

O-270-04

1 THE PATENT OFFICE

2 Harmsworth House,
3 13-15 Bouverie Street,
4 London EC4Y 3DP.

5 Monday, 26th July 2004.

6 Before:

7 MR. RICHARD ARNOLD QC
(Sitting as the Appointed Person)

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9 IN THE MATTER OF: The Trade Marks Act 1994

10 and

11 IN THE MATTER OF: UK Trade Mark Application
12 No. 2,304,053 in the name of
13 Robert McBride Limited

14 and

15 IN THE MATTER OF: Opposition No. 91255 by
16 Reckitt Benckiser (UK) Ltd

17 -----

18 Appeal from the decision of Mr. D.W. Landau, acting on
19 behalf of the Registrar, dated 15th April 2004.

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21 MR. JAMES MELLOR (instructed by Marks & Clerk) appeared on behalf
22 of the Applicant/Appellant.

23 MR. MICHAEL EDENBOROUGH (instructed by Alexander Ramage Assoc.)
24 appeared on behalf of the Opponent/Respondent.

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26 D E C I S I O N
(As approved by the Appointed Person)

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1 THE APPOINTED PERSON: On 22nd June 2002 Robert McBride Limited
2 applied to register a trade mark in respect of the following
3 specification of goods: "Preparations for perfuming the
4 atmosphere; preparations for perfuming fabrics, wall and
5 floor surfaces and textile articles; insecticides; air
6 freshening preparations; air purifying preparations;
7 preparations for neutralising odours in fabrics, wall and
8 floor surfaces and textile articles" in Classes 3 and 5
9 respectively.

10 The mark that was sought to be protected by that
11 application was described in a covering letter from the
12 Applicant's trade mark attorneys dated 21st June 2002 as
13 "Hexagon 2D mark".

14 The box in form TM3 numbered 4, which contains the
15 legend "If the mark is not a word or picture indicate here
16 (for example 3-dimensional)" was left empty.

17 Box 2 entitled "Representation of the mark" had typed
18 within it the words "See representation attached". The
19 representation attached is what I will describe as a picture
20 of a "thing", to use a neutral word, which has a hexagonal
21 outline and various details within it, which I do not need to
22 go into for present purposes.

23 The application was accepted and advertised and, in due
24 course, was opposed by Reckitt Benckiser (UK) Limited on 21st
25 November 2002.

1 In the Statement of Grounds of Opposition, the Opponent
2 pleaded at paragraph 7: "The Applicant is the Opponent in
3 opposition No. 90530 to application No. 2287388 and
4 opposition No. 90538 to application No. 2287359. In evidence
5 in these oppositions, Applicant filed a statement by its
6 trade mark agent to which was exhibited an example of a
7 container or dispenser for an air freshener marketed by the
8 Applicant. The Applicant's Mark is a two dimensional
9 representation of the said container which was part of the
10 Exhibits marked 'Exhibit KLH4' of the two Witness Statements
11 of Keith Leonard Hodkinson, both dated 27th September 2002
12 filed in the said oppositions. In his Witness Statement,
13 Mr. Hodkinson refers to the said container as 'a crystal like
14 container'".

15 In its Counterstatement, the Applicant pleaded in
16 response to that paragraph: "Paragraph 7 of the statement of
17 grounds of opposition is admitted insofar as concerns the
18 first and third sentences thereof. The second sentence
19 thereof is not admitted."

20 So the Applicant, therefore, admitted that the
21 Applicant's mark was a two-dimensional representation of a
22 container or dispenser for an air freshener which it
23 marketed.

24 Returning to the Statement of Grounds of Opposition, at
25 paragraph 11, the Opponent pleaded as follows: "The

1 Applicant's Mark represents a three-dimensional container or
2 air freshening product sold by the Applicant. Applicant's
3 Mark was represented on the application form as a two
4 dimensional drawing or label. The Applicant does not use the
5 Applicant's Mark as a trade mark, either at all or as
6 represented on the application, namely as a two dimensional
7 badge of origin. The Opponent contends that the applicant
8 has no bona fide intention that the Applicant's Mark should
9 be so used. On the contrary, the Applicant uses the
10 Applicant's Mark in the form of a container and acknowledges
11 it to be so, as outlined in paragraph 7 hereof. In the
12 premises the Opponent contends that the application has been
13 made in bad faith to the extent that the Applicant acted in
14 bad faith by stating through its agent, that the applicant's
15 Mark is being used in relation to the goods sought to be
16 registered, or that the Applicant has a bona fide intention
17 that it should be so used, pursuant to Section 32(3) of the
18 Act. In the premises the Applicant's Mark should be refused
19 under the provisions of Section 3(6) of the Act."

20 To that the Opponent responded on its Counterstatement
21 with a general denial.

22 The matter came on for hearing before the Hearing
23 Officer, Mr. Landau, acting for the Registrar on 30th March,
24 2004, and it is material to record that in the run-up to that
25 hearing the Opponent filed a short witness statement of

1 Benjamin Alexander Ramage, dated 19th March 2004, which
2 simply produced a copy of the Form TM3 that had been filed by
3 the Applicant and the covering letter from their trade mark
4 attorneys. That evidence was admitted without objection
5 under Rule 13(11) at the hearing before the Hearing Officer.

6 In his Decision, the Hearing Officer considered and
7 rejected certain relative grounds of opposition that had been
8 advanced by the Opponent. He then turned to consider the
9 objection under section 3(6). He directed himself in
10 accordance with the well-known statement by Lindsay J. in
11 *Gromax Plastics Limited v. Don and Low Nonwovens Ltd*
12 [1999] RPC 167. He also referred to a decision of Mr. David
13 Kitchin QC, sitting as the appointed person in *Ferrero SpA*
14 and *Soremartec SA v. Soldan Holding & Bonbonspezialitäten*
15 *GmbH* BL 0/279/03. He also referred to a couple of other
16 cases.

17 The upshot was that he found the allegation of bad
18 faith made out. His reasoning, in essence, was, as I read
19 it, that it was correct that McBride had no bona fide
20 intention to use the trade mark as filed, as required by
21 section 32(3) of the Act, and consequently the application
22 was made in bad faith within the meaning of section 3(6) of
23 the Act because it was, essentially, common ground that the
24 mark applied for was two-dimensional, whereas he held that
25 McBride's actual intention was to use a three-dimensional

1 trade mark. In those circumstances, he held that there was
2 no bona fide intention to use the two-dimensional trade mark
3 applied for as opposed to something in three dimensions.

4 In the course of reaching that conclusion, he dealt
5 with certain submissions which had been advanced by
6 Mr. Mellor, appearing on behalf of the Applicant, and in
7 particular, at paragraph 51, he dealt with a submission that
8 "there was no real difference between the application having
9 been for a two-dimensional form rather than a three
10 dimensional form". I refer to the first sentence of
11 paragraph 51 of his Decision.

12 In that context he referred to Philips Electronics NV
13 v. Remington Consumer Products Ltd (No.1) [1998] ETMR 124 and
14 the decision of the European Court of Justice in case
15 C-273/00, namely, Sieckmann v Deutsches Patent- Und Markenamt
16 [2003] RPC 38. Having quoted a portion of the European
17 Court's Judgment, he said in the last paragraph on page 18 of
18 the Decision: "If this trade mark is supposed to tell the
19 competent authority or other economic operators that it is
20 the goods, it markedly fails so to do. The representation
21 does not do it and more importantly the absence of a claim to
22 three dimensionality tells these persons that it is not the
23 goods. As Mr. Edenborough submitted there are advantages in
24 applying for a trade mark as a two dimensional form, it
25 militates against objection or opposition under section 3(2)

1 of the Act. I would add that it can also allow a trade mark
2 to pass under the radar and avoid possible challenge under
3 sections 3(1)(b) and/or (c) of the Act."

4 The Applicant, on 12th May 2004, filed an appeal to the
5 Appointed Person against Mr. Landau's decision in which, in
6 the Statement of Grounds of Appeal, the Applicant contends
7 that the Hearing Officer was wrong to make a finding of bad
8 faith in the circumstances of this case. Summarising, in
9 essence. The Applicant makes two basic points. Firstly, that
10 the sale of the product in question does in fact constitute
11 use of the mark applied for. So far as that submission is
12 concerned, it is accepted by Mr. Mellor that further evidence
13 that is sought to be adduced, to which I will come in a
14 moment, is not material, but in the alternative the Applicant
15 contends that even if the sale of the product does not
16 constitute use of the mark applied for, nevertheless, this is
17 not a case that can properly be described as an application
18 made in bad faith. At worst, it is said that it constitutes a
19 misjudgment on the part of the Applicant's trade mark
20 attorneys. It is to that second point that the further
21 evidence which is sought to be adduced is directed.

22 The further evidence which is sought to be adduced is a
23 witness statement of Keith Leonard Hodkinson, who is a
24 partner in the firm of Marks & Clerk, the Applicant's trade
25 mark attorneys. He had the conduct of the application in

1 question. In his statement he sets out the considerations
2 that he had in mind when filing the application, but in
3 particular the reason why it was filed as a two-dimensional
4 mark rather than a three-dimensional mark. He says that he
5 took that decision on two grounds, and I quote from
6 paragraphs 4 and 5 of his statement:

7 "Firstly, in my view the distinctive feature of the
8 product was the surface declaration, visible on the face of
9 the product. I did not consider the hexagonal outline shape
10 or configuration of the plastic liquid container to be
11 distinctive, merely its front face. Its front face was akin
12 to a label. Whilst not entirely flat, the pattern and
13 ornament forming the face were substantially planar surface
14 decoration. It would have been materially the same on any
15 container, whether hexagonal or, for instance, circular in
16 outline. It was that feature which I wished to protect, not
17 the overall shape. It was that feature which, in my view,
18 gave distinctiveness to the mark.

19 "Secondly, it was my understanding that the product was
20 in use, to be sold in a cardboard packaging and visible only
21 through a transparent plastic window in the front of that
22 packaging. All that the consumer would see when purchasing
23 the product was the front face, not the entirety of the
24 container. What was therefore material to the decision to
25 buy was the surface decoration visible through the window.

1 Competitor products were also sold in such packaging, as the
2 evidence put forward by the Opponent itself confirmed."

3 Having given that evidence, he then went on to deal
4 with why evidence had not been filed during the course of the
5 proceedings in the Trade Marks Registry, which he says was
6 based on an evaluation of the pleadings and the evidence of
7 the Opponent. He then goes on in paragraphs 9 and 10 of his
8 statement to deal with the objection under section 3(6) of
9 the Act. I will quote selectively from those two paragraphs.

10 Paragraph 9: "As to the grounds under s.3(6), it was
11 my understanding that no one disputed the product itself had
12 been offered or was to be sold...and it never occurred to me
13 that the Hearing Officer would reach a view that the
14 representation shown on the Form TM3 was other than a
15 representation of a two dimensional pattern of surface
16 decoration since, had I intended to present a 3 dimensional
17 object for registration, I would indeed have represented its
18 three dimensional features."

19 Paragraph 10: "It was only upon reading the decision
20 of the Hearing Officer that the argument to the effect that
21 my two dimensional application was really a three dimensional
22 mark 'masquerading' or misrepresented as a two dimensional
23 mark came through."

24 He says that there was simply no intention to try to
25 represent the goods or to misrepresent the mark. "I was

1 seeking to protect the distinctive pattern on the face of the
2 container which is in my view properly regarded as a device."

3 Turning to the principles to be applied on an
4 application of this nature, it was common ground between
5 counsel that these were to be found in the recent decision of
6 the Court of Appeal in DU PONT Trade Mark [2004] F.S.R.15.
7 It is common ground between counsel that I am not, in this
8 jurisdiction, bound by the Civil Procedure Rules, but
9 nevertheless I should direct myself by analogy with those
10 rules and with the case law thereunder. I can pick it up
11 in the Judgment of May LJ beginning at paragraph 95, where he
12 says this: "As to fresh evidence, under r.52.11(2) on an
13 appeal by way of review the court will not receive evidence
14 which was not before the court unless it orders otherwise.
15 There is an obligation on the parties to bring forward all
16 the evidence on which they intend to rely before the lower
17 court, and failure to do this does not normally result in
18 indulgence by the appeal court. The principles on which the
19 appeal court will admit fresh evidence under this provision
20 are now well understood and do not require elaboration here.
21 They may be found, for instance, in the judgment of Hale L.J.
22 in Hertfordshire Investments Ltd v. Bubb [2000] 1 W.L.R. 2318
23 at 2325D-H. Rule 52.11(2) also applies to appeals by way of
24 rehearing under r.52.11(1)(b), so that decisions on fresh
25 evidence do not depend on whether the appeal is by way of

1 review or rehearing."

2 He returns to the matter in the context of
3 consideration of the position under section 18 of the Trade
4 Marks Act 1938 at paragraphs 100 and following. In paragraph
5 100 May LJ. refers to the decision of Laddie J. in
6 Hunt-Wesson Inc's Trade Mark Application [1996] R.P.C. 233.
7 In paragraph 101 he refers to a decision of Sir Richard Scott
8 V.C., as he then was in CLUB EUROPE Trade Mark.

9 In paragraph 102 he comes back to r.52.11(2), and
10 refers again to the judgment of Hale L.J. in Hertfordshire
11 Investments Ltd v. Bubb, and also picks up a statement by
12 Morritt L.J. in Banks v. Cox (unreported, Court of Appeal,
13 17th July 2000), in which his Lordship concluded that "the
14 principles remain the same but the Court is freed from the
15 straight-jacket of so-called rules". Morritt L.J. comments:
16 "Sir Richard Scott had used the same expression in the CLUB
17 EUROPE case, and this, in my view, indicates a smooth
18 transition for trade mark appeals from RSC Order 55 to
19 Pt.52.11(2)."

20 His Lordship then went on to consider the judgment of
21 Pumfrey J. in in WUNDERKIND Trade Mark [2002] R.P.C. 45. At
22 the end of paragraph 103, he said: "Sir Richard Scott's
23 decision in CLUB EUROPE does not appear to have been drawn to
24 Pumfrey J.'s attention. However that may be, Pumfrey J. in
25 my view correctly summarised the position in para.[57] Of his

1 judgment, where he said:

2 "There is no doubt that in a trade mark appeal other
3 factors outside the Ladd v. Marshall criteria may well be
4 relevant. Thus in my judgment it is legitimate to take into
5 account such factors as those enumerated by Laddie J. in
6 Hunt-Wesson, provided always that it is remember that the
7 factors set out in Ladd v. Marshall are basic to the exercise
8 of the discretion to admit fresh evidence and that those
9 factors have peculiar weight when considering whether or not
10 the overriding objective is to be furthered."

11 In paragraph 104, May L.J. says: "This passage, in my
12 view, properly recognises that the same principles apply in
13 trade mark appeals as in any other appeal to which Pt 52
14 applies; but that the nature of such appeals may give rise to
15 particular application of those principles appropriate to the
16 subject matter."

17 My conclusion from that authority is that the
18 principles applicable to the exercise of my discretion are,
19 in summary, as follows. Firstly, that the factors set out in
20 Ladd v. Marshall remain basic to the exercise of the
21 discretion. Secondly, that Ladd v. Marshall is no longer a
22 straight jacket. On the contrary, the matter is to be looked
23 at in the round to see that the overriding objective is
24 furthered. Thirdly, that in the particular context of trade
25 mark appeals the additional factors set out in Hunt-Wesson

1 may be relevant.

2 Turning, then, to the present application, it follows
3 from my analysis of DU PONT Trade Mark that the first matter
4 to be considered is whether the evidence could and should
5 have been obtained earlier. So far as this factor is
6 concerned, the essential submission of Mr. Mellor was that
7 the reason why the evidence sought to be adduced was not
8 adduced before the Trade Marks Registry was that the
9 Applicant had been taken by surprise by a mutation in the
10 argument being presented against it. The pleaded argument
11 against it was that there was no intention to use the mark
12 applied for. Thus, accordingly, there was a materially false
13 statement having regard to section 32(3) of the Act leading
14 to a conclusion of bad faith under section 3(6).

15 He submitted that what the Applicant was faced with at
16 the hearing before the Hearing Officer and in the Hearing
17 Officer's reasoning in his Decision was a somewhat different
18 allegation falling into two parts; firstly, a deliberate and
19 conscious decision to file an application for a two
20 dimensional mark rather than a three dimensional mark, as to
21 which he accepted there is no dispute, but then, secondly, a
22 deliberate and conscious decision to avoid the application of
23 the restrictions on registrability contained in section 3(2)
24 of the Act and to "pass under the radar" to use the Hearing
25 Officer's words in paragraph 51 of his Decision, with regard

1 to the objections under section 3(1)(b) and/or (c) of the
2 Act.

3 He submitted that that change in the nature of the
4 case, at any rate, as perceived by the Applicant, took the
5 Applicant by surprise, had not been clearly foreshadowed in
6 the Statement of Grounds of Opposition and that, therefore,
7 the Applicant's failure to adduce the evidence of
8 Mr. Hodkinson in the Trade Marks Registry was understandable
9 and excusable.

10 Mr. Edenborough, for the Respondent, argued against
11 that, that there had been no substantial change in the
12 allegation that was relied upon, that from beginning to end
13 the case was that the mark applied for was not intended to be
14 used and that, on the contrary, what was intended to be used
15 was the product itself.

16 My conclusion is that there was no substantial change
17 in the nature of the case which the Applicant had to face.
18 The Statement of Grounds of Opposition clearly set out, in my
19 view, that the substance of the objection was that the mark
20 sought to be registered was a two dimensional drawing or
21 label which, albeit it was a representation of the product
22 sold by the Applicant, was not intended to be used by the
23 Applicant, because what the Applicant actually intended to
24 use was the product itself.

25 It seems to me that the comments made by the Hearing

1 Officer in paragraph 51 of his Decision about section 3(2) of
2 the Act and section 3(1)(b) and/or (c) of the Act were
3 directed to the submission that was made to him that there
4 was no real difference between the application having been
5 for a two dimensional form rather than a three dimensional
6 form. He was saying that there was indeed a difference of
7 substance between an application for a two dimensional mark
8 and an application for a three dimensional mark. In my view,
9 that is clear not only from its context in paragraph 51,
10 which opens with the sentence I quoted earlier, but also from
11 what the Hearing Officer says in the immediately following
12 paragraph, paragraph 52, where he says: "I just don't buy
13 Mr. Mellor's argument that there is neither any great
14 difference between applying for the trade mark as a two
15 dimensional trade mark rather than a three dimensional trade
16 mark. Nor do I buy the submission that men of business do
17 not understand the difference between two dimensional and
18 three dimensional."

19 I turn to the second factor which is whether the
20 evidence is likely to have an important influence on the
21 outcome of the appeal. So far as this is concerned,
22 Mr. Mellor argues that on the second of the two issues that I
23 identified earlier, Mr. Hodgkinson's evidence is important
24 because it makes it clear, he submits, that at worst this was
25 a case of misjudgment and it could not possibly be said,

1 having regard to his evidence, that the Applicant was acting
2 in bad faith.

3 Mr. Edenborough submits that the evidence is,
4 essentially, irrelevant and, therefore, unlikely to have an
5 important influence on the outcome because, he submits, it
6 does not really address the fundamental question of whether
7 the Applicant has any bona fide intention to use the mark
8 applied for two dimensionally as opposed to simply selling
9 the product.

10 So far as this factor is concerned, it seems to me that
11 Mr. Hodkinson's evidence is relevant because it certainly
12 does shed light on the Applicant's reasoning in having
13 elected to file an application for a two dimensional mark.

14 Whether it would have an important influence on the
15 outcome of the appeal, however, I have some doubt because it
16 seems to me that much of what Mr. Hodkinson says by way of
17 evidence would in fact be open to the Applicant by way of
18 submission, anyway. Indeed, not only would it be open to the
19 Applicant, but to a large extent those arguments were indeed
20 made before the Hearing Officer.

21 The question of whether it can properly be said that an
22 applicant, acting on professional advice, who files an
23 application for a two dimensional mark, is acting in bad
24 faith because he actually intends to sell the product, and
25 takes the view, wrongly upon this assumption, that the sale

1 of the product in the packaging in which it is sold
2 constitutes use of the mark can constitute bad faith within
3 the meaning of the Act, seems to me to be a matter upon
4 which, to put it at its lowest, the Applicant can make some
5 fairly obvious submissions. As I say, it seems to me that
6 Mr. Hodgkinson's evidence is certainly relevant but I would
7 not go so far as to say that it was in any way conclusive.

8 The third question is whether the evidence is
9 apparently credible. Mr. Edenborough submitted to the
10 contrary, on the basis that it was inconsistent with
11 submissions made below. I do not think that is sufficient to
12 deprive the evidence of credibility.

13 Turning to other factors, Mr. Mellor submitted that
14 admitting the evidence would avoid multiplicity of
15 proceedings on the basis that, if the evidence was not
16 admitted and the appeal was unsuccessful, the consequence
17 would be that the Applicant would make a further application
18 and the same issues would have to be canvassed again. I have
19 to say that I take the view that in the context of this
20 particular case the question of multiplicity of proceedings
21 is neutral, because it would have been open to the Applicant
22 to file a further application anyway. It seems to me that
23 the same points could, arguably, arise in that context as
24 well.

25 There were certain other peripheral points that the

1 parties drew to my attention, but none of the other matters
2 drawn to my attention seem to me to have any particular
3 bearing on the matter over and above the four factors which I
4 have already considered.

5 I turn to consider the overall decision in the light of
6 my consideration of those four factors, bearing in mind, as
7 Mr. Mellor urged me to do, that at the end of the day the
8 overriding consideration is to achieve justice between the
9 parties. In my view, the first factor that I have
10 considered, which is whether the evidence could and should
11 have been obtained earlier, is the factor to which it is
12 right to give most weight. In this case, I do not consider
13 that the objection has changed to an extent which justifies
14 the view that the Applicant was truly taken by surprise. The
15 evidence could have been put in earlier. The Applicant chose
16 not to do so and, whilst it is a small point in and of
17 itself, I note that when the argument was raised before the
18 Hearing Officer at the hearing, by which point there could
19 have been no shadow of a doubt as to what the Opponent's case
20 was and what points were being relied on in support of it, no
21 application was made for an adjournment; nor, indeed, having
22 read the transcript, can I see there having been any
23 suggestion before the Hearing Officer that the Applicant was
24 being taken by surprise.

25 To my mind that consideration outweighs the second and

1 third factors which I have referred to, the fact that the
2 evidence would be relevant although not conclusive and
3 as to its apparent credibility. Therefore, my conclusion is
4 that the application to adduce further evidence will be
5 refused.

6 MR. EDENBOROUGH: Sir, might I take instructions?

7 THE APPOINTED PERSON: Yes.

8 MR. MELLOR: That simplifies things a bit.

9 MR. EDENBOROUGH: Sir, there is one very minor point for your
10 note in the Decision.

11 MR. MELLOR: It was that amendment to the Counterstatement.

12 MR. EDENBOROUGH: There were, actually, four sentences in the
13 paragraph which are quoted, and the Counterstatement pleads
14 it as only three.

15 MR. MELLOR: There was an amendment ----

16 THE APPOINTED PERSON: I had not seen that.

17 MR. MELLOR: ---- shortly before the hearing. I do not know if
18 anybody has a copy of the letter we wrote on that. I was
19 looking for it in my papers and I do not have it. Ramages
20 raised this point before the hearing and we addressed it.

21 Sir, in the Decision itself the Hearing Officer
22 recorded in paragraph 8: "McBride filed a counterstatment.
23 In effect McBride denies the grounds of opposition. It does,
24 however, admit Reckitt's claim about the statements of
25 Mr. Hodkinson." That is the way he summarised it. At the

1 moment, I cannot remember precisely how he amended the
2 pleadings.

3 (Document handed to the Appointed Person).

4 I think we did not admit to the third sentence, but I
5 do not think it has any effect on your judgment.

6 THE APPOINTED PERSON: It has been drawn to my attention that by
7 a letter dated 1st March 2004 the Applicant's trade mark
8 attorneys amended the Counterstatement so that paragraph 7
9 read: "First, second and fourth sentences of paragraph 7 of
10 the Notice of Opposition are admitted. The third sentence is
11 not admitted." That amendment was not something which
12 appeared on the copy of the Counterstatement in my file. It
13 follows that in my earlier decision, when I said that the
14 third sentence was admitted, that is not correct. However,
15 do not think it affects my decision since my decision was
16 primarily predicated upon the case as pleaded by the
17 Opponents in their Statement of Grounds, paragraphs 7 and 11.
18 Thank you for drawing that to my attention.

19 It follows that your application for disclosure,
20 Mr. Edenborough, falls by the wayside.

21 MR. EDENBOROUGH: Basically, Sir, yes.

22 THE APPOINTED PERSON: As does your potential application for
23 cross-examination.

24 MR. EDENBOROUGH: The latter without a doubt.

25 There is just the smallest of points. I only raise it

1 just for clarification. You saw that in my paragraph 2 I said
2 that the application falls away. That is, in essence,
3 assuming that paragraphs 1.2, 5 and 7 of the actual skeleton
4 fall away. I do not wish to push it, really.

5 THE APPOINTED PERSON: If the evidence does not come in, how can
6 you raise an argument of waiver of privilege?

7 MR. EDENBOROUGH: Exactly. So long as there can be no argument
8 that evidence is being adduced through the back door of the
9 skeleton. It is just dotting the i's and crossing the
10 t's.

11 THE APPOINTED PERSON: If you are asking me to strike things out,
12 I am not going to do it.

13 MR. EDENBOROUGH: No. It was just for clarification that those
14 are submissions, not evidence.

15 THE APPOINTED PERSON: You have put down your marker on that. Is
16 there anything else? Actually, so far as costs of today are
17 concerned, I would suggest that we consider those at the
18 substantive hearing, unless anybody has any contrary
19 submission.

20 MR. EDENBOROUGH: Can I take instructions but I do not think I
21 have anything further to say on that point?

22 THE APPOINTED PERSON: Sure.

23 MR. EDENBOROUGH: No, Sir.

24 THE APPOINTED PERSON: Fine. Thank you both for your submissions
25 today.

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