IN THE HIGH COURT OF JUSTICE CO/1567/07

QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT

B E T W E E N :-

THE QUEEN

on the application of

(1) CORNER HOUSE RESEARCH

(2) CAMPAIGN AGAINST ARMS TRADE

Claimants

- and -

THE DIRECTOR OF THE SERIOUS FRAUD OFFICE

Defendant

- and -

BAE SYSTEMS PLC

Interested Party

DEFENDANT'S SUBMISSIONS
FOR DIRECTIONS HEARING ON 21 DECEMBER 2007

Time estimate: ½ day

Introduction

1. The Claimants seek an order quashing the decision of the Director of the Serious Fraud Office ("the Director"), made on 14 December 2006, to terminate the investigation into the affairs of the Interested Party as far as they relate to the Al Yamamah defence contract with the government of Saudi Arabia. In essence, the Director decided that the risk to national security if the investigation carried on was so serious that the public interest required him to end it.

2. The principal ground on which the Claimants seek judicial review is that the decision was, they contend, made in breach of Article 5 of the Organisation for Economic Co-operation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ("the OECD Convention").

3. The second supplementary ground, on which they were granted permission, is that the Director failed to take into account an allegedly relevant consideration, namely, the fact (as it is alleged) that Saudi Arabia would have been in breach of its international obligations if it withdrew its co-operation with the UK on intelligence and security matters.

4. The grounds of resistance are, in essence:
   4.1. the claim is based upon the Claimants' submissions as to the interpretation of an international treaty, in circumstances where the Court has no jurisdiction to interpret or apply it, where it is clear that the Director would have taken the same decision (and would have lawfully been entitled to take that decision – since the OECD Convention is not incorporated into domestic law), whether or not it might involve the UK in any violation of the OECD Convention;
   4.2. even if the court is entitled to consider the construction of Art 5 OECD, the Director's decision was lawful provided that the view he took of its meaning was a tenable view (which it clearly was): it is not for an English court in the present context (where there is a wide discretion afforded to the Director as to his decision, and where considerations of national security and international relations in relation to other parties to the OECD Convention are in issue) to attempt to decide on its proper meaning and effect beyond this;
   4.3. in any event, it is clear that the decision was not in breach of the OECD Convention; and
   4.4. the Director did not fail to take into account any relevant considerations.

Matters arising

5. The matters arising for determination at this directions hearing are:

   5.1. The Claimants seek permission to apply for judicial review on a third ground, namely, that (1) no consideration was given to the risk that discontinuing the investigation might lead to a perception that Britain easily caves in to national security threats from other states and so might damage national security and (2) the risk of information

about Prince Bandar's involvement in the alleged payment of bribes becoming public (as it has now done) was not taken into account. Having regard to the Defendant's amended summary grounds of resistance, the Divisional Court decided at the permission hearing to adjourn its consideration of this ground until the Defendant had had an opportunity to serve his evidence. He has now done so. The Defendant submits that, in the light of that evidence, this ground is unarguable and that permission should be denied in relation to it.

5.2. The Defendant has filed closed evidence, supported by a PII Certificate signed by the Secretary of State for Foreign and Commonwealth Affairs (the Sensitive Schedule to which is also "closed"). The Claimants seek disclosure of closed exhibit RW1 and the Sensitive Schedule to the PII Certificate "on a lawyers only basis subject to an appropriate confidentiality undertaking", or alternatively, the appointment of a special advocate. For the reasons given below, the Defendant submits that this is not appropriate or necessary. The closed evidence is tendered so that the Court is in a position to check for itself that the Defendant's open evidence gives a true and fair view of the factual position to enable the Court to rule upon the issues of law which arise. To that end, the Director seeks a direction that the closed material in the redacted documents may be admitted in evidence, but not disclosed to the other parties or to the public (see draft order at Annex 1 to this Skeleton Argument). It is very much a matter for the Court whether it regards this approach as necessary in the light of the grounds for judicial review, which raise essentially legal points of principle.

5.3. The Claimants have indicated that they will be seeking further disclosure of documents and making a request for further information. They have not yet indicated which further documents or what further disclosure they seek.

5.4. Issues of principle in relation to the terms of the Protective Costs Order to be made and the level of the cap on the costs that the Defendant would be liable to pay the Claimants, if the Claimants win,

remains to be decided. (After the previous hearing, a reference was made to the Senior Taxation Judge, but in the event the parties agreed that, subject to this Court's determination of the issues of principle which remain outstanding, the Claimants' maximum base costs are limited to £95,000; this being subject to uplift under a CFA).

Application for Permission: paragraph 2.5 of the Amended Grounds

6. In paragraphs 2.5, 44, 45 and 46 of the Amended Detailed Statement of Grounds the Claimants allege that:

   (1) No consideration was given to the risk that discontinuing the investigation might lead to a perception that Britain easily caves into national security threats from other states and so might damage national security; and

   (2) The risk of the (now public) information about Prince Bandar's involvement in the alleged payment of bribes becoming public was not taken into account.

7. As to (1), in fact this was taken into account as part of the national security analysis. In particular, on 11 December 2006, in a meeting with the (then) Attorney General, the (then) Prime Minister expressly acknowledged that "it was important that the Government did not give people reason to believe that threatening the British system resulted in parties getting their way": RW2/31. The possibility that discontinuing the investigation would lead to such a perception was taken into account by those who provided the advice on national security which informed the Director's decision, but it was assessed that the position in relation to Saudi Arabia was clearly exceptional and it was not considered that any such perception would in itself harm national security.

8. Moreover, the Government has recently had reason to consider this matter further in the context of requests for Mutual Legal Assistance ("MLA") in relation to investigations by US authorities concerning the Al

Yamamah contract. It is the Home Office that is responsible for dealing with this request. Under the relevant treaty arrangements between the UK and the US, the details of the request are required to be kept confidential. However, an extensive consultation has taken place across Government departments, in a manner closely similar to the Shawcross exercise which took place in relation to the SFO's investigation. In the representations prepared by the Cabinet Office, in consultation with the Ministry of Defence and the Foreign and Commonwealth Office, Ministers concluded that there is no evidence to suggest that the actions taken in respect of the SFO investigation have damaged the UK's national security in the way suggested by the Claimants: see Wardle, para 60.

9. The Claimants' contention that this matter was not taken into account is based upon the Director's evidence to the Constitutional Affairs Committee on 27 June 2007, in particular, his answer to question 269 [RW3/59-60]. As the Director made clear to the Constitutional Affairs Committee, he was speaking from recollection, without sight of the relevant papers (see his answer to Q.267 [RW3/59). As stated above, the papers confirm that the importance of the UK Government not giving people reason to believe that threatening the UK was likely to be effective was expressly taken into account by the Prime Minister when he, and other Ministers, provided advice on the public interest.

10. Moreover, it is clear from the Director's response to Q.269, that what he understood David Howarth to be asking was whether discontinuing the investigation increased the risk of people thinking they could act corruptly with impunity. The Director's view was, when he took the decision, and remains, that this case was so exceptional that it was unlikely to have any appreciable effect on other corruption cases: Wardle, para 59.

11. As to (2), the Director, and those in Government who provided him with advice on the public interest, were well aware that there had been a considerable degree of press interest in the investigation, and press reports on the subject had been published and it was likely that press interest and reporting would continue into the future. It was obvious that

a decision to discontinue the investigation would provoke further press interest. The Director regarded it as impossible to predict with accuracy what press reporting there might be, and what matters might be published: Wardle, para 62. (It so happens that, having regard to his knowledge of the state of the investigation, he had not expected any such further press reports to include speculation as to the involvement of Prince Bandar bin Sultan, National Security Adviser to the Kingdom of Saudi Arabia, in the alleged payment of bribes: Wardle, para 59).

12. This did not constitute a failure to take into account a relevant consideration. The general likelihood of future press reporting was taken into account: Wardle, para 64. The Director, and those advising on the public interest, fully understood that whilst members of the Saudi royal family might not welcome adverse press reports, such reports, unlike an official investigation under the auspices of UK law of the kind which the Director had to consider, would not be regarded by the Saudi Arabian Government as a breach of trust on the part of the UK Government. It was this assessment of the reaction of the Saudi Arabian Government to the continuation of the SFO investigation which was the basis for the Director's decision to discontinue that investigation. Even if the Director had correctly anticipated the specific allegations that have been aired in the press, he would not have considered that they diminished the risk to the UK's national security of the SFO continuing its investigation: Wardle para 65.

13. Moreover, in the context of the MLA request (referred to above at paragraph 8), Ministers have recently considered whether the public interest is affected by the extent to which substantial additional information (including that about Prince Bandar) has come into the public domain through press reporting. The assessment of the departments responding to that exercise has been, once again, that there is, from the Saudi perspective, a major difference between press reporting and official investigations conducted by or with the assistance of the UK authorities into matters regarded by the Saudis as covered by an agreement of confidentiality between the Saudi and UK Governments. It is only matters falling into the latter category which are regarded by the

Saudi Government as involving a serious breach of trust by the UK Government, such as to warrant the withdrawal of Saudi co-operation on the UK's counter-terrorism and Middle East strategies. This reaction is assessed to be unaffected by the press reporting which has occurred: see Wardle, paragraph 66.

14. In the light of the Director's evidence, the allegations that he failed to take into account these two considerations are unarguable and permission should not be granted to pursue these additional grounds at the substantive hearing.

Procedure

15. The Claimants challenge the Director's decision to discontinue the investigation. It has accordingly been necessary for the Defendant to prepare evidence in order to explain the basis of his decision, and the context in which it was made. In this regard, the Defendant has needed to exhibit to his statement nine documents that it would be contrary to the public interest to disclose in unredacted form either to the Claimants or to the public. Those nine documents are contained in the "closed" exhibit RW1/1-31. The "open" exhibit RW2/1-31 contains a transcribed, redacted version of the nine documents exhibited in RW1.

16. The redaction of these documents is supported by a public interest immunity (PII) Certificate, signed by the Secretary of State for Foreign and Commonwealth Affairs. The "closed" Sensitive Schedule to the PII Certificate gives the reasons for each of the redactions that have been made.

Provision of closed material to Claimants' lawyers

17. The Claimants seek an order that the Defendant provide copies of exhibit RW1 and the Sensitive Schedule to the Claimants' lawyers only, subject to them giving a confidentiality undertaking. They seek disclosure of the closed materials to Richard Stein and Jamie Beagant of Leigh Day & Co, and to Dinah Rose QC, Philippe Sands QC and Ben Jaffey of counsel.

18. The practice of providing documents on a lawyers only basis has been deprecated by the courts and is not appropriate. In *Somerville v Scottish Ministers* [2007] 1 WLR 2734, HL, senior counsel for the petitioners was allowed to inspect the complete versions of documents for which the respondents were claiming public interest immunity. Lord Rodger of Earlsferry (with whose opinion Lord Walker of Gestingthorpe expressly agreed [167]) observed that this procedure was "wrong in principle" [152] and "gave rise to very real practical difficulties" [152]. He continued at [153]:

> "If the respondents' claim that, in the public interest, the redacted parts of the documents should not be revealed was valid, then, in normal course, it was valid against counsel for the petitioners who should therefore not have seen the full version. As it was, counsel for the petitioners was left in a very difficult situation where, as a result of reading the documents, he had information that he was not able to reveal to, or discuss with, his clients or instructing solicitors. He even felt inhibited from revealing it to the Lord Ordinary. The result was a certain paralysis in the procedure. In agreement with all of your Lordships, I am satisfied that no such procedure should be followed in future." [Emphasis added.]

Lord Mance observed:

> "203. I must start by expressing disagreement with the Inner House's view that the course adopted under the parties' protocol and endorsed by the Lord Ordinary is to be encouraged. On the contrary, in my view. It involves disclosure to another party's (here the petitioners') counsel of material which the public interest may require should not be disclosed to anyone other than the Scottish Executive. It puts counsel in an invidious and unsustainable position in relation to his or her client. In this respect the observations in *R v Davis* at [1993] 1 WLR, pp 616H-617H per Lord Taylor of Gosforth CJ; *R v Preston* [1994] 2 AC 130, pp 152H-153D, per Lord Mustill; and *R v B & G* [2004] 1 WLR 2931, para 13, per Rose V-P are relevant, although made in a criminal context. As in this case, such a procedure may also put counsel into a position where he or she is uncertain what it is permissible to disclose or say when making submissions to the court about PII.
>
> 204. The procedure has no precedent of which I am aware in the present context, and should not become one. As in the criminal context, issues of PII should so far as possible be discussed in open court in the presence of both parties. In some circumstances, the nature of the documents may make it appropriate for the judge to hear submissions (and if necessary evidence) from the haver in the absence of anyone else, and even for the claim to PII itself only to be made ex parte. If a PII claim cannot be determined on the basis on which it is advanced without further consideration of the content of the relevant documents, it is for the court itself to undertake the

> task of inspecting the documents to confirm whether or not the documents should be provided to the party applying for them and with what if any redactions. The court may in exceptional circumstances consider it appropriate to invite the appointment of independent counsel to give it assistance (compare *R v H* [2004] 2 AC 134, pp 150 and 155, paras 22 and 36(4) per Lord Bingham of Cornhill)." [Emphasis added.]

19. There are a number of problems associated with the course the Claimants propose: (i) they have a duty to their clients to share relevant information with them, and it would place them in an invidious and unsustainable position to provide them with information which cannot be shared with their clients (this is why the SIAC rules in relation to special advocates make it clear a special advocate owes no professional duty to the person whose interests he represents); (ii) there would be a real risk of inadvertent disclosure of the protected material when having contact with their clients, advising etc (this is why the SIAC rules forbid special advocates to have contact with the person whose interests he represents, other than with the leave of – and under supervision by – SIAC); and (iii) the closed material is highly sensitive, and the range and lack of security clearance of the lawyers proposed by the Claimants (see below) itself creates an unnecessary and unacceptable risk of leaks occurring.

20. The Claimants rely upon a decision of the Permanent Court of Arbitration dated 12 October 2002 in which the Arbitral Tribunal took note of the agreement of the parties as to the procedure to be adopted in respect of access to unredacted versions of documents: *Ireland v United Kingdom* (Dispute concerning access to information under Article 9 of the OSPAR Convention) Decision No.2. The agreed procedure included giving one member of Ireland's legal team access on tribunal premises to the unredacted documents. The Claimants rely upon the Arbitral Tribunal's acceptance of this procedure as demonstrating that it would not be wrong to provide their legal team with the closed materials.

21. The procedure adopted in that case was a compromise between the parties (not the result of a ruling), arrived at in the context of commercially sensitive documents (not documents which give rise to threats to the national interest in terms of national security and

prejudice to the UK's international relations). Accordingly, that case is neither authoritative nor on point.

22. Given the very recent, unambiguous statements by the House of Lords in the context of a judicial review claim, that material in respect of which a PII claim is made should not be shown to the claimant's counsel, it is submitted that the Court should not grant the Claimants' request that the closed material should be disclosed to the Claimants' lawyers.

23. Moreover, as far as the Defendant is aware, none of the legal team acting for the Claimants will have DV (Developed Vetting) clearance, which is required to have access to the closed material. Dinah Rose QC currently has DV clearance, but this is due to expire on 8 January 2008, on which date Miss Rose QC's security status will reduce to the lower level of SC (Security Clearance) until 2013. Richard Stein, Jamie Beagant, Phillippe Sands QC and Ben Jaffey do not have DV clearance (or, for that matter, any lower level of clearance).

24. The documents in exhibit RW 1 are marked "SECRET" and the Sensitive Schedule is classified as "TOP SECRET/STRAP2". Whilst ordinarily DV clearance is only required for "long-term, frequent and uncontrolled access to TOP SECRET assets", this is an exceptional case. The redacted material is highly sensitive and, in the circumstances, the Government considers that, in addition to the reasons given above for not disclosing closed material to the Claimants' representatives, it should not be disclosed to any such representatives who do not have DV clearance. Furthermore, the number of people to whom the closed material should be disclosed should be limited to as few as possible.

Special Advocate

25. In the alternative, the Claimants contend that the Court should appoint a special advocate. The Defendant submits that the appointment of a special advocate is neither necessary nor appropriate. Common law fairness will be satisfied in the context of this judicial review by the court itself being able to see the unredacted documents to check that a true

and fair view of the factual position has been given in the open evidence and documents filed on behalf of the Defendant.

26. As Lord Mance observed in *Somerville v Scottish Ministers* at [204] (quoted above), in "exceptional circumstances" the court may consider it necessary to appoint independent counsel to give it assistance. This is not such an exceptional case.

27. First, the amount of withheld information is very limited. There are only nine redacted documents and the majority of the information in those documents has been disclosed. Where redactions have been made has been clearly indicated in exhibit RW2 and the Sensitive Schedule. The task of considering this small amount of closed material is not one for which the Court should need the assistance of independent counsel.

28. Secondly, whilst the Defendant wishes to place the closed material before the Court so that it may fully inform itself of the factual background to his decision - but, for strong public interest reasons, seeks to ensure that the closed evidence is not more widely disclosed - it is important to focus on the ground of review to which this material goes, namely, whether Article 5 prohibited the Defendant from taking into account the risk to national security of continuing the investigation. The closed material is background: the essential issue is a pure legal question of construction.

29. Thirdly, there are no human rights in issue in this case. The Defendant has disclosed to the Claimants as much of the evidence as it is possible to disclose without compromising the public interest. It is not necessary for the fair disposal of these proceedings for the Court to appoint independent counsel.

30. Accordingly, the Defendant proposes that the Court:
    (1) grants this PII application;
    (2) directs (if it considers that it is appropriate to do so) that closed exhibit RW1 should be admitted in evidence, essentially so that the Court can satisfy itself that the open evidence adduced by the Defendant gives a true and fair view of the factual position;

(3) makes appropriate directions to ensure that appropriate levels of confidentiality are maintained in these Court proceedings as regards the Defendant's closed evidence[1]. A draft order is appended as Annex 1 to this Skeleton Argument;

(4) rejects the Claimants' request for an order that the closed material should be provided to the Claimants' lawyers, or that a special advocate should be appointed.

31. In the event that the Court considers it appropriate to appoint an advocate to the court to fulfil the function of special advocate, the Defendant will invite the Court to adopt procedures that are based on those used by the Special Immigration Appeals Commission ("the Commission"), adjusted to take account of the judicial review context of the current proceedings. The Commission's procedural rules are contained in Special Immigration Appeals Commission (Procedure) Rules 2003 (SI 1034/2003) (as amended). If the Court decides that a special advocate should be appointed, the Defendant would propose directions as to the timetable and procedures to be followed in the form of the draft order at Annex 2 to this Skeleton Argument.

Request for disclosure/request for further information

32. By letter received at 3.57pm today, the Claimants set out their request for further disclosure. The Defendant is considering this, and a response will be served tomorrow morning in advance of the hearing.

Protective Costs Order

33. The Defendant has accepted that a protective costs order ("PCO") should be made, and the Court agreed at the permission hearing to grant the Claimants a PCO, limiting their liability to pay the Defendant's costs, if the Defendant wins, to £70,000. However, the terms of the order have not yet been finalised as the Court left over issues of principle relevant to finalisation of the terms of the order to be determined at this hearing. In

[1] In particular, any discussion of the redacted material should take place *in camera* with the Defendant's representatives alone. If the Court considers it necessary to refer to redacted material in the judgment, such references would need to be placed in a closed schedule to the judgment.

particular, the Court indicated that, as a balancing measure, there should be a cap on the Defendant's maximum liability in respect of the Claimants' costs (in the event that the Claimants win), but the level of that cap has not yet been decided.

34. The governing principles in relation to grant of a PCO were laid down by the Court of Appeal in *R (Corner House) v Trade and Industry Secretary* [2005] 1 WLR 2600 at [76]:

> "(i) When making any PCO where the applicant is seeking an order for costs in its favour if it wins, the court should prescribe by way of a capping order a total amount of the recoverable costs which will be inclusive, so far as a CFA-funded party is concerned, of any additional liability. (ii) The purpose of the PCO will be to limit or extinguish the liability of the applicant if it loses, and as a balancing factor the liability of the defendant for the applicant's costs if the defendant loses will thus be restricted to a reasonably modest amount. The applicant should expect the capping order to restrict it to solicitors' fees and a fee for a single advocate of junior counsel status that are no more than modest. (iii) The overriding purpose of exercising this jurisdiction is to enable the applicant to present its case to the court with a reasonably competent advocate without being exposed to such serious financial risks that would deter it from advancing a case of general public importance at all, where the court considers that it is in the public interest than an order should be made. The beneficiary of a PCO must not expect the capping order that will accompany the PCO to permit anything other than modest representation, and must arrange its legal representation (when its lawyers are not willing to act pro bono) accordingly."

35. The object of the PCO is to produce a situation in which a claim which is especially deserving of the court's attention will not be prevented by fear of the costs order which will be made if the claimant loses, whilst at the same time recognising that the public authority defendant should not itself be exposed to an unnecessarily high risk of costs in relation to the claim. By capping the defendant's costs payable by the claimant if it loses, the court imposes a burden upon the defendant (if it wins) of having to bear part of the cost of being sued unsuccessfully on the claim. That distribution of costs risk from the private claimant to the public authority is required to be matched, as the *quid pro quo*, by efforts by the claimant to keep its own costs (to be recovered from the defendant if the claimant wins) as low as possible, so that the overall costs risk to the public purse arising out of the claim the claimant wishes to bring is kept

as low as possible consistently with it being brought before and heard by the court.

36. The Defendant's resources, like those of any public authority, "are not unlimited and money spent on litigation is money that would otherwise be available for its ordinary operations": see *R (A) (Disputed Children) v SSHD* [2007] EWHC 2494 (Admin) at [30] and *Goodson v HM Coroner for Bedfordshire and Luton* [2005] EWCA Civ 1172.

37. Having regard to the principle that the costs of litigating the claim should be kept as low as possible, three points of principle are relevant in the present context:

(1) The Court of Appeal's guidance in *Corner House*, supra, is predicated upon the assumption that lawyers are not available who are willing to act and present the claim on a *pro bono* basis. Clearly, if suitable *pro bono* representation is available, it should be used, since that is a measure available to the claimant to keep the overall risk of cost to the public purse arising out of the claim it wishes to bring and seeks the court's assistance to bring to a minimum. In the present case, it now appears that the Claimants have two QCs (Dinah Rose QC and Phillippe Sands QC) as well as a junior (Ben Jaffey) willing to act, and in fact acting, for them. It is clear that the terms of the PCO will not cover all their fees, so the Claimants will have available suitable representation by Counsel at more than the level contemplated by the Court of Appeal in *Corner House* without needing allowance for Counsel's fees in the PCO. Accordingly, the Defendant submits that there should be no allowance for Counsel's fees in the PCO;

(2) Further and in the alternative, it is incumbent on a claimant who seeks the assistance of the court (in the form of a PCO) to bring his claim, by distributing the costs risk from himself to the public authority to be sued, to ensure that the costs risk to be imposed on the public authority in respect of the claim should be kept as low as possible. To that end, such a claimant should be treated as subject to a requirement to show the court that it has conscientiously made

efforts to secure *pro bono* representation for the presentation of its case. There is no evidence in this case that the Claimants made any efforts to identify whether any law firm or counsel might be willing to act in this case on a *pro bono* basis. This was not a particularly urgent judicial review. There was no good reason for the failure to ask any firms of solicitors whether they would be willing to act *pro bono* or even at reduced rates. The "big *pro bono* providers" may sometimes be unwilling to act because of conflicts of interest [Stein 2, para 65], but there is no evidence that every one of them would have been unwilling to act on this occasion. Furthermore, as the Claimants' junior counsel himself pointed out in "Protective Costs Orders in Judicial Review" [2006] JR 171 at [12] "it is relatively straightforward to find counsel prepared to act *pro bono*". It is probable that the Claimants would have found suitably experienced counsel who were willing to act *pro bono* if they had made enquiries;[2]

(3) The Claimants have £70,000 set aside to pay for this litigation: hence the request for a defendants' costs cap of £70,000. More than £65,000 of that was secured through donations raised specifically with a view to funding this case: Feltham, para 44 [I/tab 10/170] (approximately £25,000 raised in order to bring this judicial review); Beagant, paras 3 - 7 [III/tab25/1579-1580] ("a further sum of approximately £40,000 has been raised to support the present proceedings" (para 6)). The Claimants are campaigning organisations, for whom this legal challenge is part of their promotion of their wider policy objectives. Where they have taken the decision that this case is sufficiently important to use their funds to promote it, and they seek the assistance of the court to bring it by giving them protection against the full costs risk they would otherwise incur, it is again incumbent upon them to accept reasonable measures to keep the overall costs risk to the public purse (which they are creating, with the assistance of the court) as low as possible. Accordingly, the Defendant submits that the PCO terms as to costs recovery by the Claimants if they

[2] Indeed, it appears that David Pannick QC's involvement in drafting the Detailed Statement of Grounds was on a *pro bono* basis. It is currently unclear on precisely what basis Dinah Rose QC and Phillippe Sands QC are acting.

succeed at the substantive hearing should be limited to take account of the £70,000 set aside by the Claimants – ie so that they/their supporters should be required to bear that part of their own costs. This is in substance what happens when lawyers act *pro bono* (they bear their own costs, in the name of the good cause for which they act, and they are not recoverable). Put another way, the Defendant submits that it would not be fair or just to require the Defendant to be subject to exposure to costs up to £160,000 (see paragraph 38 below), whilst limiting the amount that the Defendant is entitled to receive in respect of his costs, if he wins, to £70,000.

38. Subject to these points of principle, the parties have agreed that the Claimants' maximum base costs should be £95,000. The profit costs and counsel's fees are subject to a 100% uplift. The Defendant's schedule of costs, submitted prior to the permission hearing, indicated that the total costs, including the 100% uplift, were likely to be about £30,000 less than double the base costs.[3] Accordingly, the Defendant estimates that with the 100% uplift the total costs would be approximately £160,000.

39. It is submitted that striking a fair balance between the Claimants' interest in having their claim ventilated in court and the public interest in minimising the cost to the public purse resulting therefrom requires the Claimants to accept that in order to gain the benefit of an order capping their potential liability at £70,000, if they win and their costs exceed £90,000, they should bear the remainder of the cost, up to a maximum of £70,000.

40. Accordingly, the Defendant submits that his liability to pay the Claimants' costs should be limited to £90,000.

PHILIP SALES QC

KAREN STEYN

21 December 2007

[3] The Claimants' base costs at that stage were estimated as £107,691.98 [III/tab 15/1523], on the basis of which, taking into account the 100% uplift, the Claimants sought a cap of £186,000 [III/tab 15/1482]. The 100% uplift only applies to profit costs and counsel's fees.