Neutral Citation Number - [2024] EWHC 3408 (KB)

Case No: QB-2012-005865

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20 December 2024

Before :

SENIOR MASTER COOK

- -

Between :

DAVID ROBERT SMITH

Applicant

- and -

SIR ROBERT MCALPINE

Respondent

- -
- -

Ben Silverstone (instructed by Thompsons Solicitors) for the Applicant
Bayo Randle (instructed by Macfarlanes LLP) for the Respondent

Determined on Paper 28 November 2024
Costs 20 December 2024

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Approved Judgment

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SENIOR MASTER COOK

Senior Master Cook:

The application

1. This is an application pursuant to CPR 32.12(2)(b) for an order that relevant paragraphs in witness statements served by the Defendant in these, now settled, proceedings may be used for the purpose of an independent investigation into the alleged involvement of any past or present union officers or officials in the operation of blacklists in the construction industry.

2. At the request of the parties I decided the application on the papers and without the benefit of oral submissions.

3. I was provided with the witness statement of David Smith dated 9 September 2024 in support of the application, the witness statement of Frederick Snowball dated 5 November 2024 opposing the application and a further witness statement of David Smith dated 21 November 2024 in response.

4. Written submissions were provided by counsel for the parties in support of the application, in response to the application and in reply to the response.

The law

5. The legal principles to be applied are largely agreed.

6. CPR 32.12 provides:

> "(1) Except as provided by this rule, a witness statement may be used only for the purpose of the proceedings in which it is served.
>
> (2) Paragraph (1) does not apply if and to the extent that—
>
> (a) the witness gives consent in writing to some other use of it;
>
> (b) the court gives permission for some other use; or
>
> (c) the witness statement has been put in evidence at a hearing held in public."

7. This rule is drafted in very similar terms to CPR 31.22 which deals with the restriction on collateral use of disclosed documents. The relevant case law applying CPR 32.12 has drawn heavily on principles derived from CPR 32.12. The leading cases from which these principles can be distilled are; ***Tchenguiz v Director of the Serious Fraud Office*** [2014] EWHC 1315 (Comm), ***IG Index plc v Cloete*** [2015] ICR 254, ***Tchenguiz v Grant Thornton UK LLP*** [2017] 1 WLR 2809, ***Autonomy v Lynch*** [2019] EWHC 249 (Ch) and ***Manek v Wirecard AG*** [2020] EWHC 406 (Comm).

8. The word "use" in both CPR 31.22(1) and CPR 32.12(1) is to be given a broad meaning. It extends to (i) use of a document itself eg. by reading it, copying it, showing it to somebody else (such as the judge); and (ii) use of the information contained in it. It also

includes referring to a document and any of the characteristics of the document, which include its provenance.

9. Neither CPR 31.22 or CPR 32.12 prohibit use of a document for the purpose of (i) assessing whether it falls within the "public hearing" exception under those rules; (ii) seeking the permission of the court under the rules; or (iii) seeking consent under the rules.

10. The principle governing the exercise of the court's discretion to grant permission for collateral use under CPR 32.12(2)(b) (and CPR 31.22(1)(b)) is the interests of justice, which involves considering the interest of the party seeking to use the documents and that of the party protected by the default rule against collateral use.

11. It is usually necessary to show special circumstances which constitute "cogent and persuasive reasons" for permitting collateral use.

Applicant's submissions

12. Mr Silverstone referred to the evidence of Mr Smith and drew my attention to the following features;

    i) Unite the Union has commissioned an independent investigation into the potential involvement or collusion of trade union officers or officials, past or present, in the operation of blacklists in the construction industry ('the Inquiry'). By this application, the Applicant seeks permission for the Public Interest Law Centre ('PILC') and for Nicholas Randall KC and John Carl Townsend ('the Independent Investigators') to use Relevant Paragraphs of the witness statements, ('the Relevant Paragraphs') for the purpose of the Inquiry.

    ii) There is a strong public interest in the independent Investigators carrying out the Inquiry and for the fulfilment of that public interest it is critical that the Inquiry is able to consider as broad an evidence-base as possible to ensure that its findings and recommendations are full, fair and robust., see paragraphs 34 to 44 of Smith 1.

13. As to the use the Independent investigators would make of the relevant paragraphs in the witness statements if permission was granted to protect the interests of the Witnesses, Mr Silverstone referred to paragraph 32 of Smith 1. The Independent investigators will consider the Relevant Paragraphs and may make reference to them in their report. The independent Investigators have no current plans to interview the Witnesses although they would be willing to do so, in the event that any of the witnesses were to volunteer to provide any information to the Inquiry. The Independent Investigators do not anticipate that their report will make any adverse findings about the Witnesses as that is not the purpose of the Inquiry, which is into whether past or present union officers or officials colluded in blacklisting in the construction industry, this is not an Inquiry into the witnesses' actions. However, in the event that the Independent Investigators were to form the view that it was necessary to make adverse finding(s) about one or more of the Witnesses in their report, by way of relevant background or context, then they would give the relevant witness(es) the opportunity to respond to any such potential finding(s), and review their position in light of any response provided, before publication of their report.

14. In the circumstances Mr Silverstone submitted that the public interest, in granting the application, significantly outweighs the Witnesses' interest in preventing the use of their witness statements. Accordingly and for these reasons it would be in the interests of justice for permission to be granted under CPR 32.12(2)(b), and there are 'cogent and persuasive' reasons for the grant of such permission.

Respondent's submissions

15. Mr Randel begins by pointing out that the Applicant bears the burden of persuading the court to lift the restrictions. The court's discretion is to be exercised by reference to all the circumstances: ***Autonomy v Lynch*** at [53]. He submits that it is of some significance that the Application does not point to any case law from which the court can infer that collateral use of witness evidence is appropriate in a case such as this: where the sole purpose of the Application is to seek permission to rely on witness evidence for the purpose of a non-criminal internal investigation by a third party into its own affairs.

16. He submits the Application does not meet the test for granting permission. In particular, no special circumstances which constitute cogent and persuasive reasons have been set out, nor does the application satisfy the requirement that the release would not occasion injustice to the person giving disclosure. In particular he points to the fact that SRM (and the Macfarlanes Defendants) has co-operated with Thompsons for the purposes of the Inquiry and previously agreed to the preliminary review of disclosed documents under CPR 31.22: [Snowball/27.1 – 27.4 and 27.6]. Given that SRM cannot itself consent to use of the witness statements under CPR 32.12, in deciding how to respond to this Application, SRM has had close regard to the views of the Witnesses. However, the Witnesses are now long since retired, elderly or (in one case) deceased. The litigation in which they agreed to give evidence has long settled, and the matters with which that evidence concerned took place more than 15 years ago. Understandably, they have all reached a point where they can reasonably expect to be able to put matters concerning the High Court Group Claims behind them, particularly given that in all or most cases the evidence that Mr Smith seeks to rely on is of no relevance or of limited utility to the Inquiry. SRM (and the Macfarlanes Defendants) considers the wishes of the Witnesses should be respected. In the circumstances the Application should be refused.

17. Further Mr Randel submits the reasons given for seeking collateral use of the Witness Statements are neither cogent nor persuasive. First, the witness statements must be necessary for the purposes of the Inquiry. He submitted they are clearly not, and the Application makes no contention that the witness statements are in fact necessary for the purposes of the Inquiry. Second he points to the information available to the Inquiry;

    i) Mr Smith's own CA database entries, which includes reference to a UCATT Regional Secretary who provided information that was recorded on the database: [Exhibit DS1/94];

    ii) The Scottish Affairs Committee report on "Blacklisting in Employment: Interim Report, Ninth Report of Session 2012-13, which contains several examples of database entries confirming the involvement of trade unions in the provision of information that was ultimately recorded on the SG/CA databases. Notably, this Report includes a record of Ian Kerr's evidence to the Committee on 27 November 2012, confirming the provision of information to the CA from union

officers/officials (with examples of the EETPU) which would appear in the CA database: see e.g. the exchanges at Q1159, Q1269, Q1270, Q1273, Q1274 [DS1/63, 70 - 71];

iii) The defence of the Macfarlanes Defendants, which set out its understanding that some trade union members and officials provided information which appeared on the CA Database and that the recorded entries include warnings attributed to trade unions, including Amicus, as to the unsuitability of certain workers: this is referred to at [Smith/20]; see also [Exhibit5 DS1/51 – 52].

18. Mr Randle submitted there was insufficient public interest in the collateral use of these witness statements and that the application simply involved a blanket assertion as to the importance of the Independent Investigators being able to "review all of the evidence" or "as broad an evidence-base as possible". Such an approach ignores the requirement for "special circumstances" and downplays the public interest in the observance of the rule against collateral use particularly as some of the witnesses may not have agreed to provide statements if they had known Unite would seek to use them for the alternative purposes now intended. In the circumstances the Application fails to establish a clear, convincing or persuasive rationale for the collateral use of the witness statements.

19. Mr Randle outlined the following factors which he submitted would cause injustice to the makers of the statements:

i) Firstly, each of the Witnesses has already endured lengthy proceedings during which the Witness Statements were served solely for that purpose. Once the underlying proceedings had settled, the Witnesses had a reasonable expectation that their statements would not be used in open court, in any other forum or for any other purpose.

ii) Secondly, whilst some Witnesses previously granted limited permission to review parts of their statements, this Application envisages far greater usage with the publication of extracts from or references to their statements, thereby exposing them (and their former employers) to the risk of adverse publicity, which in the case of the Witnesses was avoided by the settlement of the dispute.

iii) Thirdly, each of the Witnesses, with the exception of one (who is deceased), has expressly confirmed their strong opposition to the Application. The surviving Witnesses have long since retired from their roles, are in their old age, and are clear that they do not wish to become involved in these historic matters (whether by express participation or by their words being relied upon): see [Snowball/31 – 56].

iv) Fourthly, at [Smith/32] Mr Smith states that whilst the Independent Investigators do "not anticipate that the Report will make any adverse findings about the Witnesses", they "may form the view that it was necessary to make adverse finding(s) about one or more of the Witnesses in the Report, by way of relevant background or context". In any such event, the Witnesses would potentially be subject to criticism, following the publication of any such finding, and they would be required to involve themselves in the investigation (against their wishes) in order to defend their reputations; notably one of the Witnesses,

who is now deceased, has no opportunity to address anything that might be said as to his involvement.

v) Fifthly, the Witnesses' concerns as to the use of their evidence is understandably heightened given the tendency for Mr Smith to misrepresent their evidence (with the reasonable possibility that those misrepresentations may appear in a published report): see [Snowball/30.3].

vi) Sixthly, it cannot reasonably be suggested that Unite's own interests and/or those of its members in investigating its historic conduct outweigh the wider public interest in observing the rule against collateral use of statements and in ensuring the privacy and confidentiality of the Witness Statements, particularly in circumstances where the information contained therein is of limited, if any, relevance to the Inquiry.

vii) Seventhly, this is not a case in which the 'overriding' public interest is said to be the uncovering of some fraud or criminality on the part of trade union officers or officials, nor is it a case in which this evidence is sought (and/or necessary) for the purposes of any legal proceedings.

viii) Lastly, whilst the Court maintains a discretion as to whether or not to grant permission for collateral use of witness statements, there appears to be no reported authority where the Court has granted permission in circumstances equivalent to those proposed by Mr Smith. The grant of permission in this instance would be anomalous and would dilute the stringent requirements for the grant of permission laid out in the authorities referred to above for the collateral use of witness statements.

20. For all these reasons Mr Randel invited me to dismiss the Application.

Applicant's response

21. Mr Silverstone made reference to Smith 2 in which Mr Smith proposes revisions to the Order sought in the Application, which would prevent the Witnesses from (a) being identified in the Report and any publication by Unite of extracts to or references from the relevant paragraphs of the witness statements contained in the Report and (b) being subject to any adverse findings in the Report. Mr Smith also proposed that the Schedule to the Order should be made confidential so as to prevent any potential identification of the Witnesses from the contents of the Order. In the circumstances he submitted these revisions to the draft Order would prevent any risk that the Witnesses could face any adverse effects in the event that their witness statements are used in the way sought by the Application.

22. As far as the potential relevance of the statements was concerned, Mr Silverstone maintained the Relevant Paragraphs are of central importance to the issues to be considered by the Inquiry. In particular they contain significant evidence from individuals who acted as "Main Contacts", or took some other prominent role in the interactions, between their construction company employers and the Economic League ("EL") and Construction Association ("CA"). That evidence concerns the knowledge of trade union officers and officials concerning the EL and/or CA, and/or their participation in those organisations. The Relevant Paragraphs therefore plug various

gaps in the evidence currently available to the Independent Investigators on the Terms of Reference of the Inquiry, see Smith 2, §§43-56. As a result, and given the highly secretive manner in which the construction companies, and the EL and CA operated (which included the destruction of evidence of their activities), the Independent Investigators consider that without permission to use the Relevant Paragraphs they would be largely reliant on inferential evidence (as opposed to the direct evidence contained in the Relevant Paragraphs), see Smith, 2 §56.

23. As far as the element of public interest in the Inquiry Mr Silverstone noted that it concerns allegations that trade union officials and officers colluded with construction companies, the EL and CA to engage in covert and systematic breaches of the rights of a very large number of workers over a period of decades, in consequence of which those workers suffered serious, prolonged financial losses and significant distress and anxiety to themselves and their families. An insight into the egregious nature of the wrongdoing can be discerned from the agreed joint statement in open court following settlement of the CIVIG proceedings which is reproduced at p 45 of the exhibit to Smith 1.

24. The potential involvement of trade union officials and officers in those wide-ranging infringements to workers' rights is a matter of high public concern. For trade union officials and officers to engage in secret unlawful conduct of this nature, in a manner directly contrary to the interests and rights of union members, strikes at the heart of the right to form and join trade unions for the protection of workers' interests which is protected by (among other instruments) Article 11 of the European Convention on Human Rights: see Smith 1, §35-44; Smith 2, §35-§44.

25. Allegations of such misconduct – which may amount to criminality in some cases – calls for investigation. The Independent Investigation conducted under Unite's auspices is aimed at exploring these serious allegations, and at making recommendations to prevent recurrence of any such collusion. As one of the UK's largest unions, which was also heavily involved in the CIVIG litigation, Unite is well placed to support that investigation. The Inquiry is being conducted by two Independent Investigators – Nicholas Randall KC and John Carl Townsend, supported by the Public Interest Law Centre (which does not have a client relationship with Unite): see Smith 1, §28-34; Smith 2, §67. Contrary to the position expressed by SRM, there is a strong public interest in the work of the Inquiry and its Report; and in the Independent Investigators being able to consider as extensive a pool of relevant evidence as possible.

26. Mr Silverstone pointed out that Macfarlanes have agreed (on behalf of their clients) to the review by the Inquiry, for the purpose of assessing relevance, of disclosure given by the Defendants in the CIVIG. Further, another witness (whose statement is not the subject of this application) gave consent to the use of his witness statement for the purpose of the Inquiry. This indicates a recognition that there is a public interest in the use of such documents by the Inquiry, contrary to the stance now adopted by SRM.

27. Mr Silverstone drew three points from Mr Smith's evidence:

    i) The Application has been made in a narrow and focused manner. It is proposed that only a small number of paragraphs of each witness statement would be subject to any collateral use, and that the scope of such use would be strictly limited (as set out in the Revised Draft Order).

ii) In addition to the other witness who (as stated above) has given consent to the use of his witness statement for the purpose of the Inquiry, three of the Witnesses previously gave consent to, first, Thompsons Solicitors and then, Jane McNeill KC (the original Independent Investigator) conducting a review of parts of their witness statements for the purpose of assessing their relevance to the Inquiry. Two of these Witnesses also gave consent to the current Independent Investigators conducting a review of parts of their witness statements for the purpose of assessing their relevance to the Inquiry. Those witnesses subsequently withheld consent from any further use of those parts of the witness statements. However the use which is now proposed to be made of those parts of the witness statements (such that they would not be identified or subject to adverse findings in the Report) would involve no real impact on these three Witnesses beyond that which followed from the use to which they previously consented.

iii) One of the Witnesses is deceased and the Court cannot know whether or not he would have consented to the use proposed in respect of the relevant paragraphs of his witness statement. However, in circumstances where this Witness would not be identified or subject to any adverse findings in the Report, it is submitted that there is no reason to withhold permission to use part of his witness statement in the way proposed.

28. Mr Silverstone accepted that he could not point to any precisely analogous case in which permission for collateral use of the type sought in the Application has been made. However he pointed out the discretion provided for in CPR 32.12 is a broad one and it is not fettered by any requirement that any collateral use may only be for the purpose of "the uncovering of some fraud or criminality" or for "legal proceedings" (the two examples given by Mr Randle in his submissions).

29. For instance in ***R (Newsquest Media Group Ltd) v Police Misconduct Tribunal*** [2022] EWHC 299 (Admin) Ellenbogen J granted a media organisation's application under CPR r.31.22(1)(b) to use documents disclosed in judicial review proceedings for the purpose of media reporting: see §§47-53.

30. Mr Silverstone noted the reliance placed by Mr Randel on §31 of ***Autonomy v Lynch***, however he pointed out that the observations of Hildyard J in that paragraph were directed to the issue of the "collateral use of witness statements prior to trial, especially (as it seems to me) when the trial is imminent". By contrast, this Application is being determined at a time when the trial is not "imminent" and not at a stage "prior to trial" (settlement having taken place many years ago).

31. Lastly, Mr Silverstone submitted there is no rule to the effect that the grant of permission under CPR 31.22(1)(b) (and therefore under CPR 32.12(2)(b), by analogy) should be "rare or exceptional if a proper purpose is shown": see ***Libyan Investment Authority v Societe Generale*** [2020] EWHC 3659 (Comm), §18. In the circumstances there are cogent and persuasive reasons for permitting the proposed collateral use of the witness statements, which are justified by special circumstances, and that the proposed use would not give rise to any injustice to the Witnesses.

Decision

32. I have concluded I am satisfied that cogent and persuasive reasons exist which would justify permitting the proposed collateral use of these witness statements on the basis of the evidence put forward by Mr Smith in his witness statements and for the reasons advanced by Mr Silverstone on his behalf. In particular I accept there is a strong public interest in the Inquiry being able to consider a broad evidence base so as to ensure its findings are robust full and fair. I accept that the Inquiry has wider relevance than Unite's own interests and that of its members and that its terms of reference are wide enough to cover potentially criminal behaviour in an important employment sector in the economy. It is also highly relevant that the Inquiry is taking place long after the settlement of the underlying litigation.

33. I accept that those who provided the witness statements have the legitimate concerns described by Mr Randel however, in my judgment those concerns can be met by the amendments to the order proposed by Mr Silverstone. In the circumstances I am satisfied that the release of the statements would not occasion injustice to the persons giving disclosure.

34. In the circumstances I am satisfied having regard to the overall interests of justice that I should exercise my discretion to permit the statements to be used for the purpose of the independent Inquiry subject to the safeguards proposed.

Postscript costs

35. Having reached the above conclusions I sent out a sealed order in substantially the same form as that provided by Mr Silverstone on behalf of the Applicant. That order contained a costs provision to the effect that the Respondent would pay the Applicant's costs to be assessed on the standard basis if not agreed. I did so because the Applicant was the successful party and the written submissions provided to me did not deal with costs issues notwithstanding the draft order provided to me.

36. On receiving the order the Respondent's solicitors wrote to the court indicating that they would wish to make submissions on costs and had not been given the opportunity to make any. In the circumstances I indicated that I would be prepared to consider re-visiting the issue and either make an order for no costs or invite further written submissions from the parties.

37. The parties could not agree and so have provided further written submissions.

38. Mr Silverstone raised a preliminary jurisdictional point in his written submissions. He submitted that a final sealed order for costs on the application has already been made, and the Court has no power to vary that order, see para 541 of Vodafone Group plc v IPcom GmbH and Co KG [2023] EWCA Civ 113.

39. Mr Silverstone pointed out Paragraph 3 of the 28.11.24 Order states that "[t]he Respondent will pay the Applicant's reasonable costs of this application to be assessed on a standard basis if not agreed". That costs order was made in light of the agreement between the parties that the application should be determined on the papers and as a result of the direction of the Senior Master of 03.10.24 that the application papers would be "referred to the Senior Master who will determine the application without a hearing".

Costs submissions

40. In the circumstances Mr Silverstone submitted the court is now functus as to costs and there is no proper basis to revisit the issue in circumstances where the Applicant's submissions of 10 September 2024 made clear that he sought an order in the form of the draft Order filed with the submissions, which included an order for costs in the Applicant's favour.

41. As written submissions on costs were exchanged this is not a submission that the Respondent has addressed in its written submissions. Instead the Respondent's submissions deal only with the merits of the costs application.

42. The Respondent makes three powerful submissions.

43. Firstly, the Application was necessary in any event:

    i) The witness statements were not put in evidence at a public hearing, nor did the Witnesses consent to the collateral use proposed by the Applicant.

    ii) Therefore, under CPR 32.12(2)(b), the Applicant was required to seek permission from the Court to use the witness statements for the purpose explained in the Application in any event.

    iii) The burden is on the Applicant to persuade the Court that there are cogent and persuasive reasons for the Court to grant the permission sought (see for example, ***Autonomy v Lynch*** [2019] EWHC 249 (Ch), at paragraph 53). It is for the Court then to make its assessment in the interests of justice.

    iv) SRM's stance on the Application accordingly did not increase the burden on the Applicant or the costs which the Applicant incurred in making the Application. Those would have been incurred in any event and the general rule under CPR 44.2(2)(a) should therefore not apply.

44. Secondly, their position was not unreasonable:

    i) CPR 32.12(2)(a) is clear that consent of the witness is required for collateral use of their statement, and not the party on whose behalf the statement was given.

    ii) Accordingly, SRM was not in any position to consent to the proposed use of the witness statements by the Applicant, meaning that – as mentioned above – SRM's conduct did not necessitate or bring about the Application.

    iii) Nor can any criticism be made of the Witnesses for declining consent to the Applicant's proposed use. The CPR does not impose any obligation on a witness to provide consent in certain circumstances; they simply have the choice of whether to consent or not. They are not in a position to assess whether the reasons for the use sought are cogent, persuasive, and in the interests of justice. That assessment is for the Court. In any event, the Witnesses had genuine and well-founded concerns about the proposed use of the witness statements (as set out in paragraphs 9-17 of Mr Snowball's witness statement dated 5 November 2024). Those concerns were accepted implicitly by the Applicant through his changes made to the Application in his Reply.

iv) Moreover, even if the other Witnesses had consented, the Application would have been required because one of the Witnesses is deceased and so cannot give consent. Given the issues in the Application were common among all Witnesses, the Application in those circumstances would need to have been made in materially the same terms.

v) Against that background, it was reasonable for SRM to take the position that it did on the Application. It assisted the Court's determination of the Application by recounting details of the relevant background to the Application which were not included in the Application itself and by setting out the concerns of the Witnesses in full.

vi) For these reasons, SRM's conduct was reasonable for the purpose of CPR 44.5, and CPR 44.5(b) and (c) in particular.

45. Thirdly, permission was granted on materially different terms to what was originally sought in the application:

i) In its Response, SRM explained that the Witnesses had serious concerns about the potential consequences to them if the Application were to be granted, including concerns as to their privacy. These included the prospect of adverse findings being made against them (see paragraph 30.3 of Mr Snowball's witness statement), in circumstances where previously they had been identified individually in press articles relating to alleged blacklisting (see paragraph 21 of Mr Snowball's witness statement).

ii) In direct response to this, in his Reply, the Applicant made significant changes to the draft order in the Application, purportedly to address the Witnesses' concerns: see paragraphs 2 to 3 of the Applicant's Reply submissions. Therefore, the Application which "succeeded" was materially different to the Application which SRM responded to. In the circumstances, SRM cannot be said to have been the "unsuccessful" party in the Application; indeed, the Application to which it responded was not granted.

iii) The way in which the Applicant pursued the Application, changing it at the very last minute, and forcing costs to be incurred which otherwise could have been avoided, is conduct which is relevant to the Court's assessment under 44.5(a) to (c).

46. As far as the merits are concerned Mr Silverstone submitted:

i) it would be appropriate for costs to be awarded to the Applicant in accordance with the general rule that the unsuccessful party will be ordered to pay the costs of the successful party: CPR 44.2(2)(a). The Applicant succeeded in securing the Order he sought. While that contained revisions to the original Order filed with the application notice, the revisions were modest (focused on ensuring that the Witnesses would not be identified or potentially subject to adverse findings in the Inquiry Report). The substance of the Order remained the same as that appended to the application notice.

ii) that an award of costs in the Applicant's favour is justified in all the circumstances, under CPR 44.2(2)(b) and 44.2(4)-(5). In particular:

a) Prior to the issue of the application the Respondent and the Witnesses failed to engage properly with the Applicant's requests for consent to use the relevant paragraphs from the witness statements for the purposes of the Inquiry. In particular, in response to the Applicant's requests, by letters dated 25.04.24 [DS1/145-161], that the living witnesses consent to such use, the Respondent simply indicated that the Witnesses did not consent, without giving reasons (see Macfarlanes' emails of 05.06.24 [DS1/164], 10.06.24 [DS1/171]) and their letter of 23.08.24 [DS1/191]). Absent any detail as to the Witnesses' reasons for refusing, the Applicant was unable to engage in any meaningful discussions with the Respondent and the Witnesses as to the form of Order prior to issuing.

b) Insofar as the Respondent may seek to rely on the revision to the draft Order, following issue, as a reason not to award the Applicant his costs, the Applicant repeats the point at §3 above that the revision was modest. Further the Respondent's failure properly to engage in the Applicant's request prior to the issue of the application meant that it was only after service of the Respondent's evidence that the Applicant had notice of the Witnesses' objections to being identified / potentially subject to adverse findings in the Inquiry Report. In any event it is clear that, even if the Applicant had sought an order in the form of the revised draft Order when the application was issued, the Respondent would have opposed such an Order at that stage. This is apparent from Macfarlanes' letter to the Court on 03.12.24 (after the 28.11.24 Order was made but before Macfarlanes had seen it). In that letter Macfarlanes stated that, notwithstanding the changes to the draft Order, "all the Witnesses remain opposed to the application".

Costs decision

47. One of the perils of dealing with applications on the papers is the danger that more court time and resources are taken up than if a hearing had been ordered. In this case there could have been a single hearing at which all issues were considered and properly addressed on one occasion. As it is the Court has had to make at least two orders for directions and has had to revisit costs issues because they were not properly addressed in the original submissions. Such applications face the danger of turning into eternal games of ping pong.

48. I have no hesitation in concluding that had the points made on behalf of the Respondent been made in the original submissions supplied in connection with the determination of the application I would have come to the conclusion that the Respondent should have its costs of the application for all the reasons submitted on their behalf.

49. I have considered whether I am functus. I have concluded that I am not. It is clear that neither party made proper submissions on costs when dealing with the merits of the application. I also bear mind that at that time my decision would not be known. In the circumstances the position is analogous to the court determining an application without a hearing under CPR 23.8 (3). In the circumstances I consider it appropriate to exercise

my jurisdiction under CPR 3.1 (7) to revoke my original order as to costs and replace it with a new order made on the basis of proper submissions from both parties.

50. I also bear in mind that it would be wholly disproportionate to require the Respondent to appeal my costs order.

51. I would invite the parties to draw up a new order giving effect to this decision.