Neutral Citation Number: [2012] EWHC 1158 (Ch)

Case No: 8690 OF 2011

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
COMPANIES COURT
IN THE MATTER OF COROIN LIMITED
AND IN THE MATTER OF THE COMPANIES ACT 2006

Royal Courts of Justice
The Rolls Building
7 Rolls Building
Fetter Lane
London EC4A 1NL

Date: 26/04/2012

Before:

MR. JUSTICE DAVID RICHARDS

- -

BETWEEN:

PATRICK McKILLEN **Petitioner**
- and -
(1) MISLAND (CYPRUS) INVESTMENTS LIMITED
(A company registered in Cyprus)
(2) DEREK QUINLAN
(3) ELLERMAN CORPORATION LIMITED
(a company registered in Jersey)
(4) B OVERSEAS LIMITED
(a company registered in the British Virgin Islands)
(5) RICHARD FABER
(6) MICHAEL SEAL
(7) RIGEL MOWATT
(8) COROIN LIMITED **Respondents**

AND

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

BETWEEN

PATRICK GERARD MCKILLEN **Claimant**
- and -
(1) SIR DAVID ROWAT BARCLAY
(2) SIR FREDERICK HUGH BARCLAY
(3) MISLAND (CYPRUS) INVESTMENTS LIMITED
(4) ELLERMAN CORPORATION LIMITED

(5) B OVERSEAS LIMITED
(6) MAYBOURNE FINANCE LIMITED
(7) THE TRUSTEES OF THE SIR DAVID AND SIR FREDERICK BARCLAY FAMILY SETTLEMENTS
(8) RICHARD FABER
(9) MICHAEL SEAL
(10) RIGEL MOWATT
(11) NATIONAL ASSET LOAN MANAGEMENT LIMITED **Defendants**

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MR. PHILIP MARSHALL QC and **MISS RUTH DEN BESTEN** (instructed by Messrs. **Herbert Smith LLP**) appeared for the **Petitioner/Claimant**.

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

MR. KENNETH MACLEAN QC and **MISS EMMA JONES** (instructed by Messrs. **Weil, Gotshal & Manges**) appeared for **Misland (Cyprus) Investments Limited, Ellerman Corporation Limited, B. Overseas Limited and Maybourne Finance Limited**.

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

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

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

MS. VICTORIA JOLLIFFE appeared for **the publishers of The Times, The Guardian, The Financial Times, The Irish Times and The Irish Independent**, instructed by their respective legal departments.

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Approved Judgment

(Computer-aided transcript of the Stenograph Notes of Marten Walsh Cherer Ltd.,
1st Floor, Quality House, 6-9 Quality Court, Chancery Lane, London WC2A 1HP.
Telephone No: 020 7067 2900. Fax No: 020 7831 6864)
e-mail: info@martenwalshcherer.com)

MR. JUSTICE DAVID RICHARDS :

1. This judgment concerns an application by the petitioner and claimant in these proceedings (Patrick McKillen) for the continuation during the trial of a confidentiality regime which I imposed for the purposes of pre-trial steps, particularly disclosure.

2. The proposed confidentiality regime concerns a particular issue and would have two principal features. First, the substantial number of documents covered by it, and the written and oral evidence given in relation to the issues, would not be available to the defendants but only to their solicitors and counsel. Secondly, the part of the trial dealing with the issue, including the oral evidence of witnesses, would be held in private.

3. It therefore would involve significant departures from the two fundamental common law principles applicable to trials in the civil as well as in the criminal courts, identified by Lord Dyson at paragraphs 10-13 of his judgment in *Al Rawi and Others v The Security Service and Others* [2011] 3 WLR 388. First, the principle of open justice requires that trials are conducted in public. There are some limited exceptions to this principle. Secondly, the principle of natural justice includes the right of a party to know the case against him and the evidence on which it is based.

4. The issues at root on this application are whether there are grounds which would justify any departure from the first of these principles (that of open justice) in the particular circumstances of this case and whether any departure from the principle of natural justice is permissible and, if so, whether there are grounds which could justify it in the circumstances of this case.

5. The summary I have just given reflects the application as made by Mr. McKillen in his application notice, his evidence and the skeleton arguments of his counsel, and as argued on his behalf at the hearing of this application on 23 and 24 April 2012.

6. At about 11 a.m. yesterday, 25 April 2012, I received a letter from Mr. McKillen's leading counsel informing me that Mr. McKillen no longer sought orders denying the defendants access to the evidence but, instead, invited the court to impose a modified confidentiality regime which would restrict access to individual parties or to name representatives of corporate defendants and to require undertakings to prevent misuse. I will return to the contents of this letter a little later. Mr. McKillen still seeks an order for the relevant part of the trial to be heard in private.

7. The application is opposed by all the active respondents and defendants. The application for a private hearing of part of the trial is opposed by two groups of media organisations. The publishers of The Times, The Guardian, The Financial Times, The Irish Times and The Irish Independent have instructed counsel, who has made oral and written submissions. A written submission by the legal editor of the Press Association has been lodged on behalf of the Press Association and RTE, the national radio and television broadcaster of the Irish Republic. I am grateful to all parties for their full and helpful submissions.

8. To set the present application in context, I shall first outline the nature of the proceedings, the issue to which the relevant documents and evidence relate, and the steps so far taken as regards confidentiality.

9. The proceedings relate to a company called Coroin Limited (the company) which through subsidiaries owns three well known hotels in Central London (Claridge's, The Connaught and The Berkeley). Mr. McKillen owns shares representing 36.8% of the equity of the company. The other significant holdings are those of Misland Cyprus Investment Limited and Mr. Derek Quinlan.

10. In January 2011, a company ultimately controlled and owned by Sir David and Sir Frederick Barclay (the Barclay brothers) or their family trust acquired Misland from its previous owners (the Green family).

11. The Barclay brothers make no secret of their desire to obtain control of the company, or the hotels which it owns, and the acquisition of Misland was the first major step in their plan to achieve control. Other steps are alleged by Mr. McKillen to have been taken, but those which are common ground are the purchase of bank loans to Mr. Quinlan secured on his shares and the purchase of the company's bank facilities totalling some £660 million secured on the company's assets.

12. The present proceedings commenced by Mr. McKillen in October 2011 comprise a petition under section 994 of the Companies Act 2006 alleging that the affairs of the company have been, by reason of various acts or omissions of the Barclay brothers or those associated with them, conducted in a manner unfairly prejudicial to him, and an action for damages alleging a conspiracy to injury by unlawful means based on many of the same allegations.

13. The respondents and defendants, although not precisely the same in both sets of proceedings, are: first, the Barclay brothers; secondly, companies controlled by them (the Barclay interests); thirdly, three individuals who are executives of companies controlled by the Barclay brothers and who either are or were directors of the company ("the directors"); fourthly, Mr. Quinlan; and, fifthly, the National Asset Management Agency (NAMA), an Irish state entity from which the Barclay interests purchased the company's loan facilities. NAMA is involved only because it is said that the assignment to the Barclay interests was in breach of the facilities agreement with the company.

14. An important part of Mr. McKillen's case, although not by any means the whole of it, relates to the rights of pre-emption over shares conferred by the Articles of Association of the company and a Shareholders' Agreement. He alleges that arrangements were made by the Barclay brothers, or companies under their control, with Mr. Quinlan in either late 2010 or during 2011 which triggered rights of pre-emption over Mr. Quinlan's shares, entitling Mr. McKillen to acquire a sufficient proportion to give him over 50% of the equity. He also alleges that security granted by Mr. Quinlan over his shares to third party lenders became enforceable, again triggering his pre-emption rights.

15. Mr. McKillen alleged in his petition that the sale of Misland triggered his pre-emption rights, but on a preliminary issue it was held that it did not do so, a decision affirmed by the Court of Appeal: see [2012] EWCA Civ 179. None the less, Mr. McKillen

alleges that by virtue of a contractual duty of good faith in the Shareholders' Agreement, the shares in the company held by Misland should have been offered for sale to the other shareholders.

16. The respondents have made clear from the start that they regard as a major issue whether if Mr. McKillen had been offered shares on a pre-emption basis he would have been able to afford to purchase them. They say that if he could not have done so, his complaints in this respect, even if well-founded, which they deny, get him nowhere because he suffered neither prejudice nor loss. While Mr. McKillen submits that he can succeed in these proceedings without establishing that he would have been able to purchase the shares if they had been offered to him under the pre-emption provisions, he accepts that his ability to fund a purchase or purchases of shares is an issue in the proceedings.

17. The present application relates to the documents and evidence relevant to the issue of his ability to purchase shares if offered to him in late 2010 or during 2011. The application is put on two bases. First, it is said that if the defendants had access to the documents and evidence, there is a real risk that they would use it in order to damage Mr. McKillen, either by frustrating his attempts to raise funds to purchase shares if he succeeds in his petition and is granted relief by way of an order to purchase shares held by Mr. Quinlan or Misland, or by other steps to put pressure on him, for example, by purchasing and enforcing loans made to him.

18. Secondly, it is said that the documents and evidence contain confidential information concerning his personal financial circumstances and that disclosure in open court could be damaging to him in ways which I will later mention and that, in any event, he is entitled to the protection of private and confidential information.

19. I should outline the relevant pre-trial steps and orders. In November 2011 I ordered an expedited trial, and the parties have all been working under great pressure and to tight time limits. Standard disclosure took place in January 2012 with many thousands of documents disclosed. Mr. McKillen's disclosure did not include documents relating to the issue of his ability to purchase shares if they had been offered to him.

20. By an application dated 22 February 2012, the Barclay interests applied for orders requiring Mr. McKillen to provide further information as to how he put his case on this issue and for disclosure of documents relating to it. The application was opposed by Mr. McKillen, but on 28 February 2012 I made orders largely in the form sought.

21. Paragraph 2 required the provision of further information as follows:

> "(1) whether the petitioner will assert he did have discussions or would have had discussions with any particular third parties or, if not, particular kinds of third parties for funding; (2) if so, the identities of third parties or kinds of third parties; (3) in any case, what amount of funding he would have sought at the relevant times; (4) what, if any, security he would have offered in return for such funding; (5) the terms that he would have been prepared to agree and, in particular, what interest and

> other fees he would have been prepared and able to pay in order to obtain such funding."

22. Mr. McKillen had in fact received approaches and held discussions and negotiations for financing possible purchases of shares in 2011, and he was ordered to give disclosure of documents relating to them. He had also, since the presentation of his petition, had discussions and negotiations with a view to raising finance if he succeeded in the petition. He put those discussions in evidence and wished to rely on them also in support of his case that he could have funded the purchase of shares under the pre-emption provisions earlier in 2011. Paragraph 4 of the order required him to give disclosure of documents relating to his attempts to obtain funding for the purchase of shares if he succeeded.

23. The defendants sought disclosure of documents relating to Mr. McKillen's financial circumstances, as to which I said at paragraphs 21-23 of my judgment of the 28 February 2012 [2012] EWHC 505 (Ch):

> "21. I turn then to the balance of the disclosure application relating to the financial circumstances of Mr. McKillen. Its relevance appears clear to me. It is not Mr. McKillen's case that he would have raised non-recourse finance, in which event his personal circumstances might be of little interest to prospective lenders. Mr. Cunningham is clear in his evidence that discussions proceeded on the basis of a personal loan to Mr. McKillen. In fact a proposal by one possible lender for a loan to a special purpose vehicle was specifically rejected. In those circumstances it is to be expected that prospective lenders would be concerned to assess Mr. McKillen's ability to service the loan, pay the fees and repay the principal. They would be likely to be concerned to assess the risk of bankruptcy.
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> 22. Mr. Marshall relied on the evidence given by Mr. Cunningham, especially paragraph 58 of his witness statement where he says:
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> 'In all of my discussions with the above-mentioned lenders, none have ever made any enquiry into Mr. McKillen's ability to service the loan being sought or in carrying out due diligence on Mr. McKillen personally. Most did or do want to undertake some due diligence on the Company. They are perfectly comfortable with Mr. McKillen as a proposed Debtor.'
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> 23. Mr. Cunningham may be right in this, but the respondents are not required to accept it at face value, particularly as none of the lenders is being called to give evidence. In my judgment, the categories of documents sought in the application fall within the requirement for standard disclosure under CPR 31.6 having regard to the case being run by Mr. McKillen."

24. I was, however, concerned to ensure that disclosure was not disproportionate in its scope, and so paragraph 3 of the order was restricted to the following four categories

of documents: "(1) the identity of his substantial creditors, the debts owed to each such substantial creditor and whether such debts are in default; (2) information about the security taken in relation to such indebtedness and its terms and status, including whether it has become enforceable; (3) information about any property that could, in the relevant period, be offered to any third party as potential security for any loan, including its value and whether it was encumbered in any way; (4) information about the security existing over Mr. McKillen's shares in the company at the relevant times, including the terms of such security and whether it has become enforceable." "Substantial creditor" is defined to mean any creditor owed more than £1 million.

25. Concerns were raised on behalf of Mr. McKillen as to the confidentiality of the information and documents he was required to provide. I dealt with this in paragraphs 33-37 of my judgment:

> "33. Thirdly, Mr. McKillen is concerned about the commercial confidentiality of his negotiations with prospective lenders and of his own financial position. He is particularly concerned because the Barclay Interests have had discussions with Mr. McKillen's own bankers seeking to purchase from them their loans to Mr. McKillen and there is evidence that they have been seeking to obtain confidential information about him and his finances.
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> 34. I think Mr. McKillen is entitled to have concerns in this respect. The information and documents provided by Mr. McKillen must be subject to a confidentiality regime restricting access to those documents to the parties' solicitors and counsel and preventing any disclosure to their clients or others without the consent of either Mr. McKillen or the court.
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> 35. I can envisage that it may be thought appropriate to instruct an accountancy or other expert in relation to the disclosure provided. In that event application can be made for a relaxation of the confidentiality regime, but subject of course to the expert himself being subject to confidentiality undertakings. Whether that is necessary or not, I know not, but I indicate the sort of relaxation which might be permitted.
>
> 36. In due course consideration will have to be given to the protection of confidentiality during the trial. I think it premature to make directions about that at this stage. But I envisage that there may well need to be a regime in relation to it.
>
> 37. Confidentiality regimes of this sort are unusual in litigation of this type, but are fairly common in other areas of litigation, in particular certain types of intellectual property litigation."

For those reasons, paragraph 5 of the order provides that:

> "The confidential information shall only be disclosed to the relevant advisers and any permitted persons. The relevant advisers and any permitted persons shall keep the confidential information confidential and shall not disclose it to any other party otherwise than in accordance with subsequent order of the court."

"Confidential information" is defined so as to refer to the documents and materials to be disclosed by Mr. McKillen, and the "relevant advisers" are the solicitors and counsel identified in a schedule to the order and any others subsequently added by order of the court.

26. The confidentiality regime established by the order was highly restrictive in a number of respects. First, none of the respondents, as opposed to their lawyers, had any access to the confidential information. Secondly, it was only the lawyers to the Barclay brothers and the Barclay interests who had any access to the confidential information. The lawyers to the other active defendants did not have any access. Thirdly, none of the confidential information could be referred to in open court.

27. In all three respects, this was an interim regime dictated by the shortness of time before trial and by the fact that the issue to which the disclosure was directed was a discrete issue which would be and was directed to be heard at a late stage in the trial. There would, therefore, be time to consider the proper regime, if any, to be in place for that part of the trial.

28. The trial started on Monday, 19 March 2012 and continued until Wednesday, 4 April 2012 when it was adjourned until after Easter. Almost all that time was taken with oral evidence on other issues in the case. On 4 April 2012, I gave directions for the confidentiality issues to be dealt when the trial resumed. When the trial resumed on 18 April 2012, I included the named solicitors and counsel for Mr. Quinlan, the directors and NAMA within the confidentiality regime and directed the remaining confidentiality issues to be heard on 24 April 2012.

29. There was in one respect a significant development at the start of the trial. On Friday, 16 March 2012 Mr. McKillen disclosed to the solicitors for the Barclay brothers and the Barclay interests an agreement of the same date between Mr. McKillen and an entity called Al Mirqab Capital owned by the Qatari ruling family for the provision of a loan to Mr. McKillen of up to £70 million to fund the purchase of shares in the company in circumstances which include obtaining a buyout order in these proceedings. Mr. Marshall QC, in opening the case for Mr. McKillen, referred in general terms to this agreement, and on the application of the defendants I directed that it should cease to be subject to the confidentiality regime.

30. Before considering the grounds on which the present application is made I shall set out the principles applicable to it, as I understand them. First, as earlier mentioned, the principles of open justice and natural justice are fundamental features of our legal system. Lord Dyson said in *Al Rawi* at paragraphs 10-12:

> "10. There are certain features of a common law trial which are fundamental to our system of justice (both criminal and civil). First, subject to certain established and limited exceptions,

> trials should be conducted and judgments given in public. The importance of the open justice principle has been emphasised many times: see, for example, *R v Sussex Justices, Ex p McCarthy* [1924] 1 KB 256, at p 259, per Lord Hewart CJ, *Attorney General v Leveller Magazine Ltd* [1979] AC 440, at pp 449H-450B, per Lord Diplock, and recently *R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No. 2) (Guardian News and Media Ltd intervening*, [20111] QB 218, paras 38-39, per Lord Judge CJ.
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> 11. The open justice principle is not a mere procedure rule. It is a fundamental common law principle. In *Scott v Scott* [1913] AC 417, Lord Shaw of Dunfermline (p 476) criticised the decision of the lower court to hold a hearing in camera as 'as constituting a violation of that publicity in the administration of justice which is one of the surest guarantees of our liberties, and an attack upon the very foundations of public and private security.' Lord Haldane LC (p 438) said that any judge faced with a demand to depart from the general rule must treat the question 'as one of principle, and as turning, not on convenience, but on necessity'.
>
> 12. Secondly, trials are conducted on the basis of the principle of natural justice. There are a number of strands to this. A party has a right to know the case against him and evidence on which it is based. He is entitled to have the opportunity to respond to any such evidence and to any submissions made by the other side. The other side may not advance contentions or adduce evidence of which he is kept in ignorance."

31. There can be added to the list in paragraph 10 of authorities on the nature and importance of the principle of open justice the judgment of Toulson LJ in *The Queen (on the Application of Guardian News and Media Limited) v City of Westminster Magistrates' Court* [2012] EWCA Civ 420.

32. Secondly, and as a corollary to its importance, any departure from the principle of open justice is permitted only if it is necessary in the interests of justice and the administration of justice.

33. Thirdly, the burden of establishing that it is necessary to depart from the principle of open justice rests firmly on the party seeking it.

34. Fourthly, any departure must be supported by clear and cogent evidence which will be subjected to careful scrutiny by the court.

35. Fifthly, sitting in private is the last resort. Where the court is satisfied that some inroad into the principle of open justice is required, it will strive to keep it to the minimum and will sit in private only if any other course is effectively unworkable: see *Ambrosiadou v Coward* [2011] EWCA Civ 409.

36. In *JIH v News Group Newspapers Limited* [2011] 1 WLR 1645 Lord Neuberger said at paragraph 22:

> "Where, as here, the basis for any claimed restriction on publication ultimately rests on a judicial assessment, it is therefore essential that (a) the judge is first satisfied that the facts and circumstances of the case are sufficiently strong to justify encroaching on the open justice rule by restricting the extent to which the proceedings can be reported, and (b) if so, the judge ensures that the restrictions on publication are fashioned so as to satisfy the need for the encroachment in a way which minimises the extent of any restrictions."

37. That approach is, in my judgment, as much applicable to other aspects of the principle of open justice as it is to the particular topic of reporting restrictions.

38. I will address first that part of the application which sought to deprive the defendants, as opposed to their lawyers, of access to the evidence or documents. The considerations on which this is based are inevitably relied on also as part of the support for an order for a hearing in private of the relevant part of the trial. If the hearing were in public, then of course the defendants would learn of the matters sought to be kept from them, unless some regime were in place to use code words and so on.

39. Not only does Mr. McKillen apply for the hearing to be in private, but it was until the letter yesterday put on the basis that the defendants would be excluded from it. The wholesale departure from the principle of natural justice, which this would involve, would be highly exceptional if indeed it is permissible at all. Mr. Marshall cited a number of decisions which, as in the present case, excluded or heavily restricted a party's access to documents on disclosure. In addition to the patent cases to which I later refer, these included *Church of Scientology of California v Department of Health and Social Security* [1979] 1 WLR 723 and *Porton v 3M* [2010] EWHC 114 (Comm). Such regimes, as I mentioned in my judgment of 28th February, are not uncommon in intellectual property cases involving secret and valuable formulae processes and so on.

40. Lord Dyson referred to this in *Al Rawi* at paragraph 64 where he says:

> "Similarly, where the whole object of the proceedings is to protect a commercial interest, full disclosure may not be possible if it would render the proceedings futile. This problem occurs in intellectual property proceedings. It is commonplace to deal with the issue of disclosure by establishing 'confidentiality rings' of persons who may see certain confidential material which is withheld from one or more of the parties to the litigation at least in its initial stages. Such claims by their very nature raise special problems which *require* exceptional solutions. I am not aware of a case in which a court has approved a trial of such a case proceeding in circumstances where one party was denied access to evidence which was being relied on at the trial by the other party."

41. In patent and similar cases it may be necessary to limit severely the officers or employees of a party who may have access to the evidence. But as Lord Dyson said, he was not aware of any case in which the trial had proceeded without any access by a party to the evidence, and Mr. Marshall was unable to cite one.

42. As I mentioned in court on Tuesday, 24 April 2012, I asked the current specialist patent judges, Kitchin LJ, Floyd J and Arnold J, whether they had any experience, either at the bar or on the bench, of such a trial. None of them could remember any instance of it.

43. In *Warner-Lambert Co v Glaxo Laboratories Ltd* [1975] RPC 354, Buckley LJ said at page 360:

> "If, however, the case were one of so esoterically technical a character that even with the help of his expert advisers the party himself could really form no view of his own upon the matter in question but would be bound to act merely upon advice on the technical aspects, disclosure to him of the facts underlining the advice might serve little or no useful purpose. In such a case a court might well be justified in directing disclosure of allegedly secret material only to expert or professional agents of the party seeking discovery on terms they should not, without further order, pass on any information so obtained to the party himself or anyone else, but should merely advise him in the light of the information so obtained. Even so, if the action were to go to trial, it would seem that sooner or later the party would be bound to learn the facts, unintelligible though they might be to him, unless the very exceptional course were taken of excluding him from part of the hearing. Even where the information is of a kind the significance of which the party would himself be able to understand, it may nevertheless be just to exclude him, at any rate during the interlocutory stages of the action, from knowing it if he is a trade competitor of his opponent."

44. In *Roussel Uclaf v Imperial Chemical Industries plc* [1990] RPC 45, Aldous J said at first instance:

> "Each case has to be decided on its own facts and the broad principle must be that the court has the task of deciding how justice can be achieved taking into account the rights and needs of the parties. The object to be achieved is that the applicant should have as full a degree of disclosure as will be consistent with adequate protection of the secret. In so doing, the court will be careful not to expose a party to any unnecessary risk of its trade secrets leaking to or being used by competitors. What is necessary or unnecessary will depend upon the nature of the secret, the position of the parties and the extent of the disclosure ordered. However, it would be exceptional to prevent a party from access to information which would play a substantial part in the case as such would mean that the party

> would be unable to hear a substantial part of the case, would be unable to understand the reasons for the advice given to him and, in some cases, the reasons for the judgment. Thus what disclosure is necessary entails not only practical matters arising in the conduct of the case but also the general position that a party should know the case he has to meet, should hear matters given in evidence and understand the reasons for the judgment."

45. While both these statements refer to the possibility of an "exceptional" or "very exceptional" course that might be taken in a patent or trade secret case, it is, as I have said, unknown that it has ever in fact been adopted. The only cases in which it is known that access is sometimes denied are those concerning the welfare of children: see paragraph 63 of Lord Dyson's judgment in *Al Rawi*.

46. *Al Rawi* concerned the question as to whether it was permissible at common law for the civil courts, or indeed any courts, to adopt what was called a special advocate procedure, a procedure which by statute is available in certain immigration and asylum tribunals. The essential features of the special advocate regime are that, in relation to what is called the closed material, the party does not have access to that material and nor do the lawyers acting generally for him in the proceedings. Instead special advocates are appointed to act on his behalf. Once those special advocates have access to the closed material, they may not have contact with the party or his, what I might call, ordinary lawyers.

47. The conclusions reached by the majority in the Supreme Court, for the reasons explained by Lord Dyson, are that such a procedure was impermissible as a matter of common law and required statutory intervention to override the common law principles. One of the particular features to which Lord Dyson drew attention in his judgment was that the special advocate was in the difficult, if not impossible, position that he was unable to take instructions from his client in relation to the closed material which formed part of the case against his client.

48. That, it may be observed, would be precisely the effect of the regime which Mr. McKillen was proposing in this case. The lawyers for the defendants would have access to the evidence, but they would be unable to discuss it with their clients and would be unable to take instructions from their clients on it. The only feature of the special advocate regime proposed in *Al Rawi* which is not present here is that the special advocates in question were separate from the lawyers regularly acting in the case for Mr. Al Rawi. But in my judgment the essential feature was the inability of Mr. Al Rawi to know the evidence against him or to give instructions to his lawyers.

49. If such a departure from the principles of natural justice is not permitted in a case where there are good grounds for considering that serious issues of national security arise, it can hardly be supposed that it would be available in a case concerning the financial circumstances of a party.

50. In the light of the decision and discussion in *Al Rawi*, it is my view that at common law the court has no jurisdiction to deny a party access to the evidence at trial. But if the jurisdiction does exist, it is in my judgment so exceptional as to be of largely theoretical interest only.

51. I earlier mentioned a letter which I received from Mr. McKillen's leading counsel yesterday morning. So far as relevant to this aspect of the case, it reads as follows:

> "In the course of argument yesterday afternoon it was explained that neither the current patent Judges nor Lord Justice had any experience of any case in which a party had been excluded from access to evidence at the trial. That being the position, it would appear that the first course proposed in relation to the confidentiality club on this application would be unprecedented. In these circumstances Mr. McKillen does not seek to pursue that course and instead only asks the court to accede to his alternative proposal, based on the precedent of cases such as *Roussel Uclaf v ICI* and *Warner-Lambert v Glaxo Laboratories*: (1) that the confidentiality club should be expanded to include a limited number of client's representatives and that they should be provided with the materials relied on for the case against them and (2) in any event, whatever materials they are permitted access to should be on the basis of undertakings to prevent misuse as described in the submissions set out in yesterday's transcript at page 140, line 20 to page 141, line 22."

52. I take the view that following the intense scrutiny of the legal principles and the evidence before the court, which occurred at the hearing and which is one of the great advantages of an oral hearing, it became apparent for reasons quite other than what was reported by the current patent judges that the application being made by Mr. McKillen was on principle quite unsustainable. But I shall need to consider, and would have needed to consider in any event, the grounds on which the application was made so far as the evidence is concerned and it is of course relevant to do so in the light of what is proposed in that letter.

53. I therefore turn to consider the grounds and evidence on which this part of the application is made. It is submitted that there is a material risk that the Barclay brothers or the Barclay interests may seek to exploit the relevant documents and evidence in order to gain a commercial advantage over Mr. McKillen in relation to this litigation. First, the documents and evidence relating to third party funding would disclose the entities which Mr. McKillen had been dealing with, so that if Mr. McKillen needs further funding in the event of success in these proceedings the Barclay brothers or interests could seek to persuade those entities not to assist Mr. McKillen. Secondly, Mr. McKillen's disclosure and evidence contained confidential details of his loan facilities and security arrangements which the Barclay interests could use to identify loans which they could seek to acquire and enforce with a view to, as it was put on Mr. McKillen's behalf, destabilising his financial position and therefore his ability to prosecute these proceedings.

54. The evidence relied on in support of the existence of this risk is as follows. First and foremost, the Barclay interests have made persistent attempts to acquire the loans provided by Anglo Irish Bank to Mr. McKillen and secured on his shares in the company. As is obvious, and as Mr. Faber makes clear in his witness statement for these proceedings, it was seen as means of acquiring Mr. McKillen's shares if the loans were or became enforceable. I should mention that Anglo Irish Bank was taken

into state ownership in January 2009 and renamed Irish Bank Resolution Corporation Limited (IBRC) in October 2011.

55. Between February and April 2011 at a time when these loans might have been acquired by NAMA under its statutory powers, the Barclay interests wrote to NAMA on at least three occasions to say that they were willing to purchase the loans or the shares in the event of enforcement. In May 2011 Mr. Faber on behalf of the Barclay interests asked a number of banks to approach IBRC to purchase the loan but without disclosing that they were doing so on behalf of the Barclay interests. There was a subsequent direct approach to IBRC in October 2011 after the commencement of these proceedings. This was made without the knowledge of Mr. McKillen. Mr. Faber and Mr. Peters were surprised to be told that IBRC had informed Mr. McKillen of the approach. Their note of the suggestion records that they would have preferred if Mr. McKillen had not been informed unless and until agreement was reached as they believed it might be "counter productive".

56. None the less, on 28 October 2011, they made an offer to IBRC to purchase the loans for £133 million. They were also in contact with the Irish Department of Finance and in the course of November 2011 encouraged the Department to put pressure on IBRC. On 18 November 2011 a further proposal, subject to contract, was put to IBRC.

57. These strenuous attempts to acquire the loans from IBRC came to nothing. Mr. McKillen has given evidence that he received an assurance from the board of IBRC that it would not sell the loans to the Barclay interests.

58. Secondly, Mr. McKillen relies on an approach which it appears was made to Bank of Scotland (Ireland) to acquire loans to Mr. McKillen which although secured were not secured on his shares in the company. The only documentary evidence before the court concerning this is a text message from Mr. Peters, an executive within the Barclay organisation, to Sir David Barclay on 11 November 2011, containing the following:

> "Spoke to BoSI regarding their loans to PMcK. They believe they can't sell them to us without his permission. However they told me that they would do the work for us and are planning to demand repayment and put him on default. Good news. They have promised to keep us posted."

Nothing seems to have come of this approach either.

59. Thirdly, Mr. McKillen alleges that the Barclay interests have engaged in unlawful attempts to obtain confidential information about Mr. McKillen and the terms of his loans. I do not consider that this is borne out by the evidence. Reliance is placed on approaches made to NAMA in March 2011 and to IBRC in November 2011. Mr. Faber and Mr. Aidan Barclay met representatives of NAMA in Dublin on 2 March 2011. The topics they wished to discuss included, but were not limited to, purchasing the loans to Mr. McKillen or the shares on which they were secured. On 3 March 2011, Mr. Faber e-mailed Mr. Paul Hennigan of NAMA with suggestions as to where certain protections for the lender might appear in the loan or security documentation, it being clear that he had not seen it. Mr. Hennigan replied:

> "As we discussed and wish to reiterate, NAMA will not engage in any communications with respect to a NAMA related person with a third party."

60. I cannot see in this any attempt by the Barclay interests to obtain information in breach of any duty of confidence owed by NAMA. Assuming it was a request for information, and it is not clear that it was, it did not invite or encourage NAMA to breach any duty and NAMA clearly did not do so. The same is I consider true of the terms of the offer made by the Barclay interests to IBRC in its letters dated 28 October and 18 November 2011. Mr. McKillen relies on terms contained in those offers which would require information concerning the loan and security, including, "details of any existing events of default or the likely circumstances in which defaults and/or enforceability of the security are expected by you to occur in the next three months", and copies of all loan agreements and security documents.

61. Three points arise. First, no one would pay £130 million to purchase a secured loan without seeing the terms of the loan and security and knowing facts relevant to events of default. Secondly, there is no evidence that the terms of the documents and other information were confidential. If they were, it would mean in reality that IBRC could not sell the loan without the consent of the borrower, which appears unlikely, though no doubt possible. Thirdly, the offer did not invite IBRC to act in breach of confidence or unlawfully in any other way. If it was not lawful for IBRC to supply the information, it could be relied on to say so.

62. Mr. McKillen relies also on what is said to have been an improper attempt in late 2010 to obtain information from Deutsche Bank about the company's attempts to refinance its debt. This matter was raised for the first time in the cross-examination of Mr. Faber. The evidence relied on is at day 8, page 14, line 7 to page 18, line 10. It is not a pleaded issue and is said to go to credit. Mr. Faber did not therefore give evidence-in-chief about it. In August 2010 and again in December 2010 and January 2011, by when, as I understand it, Deutsche Bank's involvement had ceased, Mr. Faber talked to a contact at Deutsche Bank about the company. The information provided appears to have been fairly general with nothing of any detail or obvious commercial sensitivity.

63. I do not think it possible on this evidence to reach any conclusion that there was any attempt to obtain information of any sensitivity in breach of a duty of confidence.

64. Reference is also made to an e-mail dated August 2010 from Mr. Gerry Murphy, Mr. Quinlan's advisor, to Sir David Barclay attaching a copy of the Shareholders' Agreement and a review by the company's solicitors of the pre-emption provisions. Reliance is also placed on some e-mail exchanges between Mr. Murphy or Mr. Quinlan and Sir David Barclay in which information concerning Mr. McKillen is either sought or supplied.

65. It is on the basis of this evidence that the risks of interference with negotiations for further funding and more generally with Mr. McKillen's financial position are said to arise. What I think can be said with some degree of certainty is that the Barclay interests are prepared to use any means which appear to be lawful to obtain control of the company. This is clearly illustrated by the attempts to acquire the loans due to IBRC secured on Mr. McKillen's shares. The issue, however, is whether the evidence

demonstrates a risk and, if so, how substantial a risk that they will go further and interfere in the respects alleged. Whatever the possibilities, I do not consider any such risk to be substantial. I will deal first with the risk that the Barclay interests would interfere with negotiations with potential funders to raise finance for use by Mr. McKillen if he succeeded in these proceedings and obtained an order in his favour for the purchase of shares.

66. On the evidence before me on 28 February 2012, this was my principal concern. Whether or not it was a well-founded concern then, there have since been significant developments. First, the agreement with Al Mirqab was made on 16 March 2012. By that agreement Al Mirqab has contracted to make available to Mr. McKillen a facility of £70 million for the purposes of funding the acquisition by him of some or all of the shares in the company. It may be drawn down where shares are available for purchase by Mr. McKillen pursuant to pre-emption rights or a court order, among other circumstances. The loan may not be drawn down without Al Mirqab's consent unless the acquisition results in Mr. McKillen holding either voting control or shares entitling him to over 50% of a return of surplus assets of the company. The facility is available for drawdown for a period of five years. If the facility is fully drawn and further shares become available for purchase, Al Mirqab may at its absolute discretion increase the facility to fund the purchase of the additional shares. The agreement envisages a joint venture between Mr. McKillen and Al Mirqab. If Mr. McKillen acquires voting control, he undertakes to use reasonable endeavours to procure the sale of shares not acquired by him to Al Mirqab. If between them Mr. McKillen and Al Mirqab acquire all the shares in the company, Mr. McKillen undertakes to use reasonable endeavours to offer or procure the offer of sufficient shares to Al Mirqab to give it 50% of the shares. They each undertake to use all reasonable endeavours to bring this about. Unless therefore Mr. McKillen requires more than £70 million to fund the purchase of shares, he already has the necessary funding in place. That sum might well be sufficient to give him control, in which event there will be little commercial point in the Barclay interests seeking to interfere with his efforts to raise further funding. Even if for some reason they were interested in doing so, or if £70 million was insufficient to give him control, Al Mirqab appears to be commercially committed to this venture. No grounds have been suggested by Mr. McKillen for thinking that Al Mirqab would not provide additional finance. The Barclay interests can do nothing to discourage Al Mirqab from doing so, because by clause 3.6 of the agreement it has undertaken not to communicate with the Barclay brothers or anyone connected with them in relation to anything contemplated by the agreement during the term of the agreement.

67. But let me consider the unlikely event that Mr. McKillen does need to seek finance elsewhere. Leaving aside Al Mirqab, Mr. McKillen has disclosed 18 parties with whom he had negotiations or discussions in 2011 or early 2012. The interest of some was very fleeting. Others would appear to have been interested only on the basis of a joint venture with Mr. McKillen, so are unlikely to be interested while Al Mirqab remained involved. There are no grounds put forward in the evidence for thinking that any of the potential funders, if seriously interested in financing Mr. McKillen, would or could be deterred by the Barclay interests. There is a suggestion in one of Mr. Cunningham's witness statements that some of these funders have relationships with the Barclay brothers and do not want them to know of their involvement. I do not know the truth of this. There is no evidence from these parties and the Barclay

interests have not been able to see the evidence so as even to comment on the existence of any relationship. If in fact they were to provide finance, it is bound to come out. So whether they would be willing to provide finance would not depend on any connection with the Barclay interests.

68. In fact, as the evidence clearly demonstrates, the Barclay interests do know the identity of a number of these potential funders. The representative of one of them told Mr. Faber when they happened both to be in court earlier in this trial. The identity of others is clear from documents provided in standard disclosure. There is no evidence that any of them has been approached by the Barclay interests either before or after Mr. McKillen's agreement with Al Mirqab. In a cross-examination of Mr. Faber lasting more than three days, and with the subject of the present application a live issue, it was not put to him that the Barclay interests had or would approach any potential funders if known to them.

69. I regard the risk to Mr. McKillen of interference by the Barclay interests in any negotiations to raise further funds for the purchase of shares if he succeeds in these proceedings as remote.

70. What then of the risk that, if the Barclay interests have access to the general financial documents disclosed by Mr. McKillen and to his evidence at the trial, they will seek to destabilize his financial position? It should be first noted that unless referred to in open court, the Barclay interests would remain subject to the requirement in CPR 31.22 not to use any disclosed document except for the purposes of these proceedings. There are no grounds for considering that they would act in breach of this requirement. The risk, if any, arises only in respect of such documents as are referred to in open court.

71. Some 11 bundles of documents have been disclosed and it is not likely, as Mr. Maclean has confirmed without committing himself, that more than a relatively small number will be referred to. Once it is accepted, as I do, that the chance of the chances of the Barclay interests approaching potential funders is remote, the prospects of the Barclay interests engaging in a general destabilisation campaign against Mr. McKillen do not appear great. Attempts to influence potential funders would be directly linked to the battle for control of the company and in that sense are akin to the attempts to purchase the IBRC loan secured on Mr. McKillen's shares. A general destabilisation campaign is rather more removed from the object to be achieved.

72. The only basis for suggesting a more general attack in the evidence is Mr. Peters' text referring to an approach to Bank of Scotland (Ireland). This is a very slender basis indeed. Not only is there no significant evidence of propensity to take such steps, there is no evidence that even if an attempt were made it would have any chance of success. I have not been taken to evidence of any particular loan which makes Mr. McKillen vulnerable in this respect or of any particular lender being likely to co-operate with the Barclay interests. The precedents are not encouraging for them. All their approaches to NAMA, IBRC and Bank of Scotland (Ireland) have failed. The furthest that the evidence goes is in the eighth witness statement of Mr. Whiteoak when in paragraph 10.2 he says:

> "Mr. McKillen's secured lending includes lending over his residential properties which may be a potential target for

> a commercial strategy from the Barclay interests so as to put pressure on Mr. McKillen."

73. There has, however, been no attempt to make good this assertion by reference to the terms of the loan, the security or the lenders. I conclude that the fears expressed on Mr. McKillen's behalf are at best no more than that. There is no evidential basis for concluding that it represents a real risk.

74. It will be apparent therefore that there was no conceivable basis for an order that the defendants are not to have full access to all the evidence at trial, even assuming that I had jurisdiction to make such an order. Nor is there any basis for a continuation of a regime which denies the defendants access to the documents disclosed by Mr. McKillen which are, as I have mentioned, until used in court, subject to the duty not to use otherwise than for the purposes of the proceedings.

75. The issue which therefore arises is whether I should accede to the request made in counsel's letter to impose terms on the defendants as regards their access to documents used in open court. I shall not do so for two principal reasons. First, I do not consider that the evidence justifies any such order. Secondly, in so far as any alternative formed part of Mr. McKillen's application, it was touched on very lightly and there was no discussion of the principles applicable and indeed whether the court could and, if so, on what grounds would impose these restrictions in relation to documents used in open court. It seems to me an area in which the court would wish to be satisfied as to the jurisdictional basis of making any such order and the relevant principles. No attempt was made to develop this part of the case and, quite rightly, the defendants' counsel did not respond to a case which had not been put.

76. I think on both those grounds it would not be appropriate to impose the restrictions suggested.

77. I turn then to the application for that part of the trial dealing with these issues to be in private. A major ground, as I have mentioned, put forward for this order is that otherwise the defendants would have access to this evidence. That is no longer relevant. The grounds which remain relevant are these. First, and the ground I think most relied on by Mr. McKillen, is that the hearing will be concerned with confidential information relating in particular to personal financial matters. Secondly, it is submitted that the negotiation of terms with possible third party funders was confidential and commercially sensitive and that if a need to seek further funding for the purchase of shares arose, the disclosure of such terms could adversely affect the negotiation of financing by Mr. McKillen. Thirdly, it is suggested that these parties might react adversely to the disclosure in open court of the terms of their negotiations and even of their identity, thereby jeopardizing Mr. McKillen's ability to deal with them in the future, either on this matter or in relation to unconnected future projects.

78. I will take these in reverse order. The third is mere speculation and, as it seems to me, inherently improbable. There is no evidence beyond Mr. Cunningham's expression of concern to support it. It is inherently improbable because business people want to do business. If they think there is good business to be done, there is no reason to suppose that they will be deterred because Mr. McKillen was required to give disclosure and present his case in open court in these proceedings. The risks of litigation are generally well known to and understood by business people.

79. The second, equally, does not seem to me to be a substantial point. The circumstances of any negotiations to bridge a gap caused by a shortfall in the Al Mirqab funding will be very different from those which previously existed. First, Mr. McKillen will have succeeded in his proceedings and will have the opportunity of obtaining at least control and perhaps the entirety of the company's shares. Secondly, a substantial party, Al Mirqab, will be involved as funder and prospective joint venturer. Thirdly general market conditions never stand still. The whole basis of any negotiations will be different. This assumes that such negotiations take place. But for the reasons earlier given, this seems to me the least unlikely.

80. This leaves the first ground. The power of the court to sit in private is stated in CPR 39.2. Paragraph 1 states the general rule that a hearing is to be in public. Paragraph 3 identifies the circumstances in which a court may order that the whole or part of a hearing should be in private. Mr. McKillen relies on those circumstances stated in sub-paragraphs (c) and (g). Sub-paragraph (c) applies if the hearing "involves confidential information (including information relating to personal financial matters) and publicity would damage their confidentiality." Sub-paragraph (g) applies if "the court considers this to be necessary, in the interests of justice."

81. Having found little, if anything, in Mr. McKillen's other grounds, the focus is on sub-paragraph (c).

82. Mr. Marshall submits that the information which Mr. McKillen does not want to be dealt with at a public hearing relates to Mr. McKillen's personal financial matters. Some elucidation of the circumstances which may fall within sub-paragraph (c) is given by paragraph 1.5 of the relevant practice direction, 39APD. It provides that the hearing of application set out in sub-paragraphs (1)-(10) "shall in the first instance be listed by the court as hearings in private under rule 39.2(3)(c)". The list is clearly not exhaustive of the circumstances falling within sub-paragraph (c) and the words "in the first instance" made clear that the court can decide to hold the whole or part of the hearing in public. Some but not all of the listed circumstances are instances of personal financial matters. They include, for example, possession claims by a mortgagee against an individual or by a landlord against a tenant of residential property based on the non-payment of rent. They also include the determination of proceedings brought under the Consumer Credit Act 1974, the Inheritance (Provision for Family and Dependants) Act 1975 or the Protection From Harassment Act 1997.

83. These are all instances wholly or to a significant extent falling within what one would normally understand by personal financial matters. While it is true that possession proceedings by a mortgagee against an individual would on the face of it include commercial as well as residential property, its limitation to claims against individuals and the limitation of a landlord's claim to possession of residential property suggests that there is no obvious reason why mortgagees' possession claims against individuals for possession of commercial premises should not be heard in public.

84. It appears to me that the reference to personal financial matters draws a distinction between purely personal, and commercial or business, financial circumstances. Mr. Marshall, however, submits that all the financial circumstances of an individual are personal for these purposes, provided they concern the assets, liabilities, income and so on of an individual, irrespective of whether they relate to his business.

85. The only authority which Mr. Marshall cited in support of this proposition was a decision at first instance in South Australia, *Minster Ellison v Raneberg* 2011 SASC 159. The plaintiffs were a firm of solicitors who brought proceedings against their financial manager whom they alleged had over some years embezzled funds from the firm. They obtained a freezing order and submitted evidence of the profit distributions to the partners. The judge made an order to keep this information private, saying at paragraphs 30-31:

> "30. Information as to a private citizen's earnings and income is private. Where that information concerns profit distributions made by the partners of a commercial law firm in a competitive market for legal services may be understood also to be commercially sensitive [sic].
>
> 31. The information which would identify profit distributions received by individual partners and the firm's profit from client fees is not otherwise available to the public, the firm's competitors, the firm's clients or the firm's employees."

86. I would make these observations on this decision. First, it is not clear that the application was opposed. Secondly, it is a regular occurrence in employment, partnership and other cases that the earnings of employees and partners are disclosed in open court. Thirdly, even in cases of matrimonial finance, which are generally held in private or subject to reporting restrictions at first instance, the position is very different on appeal. For example, the reported decisions of the Court of Appeal and the House of Lords in *McFarlane v McFarlane* [2005] Fam 171 and [2006] 2 AC 618 disclose precisely how much Mr. McFarlane earned as a partner in Deloittes over a number of years as well as giving other financial information which on any view was personal.

87. Of course financial information does not have to be personal before the court can decide that its confidential information which requires protection, if necessary by sitting in private if that is the only way the protection can be achieved. An obvious example would be information not yet in the public domain which is price sensitive as regards publicly traded securities of a company.

88. It is necessary to look with care at the type of information for which Mr. McKillen seeks protection in this case. In an affidavit sworn by Mr. McKillen in proceedings which he and a number of companies owned by him brought in the Republic of Ireland against NAMA, Mr. McKillen describes himself in the following terms:

> "I am a property investor with a long-term hold business model designed to create and sustain income from extremely well managed prime office, retail and hotel investments. I have established a pension style property portfolio over 35 years of hard work and carefully planned and executed business strategies. I have enjoyed strong healthy professional and trusted banking and business relationships with banking and business individuals and institutions over this period."

89. Mr. McKillen has direct and indirect interests in a large number of properties in many parts of the world. He conducts his property investment business partly through a substantial number of companies, joint ventures and so on, and partly, and perhaps unusually, in his own name. He has as part of this business incurred large liabilities in his own name. The details of some of these are in the public domain. Evidence filed in the Irish action against NAMA disclosed, for example, that in October 2009 he and another individual had a total exposure of over €111 million on a borrowing in their joint names from Anglo Irish Bank. Under a different credit facility with Anglo Irish Bank in his own name, Mr. McKillen had drawn down over €250 million. He owed over £39 million on a facility secured on properties in Knightsbridge in London.

90. The disclosure required by my order of 28th February was, as regards his liabilities restricted, to those aggregating over £1 million to any one creditor. The scope of the disclosure was for the most part directed to his business borrowings, although of course there may be some loans that he has taken out in order to purchase purely residential properties for the personal use of himself and his family.

91. I asked Mr. Marshall whether if the relevant business dealings had been conducted by Mr. McKillen through a corporate structure it would have been personal financial information. His answer was that clearly it would not be. I agree with that. In my judgment, such information does not become personal financial information just because Mr. McKillen chooses to conduct some but not all of his property investment business in his own name.

92. Lord Grabiner submitted that CPR 39.2 is consonant with and provides for the balance required by Article 6 of the European Convention of Human Rights. One of the circumstances which may justify a departure from the requirement of a public hearing is "the protection of the private life of the parties." This too indicates, amongst other things, the likely scope of personal financial matters.

93. Ms. Joliffe on behalf of the newspapers which I have mentioned drew my attention to the decision of the Court of Appeal in *Browne v Associated Newspapers Limited* [2008] 1 QB 103 where there was some discussion of the circumstances in which and the extent to which business information was protected by Article 8, which provides for the protection of private and family life. There was reference to the decision in *Niemietz v Germany* (1992) 16 EHRR 97 which shows that Article 8 should not be construed as necessarily excluding business activities and Sir Anthony Clarke MR, giving the judgment, of the court said at paragraph 36:

> "In short each case must be decided on its own facts and the judge was correct to say, as he did at paragraph 42, that without entering into a preliminary enquiry as to whether any particular piece of information should be allocated a business or personal characterisation, the question to ask in relation to each of the categories individually was whether there was a reasonable expectation of privacy."

94. That decision arose in the context of an application for an injunction to restrain the publication of information, including business information, imparted to the defendant in the course of an intimate relationship. It raised somewhat different issues from whether part of a trial dealing with business information should be in private, but

Ms. Jolliffe submitted that approaching the matter in the light of the provisions of the Convention the court should, in accordance with the decision of the House of Lords in *Re S (A child)* [2005] 1 AC 593, assess the relevant weight to be given to potentially competing claims to privacy under Article 8 and to the exception to Article 6 and to open justice under Article 6, which engages also the right to receive and impart information and views under Article 10. What the court must do is to conduct what Lord Steyn at paragraph 17 called the ultimate balancing test, involving first, "an intense focus on the comparative importance of the specific rights being claimed in the individual case", secondly, a consideration of "the justification for interfering with or restricting each right", and, thirdly, the test of proportionality.

95. As it seems to me, the application of CPR 39.2 must essentially involve the same approach, at any rate in a case such as the present where it is said that disclosure in open court would interfere with rights under Article 8.

96. Ms. Joliffe submitted that if the information which Mr. McKillen seeks to protect can be said to engage Article 8, it is at the weakest end of the spectrum compared, for example, with intimate personal details or clearly personal financial affairs. As against that, the claim to open justice and freedom of expression are, for all the reasons given in the authorities, very strong.

97. Mr. Marshall submitted that there should be taken into account the relevant importance in the case of the issue to which the relevant part of the trial will be directed. In his written submissions he described the issue several times as peripheral, but he disclaimed this in oral argument but submitted that it was not central.

98. In my judgment, the issue may well be significant. The alleged loss of opportunity to purchase shares through the pre-emption provisions is a significant part of Mr. McKillen's case and a defence that he would not have been able to raise the required funding clearly raises a real argument that he suffered, on this part of his case, no prejudice for the purposes of section 994 and no loss for the purposes of his tort claim.

99. In my judgment, the balance comes down clearly in favour of the whole trial being conducted in public. The nature of the evidence which Mr. McKillen wishes to be heard in private, even without taking account of the disclosure of similar financial information in the Irish proceedings, in my judgment comes nowhere near overcoming the basic requirements for open justice. I therefore dismiss Mr. McKillen's application.

(See separate transcript for proceedings after judgment)