Neutral Citation Number: [2010] EWCA Civ 1345

Case No: A2/2010/1002
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IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE HONOURABLE MR JUSTICE EADY
[2010] EWHC 476 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/11/2010

Before :

LORD JUSTICE MUMMERY
and
LORD JUSTICE SEDLEY

- -

Between :

VLADIMIR TERLUK	**Appellant /Defendant**
- and –	
BORIS BEREZOVSKY	**Respondent /Claimant**

- -
- -

Simon Davenport QC and Aidan Casey (instructed by McGrigors LLP) for the **Appellant**
Desmond Browne QC and Matthew Nicklin (instructed by Carter-Ruck) for the **Respondent**

Hearing date: Tuesday, 9 November 2010

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Judgment

Lord Justice Sedley :

1. This is an application for permission to appeal, limited by direction of Maurice Kay LJ to two grounds which, if successful, would in all probability result in a new trial. Further grounds based on the alternative premise that the trial was lawfully constituted stand adjourned. Having heard full argument on both sides, it is agreed that if we grant permission to appeal on either or both of the present grounds we should proceed to determine the substantive appeal. The judgment which follows is the judgment of the court.

2. The claimant, Boris Berezovsky, is a wealthy Russian businessman who has taken refuge in this country and has been granted asylum because he fears persecution on political grounds by the Russian state. The endeavours of Russia to extradite him or otherwise secure his return in order to stand trial on a number of serious charges have so far failed.

3. In a television programme broadcast by satellite to this country, the first defendant (RTR), a state-owned broadcaster, alleged among other things that the claimant had tried to bolster his asylum claim by fabricating a threat to his life on the part of the Russian authorities. The programme's witness to this alleged fabrication was a man shown only in silhouette and identified by the alias Pyotr. This – although he denied it up to and through the trial – was the second defendant, Vladimir Terluk, a Kazakh citizen living in exile here but whose claim for asylum has so far not succeeded.

4. We limit ourselves to this bald account of the case because it is recounted in full detail in the judgment of Eady J [2010] EWHC 476 (QB) against which it is now sought to appeal. At the trial of the claimant's action for libel, which took place without a jury, RTR took no part, judgment having been entered against it in default. Mr Terluk, whom we will accordingly call the defendant, appeared in person with the impressive assistance of a native Russian-speaker, Ms Margiani, who acted as interpreter, McKenzie friend and (with the judge's permission) advocate for him. The trial resulted in an award against the defendant jointly with RTR of £150,000 damages with costs.

5. Of the three defamatory meanings advanced by Desmond Browne QC on the claimant's behalf, the judge found one established against the defendant. This was that the claimant had attempted through his agents to get the defendant to confess to being party to a Russian-orchestrated plot to poison him, thereby enhancing his claim to asylum. There is no need for present purposes to pick our way through the web of allegations and counter-allegations (for example the claimant's case that the defendant had in fact approached him with an allegation that Russian officials had asked him – the defendant – to scout out the possibilities of assassinating the claimant). But it may be pertinent to record that, at trial, a group of officials from the Russian state prosecutor's office placed themselves in leading counsel's bench and took a visible and occasionally active interest in the case. Their interest in the defendant's establishing his plea of justification will be obvious. At the same time, the defendant's denial that he was Pyotr made it impracticable for him to explain or qualify what he had been shown as saying on the programme, a difficulty compounded by the refusal of RTR to produce the uncut footage from which the short passages of the defendant's

contribution to the programme had been taken. A defence of justification was nevertheless run, but without success.

6. The two present issues are these. First, was the defendant's agreement to trial by judge alone given without sufficient safeguards to make it a valid consent? Secondly, ought the judge to have adjourned the trial to enable the defendant to be professionally advised and represented?

7. The two issues are tangential to one another, but the first of them seems to us to have no prospect of success. Bearing fully in mind that the defendant was unrepresented and had no immediate access to professional advice, he was in exactly the same position as any other litigant in person having to decide how best to proceed. He had both an interpreter and a judge who the transcript shows to have been careful and explicit at every stage about what options the defendant had.

8. The trial had been fixed to start, with a jury, on Monday 8 February 2010. On the previous Friday, 5 February, the defendant applied to the judge to adjourn the trial. We will come to the issue of adjournment, but in the course of the application the following dialogue occurred:

> .....
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> MR. JUSTICE EADY: Now, Mr. Terluk, I think, wanted to have a jury trial. He wanted a jury. That is right, is it not?
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> MISS MARGIANI: Mr. Terluk wanted jury?
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> MR. JUSTICE EADY: As I understand it, he wanted the jury. Is that right?
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> MISS MARGIANI: He does not want jury, he does not want journalists, he does not want filming or anything, he said. All he wants is a fair decision on all that. That is the only thing he wants.
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> .....
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> MISS MARGIANI: I do not recall him asking for jury.
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> MR. JUSTICE EADY: If he wanted ----
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> MISS MARGIANI: He would be more than happy for it to be only you yourself, my Lord. I do not know ----
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> MR. JUSTICE EADY: He would be happy for me to try it? Did Mr. Berezovsky want a jury?
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> MR. BROWNE: Well, my Lord, our attitude was, as your Lordship has said, that it was Mr. Terluk who wished to have a jury trial, and we obviously considered whether we could come

within section 69. We were dubious that we could, and Mr. Berezovsky had nothing to fear from a jury.

MR. JUSTICE EADY: Quite.

MR. BROWNE: Indeed, he would welcome the verdict of a jury.

MR. JUSTICE EADY: Yes. But it sounds, from what Miss Margiani is saying now, that Mr. Terluk does not particularly want a jury and would be happy for it to be tried by judge alone. If that is the position, would Mr. Berezovsky be happy with that?

MR. BROWNE: I cannot say without taking instructions.

MR. JUSTICE EADY: No. Because it is rather a major step. If everybody is content to have trial by judge alone, obviously there are advantages in that in terms of money, time and so on.

.....

MR. JUSTICE EADY: It may have been a misunderstanding, but my strong impression at some stage in the past was that Mr. Terluk wanted a jury. If I am wrong about that, you can sort it out.

MISS MARGIANI: No, he said never in his life he asked for jury unless he was misunderstood. Sorry. This is all happening because he is coming here... friend not in his professional... not in a professional... He said he was told that it will be jury and he just went along with it because he thought maybe the normal thing to do ----

MR. JUSTICE EADY: Well, there may have been a misunderstanding.

MISS MARGIANI: He does not want any jury or TV or anything at all, or journalists, that he ----

MR. JUSTICE EADY: The only TV would be to show the programme from April 2007.

MISS MARGIANI: No, he is saying that... he says he never asked for anything of that.

9. The judge accordingly decided that so long as the claimant consented (Mr Browne for his part was awaiting instructions; the claimant's consent was in due course given) trial would be by judge alone.

10. Simon Davenport QC, who now appears on behalf of the defendant, tells the court on instructions that the defendant simply did not understand what he was agreeing to, and that had he understood that he was foregoing a fundamental constitutional right he would not have done so. More particularly, he had been under the illusion that a jury trial would be able to be filmed and broadcast, while a trial by judge alone would be, if not in private, in relatively closed conditions. Had he known the true position he would not have consented; but without legal advice he was in the dark.

11. We have been reminded on high authority of the fundamentality of the right to jury trial in defamation, and we do not for a moment doubt it. But it is a right which can be waived. The fact that the party who has initiated the waiver comes to regret having done so cannot undo the waiver or call it in question. But it may be called in question if consent was not truly given.

12. It is to this end that Mr Davenport has taken the unusual course of securing and putting in evidence (and by implication waiving any privilege in) a transcription and translation of the conversation audible on the court's mechanical recording system between the defendant and Ms Margiani in the course of their dialogue with the court. Immediately after the last of the three passages we have set out in §8 above, the defendant is heard saying in Russian to Ms Margiani "I do not understand anything".

13. Mr Browne, whose willingness to let this transcript in might until this point have appeared surprising, has directed our attention in response to another interpolation. At the point where Ms Margiani says to the judge (see above) "I do not recall him asking for jury", the defendant can be heard saying (again in Russian): "Never. I do not mind if there will be judge alone." Other interpolations repeat a clear wish on the defendant's part not to have a jury.

14. In our judgment, the judge's explanations to the defendant of what was involved could not have been fairer or clearer. The defendant plainly understood what was at issue and, whether for good reasons or bad, had formed the view that he did not want a jury trial. On that footing the claimant too changed his position. Far from there being pressure on the defendant to abandon his constitutional right, it was he who initiated the process.

15. It may be that, had he had legal advice, he would not have done so, although this is far from certain. Trial of a complex set of issues by judge alone has advantages for a defendant, not the least of which is limiting the costs. But we have no need to speculate about this. If the judge ought to have granted an adjournment, the verdict will have to be vacated and a new trial ordered at which there is no reason to think the empanelling of a jury will not be at large again. So we turn to the adjournment issue.

16. On the adjournment issue, unlike the jury issue, it seems to us that the defendant has an arguable case. We accordingly grant him permission to appeal on it and proceed to decide the appeal.

17. As we have recounted, a last-minute application was made to Eady J, on the Friday before the trial was due to start, to adjourn the hearing in order to enable the defendant to seek and obtain professional representation. Eady J, having considered the application in detail, refused it. Then on the Monday, at the opening of the trial, it was renewed but again refused.

18. Our approach to this question is that the test to be applied to a decision on the adjournment of proceedings is not whether it lay within the broad band of judicial discretion but whether, in the judgment of the appellate court, it was unfair. In *Gillies v Secretary of State for Work and Pensions* [2006] UKHL 2, Lord Hope said (at §6):

> "[T]he question whether a tribunal ... was acting in breach of the principles of natural justice is essentially a question of law."

As Carnwath LJ said in *AA (Uganda) v Secretary of State for the Home Department* [2008] EWCA Civ 579, §50, anything less would be a departure from the appellate court's constitutional responsibility. This "non-*Wednesbury*" approach, we would note, has a pedigree at least as longstanding as the decision of the divisional court in *R v S W London SBAT, ex parte Bullen* (1976) 120 Sol. Jo. 437; see also *R v Panel on Takeovers, ex p Guinness* PLC [1990] 1 QB 146, 178G-H per Lord Donaldson (who had been a party to the *Bullen* decision) and 184 C-E per Lloyd LJ. It also conforms with the jurisprudence of the European Court of Human Rights under article 6 of the Convention – for we accept without demur that what was engaged by the successive applications for an adjournment was the defendant's right both at common law and under the ECHR to a fair trial.

19. But, as Lord Hope went on in his next sentence in *Gillies* to point out, the appellate judgment

> "requires a correct application of the legal test to the decided facts ..."

Thus the judgment arrived at at first instance is not eclipsed or marginalised on appeal. What the appellate court is concerned with is what was fair in the circumstances identified and evaluated by the judge. In the present case, this is an important element.

20. We would add that the question whether a procedural decision was fair does not involve a premise that in any given forensic situation only one outcome is ever fair. Without reverting to the notion of a broad discretionary highway one can recognise that there may be more than one genuinely fair solution to a difficulty. As Lord Widgery CJ indicated in *Bullen*, it is where it can say with confidence that the course taken was not fair that an appellate or reviewing court should intervene. Put another way, the question is whether the decision was a fair one, not whether it was "the" fair one.

21. Having heard Ms Margiani's submissions on the defendant's behalf on the Friday, Eady J gave the following ruling:

> .....
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> There is an application to adjourn the trial made by Mr. Terluk, with the assistance of Miss Margiani. Nearly three years have elapsed since the broadcast of the television programme, and the events alleged to have taken place which form the subject matter of the libel action date back to 2003. Significant delays have occurred in course of the litigation and it is fair to say that none of these can be attributed to the fault of the claimant or his solicitors. Every latitude has been

accorded to Mr. Terluk, every time to the corresponding disadvantage of the claimant.

Now, on the day before the trial effectively, which was fixed six months ago, Mr. Terluk seeks an adjournment which would in practice mean a further eight months delay until next October. It is said that Olswang solicitors were thinking of taking on the case and were considering the matter from the beginning of January at some stage, but indicated to Mr. Terluk on Tuesday or Wednesday of this week that they would be withdrawing from the case. That was not mentioned to me at a court hearing which took place on 20th January. I was not aware at that stage of the involvement of Olswang or any other solicitor in the offing.

It is also said that Miss Margiani needs time, preferably three months, to come back into the case in order to be able to give real assistance to Mr. Terluk. But it is important to emphasise of course that, so far as a jury trial is concerned, she would not be permitted to be an advocate on his behalf. Purely as a McKenzie friend she would be able to offer him assistance and guidance and so on throughout the hearing, but would not be required to address the court, and in particular would not be required to address the jury. She has, I emphasise, throughout been extremely helpful to the court and to all concerned.

Now, apart from inconvenience and delay in access to justice of the parties, there would be involved in adjourning the case huge expense. That would almost certainly be irrecoverable. For reasons which have been explained to me in the course of the skeleton argument and the further submissions, the costs thrown away by an adjournment at this stage in purely monetary terms would be of the order of £100,000.

I am afraid the time has come when I have to rule on this matter to the effect that Mr. Berezovsky must have his case heard. There have been so many delays in the past, there has been a long gap, the allegations are serious, and he must have his case heard and we must do our best to ensure that Mr. Terluk has as fair a trial as possible in all the circumstances.

Now, that means the trial will have to go ahead on Monday.

22. As can be seen, such prospect of securing legal representation as there had been (the judge himself had not been kept informed about it) had evaporated, and the submission before the judge was that time was now needed to prepare for a trial without professional representation. In our judgment, to have adjourned the trial for that reason would have once again halted the wheels of justice for the claimant without a predictable benefit of any substance for the defendant. Whatever assistance Ms Margiani was going to be able to give him – and she had no entitlement to do more than quietly advise him – was not going to be appreciably improved by standing the case out for another three months. What mattered far more was that the defendant should be afforded simultaneous translation and a full opportunity to participate in the proceedings.

23. There may, it is true, be cases in which the inequality of arms is so gross that the only fair thing the state can do is provide legal representation for the weaker party: see *Steel and Morris v United Kingdom* [2005] EMLR 15, §69. This was not such a case, and Mr Davenport has not argued that it was. But he is right to submit that it was a case in which every reasonable latitude and assistance was due to a defendant who, after all, was not in court by his own volition. With this in mind, he challenges the judge's three main reasons for refusing an adjournment on the Friday.

24. As to delay, Mr Davenport submits that, albeit time was lost at the start by the need to set aside the judgment in default obtained in December 2008, which was not accomplished until July 2009, from then on the defendant was not responsible for more than marginal delays in the proceedings. Although at this stage jury trial was still contemplated, there was nothing to prevent the judge allowing Ms Margiani to address the jury. In that event she would certainly now need time to prepare. As to the costs of an adjournment, there was no basis, it is submitted, for the judge's supposition that they would be irrecoverable. Moreover, to penalise an impecunious defendant for his own poverty was, it is submitted, entirely wrong; the more so when his antagonist is a man of enormous wealth.

25. Mr Browne advances a detailed chronology in support of his contention that the judge was entitled to hold the defendant responsible for past delays. We do not propose to run through it because we do not think that Eady J was blaming the defendant in any significant manner on this score. What he was noting, in the passage we have set out above, was that it was now some 3 years since the broadcast and that none of the time taken in reaching the point of trial was the fault of the claimant. It was, if anything, the latitude extended to the defendant that had been responsible.

26. What the judge then correctly turned to was whether, given the significant loss of time and money which a last-minute adjournment would involve, it was nevertheless needed in fairness to the defendant. At this point of time, it is important to remember, there was so far as the court knew no prospect whatever of legal representation either now or in the future. The only ground for adjourning was to allow Ms Margiani to prepare for a trial which was still at that stage to be a jury trial. The judge permissibly took the view that Ms Margiani was not going to be able to address the jury directly. No doubt, as Mr Davenport submits, he would have had power to permit this, but the problems and risks of doing so (including the aborting of an entire trial if something improper but beyond recall is inadvertently said) were quite sufficient to allow him at this stage to set his face against it. Were trial to be by Eady J alone, as in the event it was, she would revert to the role of what one can call a speaking Mackenzie friend, a role not appreciably different from that of an advocate.

27. While Eady J might have decided to adjourn the trial on the Friday without his decision being able to be impugned as clearly wrong or unfair, his contrary decision, given the situation and his factual reasons, was one which was perfectly fair to both sides. But by the Monday, when the trial was due to start, the situation had changed. Although in his skeleton argument Mr Davenport does not place reliance on it, submitting instead that the judge had by now closed his mind on the issue, there was now at least the promise of very substantial funding for the defendant; and before us Mr Davenport has developed this aspect of the case. It is worth setting out in full the submission made to Eady J on the Monday by Ms Margiani. Its composition has led Mr Browne to suggest that it must have been written for her over the weekend by the

solicitors, McGrigors, who have since come on the record and, we understand, are properly funded. Whether it was or not, it alerted the judge to a possibly new situation.

28. This is part of what Ms Margiani said or read out:

> .....
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> MS MARGIANI: Now, I know your Lordship is not going to like it probably, but I would like to make an application for the matter to be adjourned for two weeks to allow Mr Terlyuk to complete the procedural steps with respect to obtaining legal representation in this matter. In this application, I will address the following topics: first human rights; second, details of the funder; third, steps taken to obtain legal representation; fourth, political sensitivity; fifth, time savings by Mr Terlyuk being represented; sixth, steps taken after funding support was obtained; seventh, Russian criminal proceedings; eighth, prejudice to the claimant; and ninth, prejudice to Mr Terlyuk.
>
> .....
>
> It is recognised that the complexity of libel trials make the unavailability of legal aid as an impairment to access to the court.
>
> Mr Terlyuk has now obtained the necessary funds, and it would be prejudicial to his rights for him not being able to exercise them for the want of time.
>
> .....
>
> Now the funder. Mr Terlyuk was able basically to find someone who was willing to fund his legal – all the expenses in this case, and this is the company Soprotivlenie, which means -
>
> MR JUSTICE EADY: Sorry, I didn't quite catch the name.
>
> MS MARGIANI: It's Soprotivlenie -- I'm just trying to get this information, with the details on the funder. They are funded by journalist, lawyer and actress. This is a nongovernmental organisation, they have been established in 2005, and it provides support to all victims of crime and witnesses of crime with legal, psychological and moral support. This is the organisation I'm talking about. Their aim is to work out new methods for the support for victims of crime.
>
> Now, next point, obtaining legal representation. Mr Terlyuk noted and acted on your comment in paragraph 19 of your judgment of 2 July 2009. Unfortunately it was not possible to find any solicitor to take the matter on a pro bono basis. Also it

was not possible to find solicitors to take the matter on a conditional fee agreement basis.

The nature of the claim and the identity of the claimant, and I'm sure the name of his legal representatives as well, made pro bono or conditional fee agreement assistance impossible to obtain. That being the case, the time spent investigating these avenues turned out to be unhelpful and time wasted in cul de sacs. No criticism of the court in any way intended. However, Mr Terlyuk should not suffer due to the failings of the English civil litigation system.

Mr Terlyuk thought that he had secured representation from Olswang on the last occasion, and on so many occasions before, when every solicitor promised to take his case and then after that they refused to take it. However, the proposed fee of Olswang, they made this prohibitively expensive, they made it impossible.

The court's order of 5 February 2010 refusing an application to adjourn the matter is understood, as from the court's point of view what benefit could be derived from an adjournment where there was no evident prospect of legal representation being obtained by Mr Terlyuk?

This application for an adjournment is based on legal representation being made available to Mr Terlyuk as the key component finding has now been obtained.

MR JUSTICE EADY: Apart from funding, have you identified any lawyers?

MS MARGIANI: Yes, we have.

MR JUSTICE EADY: Who are they?

MS MARGIANI: This is McGrigors; I've spoken with them, I've met with them yesterday, and they are prepared to take the case as soon obviously as they are paid, and I surely hope it will be arranged as soon as I can arrange it.

29. For the rest, the submission developed the other arguments adumbrated at the start, as the introductory part had said it would. They amounted to a reminder of the significance of the trial both for the individuals involved and for the wider world, and of the steps which had so far been taken. But the potentially critical element was that, in contrast to the many litigants in person who seek an adjournment in no more than the hope that something will turn up by way of funding, the defendant was now saying that funding was to be made available.

30. How much store was to be set by this development was an important question for the judge. Correctly, he dealt with it not in isolation but in context. This was the first part of his ruling:

> .....
>
> Well, on Friday of last week, I dealt with a last minute application to adjourn the case, and at that stage it appeared that the adjournment would have to be for six months because I was being asked for a minimum of three months I think on behalf of Mr Terlyuk. On that occasion, it was rejected. It now appears that the application is either for three days for Ms Margiani to prepare herself and attend medical appointments on Wednesday, or for two weeks, so that there would be the possibility of legal representation.
>
> Now, there is of course a history to this case which needs to be considered for context. Judgment was entered in default against both defendants in December 2008 and a date was fixed for hearing the assessment of damages on 6 March 2009. On 3 March 2009, an application was made by Mr Terlyuk who emerged at that stage for the first time for a long time to set aside the judgment. That involved obviously postponement of the date. There was a hearing and I set aside the judgment against Mr Terlyuk so as to enable him to defend, and that took place last July.
>
> The date for the present trial, that is to say 8 February 2010, was fixed I think on 11 August last year, ie six months ago. During that period various consultations have I gather taken place between Mr Terlyuk and solicitors; Bindmans were consulted, SJ Berwin were consulted, Russell Jones & Walker were consulted and Olswangs were consulted, and various possible sources of funding were discussed. But, as I recorded in my judgment last Friday, the funding was not available after all when the most recent solicitors presented their prospective bill and therefore they dropped out and the funding was not available.
>
> I decided that, in view of the gravity of the allegations, it was important, notwithstanding the disadvantages to Mr Terlyuk of not having representation, that the case should at last go ahead after such a long delay.
>
> It is important to remember these are very, very grave allegations indeed, and Article 6 cuts both ways. Mr Berezovsky is entitled to have his day in court or several days in court in order to resolve the issues in the case at some stage. There have already been, as I say, several adjournments.

> Now, there is at the moment no clarity as to whether funding would be available for the new organisation which has come on the scene, called Soprotivlenie, who provide funds apparently for litigation in certain circumstances, and there is no certainty as to whether counsel would be available in two weeks' time in any event. There is nothing firm about it.
>
> As Mr Browne points out, so far as counsel who represented RTR in January is concerned, he would face formidable prima facie problems of conflict because observations he made about the strength or weakness of Mr Terlyuk's case when he was representing RTR. That would place him in difficulties. Ultimately, of course, if he were approached it would be a matter for him to decide whether or not those were embarrassing conflicts professionally or not.
>
> I am told by Ms Margiani that if he were not available, there would be some other counsel available to take up the case. To my mind, the situation is too vague and there would undoubtedly be major inconvenience to Mr Berezovsky if the matter were to go off because witnesses have been arranged, one person has come over I think from the United States, other witnesses have cleared their diaries. If the matter were to go off for two weeks, if it were to go off and funding was available for Mr Terlyuk, there would be problems because one of the counsel representing Mr Berezovsky would not be available, one of the witnesses would be on holiday, which had been pre-arranged for some time, and the witness who has come from America would have to go back and return if he were able to do so. I do not know whether that is possible but there would be major inconvenience.

31. Eady J went on to deal with an alternative request to give the defendant at least 3 days to facilitiate Ms Margiani's participation. While in the later part of the passage quoted above what might be considered undue solicitude is shown for counsel's convenience, no point is now taken on this. The point on which Mr Davenport lays all emphasis is the fact that proper legal representation was now within the defendant's grasp if the judge would adjourn the case. If that meant three months' delay, it was, he submits, an entirely fair price to pay for equality of arms.

32. It is this which has given us the greatest pause. In deciding whether it was a factor which made it clearly unfair to proceed with the trial, however, it is necessary to look a little further. We do not know how much money had to be put up, but we have been shown Olswangs' letter of 26 January 2010 asking for £730,000 plus VAT on account if they were to act. A charity or NGO with funds of comparable magnitude at its disposal and with power to spend them on private litigation is practically unknown in this country. We know now, but Eady J could not know, that notwithstanding this the funds have materialised to enable counsel's briefs – as we hope we may assume – to be suitably marked and their instructing solicitors to be properly paid, at least for the present application and appeal.

33. What confronted Eady J, however, was an assertion that money, in a large sum and from a still mysterious source, was going to be available. What was strikingly absent was so much as a letter from McGrigors or any other firm of solicitors confirming their preparedness to act and the reliability of the promised funding. It is unsurprising in these circumstances that the judge took the view that there was "no clarity" about it. It was less significant in this situation that he was also dubious about counsel's availability. If sound evidence of dependable funding had been put before him, we might very well have held that individual counsel's availability was not a sufficient reason for denying the defendant the benefit of it. But what was critical for the judge, as it has to be for us, is that even on the Monday it appeared unlikely that an adjournment would achieve anything because there was no sufficient reason to believe that the promised money would materialise.

34. In his submissions in reply Mr Davenport submits that, in the absence of any meaningful exploration of the new situation, the judge's view cannot have been intended as a reasoned conclusion; alternatively that, if it was so intended, it should not have been reached without adjourning to allow documentary evidence to be produced. For our part we have no doubt that Eady J was expressing a reasoned view based on as much material as was before him. He could no doubt have asked for documentary proof and adjourned briefly for it to be obtained; but by the same token it would have been so straightforward for the defendant and Ms Margiani to come equipped with it that it is unsurprising that the judge regarded its absence as a material fact.

35. The fact that funding has now materialised and that, had the judge been told where it was coming from, he might (depending on the source) have been more confident of its arrival, has no bearing on the legal correctness of his decision. Inevitably it makes one regret that the chance was not taken; but on 8 February it was, in the judge's legitimate estimation, made on the submissions and material presented to him, no more than a chance, and an insufficient one to require him to put off the impending trial. We do not consider this to have been unfair.

36. For the reasons we have given, we therefore refuse permission to appeal against the decision to sit without a jury and dismiss the appeal against the refusal to adjourn. This leaves the balance of the application to be determined in the usual way.