- sorry, is that feedback or am I imagining it?

MR ROBINS: I heard an echo.

MR JUSTICE MILES: Is there feedback or is that -- there is a faint echo from where I am sitting.

(Pause).

Right. Is there a question in relation to this settlement and other settlements there have been -- sorry, could the settlement, this settlement and other settlements there have been, have an impact on quantum down the line? If so, how is that going to be dealt with?

MR ROBINS: I think the short answer is yes, because certainly, for fraudulent trading, we are claiming the deficiency as regards creditors.

My Lord will recall last week we filed an updated deficiency calculation and I mentioned that we would provide a further updated deficiency calculation in due course. We will obviously have to take account of the terms of the settlement.

I think I am right in saying that the settlement is confidential but there are, of course, carve outs for administrators complying with their statutory duties, they have to report to creditors, and I think, subject to checking, there is a carve out in relation to disclosure in legal proceedings. But certainly we will be providing an updated deficiency calculation in due course.

MR JUSTICE MILES: But it may be -- I don't know, and I will say no more about it now, but it may be there will have to be disclosure of these agreements to the remaining defendants.

MR ROBINS: Yes. That is something we will have to consider. It has not been considered yet, but we will obviously have to deal with that.

MR JUSTICE MILES: Right.

Mr Warwick, did you want to say something about that?

MR WARWICK: My Lord, no. But it could be something that is dealt with by way of information if it is the information that is required for the purposes of quantum calculations and so on, that is something that I could ask my solicitors and Mr Robins' solicitors to liaise over.

I meant also to ask if I could assist further on this in any way and, if not, I may, with your leave, ask to go and make way for others to proceed with the case.

MR JUSTICE MILES: Yes.

No, certainly.

MR WARWICK: Unless there is anything else.

MR JUSTICE MILES: Thank you for your assistance in the case so far.

MR WARWICK: Most welcome.

(Mr Warwick withdrew)

MR ROBINS: My Lord, in terms of housekeeping for the rest of this week, we obviously saw the email from Mr Mayes KC to your Lordship's clerk and a subsequent email from Mr Slade. I am afraid we don't know quite what the state of play is in that regard, in particular whether Mr Slade is going to be applying for special permission under the Legal Services Act 2007 to appear as an advocate for Mr Thomson at trial. I note that Ms Dwarka Gungabissoon is robed, so it may be that there is someone on the team with higher rights of audience who is going to be addressing your Lordship and that such an application is not going to be made, but it would be helpful to know one way or the other.

Secondly, we still, I am afraid, don't know the position as regards the cross-examination of our witnesses. As I said to your Lordship last week, Mr Sedgwick has made clear that he is not going to

be cross-examining our witnesses. Mr Careless and Surge Financial are not going to be cross-examining our witnesses.

The only person who was going to be cross-examining them was going to be Mr Warwick KC on behalf of the second and tenth defendants; he is obviously not doing that now.

If Mr Thomson is not cross-examining our witnesses, then we will be able to call them tomorrow morning, swear them in, essentially, as a matter of formality, that shouldn't take more than about 30 minutes in total, and then we can proceed straight to the cross-examination of Mr Thomson. But we really do need to know what the intentions are so that we can make plans. The witnesses on our side are not all in London all the time, they would need to make arrangements to be here on the relevant date, and there is difficulty with availability for some of them next week. So we really, I am afraid, do need to know at this point.

MR JUSTICE MILES: Yes.

Right before I come to you Mr Slade, Mr Ledgister, is the -- does your intention remain the same that you don't wish to cross-examine the claimants' witnesses?

MR LEDGISTER: Absolutely, my Lord. No change at all.

MR JUSTICE MILES: Right. So, Mr Slade?

MR SLADE: My Lord, what I will do if I may is just move over here now that Mr Warwick has left and make some more space.

Excuse me just a moment while I do that. (Pause).

My Lord, I propose to appear, for these purposes, with Miss Anumrita Dwarka-Gungabissoon of my firm for the first defendant.

MR JUSTICE MILES: I am so sorry; I didn't actually catch that name.

MR SLADE: Yes. Anumrita Dwarka-Gungabissoon. I can assist your Lordship with that. She recognises the difficulty for English tongues that her surname creates and has told me that, for the purposes of the trial, she is more than happy to be called Ms Dwarka, which was, in fact, her name before she married.

MR JUSTICE MILES: How is that spelled? I am so sorry.

MR SLADE: D-W-A-R-K-A. It is a Mauritian name, my Lord.

MR JUSTICE MILES: Ms Dwarka, are you a barrister or a solicitor.

MS DWARKA: I am a solicitor advocate, my Lord, and I am a non-practising barrister.

MR JUSTICE MILES: Right. You have rights of audience?

MS DWARKA: I have all higher rights of audience yes.

MR SLADE: My Lord, I will explain as I go what I am proposing. I thought I should first start by explaining the position of Mr Mayes and his juniors. I will do that in some detail because I think it is important.

MR JUSTICE MILES: Are you seeking rights of audience Mr Slade?

MR SLADE: My Lord, I seek rights of audience only for the purposes of opening the case. I will then, with your Lordship's permission, hand over to Ms Dwarka to conduct the rest of the trial.

MR JUSTICE MILES: Right. You are going to have to persuade me that I should give you rights of audience in these circumstances, so I suppose we had better start by looking at the relevant statutory provisions.

MR SLADE: I haven't brought them with me, my Lord, but I am tolerably familiar with them. They give your Lordship the right to grant anyone, indeed, permission to address the court. All I would say in support of my present application is that this has arisen as an emergency following the events of last Friday, which I will come to in a moment, and simply as a matter of practicality, Ms Dwarka and I have split the work between us over the weekend. I have prepared the opening, she has prepared cross-examination of the claimants' witnesses. She will then proceed during the rest of the trial. We will see how it goes. It may very well be that I come back to your Lordship for permission to make the closing speech.

MR JUSTICE MILES: All right. Well, at the moment, why don't you explain to me why this has arisen as an emergency and then I will consider whether you should indeed be allowed to address me for the purposes of the opening.

MR SLADE: Yes, my Lord.

Submissions by **MR SLADE**

MR SLADE: First, I will read for the transcript an email I received from Mr Mayes' chief clerk Mr Justin Brown on 26 February. It proceeds as follows:

"Dear Richard, I wish you well in your continuing efforts to secure funding to make payment of counsel's fees in this matter. In the light of the matters set out in your fifth witness statement of 19 February, I just wanted to make sure you were clear about counsel's position. Ian and his juniors will not accept instructions to represent Mr Thomson unless certain conditions are met. Namely, first, in circumstances where you and Mr Thomson are in receipt of sufficient funds to make payment of those brief fees in full, of course taking into account the deduction for your firm's fees. Counsel will only accept those instructions if their brief fees are paid in full before they return to the hearing in court.

"This will be the case whether you or Mr Thomson are in receipt of those funds via the proposed loan from Mr Golding or from any other source.

"Or, second, if your fundraising efforts only result in realising cash sums in the first instance, which would enable a part payment of counsel's brief fees, then counsel will only accept those instructions on the basis that, (i) not only are they paid at least half of their brief fees plus VAT before they return to the hearing in court, but also (ii) they are satisfied that arrangements have been made for the balance of their brief fees plus VAT will be paid by no later than 28 June 2024, whether that is by the sale of Clarklye Farm Barn [that is Mr Thomson's house, my Lord] at auction or otherwise.

"Best, Justin."

Mr Brown sought an update and further confirmation from me by email on 13 March, my Lord, which was last Wednesday. The relevant part of my reply of the same day read as follows:

"The plan is:

"1. Complete this week."

That is a reference to the conveyancing transaction: " 2. Immediately instruct Strutt & Parker Lewes as joint agents with B's homes.

"3. Allow three months for a private treaty sale. "4. If not, sell at auction.

"I will take advice on the best auction for this property. It may not be in June, but I am not prepared to wait much longer than that. My bridging loan is for six months."

Mr Mayes himself replied last Thursday. He said: "Dear Richard, thank you for our conversation just now further explaining your email about how you propose to raise the second half of the brief fee. Your proposal does not match up to the requirements in Justin's email of 26 February. In short, we cannot be satisfied that sufficient funds will be realised in time or at all. The valuation of the property on an auction sale is unlikely to raise sufficient funds to pay off any bridging lending secured against the property and still leave sufficient funds to meet the second half of the brief fees. This is compounded by what we know of the precarious financial state of your firm, now in administration.

"Although you have tried so hard to get this far, the numbers simply do not work. We foresee not only unacceptable delay beyond June but, also, if it were to go to auction in June, a shortfall in what the only identifiable asset might raise.

"Accordingly, unless you can find a way to pay us our brief fees in full tomorrow, we will not accept instructions to represent Mr Thomson at the trial. If paid, we would like to have a consultation with Mr Thomson first thing on Saturday morning. "Best wishes, Ian."

I confirmed to Mr Brown, my Lord, on Friday morning that I would be unable to meet those terms and that completion of the transaction had, in any event, slipped into Monday, that is today, on account of a delay in the lender requesting funds. At that point, Mr Mayes wrote to your Lordship. His email was copied to the parties but I should read it for the transcript: "Dear Judge, I know that as an indulgence to the first defendant the court did not sit yesterday and kindly delayed the date for the oral opening on behalf of Mr Thomson until Monday. I write to inform you that my juniors and I have not accepted instructions to represent the first defendant and that we will not be opening his defence on Monday.

"I am writing to tell you this at the first opportunity in the hope that, by doing so, it may minimise further inconvenience and disruption to the hearing.

"Yours sincerely, Ian Mayes."

That gave rise to a crisis in relation to Mr Thomson's representation on Friday. The proposed solution which we have crafted is that I make the opening speech for Mr Thomson, that Ms Dwarka conducts the trial on Mr Thomson's behalf for the next phase and either Ms Dwarka or I make the closing speech. That is simply a pragmatic allocation of work in the situation in which we, as a firm, and Mr Thomson find ourselves, and we hope that it meets with the court's approval. We have literally done everything we possibly can on Friday and over the weekend to ensure that Mr Thomson's opening speech can be made today in light of the court's remarks when we were last present, I think on Wednesday. As your Lordship knows, I am an experienced litigation solicitor of 30 plus years standing but do not have higher rights of audience, simply because I have never taken the course. Ms Dwarka is a non-practising barrister, called in 2005 and a fully-qualified solicitor advocate. She has full rights of audience in this court which is why it is proposed that she, and not I, will conduct the trial while witnesses are examined.

While she is doing that, I will read the transcripts and prepare Mr Thomson's oral closing. As and when the money becomes available, we will seek external assistance from members of the Bar in connection with that and make a decision whether it is I, subject to your Lordship's permission, or Ms Dwarka who actually delivers the oral closing.

Clearly, Mr Thomson is very heavily disadvantaged in connection with this trial through no fault of his own. Because of the proprietary freezing injunctions, which we will say were wholly wrongly granted, he has experienced insurmountable difficulties in arranging payment for his representation. It seems that these difficulties will shortly be resolved but at the expense of losing his barrister team, with the consequence of being unrepresented for the first four weeks of this trial and now being represented by his solicitors who have had to prepare for this task over a single weekend. Ms Dwarka and I obviously have good familiarity with the case but we have not undertaken the level of forensic preparation which would be undertaken by the trial advocate in more normal circumstances and, until last Friday, everyone was working on the assumption that the trial would be conducted by Mr Mayes who has been preparing, as yet unpaid, since the end of last year. There is no doubt that this is unfair, but the unfairness has been brought about by the court's own orders, a matter which I shall address later in my opening submissions, with your Lordship's permission. The only alternative to this proposal --

MR JUSTICE MILES: Mr Slade, those orders remain in place.

MR SLADE: Of course, my Lord.

MR JUSTICE MILES: It is a remarkable submission, with respect, to say that this has been brought about by the court's orders, as if the orders ought not to be there. There hasn't been an appeal against those orders, there hasn't been an application to set them aside, those orders are orders of the court --

MR SLADE: Of course, my Lord.

MR JUSTICE MILES: -- and they need to be complied with.

MR SLADE: And they have been.

MR JUSTICE MILES: As I say, it is a rather remarkable submission, as it were, to say that this is an unfairness brought about by the court. Your client has known about these orders for a very long time, has had a very long time to try and sort out the funding situation. The court has given you additional time to sort things out. It has delayed this opening until today and, in the circumstances I don't think it is an appropriate submission to suggest that this is somehow the result of unfair orders of the court.

MR SLADE: My Lord, I will come to that. I do maintain that. I say that the court orders should not have been made. They have been and they are in force.

MR JUSTICE MILES: Have you applied to set them aside?

MR SLADE: That will follow, my Lord, yes.

MR JUSTICE MILES: When?

MR SLADE: Either today when I finish my closing, with your Lordship's permission, or tomorrow morning.

MR JUSTICE MILES: Well, I will let you carry on.

MR SLADE: I am grateful, my Lord.

Let me be absolutely clear, my Lord, I intend no offence to anybody by that submission.

MR JUSTICE MILES: Nor do I suggest that any offence is taken. It is not a question of offence. These orders have been in place for years now --

MR SLADE: I know.

MR JUSTICE MILES: -- and there has been no application to set them aside.

MR SLADE: I appreciate that and I will explain.

MR JUSTICE MILES: Nor has there been an appeal. The orders are the orders of the court.

MR SLADE: Of course. There is no question about that, my Lord.

MR JUSTICE MILES: And, frankly, I am deeply unimpressed by the suggestion that you might be about to apply to set them aside now and then base submissions on an application which has not been made. This is just not an appropriate way of conducting litigation.

MR SLADE: My Lord, I would resist that, for this reason: I intend, in the opening which I have prepared, to explain to the court why I say what I have just said, and I hope that, when I have done that, with the court's permission, your Lordship will see why I say that and will come to agree with the stance that I am taking.

MR JUSTICE MILES: I will only even countenance the question of setting aside orders of the court if there is a properly-made application to set them aside, which would have to deal with all sorts of questions, including why any such application is now being made when it hasn't been made before.

MR SLADE: I understand that, my Lord.

MR JUSTICE MILES: But I am not going to -- let me tell you -- be impressed by an argument that somehow your client has been disadvantaged unfairly by orders of the court which he has not, at any stage, appealed or sought to set aside.

MR SLADE: My Lord, I am running ahead of myself, but should it appear that the orders should not have been made when they were made, and should Mr Thomson have a perfectly acceptable explanation for his not having either appealed at the time or applied sooner, I take it the court would agree that --

MR JUSTICE MILES: Where is that explanation?

MR SLADE: I beg your pardon, my Lord?

MR JUSTICE MILES: Where is his explanation for that?

MR SLADE: His explanation will be provided in an application.

What I propose to do, my Lord, is explain to the court in opening why these orders should not have been made, together with a whole lot of other things I would like to explain. Your Lordship invited Mr Robins to say something in reply on various pleading points --

MR JUSTICE MILES: Wasn't the order made by consent or am I misremembering that?

MR SLADE: The application was made for a proprietary injunction, my Lord.

MR JUSTICE MILES: And the order was made by consent, as I recall.

MR SLADE: I am not sure because I wasn't there.

MR JUSTICE MILES: Well, you should know that, Mr Slade.

MR SLADE: Well, I do know this, my Lord, because I have seen the correspondence and I have discussed it with your Lordship in the past: the form of the order was negotiated and a consensual draft was put before the court. What happened before the parties got to that stage, I do not know, and I could only find out by making enquiries of those then representing Mr Thomson, which I have not done over the weekend, but I can do that.

Whether they simply consented to the making of the order or whether there was some reason to do with a hearing in court why they did that, I do not know.

MR JUSTICE MILES: All right. Well, you carry on.

MR SLADE: Thank you.

I got to the point of saying that the only alternative to this proposed makeshift course of action would, it seems to me, be an application for an adjournment, which would obviously be undesirable unless there was literally no alternative. To be clear, Mr Thomson is looking for the highest possible level of assistance from everybody else involved in this trial, including the court, the claimants and their counsel, hopefully, in the latter case, as far as possible on a non partisan basis. But that is not the end of the difficulties. Mr Thomson is permitted to spend £1.9 million on his defence from last October to the end of the trial, but of that sum, £700,000 is presently allocated to counsel's fees. Because, for the reason I have fully explained, we now have to carry out the work of counsel, if Mr Thomson is to be effectively represented, I will be asking your Lordship to make an order to the effect that the £700,000 may be split between my firm and Mr Mayes and his team, reflecting the work that each has done and, in the case of my team, will do from now until the end of the trial.

I signal that now so that the claimants may think about it and indicate whether they oppose the proposition. I will return to it, if I may, at the end of my submissions.

Further, there is the matter of Mr Thomson's health. As the court knows, he has experienced serious diagnosed mental illness for several years as a consequence of what has happened. That is the subject of two confidential medical reports in these proceedings. In addition, he underwent emergency surgery on his lower spine on or about New Year's Eve and is still in convalescence from that. He is seeing his NHS surgeon for a review on Wednesday. He is still on medication for the purposes of pain management. He has told me that he can now walk and even drive relatively short distances and be driven for rather longer periods with frequent stops.

He says that it is painful to sit and painful to stand. He proposes to attend court for the period of his cross-examination. He will sit with his own orthopaedic cushion, but he will need to move and walk around approximately every half an hour. He will travel on a weekly basis and stay in a hotel. I anticipate that there will be no difficulty in releasing further money from his frozen account to cover these expenses and I will be writing to my opposite number at Mishcon de Reya about this shortly.

I will have a medical report for the court's guidance in relation to the conduct of the trial, so far as Mr Thomson's evidence is concerned, shortly. Hopefully before he begins his evidence. That was what I wanted to say, my Lord, just by way of introduction. If I have your Lordship's permission to continue, then I will do so.

MR JUSTICE MILES: Now, you are going to have to persuade me that it should be you who should be representing Mr Thomson at this stage rather than Ms Dwarka who has full rights of audience.

MR SLADE: My Lord, that is purely a practical thing. It was not possible over the weekend for Ms Dwarka to prepare everything. She has prepared cross-examination and is continuing to work on the questions that may need to be put to witnesses during the course of the trial. It was not possible for her to prepare the opening as well, and so I undertook that task. It would not be easy, or indeed possible at all, simply to require Ms Dwarka to make this opening speech based on my notes.

MR JUSTICE MILES: How long, Ms Dwarka, would you need in order to be able to present the opening? Mr Slade says that he did it over the weekend.

MS DWARKA: I would possibly need a day or two, my Lord.

MR JUSTICE MILES: How long were you expecting to be cross-examining the claimant's witnesses?

MS DWARKA: I am still working on that. I will be cross-examining all the witnesses but I haven't figured out in terms of estimates. But I should be able to give an estimate by tomorrow.

MR JUSTICE MILES: Well, I am not sure that is quite satisfactory because the claimants need to know what the position is on that. I mean, are you able to say in ...

MS DWARKA: Roughly?

MR JUSTICE MILES: Roughly.

MS DWARKA: Yes. I think Mr Hudson is probably the one I will take some -- I will take about an hour and a half maybe. The rest of them, potentially half an hour to 45 minutes. I don't expect it to be long.

MR JUSTICE MILES: Right. So that sounds like a day in total.

MS DWARKA: I would think so, because it is just me now.

MR JUSTICE MILES: Something like that.

(Pause).

Right. How long, Mr Slade, are you expecting the opening submissions to be?

MR SLADE: Certainly the rest of the day, my Lord, and, because of the late start, possibly running over into tomorrow.

MR JUSTICE MILES: There is another issue, actually, with this court, which is it is required for an event this evening. I don't know whether you have been notified of that, but, unfortunately, we are going to have to rise early in any case. I am going to find out exactly when, so the screens will have to be removed and I don't know how many -- people don't seem to have very many hard copy papers here, so it is basically screens being removed. But I think that it is going to require between half an hour and an hour before 4 o'clock to do that. So we would have to rise in any event, possibly at 3 o'clock, I think. But I will find out a bit more about that.

Right. Okay. Mr Robins do you have any comments on this question?

MR ROBINS: Yes. Could I begin by seeking to assist your Lordship on the exercise of the discretion? The relevant provisions are set out in volume 2.

MR JUSTICE MILES: Unfortunately, I don't seem to have a copy of that.

MR ROBINS: It is the White Book.

MR JUSTICE MILES: Does anyone have a spare volume 2?

MR ROBINS: I think I saw a spare volume 2 on the other side of the courtroom.

MR JUSTICE MILES: Sorry, Ms Dwarka probably needs this because she is going to -- why don't you tell me --

MR ROBINS: I tell you what, I have an electronic copy as well, if I could pass up my hard copy.

(Document handed).

Submissions by MR ROBINS

MR ROBINS: The starting point is, of course, my Lord does have a discretion to grant special rights of audience on a case-by-case basis but the discretion must be exercised in a way which is consistent with the statutory scheme relating to rights of audience. It must be exercised in a way which upholds that statutory scheme and is not inconsistent with it. What that means in practice is that permission shouldn't be granted too freely.

The general exercise of the discretion is addressed in paragraph 13-16 which makes the point that the authorities from before the 2007 Act, in other words, the authorities under the 1990 Act, remain relevant. At the end of the second paragraph within paragraph 13-16, it is pointed out that section 1 of the 2007 Act states that a series of regulatory objectives which include promoting and maintaining adherence by authorised persons to the professional principles elaborated in section 1, subsection (3):

"The context in which the regulatory objectives are referred to in the Act do not include the court considering an application for special rights of audience."

It goes on to say:

"It is submitted that, where an application is made in ordinary civil proceedings to grant a right of audience to a person who is not authorised to exercise it, the judge should take as their starting point the judgment of the Court of Appeal in *Clarkson v Gilbert*. In that case, Lord Woolf said that, 'if a party, having chosen to act in person, wants somebody who is not an advocate and has no rights of audience to appear on their behalf instead of someone who has rights of audience, that has to be justified. The litigant in person must satisfy the court that it is appropriate'. "This was a case in which a claimant in person made allegations of conspiracy, inducement to breach of contract and libel and wished to have as their advocate throughout the proceedings her husband, a man who had completed the Bar finals but not been called to the Bar. Here, the court held, overruling the judge, that a special right of audience should be granted to the party's husband. The court accepted that, for reasons of ill health, the claimant was unable to conduct the proceedings herself and needed assistance. If the separate judgments of Lord Woolf and Lord Justice Clarke, with whom Lord Justice Waller agreed were put side by side, it can be seen that the court was of the opinion:

"1. That paragraph 1.2 of schedule 3 in no way fetters the discretion;

"2. All will depend upon the circumstances of the case; and

"3. Here there was good reason on the facts to permit the husband to speak on behalf of the claimant and that it was just to permit him to do so;

"4. The fact that the husband could not comply with what is now section 188 did not mean that he should not be allowed to act as his wife's advocate. "The court expressly rejected the contention that discretion could be exercised only in exceptional circumstances. The requirement that exceptional circumstances are needed to justify a right of audience applies, however, when the grant of such rights is sought by a lay person on a regular basis."

So the test is ultimately good reason. That is, as I say, to uphold the integrity of the statutory scheme in relation to rights of audience. Your Lordship would need to be satisfied on proper evidence that there was a good reason for granting a special right of audience to Mr Slade.

It is difficult to see how that test could be met in circumstances where there is no evidence to explain what has happened in relation to the sale of the property. We were all told by Mr Slade that he just needed an order permitting the sale of Mr Thomson's house for £3 million for funds to be released and for counsel to return. He emailed your Lordship's clerk on Sunday, the 10th of this month, to say that he was on the brink of being ready to complete the sale and purchase of Mr Thomson's house which will release funds to pay counsel who will then resume participation in the trial. He said:

"By 'on the brink', I mean documentation has been agreed and in large part signed and the money is ready. I anticipate we will be ready either tomorrow or, at the latest, on Tuesday."

That was Tuesday last week. But he went on to say they couldn't complete until they had received the sealed order from the Crown Court. That was the one obstacle that was said to stand in the way of an immediate resolution.

We are told the Crown Court's order was made on Thursday last week and so it is entirely unclear why this transaction that we were told was on the brink of completion hasn't been able to go through in time. Mr Slade said there was a shortfall, or would be a shortfall, in respect of the monies needed to pay for three counsel to appear. It is unclear, in those circumstances, why Mr Thomson hasn't simply instructed one of those counsel to appear, whether Mr Mayes or one of the two juniors. If there is not enough for all three of them, it would seem that the obvious thing to do is to have only one of them appear.

It is difficult, also, to see a good reason in circumstances where the claimants offered, as my Lord will recall, to provide £350,000 on the terms set out in a letter from Mishcon de Reya in order to fund junior counsel to appear on behalf of Mr Thomson. It is, I think, increasingly difficult to find any good reason when it is recognised that Ms Dwarka is part of Mr Slade's firm and on the team in this case. It is not just that she is a member of the firm, she has been instructed specifically in this case, as my Lord has seen, attended court very regularly, far more regularly, in fact, than Mr Slade, whose presence has been only very fleeting.

As my Lord heard, Ms Dwarka was called to the Bar in 2005, qualified as a solicitor in 2011, gained higher rights of audience as a solicitor in 2013 and appears frequently in courts as an advocate. She has said that she will need only a day or two in order to get up to speed and prepare Mr Thomson's opening submissions. Presumably, it will be at the shorter end of that time period now that Mr Slade has done a lot of the ground work. She simply needs to get on top of his notes. It is very difficult, in those circumstances, to see how the court could say there is a good reason for permitting someone with no higher rights of audience to appear as a trial advocate on behalf of Mr Thomson. For our part, we would not be unhappy with the idea that Ms Dwarka should have, for example, the rest of

today, and possibly some time tomorrow morning, to prepare, because we received on Friday, late afternoon, an additional set of supplemental disclosure from Kingsley Napley, more than 5,000 documents, which we were told had been wrongly coded as being privileged. There is no satisfactory explanation as to how this error arose and we haven't had a chance yet to look at those documents. It is obviously going to be important that we do so.

The last tranche of supplemental disclosure they provided, again saying that it had been wrongly coded as privileged, contained some very significant material indeed. It seems remarkable that this error in coding has happened a second time, but there we are. We have an additional 5,000 documents to look through. We could usefully be getting on with that while Ms Dwarka is getting on top of Mr Slade's notes.

MR JUSTICE MILES: Right.

Mr Slade, what do you want to say?

Submissions by **MR SLADE**

MR SLADE: My Lord, perhaps Mr Robins missed the crucial part of what I said. The only reason we are in this situation is that the conveyancing transaction was delayed as conveyancing transactions are wont to be, and that happened because we were told on Friday that there had been a delay in the lender requesting funds. That meant that it was impossible to complete on Friday. The transaction will, I am told, complete today or tomorrow. That is nobody's fault -- maybe it is the lender's fault, but the lender isn't obliged to comply with anybody else's timetables, they can do what they want. The knock-on consequence of that, my Lord, was that counsel felt obliged, with great regret, to take the course that they took. They felt that they could be professionally criticised if they were to start, only to find that, for some unforeseen reason, the conveyancing transaction did not complete and they were unpaid. So they felt they ought not to put either themselves or Mr Thomson in that situation.

With that in mind, in those quite exceptional circumstances, my team and I have prepared, over the weekend, at considerable personal expense in terms of the expenditure of time, to meet the court's deadline (inaudible). So I have come to court today prepared to deliver the opening on behalf of Mr Thomson, and Ms Dwarka is prepared to deal with the cross-examination of witnesses as soon as openings have concluded. In those circumstances, the various things which have happened seem to me amply to support the proposition that the court ought to grant me the right of audience on this occasion. I know that I have appeared a number of times before this court. I have done so extremely unwillingly in circumstances where there has been no alternative. It is not something I enjoy doing, but, to assist the client, I find myself sometimes in a position where that is the only practical way of dealing with matters.

MR JUSTICE MILES: I am not sure it is the only practical way in the circumstances, for the reasons that Mr Robins has given about the new disclosure that has been given.

MR SLADE: Well, my Lord, if your Lordship refuses my application, then we will have to think again.

MR JUSTICE MILES: Well, it would be on the basis that Ms Dwarka would be given a period to get up to speed, no doubt with your assistance and the assistance of your notes, and would then be in a position to present the opening.

MR SLADE: My Lord, I think, with the greatest respect, that that is simply imposing on Ms Dwarka in circumstances where she finds herself now having to conduct an extremely long trial on the basis of no warning whatsoever. I first asked her to do this on Friday afternoon.

MR JUSTICE MILES: Well, I know, but she has been in court. These things sometimes happen to members of the advocacy profession. She has told me she will need a day or so to be ready and the claimants are not opposing a day or so for her to get ready.

MR SLADE: Well, my Lord, I think I would need to take Mr Thomson's instructions on that. He has been disappointed already because the barrister team walked out on Friday. I told him that, in the circumstances, we could apply for an adjournment but the court would be very unlikely to be sympathetic to that because of your Lordship's remarks on the last occasion that, really, this couldn't be allowed to roll on.

MR JUSTICE MILES: But circumstances have changed since then.

MR SLADE: His instructions to me, my Lord, were he would be content if I did it because, obviously, I have quite considerable familiarity now with him and his situation, and indeed with the case. That is obviously distinctly second best. Now he is being asked, at the last minute, to contemplate a third situation.

MR JUSTICE MILES: But this is a situation which has been brewing for a very long time, Mr Slade.

MR SLADE: It has been brewing, my Lord, yes, but --

MR JUSTICE MILES: Contingency plans should have been made and you don't have rights of audience.

MR SLADE: I appreciate that. We are in your Lordship's hands.

MR JUSTICE MILES: Right. Thank you.

Mr Ledgister, do you have anything to say about timing?

MR LEDGISTER: No, thank you, my Lord.

MR JUSTICE MILES: Right. Thank you.

Ruling

MR JUSTICE MILES: I have an application by Mr Slade who is a solicitor but does not have rights of audience in the higher courts to be permitted to represent the first defendant and be granted rights of audience in relation to the opening of the first defendant's case. The court has a power under the 2007 Act to grant rights of audience to any person in respect of particular proceedings and authorities show that the burden is on a party seeking an order under those provisions to justify it that exceptional circumstances are not required but that a good reason is required. There has been a long history to the attempts of the first defendant to obtain representation by counsel. He has been subjected for a number of years to a proprietary freezing order and also a non-proprietary freezing order, and also a civil [sic] restraint order. He has made a series of applications for the release of funds for the purposes of funding his representation. This court and the Court of Appeal in a consent order have released certain amounts for him to be represented, but there also have been a number of applications made to the court in relation to the way that funds may have been released in practical terms, which have included a number of proposals from the first defendant.

Ultimately, it appeared that there was likely to be a solution under which the house owned by the first defendant would be sold and part of the proceeds would be available for legal representation.

It appeared, until late last week, that that would go through and that the first defendant would be represented by a counsel team led by Mr Mayes KC. On Friday last week, the court was informed by Mr Mayes that he would not be able to represent the first defendant and I have been told by Mr Slade today that that is because there is insufficient certainty that funds would be available. Mr Slade has explained that that has been a late or last-minute delay in the completion of the sale of the property, although he said that it was still hoped that the sale would be completed in the next day or so.

The position, therefore, is that Mr Mayes is not in court to represent the first defendant and is not, at present, instructed to do so.

Mr Slade says that this is an unusual set of circumstances and describes it as an emergency. He says that he is in a position to present the opening on behalf of the first defendant.

It has also emerged that Ms Dwarka, who is a member of Mr Slade's firm and is a non-practising barrister and solicitor advocate with full rights of audience, has been part of the first defendant's team. Mr Slade has proposed that he should be permitted to open the case on behalf of the first defendant and that Ms Dwarka should then conduct the further steps in the trial, including the cross-examination of the claimants' witnesses. Ms Dwarka explained to me that she expected to be about a day cross-examining those witnesses in total. She also explained that she would require a day or so to be in a position to present the oral opening. She had not been able to prepare both the cross-examination and the oral opening over the weekend, having only been informed last Friday that she would be required to conduct at least part of the representation of the first defendant at the trial.

Mr Slade contends that he should be permitted rights of audience to present the opening and suggests that it would be in some way unfair were he not to be permitted to do so.

The claimants have explained that there has recently been further disclosure of documents by the fifth and sixth defendants, I am told that some 5,000 further documents have been disclosed. The claimants, in these circumstances, would not object to an adjournment of a day or so to enable Ms Dwarka to get up to speed and be in a position to present the opening submissions for the first defendant.

In these circumstances, where Ms Dwarka has full rights of audience and Mr Slade does not, where Ms Dwarka has said that she will need a day or so to prepare, and where the claimants do not oppose an adjournment to enable that to happen, I am not satisfied that this is a case where the burden has been met of justifying an order for Mr Slade to be given rights of audience. It seems to me that the obvious course is for Ms Dwarka and Mr Slade to spend some time together so that Ms Dwarka, who does have full rights of audience and is an experienced advocate, is able to present the first defendant's opening submissions. I will now hear from Ms Dwarka whether she would be in a position to commence the opening at 2.00 pm tomorrow or whether she contends that a little more time is required.

MS DWARKA: My Lord, a little more time, please.

MR JUSTICE MILES: So that would be until?

MS DWARKA: Wednesday morning.

MR JUSTICE MILES: That would then mean that, in all likelihood, it would be possible for the claimants' evidence to be dealt with by --

MS DWARKA: Thursday.

MR JUSTICE MILES: -- close of business on Thursday.

MS DWARKA: Yes. I don't expect it to be too long.

MR JUSTICE MILES: So we would still be in accordance with the timetable.

MS DWARKA: With the timetable, yes.

MR JUSTICE MILES: Right. Do you have any objection to that?

MR ROBINS: My Lord, no.

Housekeeping

MR ROBINS: The only other thing that we need to fit in is my response to Mr Ledgister's pleading points. He dealt with them very quickly, I am afraid dealing with them in response is going to take a little bit longer. That is also going to have to be slotted in somewhere. We had always, to this point, taken the view that I should deal comprehensively with any pleading points and there are some in Mr Thomson's opening submissions, written submissions.

MR JUSTICE MILES: Yes.

Ms Dwarka, are you anticipating that there will be further pleading points that you will -- I mean, you may want to consult with Mr Slade on that.

MS DWARKA: Yes, my Lord.

MR JUSTICE MILES: Right.

How long do you think you will need, Mr Robins, on that?

MR ROBINS: Half a day.

It is slightly unconventional to have submissions on pleading points after the claimants' witnesses, but I don't think any of the pleading points really relate to our witnesses' evidence, so it would be potentially possible to have Mr Thomson's opening on Wednesday, our witnesses on Thursday, pleading points the following Monday. Then I think, next week, we would have Tuesday and Wednesday to begin Mr Thomson's cross-examination. We then, I think, break for the court vacation so, as currently envisaged in the timetable, Mr Thomson would be in purdah over the vacation, but that is inevitable and that is what the timetable currently provides for.

MR JUSTICE MILES: Yes.

MR ROBINS: We wouldn't be too far behind schedule, if at all, on that basis.

MR JUSTICE MILES: I see. So under the existing timetable, was your evidence going to go into Monday?

MR ROBINS: It was going to be this week and then Mr Thomson starting -- we also had Mr Thomson's witness summonses, which I think is what took us into next week, but those have gone.

MR JUSTICE MILES: Yes.

MR ROBINS: So, yes, we could have Ms Dwarka on Wednesday, our witnesses on Thursday, pleading points on Monday, and then Mr Thomson.

MR JUSTICE MILES: Yes.

Do you have any observations on that? It seems right that the pleading points don't affect the claimants' evidence and, so as long as those are dealt with before the defendants start giving evidence, that is satisfactory.

MS DWARKA: I think that's fine, my Lord.

MR JUSTICE MILES: So, what I will do, I think, is say we will return on Wednesday, on the footing that you will have a day, Ms Dwarka. Will that be sufficient? It sounded as though --

MS DWARKA: We might need a day and a half, my Lord.

MR JUSTICE MILES: How long are we going to need for the cross-examination, do we think?

MS DWARKA: I don't have that many questions, my Lord, but I have only managed to look over the weekend, so I might add a little bit more.

I roughly think, bar one witness who I will take about an hour and a half, I think the rest is going to be fairly short. But that depends on their answers as well.

MR JUSTICE MILES: Of course.

MR ROBINS: I am told we do need to get Mr O'Connell in this week because he is not available next week.

MR JUSTICE MILES: Right. Okay. But I think he is going to be one of the short ones?

MS DWARKA: Yes.

MR JUSTICE MILES: If you don't need to cross-examine, then the sooner you can say that, the better obviously.

MS DWARKA: Yes. I am cross-examining all of them but some are very short.

MR JUSTICE MILES: Yes. Right.

All right. Any more comments on the timetable, Mr Robins, on that basis?

MR ROBINS: I don't think so. May I just turn my back for a moment?

(Pause).

My Lord, provided we can accommodate Mr O'Connell's evidence on Thursday this week, we have no further comments.

MR JUSTICE MILES: Right. All right, that is what we will do.

I will allow you, Ms Dwarka, until Wednesday morning. I would like you, if possible, to complete your submissions within a day, but obviously I am not going to guillotine you. I would like that to happen, if possible, and I think you and your team should bear in mind that the court has gone out of its way to ensure that your client has an opportunity to open the case. Then we will then have, certainly, Mr

O'Connell's evidence on Thursday, on any view, but also seek, if possible, to complete the claimants' evidence by the end of the week. Again, I quite understand if it takes rather longer, but that would be the plan. Then I think we will deal with any pleading points that the fifth and sixth defendants, and indeed your client, has on Monday.

Right, so we will adjourn on that basis. Thank you very much.

(12.20 pm)

(The hearing adjourned until 10.30 am on Wednesday, 20 March 2024)

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