CO/3271/2014

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IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Wednesday, 19 November 2014

B e f o r e:

MR JUSTICE COBB

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Between:
THE QUEEN ON THE APPLICATION OF AT
Claimant

v

UNIVERSITY OF LEICESTER
Defendant

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Miss A Walker (instructed by John Ford Solicitors) appeared on behalf of the **Claimant**
Miss A McColgan (instructed by Watson Burton) appeared on behalf of the **Defendant**

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J U D G M E N T (As Approved by Court)

1 **MR JUSTICE COBB**: This is an application for permission to apply for judicial review. The claimant is AT and the defendant the University of Leicester.

2 It is necessary, in order to understand the arguments and my decision, that I should set out in a little detail the background history to the application. In February 2014, AT was in his second year as a medical student at the University of Leicester, undertaking a clinical medicine course. On 24 February 2014, AT, at the request of the university, attended a meeting of the medical school's Professionalism Concerns Group ("the PCG"). AT was asked to comment on a number of concerns, ten in all, regarding his conduct whilst on the course, which were said to have derived from complaints from staff members and students.

3 On the same day AT received a letter from Dr David Heney, chair of the PCG, which summarised the concerns raised at the meeting. Without rehearsing the detail of those concerns, they included complaints about how AT had behaved during the lectures and during small group sessions; they referred to with reported comments that he had made about female members of staff and volunteer patients; inappropriate use of the internet and social media; derogatory comments about females; offensive comments about children; and so on.

4 Dr Heney further set out in the same letter the PCG's conclusions at that stage, namely that the concerns raised were extremely serious, and that if the concerns were correct, either wholly or in part, they indicated a failure to meet professional standards. Some of the concerns, it was said, (and understandably so), would have a direct implication for patient safety. The concerns would indicate, if proved, a failure to meet fitness to practise standards.

5 It was further acknowledged that these were only alleged concerns and that the medical school had not made a decision on AT's responsibility for them or indeed had yet investigated them fully. In order to do so, the medical school would need to garner additional information. In the first instance, the concerns would be notified to the board of examiners.

6 The board of examiners met on the following day; following this meeting AT received a letter from Professor London, in which he informed AT that the PCG had recommended an initial period of four weeks' suspension from the course, during which time the PCG would seek a further opinion and obtain additional information. The letter also notified AT that the board of examiners had agreed that the PCG would report to Professor London by 25 March 2014 and that Professor London would take the chairman's action to decide whether AT could progress into the next phase of his course and, if so, whether any conditions would apply.

7 On 28 February 2014 AT emailed Dr Heney, asking for details of the allegations made against him, including who had made the allegations; when the allegations were made; the date of the alleged incidents; and when the allegations were first brought to Dr Heney's attention. He further sought details of the procedures which were being followed and the names of those making decisions concerning AT. On 3 March 2014 Dr Heney wrote to AT indicating that he would, "gladly meet up" with him and do his best to answer his queries. That meeting was arranged for 5 March. When AT attended that meeting, he realised that Dr Heney had, in fact, convened a further PCG meeting.

8 On 13 March, following a referral from Dr Heney, AT was assessed by a consultant psychiatrist. The psychiatrist concluded that AT was not suffering from any acute mental illness.

9 On 21 March 2014, AT received a letter from Dr Heney informing him that the PCG had met on 19 March, had considered the psychiatrist's report, along with the notes of the discussion of the 5 March meeting, and had concluded as follows: (a) that the allegations made concerning AT's attitude and behaviour were serious and had implications for fitness to practise; (b) that Dr Heney had put a number of allegations to AT and he had stated that they were not correct or did not occur, or that AT could not recall the incident or incidents; (c) that AT does not have a mental illness (although that might have accounted for the alleged conduct) (d) the PCG was not able to reconcile the statements of six students with the answers that AT had provided.

10 On 24 March 2014, AT received a letter from Professor London, informing him that he had concluded that AT should be referred to a Fitness to Practise ("FTP") Committee. The first stage of that process was for an investigating officer to investigate the allegations. About a week later, solicitors acting for AT sent a detailed letter to Dr Heney requesting detailed information, copies of relevant documents, correspondence, notes, minutes of meetings and emails. Shortly thereafter, Mr Kevin Harrop was identified as the investigating officer for AT's FTP case.

11 On 15 April 2014, Dr Heney replied to the solicitors' letter of request for information, providing some, but by no means all, of the relevant material. Dr Heney in fact refused or failed to provide some of the information which the claimant's solicitors had indicated would be key to assist them in the preparation of the case for the FTP panel. The FTP hearing, originally scheduled for 19 May, was postponed and rescheduled for 16 July.

12 On 17 June 2014, solicitors for AT sent a pre-action protocol letter to Dr Heney. The solicitors requested again information which had not been provided and invited the university to halt all investigations of AT's fitness to practise until all the relevant information had been disclosed. It further invited the university to agree to allow AT to have a legal representative at the FTP hearing. On the following day, AT met with Mr Harrop and was provided with an outline of the allegations made against him, altogether numbering eight.

13 On 26 June 2014, the university responded to AT's solicitors' pre-action protocol letter, refusing to provide the documents sought and further refusing to halt the investigation. It further indicated that AT would not be permitted to be accompanied by a legal representative or a legally qualified individual at the FTP hearing. The university indicated that the students who had made the complaints had declined to be identified. The FTP hearing was once again rescheduled, this time for 21 July.

14 AT issued this claim seeking permission to apply for judicial review on 14 July 2014, accompanied then by a claim for interim relief on the basis that the university had refused to halt investigations or postpone the FTP hearing pending the resolution of the issues raised by the defendant's failures to properly particularise the allegations made, identify the complainants, or allow the claimant to be legally represented at the FTP hearing. Once again, the FTP hearing was postponed and rescheduled. A few days later, Mr Harrop's investigation report was sent to the claimant, AT. Mr Harrop concluded that there was a

case to answer in respect of six of the eight allegations.

15 On 31 July 2014 Miss Geraldine Clark, sitting as a Deputy Judge of the High Court, refused AT's application for interim relief on the basis that, the hearing having been postponed until September, the interim relief sought was now academic, and gave directions for the service of an amended statement of grounds, directed service of the acknowledgement of service, and provided for determination of the claimant's application on paper thereafter.

16 On 14 August, the claimant was advised that the FTP hearing would not take place now before the end of September 2014. On 26 September 2014, McCloskey J refused permission to apply for judicial review on a consideration of the documents. His detailed reasoning is encapsulated in the first sentence of paragraph 1:

> "I consider the fundamental misconception in the claimant's case to be that he is challenging a process, a disciplinary one, which is incomplete."

This reasoning is developed further in the eight paragraphs which follow, including this important passage from paragraph 3:

> "I consider that, as a general rule, the fairness of any process of this kind is to be assessed when it has been completed."

17 On 2 October 2014, AT renewed once again his application for interim relief, seeking an adjournment of the FTP hearing, which was then scheduled for 15 October. This application was refused by Blake J on 8 October. AT enjoyed no greater success on an oral application before Thirlwall J DBE on 14 October 2014. Accordingly, the FTP hearing took place on the following day, 15 October, when AT appeared accompanied by his father.

18 On 21 October 2014, only nine days ago, the FTP panel sent its decision to AT. The panel concluded in summary: (a) that there was sufficient evidence for it to conclude that AT had made some inappropriate comments which several of his fellow students had found to be offensive; (b) that AT recognised during the hearing that his behaviour may at some times have been perceived to be immature and that he had not always been sensitive to others; (c) AT recognised that he may have upset a number of people; and (d) on the balance of probabilities the panel did not find that an intention to offend or intimidate had been established.

19 The panel went on to impose a range of conditions for AT's continuation on his medical degree course, including: (a) a written undertaking being required of him to meet the standards of the profession for respect of patients, fellow students, staff and colleagues; (b) that he be required to attend a Mastering Professional Interactions workshop run by the Medical Protection Society, after which he must complete a piece of written work set by the Department for Medical Education to demonstrate his improved understanding of how to interact professionally with colleagues and patients. AT would then be required to meet with Professor London to discuss his written work; (c) the Professionalism Concerns Group would appoint a member of staff to act as AT's professionalism mentor over the next 12 months and report back to the FTP committee; and (d) AT would be required to report the proceedings as part of a declaration of fitness to practise should he successfully complete his medical degree programme.

20 The FTP panel's letter did not include any information on AT's right to appeal, but it now transpires that there is no such right, given that the decision did not result in either AT's

suspension or termination from the course.

21 I mention here that on the day of the FTP hearing a conversation apparently took place between AT, his father, and Mr Harrop. AT's father contends that, first Mr Harrop had acknowledged that AT should have been provided with details of the allegations much earlier in the process, and that secondly all medical students should be provided with information about the standards expected of them and enforced. Mr Harrop, in a statement in reply, which I have had access to this morning, has candidly accepted that:

> "Whatever the outcome, there were lessons which could be learned for the student population as a whole and maybe the university."

And that:

> "Perhaps opportunities have been missed to explain the exact nature of the allegations to the claimant at an earlier stage. However, I also said in this part of the conversation that I was not suggesting that the claimant should have been given the names of the complainants, because I absolutely stood by the right of students to raise concerns anonymously, because if not, the whole of the concerns process would have become ineffective."

The claimant's case

22 AT's case, recently amended in the last few days to reflect the fact that the process has now been completed, is presented under a number of discrete grounds. Taken in their totality, the complaint is that the process by which AT was investigated was inherently unfair and that this has led to a conclusion which is itself unfair, procedurally irregular and irrational. Specifically, it is asserted: one, that there has been procedural unfairness and specifically a failure to provide relevant material during the course of investigation. AT complains of the university's failure to provide professionalism support forms ("PS forms") on which the investigation was said to be based. Completion of these forms, it is asserted, would have been required for the university to comply with its code of practice.

23 Two, procedural unfairness in a failure to provide details of the allegations prior to the completion of the investigation. It is said that the eight allegations on which the university relied in the FTP procedure lacked the necessary detail to enable AT fairly to comment and participate in the investigation prior to the completion of the investigation report and up to and including the FTP hearing. Miss Walker, counsel for AT, relies on the well known dicta from the decision of the House of Lords in O'Reilly v Mackman [1983] 2 AC 237 at 279, indicating that AT was entitled to have:

> "A reasonable opportunity of learning what is alleged against him and of putting forward his own case in answer to it."

Further reliance is placed on the Secretary of State for the Home Department v MB [2007] UKHL 46 at paragraph 29 and Kanda v Government of Malaya [1962] AC 322 at 337. She further refers to ex parte Doody [1994] 1 AC 531 in which Lord Mustill noted at page 564 that:

> "The right to make representations is of little value unless the maker has knowledge in advance of the considerations which, unless effectively challenged, will or may lead to an adverse decision. This proposition of common sense will in many instances require an explicit disclosure of the substance of the matters on which the decision

maker intends to proceed."

24 Three, procedural unfairness in its refusal to disclose the identity of complainants. AT claims an entitlement to know the identity of his accusers.

25 Four, refusal to allow AT a legal representative at the FTP hearing. In this respect AT claims that the defendant unlawfully and/or unreasonably failed to follow recognised guidance issued by the General Medical Council, which provides at paragraph 140 that:

> "Medical schools should encourage students to be represented at fitness to practise hearings or to have a supporter present. Medical schools' fitness to practise procedures should set out how this will work in practise. The preparation and support must protect the student's rights in line with the Human Rights Act."

Miss Walker on AT's behalf construes this guidance as necessarily falling in line with rule 33 of the General Medical Council (Fitness to Practise) Rules 2004, contending that such a prohibition on the availability of legal representation contravened ordinary common law principles of procedural fairness and contravened provisions of Article 6 of the European Convention on Human Rights.

26 Five, that there were material flaws and errors in the investigation and in the investigation report. AT cites in his written material multiple procedural failures and failures to accord with the principles of natural justice and the process of investigation. Many of these have already been alluded to.

27. Six, procedural unfairness in the university's failure to call the complainants as witnesses at the FTP hearing on 15 October, AT complaining that he was denied the opportunity to question the complainants. AT asserts that this is a material irregularity which ultimately led to an unsustainable and irrational conclusion.

27 Seven, that the ultimate decision was irrational. AT complains that the decision reached by the FTP panel is irrational since it failed to consider either adequately or at all the claimant's case, the absence of any supporting or corroborating evidence from teaching staff, or the correct weight to be applied to the complainants' evidence in circumstances in which that evidence was untested.

29 Finally, eight, that the decision was ultimately disproportionate, complaining that the sanctions imposed were disproportionate, given in particular that there was no finding that his conduct put patients or the public at risk, that there was no clear finding by the FTP panel that his fitness to practise was impaired, or recognition of the fact that he had demonstrated insight into his conduct.

The defendant's case

30 The defendant's original pleaded defence had laid particular emphasis on the incomplete nature of the process and the prematurity of the judicial review claim. In the amended case, which was served and filed yesterday, the following points are made and I summarise: one, the appropriate route of challenge after the fitness to practise panel reaches its conclusions would be to the Office of the Independent Adjudicator, it having been accepted in R (Kwao) v University of Keele [2013] EWHC 56 at paragraph 71 and R (Shi) v King's College London [2008] EWHC 857, R (Hamilton) v Open University [2011] EWHC 1292, and R (Carnell) v Regents Park College [2008] EWHC 739

(Admin), that, judicial review being a remedy of last resort, the OIA (the Office of the Independent Adjudicator) was an alternative remedy which would have resulted in the refusal of relief to the claimant even if he had not lost on other grounds. That, specifically, was the decision in Carnell. The defendant maintains that the Office of the Independent Adjudicator, which specifically deals with fitness to practise issues in detail, is the specialist office or public body to deal with complaints of this kind.

31 Two, that AT could in any event apply to his Head of College and, if dissatisfied by the outcome, to the university. There is, it is said by Miss McColgan, a recognised, well established and well tested complaints procedure within the university.

32 Three, that the grounds of challenge do not begin to demonstrate any illegality.

33 Four, that the case is erroneously framed in reliance on Article 6 of the European Convention on Human Rights, as this failure to practise process does not of itself determine the claimant's civil rights and obligations. In any event, complaints under Article 6 in relation to the investigation process can only be made in relation to the overall fairness of the university's approach. The claimant's contention that he was denied equality of arms by the Fitness to Practise Panel is, says Miss McColgan, "hopeless" in view of the fact that there was no legal representation of any sort at that panel.

34 Five, that the fact that the fitness to practise procedure against the claimant arose as a result of concerns originally brought to the Professionalism Concerns Group other than as a result of the completion of PS forms gives rise to no question of unfairness. Any breach of the code of practice of the Professionalism Concerns Group then in force was technical only.

35 Six, that there was no obligation on the defendant to provide the claimant with the detail of the allegations against him prior to the completion of Mr Harrop's investigation report. The claimant was subsequently provided with the detail of those allegations, to which he had had the opportunity to respond in full to the Fitness to Practise Panel. The FTP proceedings were subject to the FTP regulations, and these were fully complied with as regards timing of notice and referral of the investigation report and opportunity to respond.

36 Seven and finally, that the statement in the letter of 21 October that the claimant would have to report these proceedings to the GMC on registration is not in itself a sanction or requirement imposed by the defendant, but is a statement of GMC requirements that the fact of an FTP procedure, not only of any sanctions imposed, must in fact be reported to the GMC.

Conclusions

37 I am indebted to counsel for the skill with which they have presented their case, both orally and in writing. I must record that there were aspects of the process of this investigation into the conduct of AT which I regard as less than optimal, and had the potential to be unfair, particularly for a young student to have to deal with. I very much hope that Mr Harrop's comments referred to above are noted by the university and that they indeed do learn lessons from the way in which this investigation has provoked criticism. Specifically, but without prejudice as it were to the generality of those

comments, I wish to refer to four points.

38 One, that whilst there may have been a legitimate reason for protecting the anonymity of the complainants in this particular case, I was not shown or provided with any evidence that the university had itself considered the pros and cons of anonymity for the complainants. Anonymity should not be assumed or presumed for the complainants, even in circumstances such as these. While in the event I conclude that there has been no ultimate unfairness to AT, it is important that the university considers this question of anonymity on a case by case basis, and carefully weighing up the pros and cons in the event of investigation of a similar nature.

39 Two, that the university should be more conscientious to consider the production of documents to the student against whom allegations or complaints are made at the earliest opportunity, to give that student the best chance of responding and responding in detail, and at an early stage, to the allegations which are made.

40 Three, that there really needs to be clarity about what is meant by "representation" at an FTP hearing, and whether this includes or does not specifically include legal representation. Once again, in my judgment the question of whether or not a student should be entitled to have legal representation at an FTP hearing should probably be determined on a case by case basis. There should be no blanket principle that legal representation is not permitted. In my judgment, there needs to be close and renewed attention given to the way in which the code is interpreted by the university.

41 Fourth and finally, when providing its statement of reasons and proposed sanctions, if any, following on from the FTP process, there needs to be conspicuous clarity about what has been found, and the consequences which arise from those findings. Miss Walker in my judgment made good a submission that the letter of 21 October was less than satisfactory in that it failed to formally record a finding of impairment, such as to lead, with reference to paragraph 89c of the Medical Students: Professional Values and Fitness to Practise guidance produced by the General Medical Council, to the imposition of a sanction.

42 I note, and to some extent accept, Miss McColgan's submission that the letter, taken as a whole, infers the finding of impairment, but in my judgment such a finding should specifically be spelt out on the face of a document of such importance.

43 With those comments or observations in mind, and having reviewed the material carefully, I have reached the conclusion on balance that the application for permission to apply for judicial review should fail. In so concluding, I make the following points:

44 The claimant has not sufficiently demonstrated in my judgment for the purposes of this jurisdiction sufficient degree of procedural unfairness. The decision in O'Reilly v Mackman does not in my judgment assist him. While I have some sympathy with the claimant in facing the daunting process of investigation, in circumstances in which he will doubtless have found challenging and stressful, on the information presented to the court on this application, it appears that AT did in fact have the opportunity to answer the case against him before the Fitness to Practise Panel, and had already had the opportunity to review the material in advance of his submissions to the Fitness to Practise Panel.

45 Moreover, I do not regard the claimant's reliance on the decision of House of Lords in Doody as particularly helpful given that, as indicated, AT had full knowledge prior to the

FTP panel hearing of the allegations made against him.

46 Two, that while recognising that ordinarily the accused has a right to know the identity of the accuser, there are limited exceptional circumstances in which that ordinary expectation necessarily has to give way to the need for confidentiality of the complainant. This particularly arises in situations where it is necessary to encourage those who have a legitimate concern about the conduct of others, particularly those in a professional capacity or who aspire to that, to come forward. In this context, while there is a legitimate interest in ensuring the fairness of an important disciplinary process affecting a young aspirant to the medical profession, there is a yet more powerful public interest in promoting and maintaining patient safety and wellbeing, and there is in my judgment a sufficient case made out for this degree of confidentiality in this case.

47 Three, I do not consider that the fact that AT was not permitted legal representation was of itself procedurally unfair. The facility for legal representation in process of this kind entirely depends on the circumstances of the particular case, see ex parte Hone [1988] AC 379 at 392.

48 Four, overall the claimant has not in my judgment demonstrated sufficiently that the defendant failed to act fairly, which is of course the key element of procedural propriety.

49 Five, the claimant's own recognition during the FTP hearing that his behaviour was at times insensitive, that it may have upset others and that it may have been perceived by others as immature, is ostensibly sufficient to justify the conclusions reached by the FTP panel of an impairment such as to warrant the conditions imposed upon him, AT. The sanctions imposed were not irrational, not least in view of the demands of professional practice and the shortcomings in his conduct which he himself had recognised.

50 Moreover and finally, it seems to me that the claimant has or had an effectively alternate remedy in making a complaint to the Office of the Independent Adjudicator. As is well known, judicial review is a remedy of last resort and in this case, as in others, permission to proceed with a judicial review claim will be refused where the claimant has failed to exhaust other public remedies.

51 Overall, I do not consider that this other procedure is or would have been less satisfactory or otherwise inappropriate, and I accept without reservation the assurance of Miss McColgan on behalf of the university that were AT, the claimant here, to pursue a claim to the Office of the Independent Adjudicator, there is no question, as she told me, of the university not complying or following its recommendations.

That is my judgment

52 MISS WALKER: My Lord, there is an application for costs by my learned friend. As I understand it, there's an application for additional costs of the amendment of the summary grounds. There is also the matter of the original costs order which was made by McCloskey J on which very short written submissions were made to try and keep to the time, because McCloskey J's order -- the second page of it went astray and none of the parties realised that he'd made a costs order until the 14th. So costs submissions were

made.

53 MR JUSTICE COBB: Do I have those?

54 MISS WALKER: You might not. They are very brief.

55 MR JUSTICE COBB: Good.

56 MISS WALKER: I can just simply repeat them. The first submission was--

57 MR JUSTICE COBB: Let me just remind myself, one second, of McCloskey J's order, which is in?

58 MISS WALKER: It's at tab A, the supplemental bundle, starting at page 44.

59 MR JUSTICE COBB: Yes.

60 MISS WALKER: It's the second page, which is actually also page 44.

61 MR JUSTICE COBB: 43, I think.

> "Giving effect to the general rule, I'm provisionally minded to order that the claimant pay the defendant's costs. This discrete order will take effect within 14 days, subject to any representations in writing."

62 But you didn't have that.

63.MISS WALKER: Yes, the representations in writing were made on the 28th, which is 14 days after the order was actually drawn to the parties' attention by Thirlwall J, and the representations are that -- because it seems sensible to deal with it now.

64 MR JUSTICE COBB: No, I agree.

65 MISS WALKER: The first point that's made is that the claimant is legally aided, and so to that extent any order would need to reflect the fact that he's legally aided and there should be no order against him save for an assessment of costs. My learned friend and I said that if that order is going to be made, we could come up with the wording.

66 MR JUSTICE COBB: Yes.

67 MISS WALKER: There's usually a reference to section 26, as I understand it.

68 MR JUSTICE COBB: Yes.

69 MISS WALKER: So costs protection applies. The other submission that was made -- costs protection applies to the extent that the court was considering his resources, which in my submission the court probably shouldn't have been, so perhaps I won't trouble be with that, that was just in case it was in writing, he doesn't have any resources, which is why he is legally aided.

70 The other point that was made was merely about the proportionality of the costs that were incurred, because the costs incurred were £2,400, which in the claimant's submission seems disproportionate to the preparation of 14-page summary grounds, and I note that in addition £1,000 has been claimed for amending, and the same point would be made that it seems a disproportionate sum. To the extent that -- so those additional costs should be --

71 MR JUSTICE COBB: Yes. Do you accept that the ordinary rule applies in this case, notwithstanding what I've said in my judgment?

72 MISS WALKER: Yes, my Lord, I have to accept that, in circumstances in which there's a pre-action protocol response from the defendant, although the extent to which it was made clear to the claimant that he would have an alternative remedy through following the complaints system, where it was clear that there was no right of appeal, I would say is a factor that would weigh against making the costs order, but I accept that there was a pre-action protocol response and therefore the ordinary rules would apply.

73 MR JUSTICE COBB: All right. Well thank you very much indeed. Miss McColgan.

74 MISS McCOLGAN: Yes, my Lord. Given that the claimant is costs protected, it's something of a Pyrrhic argument, but the only point I would make is that although the defence itself was relatively short, there are multiple grounds in this case, there was a huge amount of documentation, and in my submission the costs that were incurred in drafting the defence were not disproportionate.

75 would say in relation to the amended defence there were a number of additional grounds that had to be dealt with.

76 MR JUSTICE COBB: Yes.

77 MISS McCOLGAN: I was careful in making that costs assessment not to include the preparation for today, that that addition was simply in relation to the amended grounds, but particularly given the fact that there's legal aid in place, I don't propose to waste your Lordship's time on any further discussion of it.

78 MR JUSTICE COBB: No. The total number is 3,412?

79 MISS McCOLGAN: Yes.

80 MR JUSTICE COBB: Yes, I see.

81 On the question of costs in relation to this claim for judicial review, I am not encouraged or invited, indeed, to disapply the ordinary rule that costs follow the event. However, the fact that the claimant has failed in his application has in my judgment to be tempered with some of the observations which I have had cause to make during the course of my judgment, which affect the way in which I propose to exercise my discretion in this regard. I propose to direct that the claimant will pay the defendant's costs in the sum of £2,500. Such costs order will not be enforced ... and you will then fill out the relevant provisions under the legal aid regulations.

82 Thank you both very much. Anything further?

83 MISS WALKER: No, my Lord.

84 MR JUSTICE COBB: No. Thank you very much indeed, both of you.

SMITH BERNAL WORDWAVE