Judgments

QBD, DIVISIONAL COURT

Neutral Citation Number: [2015] EWHC 1813 (Admin)

CO/5477/2014

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

DIVISIONAL COURT

Royal Courts of Justice

Strand

London WC2A 2LL

Thursday, 7 May 2015

B e f o r e:

LORD JUSTICE DAVIS

MR JUSTICE SINGH

Between:

THE QUEEN ON THE APPLICATION OF BSG RESOURCES LIMITED

Claimant

v

DIRECTOR OF THE SERIOUS FRAUD OFFICE

First Defendant

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Second Defendant

Computer-Aided Transcript of the Stenograph Notes of

WordWave International Limited

A Merrill Communications Company

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(Official Shorthand Writers to the Court)

Mr J Lewis QC and Ms R Scott (instructed by Mishcon De Reya) appeared on behalf of the **Claimant**

Ms H Malcolm QC and Ms K Hardcastle (instructed by the Serious Fraud Office) appeared on behalf of the **First Defendant**

Mr D Jeremy (instructed by the Treasury Solicitor) appeared on behalf of the **Second Defendant**

J U D G M E N T

(As approved)

1. LORD JUSTICE DAVIS: This is a renewed application on the part the claimant, BSG Resources Ltd, seeking permission to apply for judicial review. The claim form was issued on 26 November 2014. Permission was refused on the papers by Goss J by detailed written ruling dated 23 February 2015.

2. It is not the practice of the Administrative Court on renewed applications to deliver lengthy judgments; either the grounds, or some of them, are realistically arguable or they are not. If they are arguable, the court can say so shortly. If not, the court can say so equally without giving elaborate reasons of the kind appropriate for a judgment on a substantive claimant for judicial review. No different approach is called for simply because of the very great quantity of materials that have been lodged in this present case or because all parties have been represented before us.

3. The context of the present proceedings is that of mutual legal assistance with regard to investigation of alleged corruption. That connotes, as I see it, some initial points which are to be borne in mind from the outset. First, the requesting state, here the Government of Guinea, is a friendly foreign state. It also is, as is the United Kingdom, party to the United Nations Convention against Corruption. That treaty requires signatories to afford one another the widest measures of mutual legal assistance to the fullest extent possible. Second, the relevant powers with regard to legal assistance are conferred on the Secretary of State for the Home Department and, as in the present case, the Serious Fraud Office under the provisions of sections 13 to 15 of the Crime (International Co-operation) Act 2003 and section 2 of the Criminal Justice Act 1987. It is the ordinary understanding in this regard that requests made are intended to be acted upon expeditiously. Third, it is further well established that the United Kingdom in considering whether to act on any such requests is not expected or required to adjudicate upon substantial disputes of evidence or of foreign law. The expectation is that requests for assistance will be acted upon and complied with unless there are compelling reasons for not doing so or unless the request is obviously unlawful (see by way of example the decision in JP Morgan Chase Bank National Association & Ors v The Director of the Serious Fraud Office & Anor [2012] EWHC 1674 (Admin) and the authorities there cited). As there said, cases of refusal to accede to such cases must be rare: otherwise indeed international mutual assistance will cease to function.

4. In the present case, the claimant seeks to challenge the decisions of the Secretary of State to accede to the requests of the Government of Guinea and then refer them to the Serious Fraud Office and the decisions of the Serious Fraud Office to accede to those requests and then to issue amended section 2 notices served on 7 October 2014. Further, there is challenged the decision of the Serious Fraud Office to refuse to disclose to the claimant or its advisers the letters of request made by the Government of Guinea and, further, the decision of the Serious Fraud Office to refuse to disclose the conditions of use to be imposed on the Government of Guinea in relation to documents obtained, if transmitted within the relevant time, before transmission.

5. Within those particular grounds of challenge a considerable number of differing arguments have been deployed. Perhaps the core contention, and certainly the contention which has taken up a vast amount of evidence, is that of the claimant to the effect that the request for legal assistance made by the Government of Guinea is irredeemably tainted by bad faith and/or political motivation on the part of the requesting state. It is further complained that the defendants have simply failed to give sufficient consideration to that point.

6. Notwithstanding the great detail of evidence adduced and the careful and thorough arguments deployed, in my view this entire argument is misplaced.

7. The propositions themselves in support of such an assertion are contained primarily in a very lengthy witness statement of Mr Dag Cramer, dated 25 November 2014, supported by a further witness statement of Mr Lipson, the claimant's solicitor, dated 26 November 2014, each having substantial exhibits.

8. Mr Cramer's statement is an interesting document. He has little first-hand knowledge of the underlying alleged facts. Instead, in what has to be acknowledged as a conspicuously carefully crafted and well-constructed statement, he sets out what in reality is the claimant's presentation of its entire case and indeed he has done so very lucidly. But having considered that evidence, including the relevant parts of the attached documentation, I do not think the evidence can bear the weight which the claimant would seek to ascribe to it as, in effect, representing the entire truth of the matter. There is no doubt at all, to my mind, on the present materials that there are some disconcerting features contained in the evidence relating to events which have happened in Guinea: not least, although certainly not solely, because of what appears to have been a possibly arbitrary detention and arrest of two employees of the claimant in Guinea for no very clear reason apart from their being such employees. There are numerous other points that can fairly be made, and are made, in Mr Cramer's statement.

9. But for present purposes, in my judgment, all this ultimately leads nowhere. The claimant simply cannot show an overwhelming case that the letter of request is tainted by bad faith or political motivations. The position of the claimant is that its own initial involvement in Guinea (notwithstanding that it apparently had had no previous significant involvement in iron ore and related mining) was in no way untoward. It claims that the then regime in Guinea under President Conté had not been party in any way to or recipient of any inducements in granting to the claimant the relevant mining and exploration licences. Its subsequent joint venture with Vale at seemingly massive profit, actual or potential, to itself was, it says, good business and well-merited good fortune. It says that subsequent events in Guinea, culminating in the decision of the Technical Committee, were a device on the part of the current President to expropriate the claimant's assets with a view to, and as a promised reward for, favouring a new mining venture which it is said had dishonestly and illegally lent support to the current President, Alpha Condé, during his election and thereafter: it being alleged that that election was entirely rigged.

10. The claimant further says that the processes leading up to the Technical Committee's decision to deprive the claimant of its licences was, in effect, a charade giving effect to a predetermined decision and ignoring the protestations of the claimant through its lawyers and ignoring the asserted lack of evidence needed to sustain the purported reason for the expropriation of the assets and termination of the licences. The purported reason advanced is the alleged corruption by the claimant of the previous regime, this being put forward as the explanation for depriving it of its licences whereby, so the Government of Guinea were saying, it was enabled to obtain the initial mining exploratory rights and subsequent rights as it did.

11. It is further said that this kind of tactic has been sought to be deployed unsuccessfully by the Government of Guinea with regard to the attempted expropriation of the rights of another company called Getma.

12. It seems plain that all matters of this kind are likely to be the subject of detailed examination and detailed evidence in the course of the arbitration proceedings which I gather are extant between the claimant and the Government of Guinea with regard to the purported rescission of the agreements by the Government of Guinea.

13. What the claimant says in this regard may be true. It may not be true. This court, the Administrative Court, simply cannot decide such matters, especially given the evidence is both so contentious and tendentious. More importantly, neither can, nor indeed should, either the defendants decide on such matters.

14. Mr Lewis referred in argument to the Secretary of State's guidelines with regard to such requests and to the indications, for example, that evidence of political motivation, or substantial grounds for believing that request is prompted by the political opinions or otherwise of the target, may be taken into account in deciding whether to accede to such a request. But, as he realistically accepted in argument, so far as the Secretary of State was concerned at the time the requests were received, the Secretary of State would have had little material to go on to decide not to accede to them; and indeed the full force of what the claimant was seeking to say was only deployed thereafter in discussion with the Serious Fraud Office and thereafter, as I have said, in its detailed evidence lodged in these proceedings.

15. Indeed, the evidence of the claimant, as I read it, rather cuts two ways, as is illustrated by the effective necessity for Mr Cramer to disparage or downplay evidence which tells against the claimant's case. For example (and he may or may not be right, I cannot say) he says that there is no substance at all into previous reports such as the DLA Piper report and the Veracity report; and he devotes much evidence and argument to seek to support his contentions in that regard. Likewise, he entirely condemns the letter of allegations and the decision of the Technical Committee. It seems to me in such circumstances that it is a wholly empty point for Mr Lewis to say that neither defendant has put evidence in in this regard. It was, and is, as matters currently stand under no obligation to do so. In truth, the evidence put in by the claimant speaks for itself in showing just how much potential dispute of fact there is.

16. Yet further, there are the implications of the evidence of Mamadie Touré, the recordings of her discussions which Mr Cilins and the outcome of the criminal proceedings in the United States against Mr Cilins to be borne in mind. Indeed, it seems to be an integral part of the claimant's position that the purported agreements produced by Mrs Touré are forgeries. But again whether that is so can only be determined on further investigation and questioning; and the same goes for the recordings obtained, seemingly covertly, by the claimant in support of its case.

17. Moreover, although perhaps this is a lesser point, there is some force in Ms Malcolm's observation that there is no evidence to show that the investigating magistrate responsible for issuing the letter of request is himself embroiled in any fraud or corruption, although as against that I should record that Mr Lewis says that is inherent in the whole general country evidence relating to the way in which, sadly, it appears that Guinea often has operated.

18. In my view, it is really pointless for present purpose to say much more on all these points at this stage. In my view, such matters were no bar to the defendants deciding to act as they did; and, as it seems to me, there was nothing unlawful or unreasonable in them acceding to the request that had been made to the Secretary of State and then passed on to the Serious Fraud Office. On the contrary, those steps accord with the general intent behind the treaty, they accord with the statutory provision and they accord with the general statement of principle to be found in the various legal authorities. Moreover, it is not to be overlooked that the documents sought relate to an *investigation*: no more and no less. The position therefore is quite different from, for example, that pertaining in cases such as Ismail v Secretary of State for the Home Department [2013] EWHC 663 (Admin).

19. A further point taken on behalf of the claimant is that it is said that the defendants in making their various decisions have failed sufficiently to consider the question of human rights, in particular Article 6. Some mention was also made by Mr Lewis of Article 8. Given the structure of the Act and the safeguards provided, however, I cannot see how Article 8 can come to bear in this case.

20. So far as Article 6 is concerned, again I do not see how at this stage it is easy to invoke that Article by reference to any possibility of there being no fair or meaningful trial subsequently in Guinea. I am extremely doubtful if such a point is open to the claimant to raise at this preliminary stage. I say preliminary, because at the moment what is sought is documentation with regard to an investigation. This is not an extradition

request, for example. Indeed, there has been no decision as yet in Guinea to commence any criminal proceedings.

21. But in any event, the point is further answered for present purposes by the assurance of the Serious Fraud Office that it will consider such aspects at the stage of transmission of the evidence obtained under the notices, if such evidence is permitted to be handed over. In my view, that was and is a reasonable approach on the part of the Serious Fraud Office; and that approach thus far, so far as Convention rights are concerned of the defendants, cannot be impugned.

22. Mr Lewis raised a point about the notices in part being directed at BSG: that is to say a corporation. It was said that under the Guinean penal code a corporate entity cannot be prosecuted for corruption. Up until yesterday that had not been accepted by the defendants. But by letter sent yesterday to the claimant it is accepted that that is so and that the opinion of the French lawyer obtained by the claimant to support that proposition is correct. But that does not necessarily invalidate that which the defendants have done. It is to be borne in mind that corporations can only act through agents or servants. In the present case the notices as amended and served on 7 October 2014 were headed "Persons under investigation: BSG Resources Limited and others". Mr Lewis complains that there can be no investigation for the purposes of criminal proceedings against BSG just because it is a corporation and complains that the reference to others is entirely unspecific. However, one has to read the notices as a whole, accepting as I do that the relevant details and information must be contained within the four corners of the notices themselves. Thereafter, as I see it, it is made quite clear that the documents sought relate to "any of the following individuals or entities whether acting in their official or private capacity ... " and then four such categories are set out. In my view, that sufficiently identifies that the ultimate target for the proposed investigation relates to individuals, even though necessarily (because all were allegedly operating in connection with BSG) the notices have to incorporate reference to BSG itself.

23. I should add, although I do appreciate that this is only collateral to the notices, that by the accompanying letter of 7 October 2014, the SFO had said this:

"The criminal investigation in Guinea relates to the suspected corrupt practices of employees, officers, agents and other representatives of companies operating within the BSG group ... "

As Ms Malcolm pointed out, there is clear sense in this context in seeking documents by reference to the corporations for whom such individuals worked or otherwise acted.

24. This then leads into Mr Lewis' next point by reference to the particularity (or as he would say want of particularity) in the notices and, as he would say, the oppressive consequences arising from the width of the wording of such notices. I have considered carefully the drafting of the notices. In my view, they are entirely clear as to what is required to be produced. I do not think a reasonable recipient could be under any real doubt as to that.

25. Mr Lewis sought to raise points of construction, suggesting that properly construed the notices would require a massive potential disclosure of documents which could have nothing to do with the potential investigation, including, he suggested and by way of example, things like geological surveys and mining reports and so on. I do not so read those notices. It seems to me that they make it clear that what is sought with regard to the Simandou and Zogata transactions is limited to transactions relating to the acquisition, retention, sale or proposed sale by BSG of mining rights and so on and the joint venture agreement between BSG and Vale. In my view, that is sufficiently specific and sufficiently relates to the proposed investigation. Mr Lewis queried why Vale was included in this regard. It seems to me there is ample reason, having regard to the background, to include Vale in this regard, it having come on board as a join venturer to seemingly

very great profit of the claimant itself.

26. So far as further disclosure is sought by Mr Lewis, I do not think that is needed. I do not think it can be said that the claimant needed more materials to be disclosed to it before it could understand properly what was required of it by the notices, or perhaps more strictly what the recipients of the notices were to understand was required, that is to say the two firms of solicitors and Onyx. As I see it, there was entirely sufficient for the recipients of these notices and the claimant to understand the position. And in the context of disclosure (different I appreciate from the actual contents of the notices) it seems to me perfectly legitimate for the defendants to rely upon the undoubted extensive knowledge of the claimant and its advisers to the entire background.

27. As I have said, I do accept that these notices, albeit sufficiently clearly phrased, are very widely drawn indeed. However, as a number of the cases show (see, for example, Finninvest SPA, R (on the application of) v Secretary of State for the Home Department [1997] 1 WLR 743). In the context of an investigation, as opposed to an actual legal proceeding, however, it is inevitable that the area of search may be wider and cover more material than would ultimately be used in any proceedings.

28. One does, I accept, now have to bear in mind what the recipients of the notice say about the very potentially dramatic consequences of compliance with those notices. It is said, for example, that so far as Mishcon de Reya is concerned, it may spend many, many hundreds of hours in looking into the documents and the costs of complying with these notices may run to over £300,000. Whether that really will prove to be so, this court has no way of knowing. But the fact remains that the claimant is in a position to comply, the recipients of the notices are in a position to comply and, as it seems to me, this suggestion of oppression has no arguable basis. I should place on record that it has in any event been offered on behalf of the Serious Fraud Office to discuss with the solicitors any difficulties that arise: and the impression I get is that they would be sympathetic in avoiding any duplication between the two notice recipients.

29. Mr Lewis did also advance an argument more specific perhaps than the one I have previously mentioned to the effect that these notices were invalid. In particular, he placed reliance on a recent decision of the Divisional Court in the case of R (Van der Pijl) v Crown Court at Kingston [2013] 1 WLR 2706. That case, it is true, involved a very strict approach to the drafting of the warrants as applied for in that case and in particular indicated that reference to the words "the suspects" without identifying them was a fatal flaw notwithstanding that everyone knew apart from what was set out in the notices themselves as to who those suspects were.

30. In my view, that case can readily be distinguished. It can be distinguished because that case, unlike the present case, involved consideration of section 15(6) of the Police and Criminal Evidence Act 1984, which has wording quite different from section 2 of the 1987 Act and perhaps; and more importantly, what was said by Wilkie J in giving the principal judgment in that case, and with which Sir John Thomas agreed, was that:

"Accordingly, it is impossible, within the four corners of the warrant, for a person executing it, or a person whose premises are being searched pursuant to it, to be able to identify precisely what the warrant authorises by way of seizure in respect of those five categories."

That is to be distinguished from the present case given the drafting of these particular notices which, in my view, do make the position clear.

31. The next point raised by Mr Lewis relates to limitation. It is common ground that for the purposes of

limitation time runs in Guinea from the start of the investigation, which as I understand it was 16 April 2013. There is evidence from a distinguished French lawyer, Professor Sur, to indicate that the relevant provisions under Guinean law would connote a statutory time bar after the lapse of a period of 3 years. The argument goes on that it cannot be said that there had been any payments after 2010. Everything that happened, it is said, would have occurred long before then.

32. I can see no reason why either of the defendants should have been required so to conclude. Not only are the full facts not known but the opinion of the French lawyer, Professor Sur, obtained by the claimant, is, understandably, rather equivocal on the point. That in part is because he himself does not know the full facts but in any event he makes the point that the legal issues are, in effect, complex, as the claimant has itself accepted in argument. Indeed, Ms Malcolm in the course of her argument drew attention to certain materials which are at least suggestive of payments having been received after 2010 and indeed during 2012 and maybe thereafter also. Mr Lewis sought to rebut that by saying that would not in any event knock out the limitation point because it had to link to the date of the agreement. Suffice it to say the position is far too complex to be capable of a ready or easy solution. While it may be the Serious Fraud Office went too far in asserting that limitation could not apply, what cannot be asserted is that limitation is a knockout answer to any prospective criminal proceedings; and there was no reason for the defendants, or either of them, so to have concluded.

33. A further point was raised in the written argument as to the lack of undertakings being required from the Government of Guinea if documents are to be transmitted to them. Suffice it to say Mr Lewis realistically did not pursue that point.

34. As to the point he has raised about disclosure, I have already briefly expressed my views on that. I would simply add that it is well established that a letter of request is properly treated by the receiving state as confidential. Indeed, it is easy to imagine in some circumstances whereby it could be damaging if the extent of the requesting state's knowledge, or indeed a lack of it, were revealed. There may be some cases where the authorities are prepared to reveal the letters of request but they are not invariably required to do so. In my view, there was no obligation on them to do so here and, as I have said, the claimant and its advisers and the recipients of the notices knew well what was going on and did not need more information. In my view, therefore, no more information was required to be disclosed. One can compare the decision in R(Evans) v The Director of the Serious Fraud Office [2002] EWHC 2304 (Admin).

35. I do not propose to say more, notwithstanding the detail of the arguments deployed before us. I have, of course, borne in mind the test here is whether or not this claim or parts of it are arguable. My view overall is that none of these grounds are arguable. It seems to me that the defendants reached decisions properly open to them. Such decisions were reasonable and proportionate and cannot be said to have been vitiated by any failure to take relevant matters into account. The contrary is not realistically arguable. I think Goss J's reasoning was right and I think his conclusions were right and for my part I would dismiss this application.

36. MR JUSTICE SINGH: I agree that this application should be refused for the reasons given by Davis LJ. I would wish to add my own observations on just two matters. The first relates to the reliance placed by the claimant on Article 6 of the Human Rights Convention as set out in Schedule 1 to the Human Rights Act 1998.

37. As advanced in the written grounds, the argument proceeded on the following basis. Reference to two passages will suffice. At paragraph 33 of the grounds it was submitted that by virtue of section 6 of the Human Rights Act both the Secretary of State and the SFO are obliged to ensure that their actions in providing assistance to a foreign requesting state do not contribute to a flagrant breach by that state of Article 6. At paragraph 65 of the grounds the claimant submitted that the defendants have failed to take into consideration the risk that by acceding to the Government of Guinea's requests for assistance they are

facilitating a criminal process which will entail a flagrant breach of the fair trial rights of the accused.

38. It was further submitted that the defendant's duties under section 6 of the Human Rights Act are therefore engaged. As I understood the way in which the argument was developed in the course of this hearing, Mr Lewis QC accepted that on reflection the propositions sought to be advanced in the grounds were too broadly formulated. Certainly, as it seems to me, he was unable to cite any authority supporting such broadly formulated grounds. It is important to recall the context in which the Article 6 issue, if it arises at all, has to be considered. The reference to a flagrant breach of fair trial rights flows from well-known jurisprudence of the European Court of Human Rights, reflected also in decisions of the House of Lords and the Supreme Court in this country, that there can be certain limited circumstances in which a state party to the Human Rights Convention may bear responsibility under that Convention not for its own acts but indirectly because it proposes to do something which will entail a flagrant breach of a person's Article 6 rights in a foreign state which is not party to the European Convention. A typical example of that may be where it is proposed, for example, to extradite a person from a contracting state to a state outside Europe. In my view, it is important, certainly in the absence of any authority cited to the contrary, to bear in mind that there are well-defined limitations on the applicability of Article 6 in such cases.

39. For the reasons that Davis LJ has given, I would certainly not in the absence of authority accept that such a duty as broadly formulated in the claimant's grounds has arisen, particularly at the investigation stage, which is all that this case is presently concerned with.

40. The second matter to which I would briefly wish to return is the decision of this court in Van der Pijl. In my judgment, it is clear from a fair reading of the judgment of Wilkie J read as a whole that the ratio, so far as material, of that decision was concerned with the terms of section 15(6) of the Police and Criminal Evidence Act 1984 (see, for example, paragraphs 66 to 67 in his judgment). The terms of section 15(6) of the 1984 Act were set out by Wilkie J at paragraph 42 of his judgment and are as follows:

"A warrant-

...

(b) shall identify so far as is practicable the articles or persons to be sought."

41. Mr Lewis QC placed some reliance on the passage cited by Wilkie J at paragraph 53 of his judgment in the decision of this court in R (Energy Financing Ltd) v Bow Street Magistrates' Court (Practice Note) [2006] 1 WLR 1316 paragraph 24, conclusion (5), in the judgment of Kennedy LJ. In that passage Kennedy LJ stated that there was the same degree of specificity required in that context as would be required for a notice under section 2(3) of the Criminal Justice Act 1987. That, it seems to me, is the highest at which the point can be put by Mr Lewis.

42. For the reasons that Davis LJ has already given, I would not accept that there is any legal defect in the framing of the notices under section 2 of the 1987 Act in the present case and I too would conclude that the decision of this court in Van der Pijl is readily distinguishable.

43. MS MALCOLM: My Lord, there remains then the question of an application for costs. The application in relation to the acknowledgement of service was granted by Goss J in principle but the sum of the Secretary of State was identified and the sum of the Serious Fraud Office at that stage was not. Thereafter, that order was varied to put it back behind the permission application for obvious reasons. May I

renew, therefore, the application for the Serious Fraud Office's costs both at the point of the acknowledgement of service and up until the conclusion of today. I say that in the knowledge that we were not required to attend today and that in other, and if I may say perhaps simpler, cases of judicial review permissions, renewal of permission, the defendant would not apply here but I hope I would be correct in submitting that our appearance and the work that has been put in at this stage has assisted in the matter not going forward to a full hearing.

44. LORD JUSTICE DAVIS: So far as the costs of the acknowledgement of service are concerned, presumably Goss J applied the Mount Cook principles. Is it disputed that in principle the defendants should have the costs of their acknowledgment of service?

45. MS MALCOLM: No. As I understand it, it is the amount.

46. LORD JUSTICE DAVIS: So the question is simply quantum. I think one is £5,000 the other is £30,000 something.

47. MS MALCOLM: That is correct. It was the quantum as far as that is concerned.

48. LORD JUSTICE DAVIS: Is that right, Mr Lewis, you do not dispute it in principle?

49. MR LEWIS: I cannot resist that.

50. THE JUDGE: Can we just deal with the acknowledgements of service first. Do you dispute the principle of the orders of Goss J requiring payment of the acknowledgement of service?

51. MR LEWIS: No.

52. LORD JUSTICE DAVIS: So the question is quantum. The obvious thing to do is to remit to Goss LJ, or some other available High Court judge, the issue of quantum, and that can be done on the papers. You have put in a schedule of costs.

53. MS MALCOLM: We have.

54. LORD JUSTICE DAVIS: Mr Lewis, your side can put in any objection. If the parties can come to some sort of agreement, so much the better. If you cannot, some judge, preferably Goss J, will decide on the papers.

55. MR LEWIS: As indeed the order of today. It used to be called taxed if not agreed.

56. LORD JUSTICE DAVIS: But the assessment of costs can be made by the judge in a case of this kind because there can be summary assessment. You also want your costs of today.

57. MS MALCOLM: I understand Mr Lewis to be saying, therefore, that the principle of today's costs is not disputed either.

58. LORD JUSTICE DAVIS: Mr Jeremy, do you apply for costs?

59. MR JEREMY: Yes, please.

60. LORD JUSTICE DAVIS: Mr Lewis?

61. MR LEWIS: It is difficult because the normal principle is that unless your Lordships can say you would have come to the same conclusion without the assistance of the other parties, you would normally give them costs. That is the general principle.

62. LORD JUSTICE DAVIS: This court does not always give costs to people, however helpful they may have been, who turn up on renewed applications for permission but this case had its own features, not least the defendants had to work to the principle of expeditious decision making.

63. MR LEWIS: The only comment on that, my Lord, is that they did delay for a year and a half after receipt of the letter of request and of course they have conceded today that the first section 2 notices were too wide.

64. LORD JUSTICE DAVIS: But you do not oppose in principle the question of them having their costs of today?

65. MR LEWIS: May I just take instructions, my Lord?

66. LORD JUSTICE DAVIS: Of course.

(A short pause)

67. MR LEWIS: It is a matter for the court.

68. THE JUDGE: We have considered the matter and our view is in these rather unusual circumstances we have decided that your side should pay the costs of each of the defendants of this hearing. We have no schedule of costs, so those costs will have to be assessed if not agreed.

69. MR LEWIS: Certainly on behalf of the Bar can I apologise for keeping your Lordships late and also at the same time thank your Lordships for dealing with the whole matter today. We are much obliged that it has been dealt with.

70. THE JUDGE: Mr Lewis, you and your junior did not succeed but it has been through no want of skill and effort on your part. Thank you, Ms Malcolm, and thank you, Mr Jeremy, very much indeed.