NIGEL EDGAR BERTRAND JOHN GUINLE V BASSAM EDWARD KIRREH
KINSTREET LIMITED V BALMARGO CORPORATION LIMITED & OTHERS
INTERFISA MANAGEMENT INC. V MICHEL PHILIPPE HAMAM & ANOTHER

Judgment : Mrs Justice Arden : Chancery Division : 23 July 1999

These three actions are related actions. In the first action, known as the share action, the principal claim is for a declaration that 50% of the shares in Kinstreet Limited ("Kinstreet") are held by the defendant, Mr Kirreh, on trust for the claimant, Mr Guinle. In the second action (known as the conspiracy action), Kinstreet and a company associated with it (or Mr Kirreh) called Interfisa Management Inc ("Interfisa") seek damages for breach of contract, conspiracy and breach of duty from Mr Guinle and others, including Mr Hamam. There are nine defendants in that action, but only four have been served and accordingly when I refer to the defendants in the conspiracy action I refer to those defendants only. Both those actions were commenced in 1994. I describe them in more detail under (c) Separate trial of the Share Action, below. The third action, which was begun in 1999, is by Interfisa against Mr and Mrs Haman. In it Interfisa claims a declaration that Mrs Haman holds certain property on trust for the claimant and other relief. The first two actions have been ordered to be tried together and are due to be heard starting in February 2000, On 2 July 1999 I made an order for *Inteifsa v Haman* to be tried immediately after the conspiracy action.

This judgment sets out my reasons for the rulings which I made following submissions at case management conferences on 2 and 23 July. The principal rulings I made were as follows:

(a) *on a preliminary issue in the application for security for costs by the defendants pursuant to section 726(1) of the Companies Act 1985 in the conspiracy action, that Kinstreet would be unable to pay the defendants' costs in the conspiracy action if the defendants were successful in that action and their costs were £350,000 or more;*

(b) *that paragraph 17C of the Amended Defence in the share action did not constitute reasonable grounds of defence and should be struck out, and that paragraph 21 of the Amended Defence and the Counterclaim in the share action should be stayed;*

(c) *certain issues in the share action should be tried first; and*

(d) *that there should be alternative dispute resolution ("ADR") in all three actions.*

These applications have raised novel issues of case management under the new Civil Procedure Rules (CPR) against a background of procedural and factual complexity.

(a) **Conspiracy action - Security for costs -preliminary issue**

The defendants' application for security for costs is made under section 726(1) of the *Companies* Act 1985, which provides:

"(1) Where in England and Wales a limited company is plaintiff in an action or other legal proceedings, the court having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the defendant's costs if successful in his defence, require sufficient security to be given for those costs, and may stay all proceedings until the security is given."

The meaning of the words "it appears by credible testimony that there is reason to believe" was explained by Sir Donald Nicholls VC in the ***Re Unisoft Group Ltd*** *(No.2)[1993]* BCLC 532, 534:

"I start consideration of the subsection by noting that the phrase `the company will be unable to pay the defendant's costs if successful in his defence', is clear and unequivocal. The phrase is `will be unable', not `may be unable'. `Inability to pay' in this context I take to mean inability to pay the costs as and when they fall due for payment. Thus the question is, will the company be able to meet the costs order at the time when the order is made and requires to be met? That is a question to be judged and answered as matters stand when the application is heard by the court, although the court will take into account and give appropriate weight to evidence about what is expected to happen in the interval before the costs order would fall to be met. The court will draw appropriate inferences and here, as elsewhere, it will not let common sense fly out of the window. The phrase `the company will be unable to pay' is preceded by the words `if it appears by credible testimony that there is reason to believe'. I do not think this latter phrase has the effect of watering down the words which follow. The court, on the basis of credible testimony, must have `reason to believe', that is, to accept, `that the company will be unable to pay'. If this were not so, and the test is not whether the court, on the basis of credible testimony, believes the company will be unable to pay, then it is difficult to identify what is the proper approach and what is the test being prescribed by the statute. It cannot, surely, suffice that the applicant's accountant, for example, who is a credible witness, puts forward a case of inability, to pay. If there is conflicting evidence the court must have regard to that also.

The court must reach a conclusion on the basis of the totality of the evidence placed before it, giving such weight to the various matters deposed to as is appropriate in the circumstances. The matter on which, in the end, the court is required to reach a conclusion is whether the company will be unable to pay."

The Vice-Chancellor made it clear that the company's financial position was a matter on which the court had to be satisfied on the evidence when reviewing the evidence the Vice-Chancellor held:
"On the basis of this financial information, in my view if the petition fails SHL will be unable to pay a substantial costs bill as it falls due. SHL has no cash, and substantially its only current asset is not readily realisable. So SHL would have to obtain a loan. It is possible that its backer would be prepared to make an advance for this purpose. That is possible. It is also possible that money might be coming from another source, for example its controlling shareholder. However, there is no evidence before me on these points. There is no letter from the bank, nor, on the figures I have summarised, is it at all obvious that a loan of a six-figure sum would be forthcoming when sought. As matters now stand, therefore, SHL will be unable, on the evidence before me, to meet a significant costs order if one is made next May."

The defendants' application came before me as Applications Judge for directions on 23 and 10 June 1999. I directed that a single expert should be appointed to give expert evidence on the question whether Kinstreet would be able to pay the defendants' costs if the defendants were successful in their defence and that there should be a preliminary issue as to whether for the purposes of section 726(1) of the *Companies* Act 1985 Kinstreet would be unable to pay the defendants' costs if successful in their defence. I indicated that I might only be able to resolve this issue subject to various outcomes as to the defendants' costs. By my order, Mr David Epstein, Chartered Accountant, of Levy Gee was appointed as the single expert and he produced a report which I have found most helpful. There is no evidence as to the financial position of Interfisa, and the claimants do not suggest that any significance attaches to it for the purpose of the application for security for costs.

In his report, Mr Epstein sets out the instructions he has received and the information available to him. He points out that he had requested, but not received, up to date management accounts and forecasts for Kinstreet. Likewise, Mr Epstein had no details of bank facilities beyond the information given in Kinstreet's statutory accounts to 31 January 1998. Mr Rosen QC informed me that Kinstreet had made a considered decision not to provide further information. In this they must have realised that the court could only make its decision on the evidence placed before it.

The defendants contend that their total recoverable costs will be £1,592,048. This is hotly contested: the claimants say this figure should be £172,000. Accordingly, in preparing his report, Mr Epstein considers Kinstreet's ability to meet a number of cost outcomes. He considers whether Kinstreet would be unable to meet costs ordered to be paid to the defendants totalling £250,000, £600,000, £1,000,000 and £1,600,000. He applies two separate tests- a net assets test and a cash flow test. The former test is used to determine whether Kinstreet will have positive net assets after paying the defendants' costs. The latter test is used to determine whether the company will have the cash facilities to meet its bills as they fall due not only to the defendants but other creditors in the normal course of trade (paragraph 6.14). Throughout his report Mr Epstein's approach is one of manifest fairness to Kinstreet, and this is evidenced by his willingness to make assumptions in their favour such as an assumption (paragraph 4.7) that all Kinstreet's costs to 10 June 1999 have been charged in the accounts, even though he considers that this is unlikely. The claimants' estimated costs incurred or to be incurred total £878,463.98. Kinstreet has an unqualified audit certificate on its latest statutory accounts which means that the auditors were satisfied that it could continue to trade within its existing facilities during its next accounting period. Mr Epstein states that in his opinion it would be "unreasonable" in the absence of information to project either an increase or decrease in turnover or profitability (paragraph 5.6). However, he considers that it is likely that normal inflation and prices are likely to have some effect and he accordingly produces cash flows based on assumptions of 2% and 3% per annum growth in turnover. He also makes a number of other assumptions in these cashflows, in particular that Kinstreet's substantial cash balance of £637,450 at 31 January 1998 will remain.Mr Epstein considers that "the cash may be a deposit that is secured for VAT or deferral purposes or for some other purpose" (paragraph 6.15). Mr Epstein assumes for simplicity that all costs will be payable on 31 January 2001.

On the net assets test, Kinstreet can (on the assumptions made by Mr Epstein) pay costs of £600,000 before it has negative net assets. The cash flow test, however, shows that it needs bank facilities of 12.1m to £2.2m to pay defendants' costs of £250,000 and bank facilities of approximately £2.5m to pay defendants' costs of £600,000. Mr Epstein continues:

"6.18 In the light of the net assets reduction as set out in 6.6 above [viz the effect on net assets of paying the defendants' costs], I am of the opinion that any amount of defendants' legal costs in excess of £250,000 are unlikely to be met by the company's bankers. Further information regarding the facilities available, the security that has been offered and any other relevant information may cause me to change my opinion."

In his Summary and Conclusion, Mr Epstein states:

"7.8 I am of the view that [it] is possible that the company could meet defendants' legal costs to the extent of £250,000 which would need an overdraft limit at 31 January 2001 of between £2,142,640 and £2,204,525 (Appendix 9).

7.9 If the defendant's costs amounted to £600,{lot} or more, I am of the opinion that the increase in the overdraft facility- to approximately £2.5m coupled with the reduction in net assets to between £30,000 and L104,000 would make the agreement of such a facility extremely unlikely and that the claimant Would be unable to meet such a liability of £600,000 or more."

Submissions were made on the preliminary issue by Mr Warwick, Mr Hossain QC and Mr Rosen QC. All Counsel agreed that Mr Epstein's report should be the start and finish of the evidence on the financial position of Kinstreet. (I was not therefore invited to consider the earlier opinion of Mr Kabraji). Mr Warwick pointed to the various assumptions which Mr Epstein had made in the defendants' favour. He submitted that the jurisdiction threshold under section 726(1) was on the evidence satisfied if the defendants would recover costs which were substantially greater than £250,000. Mr Hossain QC, for Mr Haman, contended that, in the absence of evidence as to bank borrowings, the court should hold that there was no evidence that Kinstreet could meet any costs of the defendants if successful. He pointed out that Mr Epstein's opinion in paragraph 7.8 was qualified by reference to the need for bank facilities of about £2.2m: it was clear from paragraph 6.17 of Mr Epstein's report that he considered that it might be possible for Kinstreet to obtain these facilities but that it would have to show firm evidence of real turnover growth. Mr Hossain said that bankers would not be likely to want to fund litigation costs. Mr Epstein had considered it unreasonable for him on the evidence to project turnover growth. Mr Hossain referred to the 1998 accounts. These show that at 31 January 1998, Kinstreet had cash at bank of £637,450 (page 5) and bank loans and overdraft due within one year of £1,797,378. Note 11 also states:

"The company has loan facilities of £1,600,000 for issuance of letters of credit in favour of overseas suppliers. They are secured by a 15% - 20%, margin against letters of credit issued.

The company also has a loan facility of £35(1,0(10 for issuance of a Guarantee in favour of HM Customs and Excise for deferment of duty and VAT."

Mr Rosen QC for Kinstreet conceded for the purposes of the security for costs application that if the defendants' costs exceeded £600,000 the court had jurisdiction to award security against Kinstreet under section 726(1). He submitted that the court should rework the figures for the bank facilities required by Kinstreet by utilising the whole of the cash at bank which is assumed in Mr Epstein's projections plus the aggregate by the net cash inflow shown by the cash flow projections for the previous three years. He did not challenge other points made by Mr Epstein, including his opinion on the likelihood of Kinstreet obtaining facilities of more than £2.2m. Mr Rosen however contends that on Mr Epstein's figures, Kinstreet's overdraft is £300,000 below its level at 31 January 1998 (see Appendices 6 and 7). However, this amount has to satisfy the claimants' costs as well as the defendants'. Mr Rosen further submits that if all the cash was utilised to pay the defendants' costs, the bank facilities could remain at the figure shown for 31 January 1998, namely £1,797,378 and credit was given for the net cash inflow shown by the cashflow projection, and Kinstreet would have cash at bank of between £893,389 and £955,274 at 31 January 2001 (dependent on the percentage growth in turnover). Mr Rosen accepts that Kinstreet would then a need funds but he submits that Kinstreet could borrow these from the bank so that the bank would be funding the business and not the litigation. Again however this makes no allowance for the claimants' own costs estimated at £413,086

in 2001 leaving a cash balance of only £542,188 (maximum). Mr Rosen properly accepted that some at least of the cash balance was required as security as indicated by Note 11 to the 1998 accounts.

I do not consider that it is appropriate for me to deduct the net inflow shown by the cash flow projections for 2001 from the overdraft at that date. In my view, Mr Epstein will have done this to the extent appropriate. Accordingly, the only question is whether his retention of the cash balance (paragraph 6.15) is justified. This balance is approximately twice the cash balance shown at the previous year's balance sheet (£310,325). The amount of cash at bank at the year end date does not mean that cash at bank was at that level throughout the year. Turnover hardly increased at all in 1998. The projections are on the basis that by 2001 turnover will have increased by small amounts, that is from between £1 1,916,168 and £12,032,994 to £12,397,581 and £12,765,804. At the present time, there is evidence which shows that up to £320,000 may be required as margin for letter of credit facilities. It seem to me likely that Kinstreet would not in practice be able to use this sum of £320,000 to pay any costs to the defendants as at 31 January 2001 In addition, in all the circumstances, a cautious approach to Kinstreet's cash resources is appropriate.

As regards cash, Mr Epstein considers that it is reasonable to draw his calculations on the basis that the whole of the cash balance should be retained. As I have said, it is manifest that throughout his report, Mr Epstein has bent over backwards to be fair to Kinstreet so far as he can. Mr Rosen's calculations were produced only just before the sitting of the court. Mr Epstein has not had an opportunity to comment on them and no one has suggested that I should adjourn this case so he can give me his opinion on them. In those circumstances I would be very reluctant to find that the cash balance is probably available for the purposes Mr Rosen indicates.

In paragraphs 6.17 (twice) and 7.8, Mr Epstein uses the word "possible". In my judgment this is a prudent use of the word, and it is appropriate for me to conclude that on a balance of probabilities Kinstreet could obtain an overdraft of up to £2.2m at 31 January 2001, and that accordingly it could meet costs of £250,000 payable to the defendants. There must however be a point between that figure and £600,000 when Kinstreet could not obtain adequate facilities. That figure is not £599,999 because of the emphatic expression of opinion in paragraph 7.9. 1 am satisfied that on the whole Mr Epstein's general approach to the retention of the cash balance is a reasonable one and confirmed by the information in the latest statutory accounts, and that on the balance of probabilities Kinstreet would be unable to use most of this (assumed) cash to pay the defendants' costs. But as I have indicated, the cash balance at the last year end date was at a higher level than in the previous year. It seem to me likely that some part of it was available for Kinstreet to use in its business. I attribute the figure of £100,000 to such part as at 31 January 2001. This sum can then be added to £250,000 to make £350,000. I do not consider that I should increase this figure by reference to bank facilities as it has not been shown that Kinstreet could obtain these.

For the above reasons, on the evidence, in my view it is probable that if the costs payable to the defendants, if successful in their defence, exceed £350,000, Kinstreet would be unable to pay them. I therefore direct a further hearing (or hearings) early next Term to determine:

(a) the appropriate amount for the defendants' costs for the purpose of security for costs and
(b) whether, and if so in what amount, security for costs should be ordered.

The parties have agreed directions for evidence. They have also agreed that, for the purposes of (a), I should sit with a costs judge as an assessor, and I make a direction for that purpose. I adjourn the Kinstreet's application for leave to appeal against the figure of £350,000 until the conclusion of the security for costs application

(b) Should paragraphs 17C and 21 of the Amended Defence and the whole of the Counterclaim in the share action be struck out under CPR 3.4 as disclosing no reasonable ground of claim or defence?

The parties to the share action have argued these points at my request.

Paragraph 17C states:

"17.If, which is denied, the Plaintiff should hereafter prove that the defendant agreed to hold the alleged or any shares upon trust for the Plaintiff as alleged in the Amended Statement of Claim or at all, the Plaintiff is not entitled to any of the relief prayed for therein by virtue of his unconscionable and inequitable conduct. The defendant in support of the foregoing will rely upon the matters pleaded below and upon the facts and matters pleaded in the action brought by Kinstreet against inter alia the Plaintiff referred to in Paragraph 17B above.

Mr Warwick argued that the alleged conscionable conduct could not prevent the claimant from enforcing this trust since that conduct did not arise out of the creation of the trust. There was no direct relationship between that conduct and the trust. He cited ***Williams v. Staite*** *[1979] Ch. 291* where the Court of Appeal held that an equitable licensee could rely on the licence against a successor in title to the licensor even though he had behaved badly towards him. At page 300 Goff LJ said:

"Excessive user or bad behaviour towards the legal owner cannot bring the equity to an end or forfeit it. It may give rise to an action for damages for trespass or nuisance or to injunctions to restrain such behaviour, but I see no ground on which the equity, once established, can be forfeited."

Mr Warwick pointed out that if the defendant was right in law, the claimant's conduct could lead to the highly anomalous situation where the trustee became beneficial owner of the trust property contrary to the strict rule of equity that a trustee must not profit from his trust (**Regal *Hastings v* Gulliver** [1967] 2 AC 134n.)

Mr Shepherd's starting point was that the claimant had created the trust for an illegal purpose, namely to conceal his assets from creditors, but he could not pursue this as it was not pleaded and indeed he declined an opportunity to apply for leave to do so. Thus he was driven to argue that the maxim "he who comes to equity must come with clean hands" applied referring to the following passages *in Snell 's* Equity (27th ed.) (1990) at pages 31 to 32

"6. He who comes into equity must come with clean hands. This maxim, which seems to be related to the ex turpi causa non oritur actio of the common law, is very similar to the previous maxim [He who seeks equity must do equity], but it differs from it in looking to the past rather than the future. The plaintiff not only must be prepared now to do what is right and fair, but also must show that his past record in the transaction is clean: for `he who has committed Iniquity ... shall not have Equity.'

The maxim must not be taken too widely; `Equity does not demand that its suitors shall have led blameless lives.' What bars the claim is not a general depravity but one which has `an immediate and necessary relation to the equity sued for, and is not balanced by any mitigating 2 factors."

He argued that the relief sought was equitable: Mr Warwick did not seek to challenge this and I therefore proceeded on the basis that that is so.

I prefer Mr Warwick's submissions on paragraph 17C. In my judgment there is no sufficient relationship between the breaches of duty and other wrongs alleged to have been committed by the claimant to Kinstreet, and the claim made by the claimant to 50% of the share capital of Kinstreet. I do not accept that it is relevant that the maxim is raised here against the claimant, whereas in **Williams v. Staite** it was raised against the defendant. The principle - that there must be a direct relationship between the alleged "dirty hands" and the claim in issue - applies both to claimants and defendants. Furthermore, as Mr Warwick submits, it would be extraordinary if the trustee could thereby end up as beneficial owner. The correct analysis is that the allegations of misconduct sound in claims in damages against the claimant brought by the person properly entitled to such claims.

In the circumstances I strike out paragraph 17C of the Amended Defence in the share action.
Paragraphs 21 and (in material part) the Counterclaim provide:

"21, if it be held, contrary to the defendants contention that he is liable to the Plaintiff in any sum by way of damages, then the defendant will seek to set off in extinction or diminution thereof the sums counterclaimed hereunder.

22. ….

Counterclaim

23. The defendant repeats paragraphs 2, 18 and 19 of his Defence herein

24. By reason of the Plaintiff's said breaches of contract and duty the defendant has suffered loss and damage in that the value of his 75% shareholding in Kinstreet Limited has been diminished.Particulars of the said diminution will be supplied so soon as the same are available to [lie defendant"

Mr Shepherd accepts that the court is bound by the decision of the Court of Appeal in ***Johnson v Gore Wood*** [1999] PNLR 426 and that these claims cannot now be brought. The House of Lords has, however, granted leave to appeal and a petition for leave to cross appeal is pending, but it is not expected to hear the appeal until next summer, In those circumstances, contrary to Mr Warwick's submissions that I should strike these paragraphs out, I propose to stay them pending (whichever is earlier) the decision of the House of Lords in ***Johnson* v. Gore *Wood*** and judgment in the conspiracy action. If the relevant issue in ***Johnson v. Gore Wood*** is the subject of the petition for leave to cross appeal, and that leave is not granted, that refusal should be treated as the decision of the House of Lords for this purpose

(c) Separate trial of the Share Action

On 9 October 1995, Blackburne J decided that the share action and the conspiracy action should be heard together. He dismissed an application by Mr Guinle that there should be a separate trial of the issue "whether any and, if so, how many of the shares in Kinstreet were registered in Mr Kirreh's name are now held by Mr Kirreh as trustee for Mr Guinle, or whether he and Mr Kirrell agreed to enter into a joint venture agreement in the terms pleaded in paragraph 2.6 of Mr Kirreh's defence" (Transcript, page 9).

The background to the share action is that Mr Guinle was chairman and managing director and 50% shareholder of a company called Rindalbourne Ltd which was involved in the import and sale of textiles. Rindalbourne was about to enter receivership. Mr Guinle wanted to carry on trading and he claims that Mr Kirreh acquired Kinstreet "off the shelf' to enable him to do this. Kinstreet in due course purchased the order book of Rindalbourne. Mr Guinle further claims that Mr Kirreh holds 50% of the shares in Kinstreet on trust for him. He refers to an oral agreement to this effect and claims that he confirmed the trust on several occasions after it was set up. Mr Guinle contends that the shares are by virtue of an oral declaration of trust held on trust for the benefit of the trustees of another trust.

Mr Kirreh contends that at most there was an option, and that he was to be the registered holder of all the shares. If an outside investor was found, he would retain 25% of the issued share capital of Kinstreet and Mr Guinle would take up 42% of the issued share capital of the new company at par. However, if such investment did not take place, Mr Guinle would be entitled to purchase from the Mr Kirreh at par up to 50% of Mr Kirreh's 100% shareholding in the new company on condition that Mr Guinle arranged or procured the defendant's personal liabilities incurred in respect of the company were at the same time reduced pro rata with the percentage of shares which the Mr Guinle purchased. It is said that the option was repudiated by conduct. It is also said that there is an implied term that the option would be exercised within a reasonable time. It is further claimed that the claimant did not exercise the option and that accordingly is no longer capable of being exercised. It is also alleged that it was an implied term of the option or agreement that it would cease to be exercisable if there was a material change in circumstances or a breach of fiduciary duty by Mr Guinle in his capacity as shadow managing director of Kinstreet. It was further alleged in paragraph 17C of the Amended Defence that the claimant ceased to be entitled to any shares held on trust because of his unconscionable or inequitable conduct and particulars were given of the activities alleged on the part of Mr Guinle which are pleaded in the conspiracy action. There is a further allegation of estoppel. Finally there is a counterclaim by Mr Kirreh that the claimant's breaches of contract and duty have reduced the value of his 75% shareholding in Kinstreet and damages are sought accordingly. I have now struck out paragraph 17C of the Amended Defence (added by leave of Blackburne J) and ordered a stay of paragraph 21 of the Amended Defence and the whole of the counterclaim.

The third action, *Interfisa v Hamam,* which I have directed should be heard immediately after these actions, is not affected by the application for separate trial of the share action or issues in it.

On the application made to him in 1995, Blackburne J ruled against separate trial of the issues identified. He did not consider that the questions identified for separate trial constituted a discrete part of the overall course of events that arose for investigation. In particular he accepted that Mr Guinle could be cross-examined as to his subsequent conduct in relation to the Kinstreet and its business to see whether that conduct was inconsistent with his claim to be a 50% owner and, with Mr

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Hamam, the controlling shareholder of the company. In addition Blackburne J accepted that if Mr Guinle was successful in the trial all that would happen is that Mr Kirreh would continue the conspiracy action in the name of Kinstreet as a derivative action or he would obtain under an order under section 461(2)(c) of the Companies Act 1985 so that he could continue the action.

In support of his application Mr Warwick made the following submissions. He pointed out that the new Civil Procedure Rules effect significant changes in matters of procedure. As regards Blackburne J's first point, the court could now control the cross examination. In addition, when the action was before Blackburne J, it was at an early stage and there had been no discovery or trial date fixed. There is now a trial date for the case and it will be possible for the same judge to hear the "trust" issues (Mr Warwick's term for "issues directly concerned with the trust alleged by Mr Guinle") and the rest of the trial, and for the trust issues be heard in advance (say) in November of this year. If it was heard and Mr Guinle was successful, it would remove the need for major costs to be incurred in preparing for trial in the conspiracy action. On the other hand the parties would still have time to gear up for that trial if it was necessary.

As to Blackburne J's second reason, Mr Warwick submitted that if Mr Kirreh had wrongfully denied the existence of the trust, it will be difficult for him credibly to continue the conspiracy action. He accepted that leave would be needed to pursue a derivative action and he submitted that Mr Kirreh was unlikely to obtain leave. There would also be an inchoate claim against him for damages if the trust action succeeded. It was unclear what would be the measure of damage in the trust action. He pointed out that Blackburne J gave as a third reason the fact that settlement of the action looked speculative.

Mr Warwick then referred to the overriding objectives in the CPR and in particular pointed out that no one in the case was very wealthy and the costs were not costs that could readily be lived with.

Mr Warwick's submissions were supported by Mr Sewell for Mr Hamam. He submitted that the court should adopt the course proposed by Mr Warwick and that if the trust issues were resolved in favour if Mr Guinle, it would obviate further costs.

Mr Shepherd for Mr Kirreh opposed Mr Warwick's application. He said that the court's power to order a separate trial of issues was the same under CPR rule 3.1 as it was under RSC Order 33, rules 3 and 4. The notes to those rules in the Supreme Court Practice state (among other things):

*"An order for the separate trial of separate issues is a departure from the beneficial object of the law that disputes should be tried together, and therefore, generally speaking, such an order should only be made in exceptional circumstances or on special grounds (per Jessel M.R. in **Piercy v.Young** (1880) 15 Ch.D 475 at 479 and 480; per Scrutton L.J. **Bottomley v Hurst and Blacken** (1928) 44 T.L.R. 451 at 452).*

On the other hand, these rules provide the machinery for avoiding the trial of unnecessary issues or questions, by isolating particular issues or questions for separate trial and thus eliminating or reducing delay and expense in the preparation and the trial of issues or questions which may ultimately never arise for trial or which otherwise warrant being separately tried. An order should therefore be made for the separate trial of a preliminary issue. e g. a point of law, which if decided in one way is likely to be decisive of the litigation, and it is not necessary that the decision should be such as to dispose of the entire action whichever way it is decided *(**Carl Zeiss Stiftung v Herbert Smith & Co** [1969] 1* Ch,93; [196812 All E.R. 1002, CA approving the principle stated by Romer *L.J. in **Everett v Ribbands*** [1952] 2 Q.B. 198, 206"

Mr Shepherd further submitted that the court should not revisit orders that had previously been made and that principle was as important as the court's wish to manage cases. Irrespective of that, the order made by Blackburne J had not been appealed and therefore the court could not revisit that order. He submitted that the test applied by Blackburne J was the same as would be applied today. He submitted that it was not open to Mr Warwick to submit that Blackburne J's reasons were wrong. He further submitted that the subsequent conduct of Mr Guinle was relevant because if Mr Guinle was an owner of Kinstreet, he would not have set out to destroy it.

In addition, Mr Shepherd submitted that the outcome of the share action would not render a trial of the other issues unnecessary. He submitted that any damages payable by Mr Kirreh for breach of trust would be nominal. He further submitted that if Mr Kirreh was unsuccessful in the share action, he would have a claim for relief as a minority shareholder under section 459 of the *Companies Act* 1985. Mr Kirreh had given all of the guarantees which supported Kinstreet's trading whereas Mr Guinle and Mr Hamam had given none. He submitted that if the majority shareholders simply liquidated Kinstreet so that the minority shareholder was made liable to meet the liabilities under the guarantees, he would have a claim under section 459. He therefore submitted that Blackburne J had been right. Mr Kirreh he said had invested everything in the company.

He accepted that both parties had concerns about costs. He referred me to the judgment of Blackburne J given on 25 November 1997, in which Blackburne J had said of Mr Guinle

"The overall picture is of a person who if he owns any assets at all is unwilling to divulge what those assets are, much less what they are worth, and who operates through companies and resides in a property held by off shore entities of one kind or another for the benefit of a person or persons unknown."

He therefore submitted that while Mr Kirreh had assets, Mr Guinle had made himself judgment proof. He referred me to paragraph 45 of the amended statement *of* claim in the conspiracy action as showing the allegations *of* breach of duty on Mr Guinle's side.

Miss Allan made submissions on behalf of Kinstreet and Interfisa. She submitted that whatever the outcome of the preliminary issues in relation to the ownership of Kinstreet, it would not dispose of the claim of Interfisa. However she has helpfully since confirmed that the question of the ownership of the company's shares which is to be decided in the share action would not be relitigated in the conspiracy action. She stated that it was her clients case that the matter had been determined by Blackburne J and that it was not open for re-airing. It was too late now to mount an attack on Blackburne J's order.

She further submitted that the conspiracy issues could not be reduced without seriously damaging the claimants' case. The claimants contend that the breach of duty was inconsistent with Mr Guinle's claim regarding ownership of the shares.

She further submitted that splitting the trials was not going to save costs. It would not lead to deciding the issues fairly. It was not the intention of the Civil Procedure Rules to prejudice the parties in their legitimate claims.

In reply, Mr Warwick said that he did not accept Mr Shepherd's submission that the parties were bound by the early decision of Blackburne J. This was a procedural decision under a different regime. Blackburne J had thought that there would be a summons for directions shortly thereafter and trial within a short time. That was two years ago. He contended that this justified the court's intervention, even though it was the claimant's delay in a share action which was responsible.

He referred me to a passage in Robert Walker J's decision on 24 May 1996 where Robert Walker J observed:

"It is intrinsically probable that Mr Guinle has intended to have some sort of equity stake in Kinstreet once the threat of his insolvency had receded."

Mr Warwick submitted that it would be difficult for Mr Kirreh to rely on section 459 of the *Companies Act 1985* if he lost the share action He would not be able to pray in aid his conduct prior to the trust being established.

He said Mr Shepherd had made two inconsistent statements, first that Kinstreet was a successful trading company and second that Mr Kirreh would be called upon under his guarantees if the company was liquidated. Mr Warwick submitted that the evidence as to subsequent conduct was equivocal. There was not much logic in the argument since, if Mr Guinle had fallen out with Mr Kirreh, it did not mean that his case as regards the trust ceased to be realistic. It was not being suggested that Mr Guinle had said or wrote things which denied the ownership of the shares. It was inconsistent conduct which Mr Kirreh was seeking to rely on.

He said that if the share action was tried separately, he estimated that there would be cost savings by Mr Guinle, Mr Hilton Guinle, Champbridge and Mr Hamam of some 11. 6m.

As regards Miss Allan's submission that disposal of the share action would still leave Interfisa's claim, he pointed out that there were no contractual duties to Interfisa and in any event Interfisa was only entitled to a quarter of the profits.

Reference was made to **Thermawear Ltd v Linton,** Court of Appeal, unreported, 17 October 1995. In that case, a pre-trial application to split liability from quantum in a negligence case failed and there was no appeal. But when the case came on for trial, the trial judge, Lightman J, directed a preliminary issue as to the existence of a duty of care. The Court of Appeal upheld his decision. At page 10, Lord Woolf MR said:

"Of course it is true that a judge's procedural decision need not save time or expense. If the Learned Judge's resolution of these issues is in favour of Thermawear Limited, it may lead to additional time and expense, so, too, if his decision is in favour of Citroen Wells and that decision is later the subject of successful appeal. But these are matters which fall fairly and squarely within the growing procedural decision-making area accorded to the trial judge."

Lord Woolf commended the determination of Lightman J "to try and avoid time-consuming investigation and exploration of issues which may never, and I emphasise "*may never arise*." Henry LJ agreed adding that the preferred solution to the problem of costs and delay in the adversarial system required "*a more interventionist judiciary, the judge as trial manager*". This decision confirms that it is appropriate for the court to keep under review in an appropriate case the question of whether a splitting of issues is required. I do not accept that, as Miss Allan in effect submitted, that should only be done now by the trial judge, because he or she will have the full materials for trial.

I have carefully considered the submissions set out above. For the reasons set out below I have made an order that the issues in the share action, other than those already stayed and the issues ("the excluded issues") identified below, should be heard separately from and in advance of the conspiracy action. I have accordingly directed that those issues should be heard next Term. I envisage that the same Judge will hear both actions. The excluded issues are!

(a) any issue as to any breach of the option agreement or the joint venture agreement relied upon in the Amended Defence. (see particularly paragraphs 16B, 17, 17B, 19 10 and 20);

(b) any issue as to the terms of those agreements, save in so far as it is necessary for those issues to be determined for the purpose of determining whether the claimant is entitled to the relief sought in the Amended Statement of Claim. This concerns paragraphs 16A, 17A and 18 of the Re-Amended Defence. Mr Kirreh is entitled to lead evidence or cross-examine on the basis of his version of the joint venture agreement and option agreement relied on by him in his Re-Amended Defence, in 18order to meet the claim But my provisional view is that it is not necessary for this purpose for the court to try the issues as to the existence of the implied terms pleaded in paragraphs 16A, 17A and 18 as the claimant is not seeking to enforce those agreements However I have not heard full argument on this point. If there is any difficulty about excluding these paragraphs, it can be mentioned to me in court early next Term.

(c) any issue as to the amount of any damages payable by the defendant in the share action.

In my judgment, it is unnecessary for the court to deal with excluded issue (a) because Mr Guinle does not seek to enforce the agreements relied on by Mr Kirreh. I provisionally consider that the same is true in relation to excluded issue (b) above. So far as (c) is concerned, this issue can be more economically dealt with on an enquiry as to damages. Mr Shepherd and Mr Warwick agree with the way I have dealt with excluded issues (a) and (c). In so far as necessary, the court has power to exclude evidence on the excluded issues under CPR rule 32.1(1).

My reasons for directing a separate trial of the remaining issues in the share action are as follows:

1. I accept that it is not open to me to revisit a matter determined by Blackburne J and that to do so would run the risk of undermining certainty in case management decisions. Nor would I wish to do so. However, as I see it there has been a material change in the position since Blackburne J's decision. In particular, under the Civil Procedure Rules, the court has new powers to control cross-

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examination, to exclude issues and to direct separate issues. In addition, the issues in the share action which I have directed to be tried separately do not now, following the orders made as described above with respect to paragraphs 17C and 21 of the Amended Defence, and the Counterclaim (as described above), overlap with the issues in the conspiracy action

2. Having regard to the fact that the share action and the conspiracy action were ordered to be tried together, I accept that the appropriate question is whether the court should decide the order in which the issues in the consolidated actions are to be tried. This is the power conferred by CPR rule 3.10). 1 do not accept that I should exercise this power only if the court would have ordered the issues to be tried on a preliminary issue under RSC Order 33 rules 3 and 4. The CPR are "a new procedural Code" (rule and I must therefore in general approach the new powers without reference back to the Rules of the Supreme Court unless there is an ambiguity in the CPR which requires me to do this (see generally ***Bank of England v. Yagliano*** *[1892] AC 107;* and compare ***Re a Debtor No.1 of*** **1987** [1989] I WLR *271, 272 per* Nicholls LJ). On the other hand, as I explain below, there is a realistic possibility that the issues between the parties may be reduced if the share action is heard first.
3. As is already clear, Kinstreet's financial position at least is weak. The costs of the combined actions are very substantial and those costs constitute a luxury which none of the parties can easily afford: I am bound to have regard to the parties' financial positions under CPR rule 1.1(2)(c)(iv). If the share action is heard first, there is a tangible possibility that the conspiracy action will be settled or will for some other reason not require to be tried. This will lead to a very substantial saving in legal costs. It may also lead to a valuable saving in the court's resources.
4. I am concerned about the overall level of costs which the parties say they will incur in the share and conspiracy actions, in relation to the amount or value of the claims in the actions. As I have said, the defendants in the conspiracy action claim that their costs in that action will be £1,592,048.. The claimants say that their costs in that action will be £878,463.98. Further details of costs are given below. However, the amount of costs is to be the subject of further consideration in the security for costs application in the conspiracy action. While I have therefore identified this as a relevant concern, it has not been a deciding factor.
5. The share action and the conspiracy action are each in their right relatively complex actions. In my judgment, the trials can be more effectively conducted if separated. I have made the working assumption, based on the resources the parties have committed to the litigation, that the parties attach importance to both actions. The nature of the allegations is serious.
6. On cross-examination, I accept that if the share action is separated from the conspiracy action the defendant will not be able to rely on the evidence in the latter action as a means of undermining the credibility of Mr Guinle. But Mr Kirreh has a substantial defence in the share action, and in my judgment the possible prejudice to the defendant in this respect is outweighed by the advantages of separate trials. The court now has power to limit cross-examination (CPR rule 32.1(3)) and so Mr Kirreh has no right to insist that the actions are heard together in order that he can more effectively cross-examine Mr Guinle on the issues in the share action. In any event, Mr Kirreh has not given any particulars of any subsequent conduct on the part of Mr Guinle on which he relies in the share action apart from that specifically pleaded. Any such evidence may well, as Mr Warwick submitted, turn out to be equivocal. There may be other explanations for his conduct. The parties may have fallen out, and Mr Guinle may have a larger percentage of the defendant companies than even on his case he has in Kinstreet.
7. In my judgment, the position whereby Kinstreet pursues the conspiracy action when it is not clear whether or not the defendants own the majority of its share capital is unsatisfactory. If the defendants are successful, they could find that they had 75% of an insolvent company. The costs of the conspiracy action will be payable by Kinstreet and not (in the absence of some special order) by its current controller, the defendant in the share action. If he succeeds in the share action, all is well. If he does not succeed, it seems to me that he should have to persuade the court that it is right for him to pursue the action as a minority shareholder under section 459 of the Companies

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Act 1985 or RSC Order 15 rule 12A (CPR Schedule 1). If the company is put into liquidation, Mr Kirreh would have to persuade the liquidator to pursue the claim or obtain a direction from the court to the liquidator to that effect, and he may have to put the liquidator in funds for this purpose.

8, It is significant that neither Kinstreet nor the defendants to the conspiracy action who have been served wish to relitigate the trust issue in the conspiracy action.

For all these reasons, I consider that the order which I have made for separate trials will enable the **court to** deal with the various actions justly, and thus in accordance with the overriding objective of the CPR (see CPR rule 1.1(1)).

I asked Counsel if they could suggest ways in which the conspiracy action could be split or reduced. Both Miss Allan and Mr Warwick made suggestions as to how the issues might be split, in particular the issue whether Mr Guinle was ever employed by Kinstreet or Interfisa might (with other issues) be heard first.. Mr Warwick thought that the conspiracy action would not proceed if that issue, and the issue whether Mr Guinle was paid by Kinstreet or Interfisa, were heard first and decided in his clients' favour. Miss Allan, however, thought that all the issues in the conspiracy action were inextricably interlinked. Neither Counsel proposed any reduction of the issues. In those circumstances I propose to direct that the question as to the order in which the issues in the conspiracy action should be tried and the question whether the court should exclude evidence in the conspiracy action, should be deferred and should be brought back to the court no later than after judgment on the issues in the share action, which I have directed to be tried first.

(d) **Alternative Dispute Resolution (ADR)**

I will now deal with the claimant's application for directions with respect to alternative dispute resolution. The application is supported by Mr Kirreh, the defendant in the share action.

Miss Allan for the claimants, relies on the witness statement of Mr Pollack, dated 34 June 1999. Mr Pollack is a partner of S.J. Berwin & Co, solicitors for Kinstreet. Mr Pollack points out that the costs to date, and to be incurred should the matter proceed to trial, will be substantial. He also observes that serious concerns have been raised in the past by the claimants in relation to the ability to the defendants, principally Champbridge and Mr Guinle, to meet any judgment given against them. The litigation is contested on all fronts. The background litigation revolves around actions at a time when three of the protagonists (the third and ninth defendants and the managing director of Kinstreet, Mr Kirreh), were running Kinstreet together. Furthermore, Kinstreet and Champbridge of which the third and ninth defendants are directors, are today major competitors in the clothing industry. Mr Pollack has been involved in the litigation from the beginning. He expresses the view that the background of mutual mistrust has led to any attempts by the parties and their solicitors to discuss settlement foundering. It is his belief that without the assistance of an independent third party facilitator, the parties and their solicitors will be unable meaningfully to advance settlement negotiations with a view to meeting the overriding objectives of the CPR, namely saving expense and dealing with the case in a way which is proportionate.

In those circumstances, Mr Pollack says in his witness statement that now is the appropriate time for the parties to attempt to resolve the litigation through mediation before significant further costs are incurred while there are still some eight months to trial. If the matter could be resolved by way of alternative dispute resolution, there could also be a substantial saving of the court's time and resources which would be taken up by the various pre-trial steps and indeed the trial, which it is estimated could last ten weeks.

Mr Pollack produces a letter from Mr Jason Reeves of CEDR which details some of the advantages of mediation and its track record of success in the resolution of litigation. The letter states that currently approximately 85% of mediation set up through CEDR result in a successful resolution of the dispute.

Mr Pollack states that having undergone two mediations recently (one of which successfully resolved a long-standing action), whether it succeeds or fails, the process in mediation has the

added advantage of clarifying the issues in dispute, which itself goes some way to achieving the overriding objective of the CPR.

The letter dated 29 June 1999 from Jason Reeves of CEDR further explains that:

"The process of mediation is voluntary, non binding and without prejudice. Any settlement reached at mediation only becomes binding once it is reduced to writing and signed by the parties. If the parties cannot agree a settlement, they are free to arbitrate or litigate.

The mediation generally begins with a joint meeting between the parties and the mediator when each party is invited to make short informal oral presentation describing its position in the dispute. The mediator will then convene a series of private meetings with the parties and attempt to broker a settlement. These meetings are entirely confidential and no information will be passed to the other party unless explicit authority is given.

*The mediator does not decide the outcome of the dispute but acts as a facilitator for the parties' own negotiation. In this capacity he or she **will ask** difficult questions in private sessions about the strengths and weaknesses of your case.*

The principal advantages of a successful mediation are achievement for quick results, substantial savings and costs and time management and in appropriate cases the maintenance of business relationships. The range of settlement options are also much wider than are available in traditional adversarial forms of dispute resolution.

In the course of the hearing, the parties have provided me with estimates of their costs. Taking the share action and the conspiracy action together for this purpose (and on the assumption of a five day trial for the share action), the third, fourth and eighth defendants have incurred some £625,000 worth of costs and expect to incur about a further £820,000. Mr Kirreh, Kinstreet and Interfisa have incurred some £650,000 and their estimated further costs are some £786,000. The ninth defendant has incurred some £132,000 in the conspiracy action and estimates that he will incur a further £421,000 approximately. The costs of ADR are much less. Miss Allan's instructing solicitors estimate that they would incur some £27,500. The costs of the mediator would be some £3,000 per day, together with preparation time. Thus the costs to be saved by mediation, if successful, would be very substantial. As Mr Shepherd put it in his submissions, "the parties have been at daggers drawn in the past. They have tried to resolve their difficulties without success. The mutually assured self-destruction of a trial is so horrendous a prospect that it must make it worth trying. Very little would be lost if it fails The proportion of cost to gain is immeasurable. The loss if it fails is infinitesimal."

Mr Warwick for Mr Guinle, Mr Hilton Guinle and Champbridge opposed ADR. He was instructed that the proposal was not made in good faith and that the question of negotiations had not been raised in the past. There could be negotiations without ADR He suggested that the claimants were raising the prospect with the object of gaining some benefit in the case management stages. Accordingly any order that the court might make should not impinge on case management. He referred me to the judgment of Blackburne J given 4 July 1997 in which Blackburne J had said that `the estimated trial length is some ten weeks, but it would not surprise me, given the ferocity with which these matters are being litigated, if the action were not to last a lot longer than that. I have equally no doubt that the costs of the action will be substantial' and again in his judgment given on 25 November 1997 "this is another round in a hard fought dispute which embraces two sets of proceedings". The same judgment makes reference to an allegation that Mr Kirreh had been guilty of "dirty tricks" in the conduct of his defence of the action. Indeed he observed that that allegation had featured on a motion before Robert Walker J. in May 1996 and that Robert Walker J. had referred in his judgment to the matter being `beset and bedevilled by all manner of unsavoury happenings, including anonymous disclosures of information to Mr Guinle's companies' bankers'. Mr Warwick was concerned about misuse of information disclosed in the course of the ADR procedure. As I see it, confidential information disclosed in the course of ADR should remain confidential and not be used for any other purpose without the parties' agreement. To avoid dispute the parties should agree this in writing before the ADR starts. Mr Warwick also expressed concern about the timing and circumstances of the present application and in particular while the court might wish to seek all reasonable steps to abbreviate the litigation if the court were minded to make any kind of order, nothing should impede other steps in the action. In his judgment the best way of securing settlement is by moving the action along.

Mr Warwick submitted that the court did not have jurisdiction to order the parties to take `such serious steps as they might be advised to resolve their disputes by ADR procedures before a neutral individual or panel" (as in the draft ADR order constituting Appendix 7 to the Commercial *Court Guide). In my* judgment this is not so: all the order requires is that the parties should take such steps

(if any) as they think fit following the appointment of the mediator. Mr Warwick further submitted that such an order was a recipe for disaster in that it would spawn satellite litigation and allegations of breach. Mr Guinle however did not oppose the appointment of CEDR mediators if the court thought fit to make any order in relation to ADR.

Mr Sewell for Mr Hamam emphasised again that the action should not be held up. He was insistent that court date should be held. It was his experience that ADR works - if it works - because it generates the atmosphere of being outside the door of the court.

He emphasised the point also made by Mr Warwick, that damage had not been fully particularised in the action. A figure of £ l .2m had been claimed, but it was not clear how that had been arrived at. He felt that if there was to be an ADR there would need to be an agenda. On the other hand, so long as the time table was held, his client was delighted at the prospect of litigation being lifted and was content with the nomination of CEDR. It should be written into the order that any mediator who was chosen should be independent of the parties.

Miss Allan addressed these points in her submissions. She made it clear that her clients were not seeking a stay to allow ADR but merely that some directions for the court that the parties attempt ADR. In relation to the quantification of damage, she accepted that mediation could only take place with a view to settling claims that had been particularised. She would be content to formulate the claims in a written document and her client would be bound by that - so that if ADR succeeded, no further claim for damage could be made in these proceedings. In fact these matters have now been overtaken by events since I have heard argument on expert evidence, and particulars of damage. I have directed that a single expert should be appointed to give his opinion on the loss to the claimant attributable from the alleged breaches of contract, conspiracies and torts pleaded in the conspiracy action and on the profits for which it is alleged that the third defendant (Champbridge) should account and repay.

This report is to be delivered by 15 September 1999. I have directed that Kinstreet and Interfisa should deliver particulars of the damage claimed by Kinstreet in the conspiracy action explaining how any particular sums are calculated and identifying in respect of each item of damage claimed the defendant to whom it relates, and the breaches to which it is attributable, by 22 September 1999. Until that date no step need be taken in relation to ADR other than to appoint a mediator.

As will be apparent, the concern about costs in this case is a very real one. If the shares in Kinstreet were worth say, £500,000 (and there is some evidence to that effect), and the claim in the conspiracy action is worth £1.2m plus interest, both sides will have spent a very substantial proportion of the likely gain to them of the total success in the action in costs. They may not be able to recover those costs. Even if suggestions that the parties will be unable to pay costs are left aside, the parties will have to bear in mind that the court can only award proportionate costs if costs are ordered on a standard basis at the end of the trial. There is therefore, in my judgment, an acute need to consider any viable means for resolving this litigation.

The success rate stated by CEDR is impressive. CPR rule 1.1 provides that the overriding objective of the new procedural code is to deal with cases justly and this includes, so far as it is practicable, dealing with the case in ways which are proportionate to the financial position of each party. I have evidence as to the financial position of Kinstreet, and I have held that it will be unable to pay the costs of the defendants if successful and if their costs exceed £350,000. This evidence confirms the view that it is appropriate to direct ADR in this case.

I therefore propose to direct ADR. *Subject* to any further submissions by Counsel as to the form of the order, in my judgment, it is appropriate to give the following directions for ADR in all three actions:

(1) a mediator shall be chosen from a list of independent mediators proposed by the Centre for Dispute Resolution (`CEDR') and agreed by the parties by noon on 27 August 1999 failing which an independent mediator shall be nominated and appointed by the ADR case manager of CEDR.

(2) The costs of mediation shall be borne in equal parts by the claimants in the conspiracy action and Mr Kirreh on the one hand and the defendants in the conspiracy action on the other.
(3) The parties shall take such serious steps as they may be advised to resolve their disputes by ADR procedures before the independent mediator nominated and appointed as mentioned.
(4) The mediation shall take place as soon as possible after 22 September 1999. The parties are not required to take any step before this date save to select and appoint a mediator.
(5) If the actions are is not finally settled by 30 October 1999 the parties are to inform the court by letter within three working days what steps towards ADR have been taken and (without prejudice to matters of privilege), why such steps have failed.

Costs

I have already dealt with the question of costs arising out of Mr Guinle's application to strike out paragraph 17C of the Amended Statement of Claim in the share action. In the draft of this Judgment which I circulated, I directed that, if any party wishes to apply for costs arising out of this ruling, that party should notify the court by 4.00 p.m, on Friday 30 July 1999 in order that a date can be fixed for early next Term. The defendants in the conspiracy action have given that indication. Kinstreet, Interfisa and Mr Kirreh have made submissions in writing. I direct that the defendants in the conspiracy action should apply to the Chancery Listing Officer to fix a date early next Term for a short hearing on costs, or lodge written submissions, in either case by the end of the Long Vacation.

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