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Case No: AC-2023-LON-000888

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Tuesday 28th November 2023

Before:
FORDHAM J

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Between:	
THE KING (on the application of LAW SOCIETY OF ENGLAND AND WALES)	**Claimant**
- and -	
THE LORD CHANCELLOR AND SECRETARY OF STATE FOR JUSTICE	**Defendant**
- and -	
(1) THE CRIMINAL LAW SOLICITORS' ASSOCIATION	**Interested Parties**
(2) THE LONDON CRIMINAL COURTS SOLICITORS' ASSOCIATION	

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Tom de la Mare KC, Gayatri Sarathy and Emmeline Plews
(instructed by Bindmans LLP) for the **Claimant**
Sir James Eadie KC, Catherine Dobson and Adam Boukraa
(instructed by Government Legal Department) for the **Defendant**
Adam Wagner for the **Interested Parties** (instructed by Hay & Kilner LLP for IP(1))

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Hearing date: 28.11.23
Released to the parties: 28.11.23
Formal hand-down: 30.11.23

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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FORDHAM J

FORDHAM J:

Introduction

1. This is a judicial review case about criminal legal aid. The target for challenge is the Lord Chancellor's decision (30.11.22) in the "Government Response to the Criminal Legal Aid Independent Review and Consultation on Policy Proposals". The case concerns what the Law Society says is the Lord Chancellor's failure to implement two core recommendations in Sir Christopher Bellamy KC (now Lord Bellamy)'s Independent Review of Criminal Legal Aid (29.11.21). One core recommendation (Rec.3(i)) was related to 'intervention' in areas of unmet need; the other (Rec.5) concerned levels of 'remuneration'. The claim for judicial review has the permission of May J (22.6.23) and permission of Jay J to rely on expert evidence (20.7.23). It is due to be heard by a Divisional Court in 2 weeks' time over a 3 day hearing slot (beginning on 12.12.23). Directions were made by Jay J and subsequently varied by a consent order (31.10.23).

2. The case is characterised by a vast volume of documentation. The Law Society originally filed 8 witness statements (February and March 2023). The Lord Chancellor filed 2 witness statements at the permission stage (March and April 2023), 4 witness statements at the substantive stage (September 2023) and one further witness statement (October 2023) in reply to the 22 witness statements filed (August and September 2023) on behalf of the interested parties. The Law Society has filed 10 'reply' witness statements (October 2023). There are lots of exhibits and there has been lots of disclosure.

3. The case has included multiple requests for documentation made by the Law Society. It has involved multiple stages of disclosure by the Lord Chancellor, with an aggregate of 897 pages of documents having been disclosed so far. I record that it was no part of the Law Society's submissions to me today that there has been, in this case, any breach by the Lord Chancellor of the judicial review duty of candour. The case also entails 'reservations' by the parties. One reservation by the Lord Chancellor is about making submissions at the substantive hearing as to admissibility, relevance and weight of witness statement evidence. One reservation by the Law Society – in the original pleading – was about seeking to amend when more was known about monitoring and monitoring results of the adequacy of the provision of legal aid services to areas of unmet needs.

The Application

4. These are my reasons for the outcome which I announced in Court at the end of this morning's hearing. The matters which were formally before me today are embodied in an application by the Law Society (20.10.23). The application seeks permission to amend the pleaded judicial review grounds. It also seeks orders for specific disclosure of classes of document, two of which have been pursued at today's oral hearing. The application was made 7 weeks before the trial date. That was 5 weeks ago. Sir James Eadie KC fairly recognises that, so far as any delay objection against the Law Society is concerned, it is 5 weeks ago (20.10.23) that is the fair point in time to take. Whatever it is that led to the 5 weeks passing before the application was listed, that is not down to the Law Society or its team. Having said that, the prospect of anything now imperilling the viability and effectiveness of the hearing in 2 weeks' time,

including the ability of the parties and the Court to prepare for that hearing, is a matter of anxious concern. Nobody wishes the hearing to be imperilled. No application, or contingent application, has been made for any adjournment.

The Existing Grounds

5. The pleaded claim, on which permission for judicial review was granted (22.6.23), and in respect of which permission for expert evidence was granted (20.7.23), involves the following grounds. Ground (1) is that the Lord Chancellor's failure to implement the two core recommendations in the Bellamy report is inconsistent with the common law right of access to justice, and places the Lord Chancellor in breach of s.1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, because that implementation failure creates a real risk of people charged with criminal offences being unable to receive effective legal representation. Ground (2) alleges unreasonableness: in failing to implement the remuneration recommendation (Ground (2A)); or in treating that recommendation as in substance implemented (Ground (2B)); and in failing to take action in response to the intervention recommendation (Ground (2C)). Ground (3) alleges a breach of the public law duty to give legally adequate reasons for rejecting the two core recommendations.

Temporality

6. Although the target for the judicial review proceedings is the November 2022 response, there is evidence on all sides as to the adequacy or inadequacy of the criminal legal aid arrangements both prior to November 2022, and subsequent to November 2022. One of the pleaded remedies in the original pleaded grounds refers expressly to a present breach of s.1 of the 2012 Act. There was a discussion before me as to the temporal focus of Ground (1) of the claim. The case which is being put forward by the Law Society on Ground (1), as I have understood it, is this. By the failure in November 2022 to implement the two core recommendations the Lord Chancellor has been placed in breach of common law access to justice and s.1 of the 2012 Act, that breach being identifiable by reference – at least in part – to the consequences of the non-implementation. It is those consequences to which the later evidence properly goes, in informing the question for the judicial review court, as to whether there are grounds for intervention and for the grant of a judicial review remedy. There is force, on the face of it, in Mr de la Mare KC's submission that this is how the claim has been understood, given the scope of the Lord Chancellor's own evidence in describing the picture both before and after the November 2022 response.

Permission to Amend #1

7. There are 3 respects in which the Law Society seeks to amend the pleaded grounds of claim. The first respect is in a two-page section (§§99X to 99AA) described as further evidence of a real risk that criminal defendants will be prevented from having access to justice. The Lord Chancellor does not oppose permission for that amendment. I record that it includes points arising from the material disclosed by the Lord Chancellor subsequent to the filing of the claim. They include an October 2022 "Crime/Duty Scheme Capacity Assessment" by the Legal Aid Agency, capacity reviews in 2023, a January 2022 ministerial submission, and evidence relating to steps taken in areas with capacity risks including January 2023 material. I grant permission to amend to include those grounds.

8. Pausing at this point, I would emphasise the following. (1) The Law Society has taken the procedurally correct course of making a formal application with amended grounds (R (Wingfield) v Canterbury City Council [2019] EWHC 1975 (Admin) at §83). (2) It has made that application within the timeframe for an application to amend (or for specific disclosure), laid down in the July 2023 order of Jay J, a timeframe subsequently varied by consent between the parties. (3) There is a clear nexus in legal, factual and evidential terms between the newly pleaded aspects and those which already existed in the claim. (4) The augmented claim being made is, in my judgment, an arguable one. (5) Permission allows the real dispute between the parties to be adjudicated upon (R (P) v Essex County Council [2004] EWHC 2027 (Admin) at §35). (6) The fact that permission to amend is being sought subsequent to a defendant's Detailed Grounds of Resistance and substantive evidence is explicable by reference to the 'derivative' nature of these claims. They materially 'derive' from the defence evidence and disclosure (cf. R (Middlebrook Mushrooms Ltd) v Agricultural Wages Board [2004] EWHC 1447 (Admin) at §12). I emphasise all of those points because they have a clear resonance in my judgment for the contested features of permission to amend which I have needed to decide.

Permission to Amend #2

9. The second respect in which the Law Society seeks to amend the pleaded grounds is this. On Ground (2A) (unreasonable non-implementation of the remuneration recommendation), the Law Society seeks to add a different species of unreasonableness. The contention is in a single paragraph (§79A). It comes to this. There was an absence of sustainability modelling or other evidence-based analysis. That vitiates the Lord Chancellor's response to Bellamy, because the response was without any evidential basis.

10. Permission to amend is opposed by the Lord Chancellor squarely on grounds of delay. It is certainly right that the absence of modelling was known at the outset of the case (as is pleaded at §79). But what is explicable, and 'derivative', is the aggregate position of no sustainability modelling and "no other evidence-based analysis", a contention which on the face of it the Law Society is properly putting forward after the defence and substantive evidence stage. In fact, I would have granted permission to amend even if the point were simply one of the absence of modelling itself meaning there was no reasoned or evidenced basis for the Lord Chancellor's response. That is because this is in substance precisely the same point as was made (at §7.3) in the Law Society's permission-stage reply (24.4.23), but in the context of the 'remuneration' decision. It is in the interests of justice and the public interest to grant permission to amend. All of the other points that I emphasised at §8 above apply equally here.

Permission to Amend #3

11. The third respect in which the Law Society seeks to amend the pleaded grounds is this. A 9-page section of the pleaded grounds (§§99A-99W) now develops a new Ground (4): breach of the Tameside duty of legally sufficient enquiry. This overlaps with the two-page section with which I started (§§99X to 99AA).

12. Ground (4) has not been included as a new subspecies (Ground (2D)) of Ground 2 unreasonableness. The newly pleaded Tameside contentions expressly reference the

s.1 duty and alleged failure to make sufficient inquiries in discharging the s.1 duty at any time prior to the November 2022 decisions "or thereafter". Mr de la Mare KC for the Law Society characterises the new Ground (4) as not being limited to a conventional 'historic' Tameside review of the enquiry as at the time of the November 2022 decisions, but extending temporally with Ground (1) (see §6 above). Sir James Eadie KC for the Lord Chancellor submits that, unless conventionally linked to reasonableness (Ground (2)) and the 'historic' November 2022 decision, new Ground (4) represents a wholly different challenge from that which is currently pleaded. The short answer to that, in my judgment, is that when linked to Ground (1) rather than Ground (2), the new Ground (4) is reflective of a reach and scope which the proceedings already have. They already have whatever scope and reach Ground (1) has. Ground (1) has permission for judicial review. I have already articulated my understanding of the reach of Ground (1).

13. On this part of the case Sir James Eadie KC emphasises delay, by reference to the fact that the absence of a monitoring 'policy' was known at the outset of the case in April 2023. But the answer to that is that the contentions made are 'derivative' and explicable in terms of timing. That is because they do not rest solely on the absence of a monitoring 'policy'. They rest on what is said to be uncollected or inadequate data, in the context of an absence of any monitoring 'policy' or monitoring 'criteria'. There is no unfairness. The contention fits closely with the reservation in the original pleaded grounds about monitoring and information not currently known which could warrant a future amendment (§3 above). It also fits with a point that was being made at the permission-stage reply (§10) about the awaited disclosure of data, analysis and evaluative criteria (24.4.23). It also fits with what was said by Counsel at the July 2023 hearing about an envisaged amendment, when Jay J was making the order with the agreed directions.

14. Sir James Eadie KC strongly submits that this new Tameside ground is not arguable with any realistic prospect of success. I cannot accept that submission. In my judgment, the new ground is an arguable one. It should be considered alongside the other points in the case, to which it is closely linked in legal, factual and evidential terms. Permission to amend is necessary in the interests of justice and the public interest. The points identified above (§8) apply.

Amended Defence?

15. It was common ground that the amendments, if permitted, would not – in the circumstances as they now are – call for any amended pleading from the Lord Chancellor. The Lord Chancellor can properly deal with the substance of the newly pleaded points in the skeleton argument for the upcoming substantive hearing, having already foreshadowed the Lord Chancellor's position when responding on arguability for today.

Witness Evidence #1

16. I will turn next to the question of witness evidence. The agreed directions made by Jay J allowed for "reply evidence" to be filed by a deadline which was subsequently extended by agreement. It is not said that the Law Society's 10 witness statements fell foul of that deadline. The point raised by the Lord Chancellor is that 4 of the 10 witness statements do not constitute "reply evidence". The logic is that they would not

fall within Jay J's direction and would require permission, which should be refused. There was a procedural point about whether the Lord Chancellor ought to have made an application to exclude the evidence. Ms Sarathy, who argued this part of the case for the Law Society, rightly did not take that technical objection but addressed the point on its legal merits. So have I.

17. The contested witness evidence falls into two categories. First, there are three witness statements about research evidence, accompanied by voluminous exhibits. These are the statements of Penelope Gibbs (the Director of "Transform Justice"), Anna Powell Smith (the Founder of the "Centre for Public Data") and Dr Vicky Kemp (Principal Research Fellow at the University of Nottingham).

18. Sir James Eadie KC rightly reminds the Court of the need for procedural rigour in judicial review, not just to give the right signal for future cases but to deal properly and justly with the individual case under consideration. He accepts that these three witness statements are "evidence", but submits that they are not evidence in "reply". He submits that the evidence is describing and introducing research reports, most of which predate the claim for judicial review. This material could and should have been prepared and filed much earlier. I think there is force in the point about timing, insofar as the witness statements and research reports are being relied on in support of Ground (1). But there is a counterbalancing answer. There is a 'responsive' nature of the evidence, in light of the Lord Chancellor's evidence and disclosure regarding the decision-making in November 2022 and the functioning and adequacy of criminal legal aid arrangements. The essential point is that what is now seen to be missing includes the research, even that which was already included within the Bellamy review and report (which applied to Dr Kemp's work). These arguments involve a balance.

19. But what is undoubtedly the case is that this evidence also serves to support the newly pleaded Tameside Ground (4). The way in which the evidence is being deployed, in that newly pleaded part of the case, is clearly signalled. There are multiple paragraphs of the new pleading which make reference to specific parts of these witness statements. That interweaving of the new grounds and this evidence is something that I had in mind in considering whether permission to amend should be granted or refused for the new Ground (4).

20. Stepping back, I am satisfied that it is necessary, appropriate and proportionate – in the interests of justice and the public interest – for this first category of evidence to be before the court at the substantive hearing, to assist the Court, in its consideration of all of the pleaded issues in the case. If permission were needed, I would be granting it.

21. There is no injustice. The Court at the substantive hearing will need and expect from the parties a real focus, to navigate the voluminous materials, to identify what matters in public law terms. It is worth remembering that the Lord Chancellor has already had these witness statements and the application to adduce them, and the new pleading weaving them in, for 5 weeks. It was not suggested that admitting these materials would necessitate an adjournment of the substantive hearing. It is a tribute to the industry of the Lord Chancellor's legal team that they would be able to take such materials – and all the other recent witness statements – in their stride. Ultimately the

Court at the substantive hearing will of course have the final say on all questions as to relevance and weight.

Witness Evidence #2

22. The second category is a second witness statement (dated 23.20.23) of Richard Miller, Head of the Justice Team at the Law Society. This is a 29 page statement. It exhibits 10 new items of evidence. Here, as I saw it, the Lord Chancellor's point is that this is really not evidence in reply, because it is not really "evidence" at all.

23. The nature of Miller 2 is really this. It is a themed commentary on the evidence, speaking for the Law Society. It also, not infrequently, gives Mr Miller's own observations. The statement is a fusion of themed description and observation. There is force in the Lord Chancellor's concerns that there is commentary, submission and opinion (Flaxby Park Ltd v Harrogate Borough Council [2020] EWHC 3204 (Admin) at §15). I have found some rough edges in the way that the statement is expressed. On the other hand, it is not said that the exhibits to Miller 2, or their introduction, should be excluded. Nor is it said that Miller 2 is raising points to which the Lord Chancellor would need an opportunity to respond by evidence. As I see it, what has gone on in the creation of Miller 2 is not an exercise which would tend to bring proliferation or to increase costs and time (cf. Flaxby §§16-17). In fact, it was an exercise seeking to summarise, draw together and organise points of evidence. It is true that that could equally be done in a note signed off by a junior counsel rather than from the Law Society's Head of Justice team.

24. Focusing on practicality and efficiency, in this particular case, and this close to the substantive hearing, I am not persuaded that it would be appropriate or in the interests of justice or the public interest to exclude this witness statement. In the particular circumstances of the present case, the answer lies in the function of the Court at the substantive hearing to decide whether it is assisted by this themed commentary, as a matter of relevance and weight (see R (The Good Law Project Ltd) v Minister for the Cabinet Office [2021] EWHC 2091 (TCC) at §§48-49). I decline to exclude the witness statement. I decline to direct that it be reproduced in a different shorter form or that aspects of it be produced as a note. Of course, the Court dealing with the substantive hearing may or may not wish to express a view about this evidence. For today, I am the gatekeeper and I decline to close the gate.

Disclosure

25. That leaves the important question of orders for specific disclosure. From the Lord Chancellor's perspective, there has been very substantial disclosure already in this case and there is no need for any more. From the Law Society's perspective, there remained a range of unanswered questions and requests, which it and its team has narrowed down to the two which really matter.

26. The items in respect of which orders for specific disclosure are sought are as follows. The first is what is described in the amended pleading as a "sample" of evidence of the monitoring mechanisms described by David Phillips, Deputy Director for Service Development at the Legal Aid Agency in his second witness statement (4 September 2023) as monthly Scheme Performance Reports (SPRs) and regular Provider Activity Reports (PARs). The Law Society limits its disclosure application to the sample of

these, covering 9 'red light' capacity risk areas and a temporal period of 22 months between January 2022 and October 2023. GLD for the Lord Chancellor has identified that these materials are 630 pages of PARs and 22 monthly Excel spreadsheets of SPRs. Concerns are raised as to commercial sensitivity and the burdensome exercise of identifying contents deserving protection.

27. The second item is what is described in the first witness statement of Mr Phillips (31.3.23) as the "19 responses" to a consultation relating to criminal legal aid provision in Barnstaple in August 2022 and the "6 responses" to a consultation relating to criminal legal aid provision in Skegness in May 2022. GLD has identified that with covering emails there would be a total of 39 documents. Again, concerns are raised as to commercial sensitivity and the burden of any redaction exercise, particularly so close to the trial date.

28. Sir James Eadie KC submits that neither of these sets of materials falls within the applicable test where disclosure is necessary for the just and fair disposal of the issues in the judicial review proceedings (Tweed v Parades Commission for Northern Ireland [2006] UKHL 53 [2007] 1 AC 650 at §3). He emphasises the well-understood general point that reference to a document in a witness statement does not automatically trigger a disclosure duty or right (R (Sustainable Development Capital LLP) v Secretary of State for BEIS [2017] EWHC 771 (Admin) at §80). He emphasises that, even if materials are relevant, it is necessary carefully to address the question of proportionality of disclosure (Mehan v Commissioners for HM Revenue & Customs [2015] EWHC 2569 (Admin) at §2), submitting that this disclosure would be disproportionate.

29. Sir James's central points on relevance are as follows. It is true that the Lord Chancellor's evidence in response to the judicial review claim described monitoring and interventions after local consultations, as part of the arrangements to secure adequacy of provision. But the point that matters in public law terms is the 'existence' of the arrangements, the architecture. It is the fact that there is a set of arrangements for monitoring and for consultative local intervention. To the extent that the 'effectiveness' of those arrangements has any legal relevance at all, that effectiveness will fall squarely within the evaluative latitude of the Lord Chancellor, whatever the standard of scrutiny. So far as the 'existence' of the architecture is concerned, the witness statement evidence itself gives a clear description of the monitoring and consultation arrangements. So far as the local consultations are concerned, the LAA published its summary of consultation responses. What is already before the Court is amply sufficient for the purposes of this claim for judicial review. Especially when close regard is had to its proper scope.

30. I have not been persuaded by those submissions. I agree with the submissions of Mr de la Mare KC (as to the monitoring) and Ms Sarathy (as to the consultation documents). A key feature of the Lord Chancellor's defence of this claim, reflecting the understanding of the scope of the claim, has been positively to rely on the arrangements for monitoring of duty solicitor schemes, with intelligence-led real-time monitoring together with local consultative interventions managing risk. I do not accept that this is, or could be, limited to 'existence'. The Court is being told that there are effective arrangements. Part of the claim for judicial review is that the arrangements cannot properly be relied on as adequate. Part of the new Tameside

enquiry Ground (4), where these points are interwoven, is that there has been an insufficiency of enquiry. It is, in my judgment, necessary in the circumstances of the present case, in the interests of justice and in the public interest, for the Law Society to be in a properly and sufficiently informed position to be able to advance any points about the nature of the architectural arrangements (once the primary documents have been seen) and about their effectiveness when the 'problems' being elicited through monitoring and consultation are put alongside the 'solutions' being identified.

31. The point is brought into focus, in my judgment, by the pleaded reference to the disclosed October 2022 Duty Scheme Capacity Assessment (§7 above). This describes what is "illustrated" by the 2022 Barnstaple and Skegness consultative interventions in terms of sustainability. That kind of point can only be made by someone who can see the position in relation to the 'problems' uncovered and the 'solutions' adopted. The same would be true of the monitoring arrangements.

32. This material is, in my judgment, directly relevant not just to the new Ground (4) for which I have given permission to amend but to the judicial review claim as a whole. If the Lord Chancellor is putting forward a positive case about the virtues of relevant arrangements – as, in my judgment, he is – then it is necessary in the interests of justice that the Law Society should be in an informed position to assist the Court with any contrary contention.

33. What about delay? So far as the disclosure of the monitoring mechanisms is concerned, there can, in my judgment, be no possible criticism on the basis of the timing of the application for disclosure. I have seen the sequence of disclosure requests and the repeated emphasis on monitoring, including data. The permission-stage reply (§10), referring to the need for full disclosure of data and analysis, is just one reference from April 2023. The description of the PARs and SPRs appeared for the first time on 4 September 2023. In circumstances where there was a court order giving a timeframe for applications for specific disclosure, then extended by agreement between the parties, there can be no delay criticism. The timing in relation to the Barnstaple and Skegness consultation responses has a different perspective. These could have been requested after Phillips 1 (31.3.23) where those were expressly referenced. What ultimately triggered the request was disclosure documents in which further emphasis was placed on those local interventions. That led to a clear request made by Bindmans solicitors (18.9.23). That was more than 2 months ago. We know that, even if raised from April 2023, these materials would not have been forthcoming through the Lord Chancellor's evidence and disclosure. So, we would be where we are. Even leaving that reality to one side, in circumstances where I am satisfied that disclosure is necessary for fair and just disposal of the issues in the case, I do not and would not refuse disclosure on timing grounds.

34. That leaves the questions of proportionality and practicality. I have anxiously considered, with the assistance of Mr de la Mare KC and Sir James Eadie KC, the practical implications, because of what is said by the Lord Chancellor about commercial sensitivity. Especially in the light of the looming trial date which nobody wishes to undermine or lose. But I am entirely satisfied that my orders today for specific disclosure ought not, and will not, have the consequence of undermining the parties' preparation or the Court's preparation for the trial in 2 weeks' time. I am not directing an immediate exercise in days of confidentiality checks or redactions. As I

made clear at the hearing, the arrangement – sensibly ventilated between Leading Counsel – should enable the disclosure to take place speedily. That can be on a protected basis, within an agreed confidentiality ring.

35. I emphasise this. Disclosure is necessary for the fair and just disposal of the issues because it is necessary to put the Law Society in an informed position as to these underlying materials. But disclosure by the Lord Chancellor pursuant to my order today does not, of itself, entail materials being filed with the Court in the proceedings. What it entails is the Law Society being speedily put in an informed position. I know I am able to rely on the duty of cooperation and the good sense and industry of all members of the legal teams. Sir James was quite right to remind me – in the context of materials being relied on in the proceedings – of the implications for open justice. The press and others would have a legitimate interest and might have submissions to make about any arrangements for the hearing. The parties will be able to communicate about what materials it is, in fact, necessary to put before the Court for the purpose of any submissions about those materials, and in what format and with what arrangements to promote open justice. Obviously, the Court dealing with the substantive hearing will be acutely alive to all of this too. I am satisfied that practicality and principle can be protected.

Conclusion

36. It is for these reasons that I announced at the end of the half day hearing this morning that I would be granting the Law Society's application in its entirety. The orders which I am making seek to serve and reconcile the interests of justice, the legitimate interests of all parties, the fairness and even-handedness of the proceedings, the public interest, standards of procedural discipline and case-management, practicality and proportionality, and the preservation of an imminent 3 day substantive hearing slot. I understood it to be agreed that costs be reserved. I will look to the parties to draw up a draft Order reflecting my decisions and including any directions. I have communicated that I would be available for any further case-management directions which might need to be dealt with on the papers in the next few days. I conclude by expressing the Court's gratitude to all, for the industry and conscientiousness in the preparation and presentation of the submissions.

28.11.23