IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

A.141/84

880

BETWEEN THE BROADCASTING CORPORATION OF NEW ZEALAND a body coporate duly established pursuant to the provisions of the Broadcasting Act 1976 and having its office at Wellington

Plaintiff

A N D MURRAY ANTHONY INGLIS of Christchurch, Broadcaster

Defendant

Hearing: 18 - 20 June, 1984.

Counsel: W.G.G.A. Young for Plaintiff
C.B. Atkinson, Q.C., for Defendant

Judgment: 21 June 1984.

ORAL JUDGMENT OF HARDIE BOYS J.

Pursuant to a contract dated 12 May 1983, the plaintiff Corporation agreed to employ the defendant, Mr Inglis, and the defendant agreed to work for the Corporation as an announcer on Radio New Zealand's 3ZM Christchurch Announcer Establishment for a period expressed to be: "1st day of June 1983 to 31st day of March 1984 or until determined by either party giving not less than four weeks notice in writing". On 15 May 1984, whilst that contract was still subsisting, Mr Inglis gave the Corporation four weeks' notice of termination in order that he could take up a position as an announcer with the privately owned Radio Avon, commencing on Monday next, 25 June.

The Corporation claims that in taking up this position the defendant is in breach of a covenant in his contract with the Corporation. It has instituted proceedings for an injunction to restrain him from engaging in radio broadcasts for Radio Avon Limited for a period of six months from 12 June 1984, and it has moved for an interlocutory order, to continue until further order of the Court, in the same terms. Counsel did not consider it appropriate to deal at this stage with the substantive motion. In would, in many respects, have been far more satisfactory had it been possible to do so. Hence I have heard only the interlocutory motion, but because it was said that a decision upon the latter may determine the fate of the former, and because Mr Atkinson contended that the Corporation has no arguable case, or at best only a weak case, and on either basis should not be granted an interim order, the matter was extensively argued on the merits. The time constraints, both in hearing and in giving judgment upon it, have been such that I cannot deal as fully as I would in a more considered judgment with all the points that have been canvassed. I will, however, refer to the principal matters upon which my conclusion is based.

First I mention the principles applicable to an application such as this. They find their genesis in the House of Lords' decision in American Cyanamid Co. v Ethicon Ltd [1975] AC 396, but they have been stated in a variety of ways, most authoritatively and succinctly by the Privy Council in a judgment delivered by Lord Diplock, who also delivered the

judgment in the American Cyanamid case, in Eng Mee Young v Letchumanan [1980] AC 331, 337:

> " The guiding principle in granting an interlocutory injunction is the balance of convenience....but before any question of balance of convenience can arise the party seeking the injunction must satisfy the Court that its claim is neither frivolous or vexatious; in other words that the evidence before the Court discloses that there is a serious question to be tried."

Despite the way in which Lord Diplock first formulated the principles in the Cyanamid case and Browne L.J. refined them in Fellowes & Son v Fisher [1976] QB 122, as Somers J pointed out in our Court of Appeal in Congoleum Corporation v Poly-flor Products (NZ) Ltd [1979] 2 NZLR 560, 572 it should not be thought that it was intended to reduce the factors relevant to the balance of convenience to a matter of mechanics. The remedy is a flexible and discretionary one and is not to be governed by rigid or mechanical rules. The weight to be given to the relative strength of the parties' cases will depend on the particular circumstances. Usually the Court is reluctant to embark on an extensive examination of the merits because it has to be recognised that when the action comes to trial, much more material may be put forward by either or both parties than has been possible in the short time that is usually available for the presentation of this kind of interlocutory application. That does not mean to say that in determining whether or not there is a serious question to be tried, the Court should not consider carefully the merits of the plaintiff's claim, both in fact and in law, and if necessary, embark on a

full examination of the legal issues involved. Because it is obvious that if on the case presented the law can give the plaintiff no remedy, then he cannot obtain interim relief. So when, as here, a plaintiff challenges the whole basis of the plaintiff's claim, that challenge cannot be side-stepped, and the Court must embark on an examination of the merits, so far as it can. Often it cannot go far, because a concluded view will depend on evidence still to be given. But there are cases where a fuller examination can be made, because the issue appears clearly from the unchallenged material before the Court. This is, in many respects, such a case. But even then it is not desirable to endeavour to reach a concluded view if there are time constraints except in the clearest of cases. It should be added that even if on examination of the merits it appears that the plaintiff does have a serious question to be tried, the respective strengths of the parties' cases may become relevant in the assessment of the balance of convenience.

There is another kind of situation, and that is where resolution of the interlocutory proceedings is likely to bring the litigation to an end, because there would be nothing left on which it was in the unsuccessful party's interest to proceed to trial. Such a situation was contemplated by Lord Diplock in his judgment in N.W.L. v Woods [1979] 1 W.L.R. 1294, and was confronted by the Court of Appeal in Cayne v Global Natural Resources plc [1984] 1 All ER 225. In such circumstances, as was held in the latter case, the Cyanamid approach is not entirely appropriate. The test becomes what can the Court do

in its best endeavour to avoid injustice: see per Eveleigh L.J. at p.232. The question must be, in all the circumstances should the Court exercise its discretion, when to give the plaintiff his order would effectively mean giving final judgment against the defendant without permitting him the right of trial (idem p.233).

As a corollory of course, the Court might have to consider the injustice that would occur to the plaintiff if refusal of an interim order meant that he on his part was deprived of the right of trial, and denied the opportunity of preventing a breach of his rights to which he was actually entitled. If those competing considerations have to be balanced in a particular case, the relative strengths of the parties' individual cases may be relevant. So, of course, may the respective appropriateness of damages as compensation.

The covenant in question in this case reads as follows:

> " THE contractor will not for a period of six months from the termination of his employment with (service/station) engage in radio or television broadcasts for any organisation other than the BCNZ whose primary area of coverage is the same as that for the (service/station) at which he was employed <u>except</u>:
>
> (i) where prior written consent has been given by the Corporation and;
>
> (ii) where the employees services have been terminated by the Corporation during the continuancy of the contract of employment with the Corporation. "

An immediate difficulty is created by the words appearing twice in parentheses: "service/station". "Service" is defined at the commencement of the contract as Radio New Zealand, so if the words in question are to be read as including that organisation, which has national radio and television coverage, then the covenant would prevent the defendant from working anywhere in these media in New Zealand. If the words are to be read so as to refer only to the station in which he was engaged to work, 3ZM, the covenant would preclude his employment only in the Christchurch area, for that is the area of primary coverage of that station.

It is obvious that this contract was prepared from a precedent and that one or other of the words was intended to be deleted. They cannot stand together. The document must be given commercial efficacy by interpreting them so as to give the meaning the context suggests is correct. The contract provides for the defendant to work at 3ZM, Christchurch, not for Radio New Zealand generally. He is to be under the direction of the 3ZM station manager. And in clause 7, following the parentheses where they secondly appear, is the word "at", a word appropriate to follow the word "station" but not to follow the word "service". I therefore read the clause as limited in its restraining scope to the primary area of coverage of 3ZM. It is accepted that Radio Avon comes within the contractual description of an "organisation other than the BCNZ whose primary area of coverage is the same as that for" 3ZM.

The contract of 12 May 1983 is the third the parties signed. The first was on 29 June 1982, and was for a period from 5 July 1982 to 4 January 1983. The second, signed on 5 December 1982, was for the period 1 December 1982 to 31 May 1983. Both these contracts contained a provision for determination on four weeks' notice identical to that in the instant contract. The remuneration in each of the three contracts was for a successively greater sum. The second but not the first had a covenant identical to clause 7 in the third. In all other material respects the three contracts appear to be identical.

It is first necessary to construe clause 7 and because it refers to the date of termination of the employment, to construe as well the relevant provision in that regard. Such construction is, of course, to be undertaken objectively in the light of the language used. Both provisions are most infelicitously worded. That relating to the contract period appears to me to mean that the notice of termination may be given at any time before or after 31 March 1984. To give all the words used a meaning, that does not mean that 31 March 1984 cannot be the, or a, termination date. Mr Atkinson suggested that it could hardly have been contemplated that the defendant could without notice work up to the end of 31 March and then not reappear on 1st April. I think he could. That is in my view what the contract plainly provides. Similarly, the Corporation could tell him on 31 March not to return on

1st April, but then probably the restraining covenant would not apply, because the notice would have been given during the currency of the employment prior to 1 April. The likelihood of either of these things happening is, of course, remote in terms of normal human behaviour and normal industrial relations. No doubt the parties must be presumed to have relied on the fact that each would behave in a normal and reasonable way.

In any event, if the contract does not end on 31 March, then it is terminable on four weeks' notice just as it was so terminable in the period prior to that date. On this construction the meaning of the words "six months from termination of employment" is clear. They refer to actual termination, whether on the expiration of four weeks' notice or on 31 March as the case may be. As things have transpired the contract came to an end four weeks after 15 May, that is on 12 June 1984 and the six months' period nominated by clause 7 began then and expires on 12 December.

A further difficulty with clause 7 appears to be created by the word "and" linking the two exceptions. But Mr Young conceded that must be read as "or" with the result that the covenant does not apply if the employment is terminated by the Corporation, whether before or after 31 March 1984. Mr Atkinson also submitted that it does not apply unless the employee terminates before 31 March, but I see no justification for that submission which I regard as being contrary to the

plain meaning of the words.

What we have then is a provision that the employment may continue indefinitely on four weeks' notice and a covenant that if the defendant gives that notice at any time, whether before or after 31 March 1984, or if employment terminates on 31 March other than as a result of notice given by the Corporation, then unless the Corporation consents Mr Inglis will not work for any other competing employer for six months from the expiry of his notice, or for six months from 31 March, depending on when and how the employment was terminated.

The practical effect from his point of view was, as Mr Atkinson said, that if he ever wanted to leave the service of Radio New Zealand, even after only a few months, either he had to leave Christchurch for six months if he wanted to engage in his particular calling, or he had to work at some other occupation, or be out of work, if he wanted to remain in Christchurch. That was obviously a strong inducement for him to stay with 3ZM even though the contract did not require the Corporation to renegotiate the terms to allow for any increases in his worth that he may have been able to bring about.

A covenant such as this, being in restraint of trade, is prima facie unlawful and invalid as being contrary to that public policy which requires that every person shall be free to work for himself or for the employer of his choice, and to offer and use his talents and his abilities, improving as they

are likely to do with experience and training, for this purpose. But an employer is entitled to protection in respect of certain of his own interests, and this right will displace that of the employee if the employer can establish it. The onus is on him. He must show that what he seeks to preserve is what may be called his own property as distinct from the personal aptitudes of his employee or competition from their exercise elsewhere: see per Lord Wilberforce in Stenhouse Australia Ltd v Phillips [1974] 1 All ER 117, 122. The employer must show that the means he has taken to preserve this property are reasonable for that purpose and that it is not injurious to the public good that the protection should be had. This latter point was not raised in this case. This property, or proprietary or commercial interest, as it has been variously described, may be of two kinds - trade secrets or trade connection. It is the second with which we are concerned here. An employer is entitled to prevent his customers from being enticed away by a former employee. But he cannot safeguard himself against such a possibility in the case of every employee. As I understand the law it is only those employees who are likely to have the ability to do so in that they have personal knowledge of or influence over the customers and hence over where they place their custom, against whom such protection can be obtained. See per Lord Parker of Waddington in Herbert Morris Limited v Saxelby [1916] A.C. 688, 709.

The evidence shows that, in the the words of 3ZM's

station manager: "The relationship between a commercial radio station and its announcers is mutually sustaining. The popularity of an announcer is reflected in ratings which are in turn reflected in the ability of the radio station to sell advertising". Mr Inglis had worked for Radio Avon for four and a half years up to February 1978, and he had built up a substantial following with his breakfast programme which was reflected in that station's ratings and consequent profitability through its advertising revenue. He then worked in Auckland, Australia and Wellington until he was offered his position with 3ZM, substantially on the basis of his past performance in this city. For he was still remembered by listeners, and thus his profile, to use the term of art, was still high. Having engaged him, 3ZM proceeded to promote him, or in other words, to advertise both him and his association with that station, all with a view to increasing ratings and consequent advertising revenue. It is to be noted that advertisers once attracted to a station tend to stay with it, so that the business connection and the revenue received as a result of it is a recurring thing.

It is this relationship between 3ZM and its advertisers that the Corporation claims to be the business interest which it is entitled to protect, for it is said that if the defendant goes to another station, the advertisers will forsake 3ZM and follow him to that other station, and much of the investment made in his promotion will be lost. Of course that result may ensue even if he is silenced for six months, but in that six

months 3ZM will not be subjected to competition from him and it will have the opportunity to establish another announcer in his place who will, it would be hoped, retain the advertising custom following his departure and, later, retain it despite his re-emergence with Radio Avon.

The true significance of the promotional expenditure needs a little further consideration. In looking at it, I am of course concerned with what had been done and was contemplated at the time the covenant presently in issue was obtained. Such effect as that promotion had or was expected to have was no doubt intended to be twofold. First it would go to build up the business connection, as does any advertising. And also it would increase the personal connection between Mr Inglis and the advertisers. They were being encouraged to put their business with 3ZM because Mr Inglis was there. That was a legitimate exploitation of his presence, for which he in turn was paid his salary. It did not go to the enhancement of his own attributes or skills. It merely made better use of them for the station's benefit. Any improvement of his profile for his own benefit was no doubt an incidental side effect. But the promotion tended to emphasise and intensify the personal influence which Mr Inglis, by reason of his employment, had in relation to obtaining and maintaining the Corporation's advertising customers. In this very important respect the case differs from the Victorian case to which reference was made, Lido-Savoy Pty Ltd v Paredes [1972] V.R. 297. Mr Atkinson argued that in reality what the

Corporation was seeking to do was protect itself from competition by the defendant himself in the proper exercise of his own skills and talents. That, of course, is not permitted, even where those skills are learned from the employer. The Paredes case is an example of a case where an injunction was refused because that was the interest which the plaintiff sought to protect. I do not think that is the case here. I think the better view is that the Corporation had a recurring business connection with its advertisers brought about as a result of its employment of the defendant and that it was entitled to obtain a covenant restraining the defendant, by whose influence those customers came, from exercising the same kind of influence to have them move to his new employer.

It is not the law that no restraint can be imposed on an employee if his employment is terminated. Any restraint that is imposed will inevitably restrict the employee's ability to use his natural talents in a competitive way. This branch of the law represents the balancing of the two conflicting interests. This was, with respect, aptly expressed by Somers J in H & R Block Ltd v Sanott [1976] 1 NZLR 213, 218 in these words:

> " Where, however, the possibility of the employee taking advantage of his position to damage his proprietary interest of his employer exists, a covenant against what is in effect competition has been upheld, not on the ground that the employee by reasons of his employment or training has obtained skill and knowledge to enable him to compete, but on the ground that he may obtain 'such personal knowledge of and influence over the

> customers of his employer, or such an acquaintance with his employer's trade secrets as would enable him, if competition were aldlowed, to take advantage of his employer's trade connection or utilise information confidentially obtained': Herbert Morris Ltd v Saxelby [1916] 1 AC 688, 709, per Lord Parker of Waddington. "

To approach the case in this way is consistent with the view taken by Prichard J in Independent Broadcasting Company Limited v Goldsbrough, (A.45/82, Hamilton Registry). The facts there were somewhat different, but the covenant with the defendant was, so far as is relevant, in very similar terms to that in this case. I do not regard my conclusion as in conflict with the Paredes case because the facts there were very different, and on those facts it was, if I may respectfully say so, very properly held that the plaintiff had no commercial interest to protect and that what it was really attempting to do was restrain the use of something which had become part of the defendant herself, namely the enhancement of her own reputation by an expensive promotional campaign. That is different from this case. In coming to my conclusion I prefer not to rely on Nili Holdings Ltd v Rose [1981] 123 D.L.R.(3d) 454, which was also referred to, because, in the brief time I have had to consider it, I have entertained some reservations about it. I have therefore come to the conclusion that in this particular aspect of the case the plaintiff has an arguable case. And it is by no means such a weak case as to be heavily discounted in considering where the balance of convenience lies.

Whilst the circumstances may entitle the employer to

obtain a covenant, the covenant will not be upheld if it is unreasonable in its scope. Mr Atkinson did not argue that, construed as I have construed it, the covenant is unreasonable in its geographical coverage. But he submitted that it is unreasonable in terms of time and the inclusion in it of a ban on television broadcasting. It must be acknowledged that there is what I would regard as a strong argument that this contract is of the kind considered by the House of Lords in A Schroeder Music Publishing Co Ltd v Macaulay [1974] 3 All ER 616, and that therefore the question of what is reasonably necessary for the protection of the legitimate interests of the Corporation is to be considered in balance with the benefits secured to Mr Inglis. From the Corporation's point of view, six months is not, I would think, an unreasonable time for the protection of its proprietary interests prior to the revival of the influence the defendant would be likely to exercise upon it. From the defendant's point of view, I am not sure that it is unreasonable either. True, it means, as I have said, that unless he is prepared to stay with the Corporation for as long as it chooses and on whatever terms it chooses, he cannot for six months engage in the occupation for which alone he is trained, and for which he has a particular talent, unless he leaves Christchurch and the number of opportunities available to him elsewhere in the country are probably limited. But in return for this he is given employment in this probably limited market, with the station of his choice and by the only organisation having nation-wide coverage. He may remain as long as he wishes. If he remains of value he is surely in a

strong position to negotiate improved terms. If he is dismissed or the contract is terminated by action of the Corporation, the covenant does not apply. This particular exclusion is I think of considerable significance in terms of fairness and reasonableness.

The inclusion of television is another matter. 3ZM does not transmit television and its business interests are not related to television. Although the Courts have power to enforce only part of a covenant, there is some reluctance to do so, if only from fairness to the covenantor, who having ventured into litigation successfully attacks the covenant only to have it nonetheless enforced, although in modified form, against him. See Mason v Provident Clothing & Supply Co Ltd [1913] AC 724 and Attwood v Lamont [1920] 3 K.B. 571. However the power may properly be exercised, to use the words of Lord Moulton in the Mason case where the part of the covenant concerned is clearly severable and even so only in cases where the excess is of trivial importance or merely techinical, and not a part of the main purpose and substance of the clause. That appears to be the case here, for the reference to television is severable; it is in practical and realistic terms of trivial importance (for Mr Inglis has not been a television announcer and he has indicated no intention of becoming one); it certainly is not part of the main import of the clause; and the Corporation does not in any event seek to enforce it. Therefore my conclusion that the plaintiff has made out an arguable case of more than faint strength remains

unaffected by considerations of reasonableness.

Mr Atkinson went on to attack the covenant on two other grounds. First he submitted that there was no consideration. I can see no substance in this argument. The consideration was the contract itself and the remuneration to be paid under it. But I think that when this submission was developed to the limited extent to which it was, it really did not go further than an argument that the consideration was inadequate. And as Mr Atkinson himself conceded, that is not a matter into which the Court is able to inquire.

The second ground was that the contract was illegal in that it involved a breach of s 4 of the Wages Protection Act 1964, and also a breach of s 82 of the Broadcasting Act 1976. These are rather more complex questions, raising also the availability of relief under the Illegal Contracts Act. They were not fully argued and I did not understand Mr Atkinson to put them in the category of defences which clearly established that the plaintiff had no or even a weak case. They are certainly arguable questions but they do not affect my present view of the nature of the plaintiff's case.

I must now ask myself whether this is the kind of case which should be dealt with on the basis considered in Cayne v Global Natural Resources. Mr Atkinson submitted that it should, because, he said, if an injunction were to be granted now it is highly unlikely that the substantive proceedings, in

which the Corporation's right to impose the restraint and hence to obtain an injunction at all would be finally determined, could be disposed of before much or indeed all the period over which the restraint could operate expires on 12 December. However, a hearing is able to be arranged in mid-August and time would not by then have passed to the extent that it would not be in the defendant's interests to proceed, for more than half of the period of restraint would remain. To ensure the Corporation did not take unfair advantage of an interim order, the Court is able to impose conditions in the form of a time-table for the taking of steps preliminary to hearing and for a fixture for the hearing itself. If in the end it were held that the Corporation was not entitled to an injunction, the defendant could, I think, be readily compensated in damages. Thus, I do not think this is a special case of the kind contemplated by Lord Diplock and the Court of Appeal in the cases referred to.

I therefore turn to consider the balance of convenience generally. If an injunction is granted, the defendant will be unable to pursue his occupation as an announcer in Christchurch for six months. I do not know what, if any, other arrangements he may be able to make. As his decision to accept the position offered by Radio Avon was made when his agent and an executive of Radio Avon visited him in New Plymouth, it then being known that the Corporation had drawn attention to the covenant, although it had not necessarily asserted an intention to enforce it, I strongly suspect he will

not go unemployed or at least unpaid. Indeed I wonder whether the position in this regard has been completely disclosed to the Court. However, whatever Mr Inglis' loss may be, it must surely be a purely financial one and capable of monetary assessment. Even if his profile suffers through being off the air, that in the end is a matter of his earning capacity and so again should be capable of monetary compensation. And there can be no doubt as to the ability of the Corporation to pay proper compensation in accordance with the undertaking it has filed in Court. If in fact any loss falls on Radio Avon, that is solely the result of a calculated business risk that company took in offering the position to the defendant. The availability of Mr Inglis to the listening public is not, in my view, a relevant consideration in this regard. Nor is possible public resentment, a factor adverted to in submissions, which in any event is surely likely to be directed to the Corporation which has obtained the injunction. I fail to see how in the end Mr Inglis' reputation would be unjustifiably impaired. Any adverse reflection upon him, which in any event would not be warranted by the mere grant of an interim injunction now, would either be redressed or confirmed by the outcome of the substantive hearing.

If an injunction is not granted, 3ZM is likely to suffer loss of advertising custom, although the extent of that is difficult to predict, particularly as the Corporation could expect to have at the most only a six month respite from the effects of the defendant's employment by its competitor. The

Corporation's loss would be more difficult to quantify than that of the defendant if the injunction were to be granted. Other factors may have come into play - or so I am sure it would be argued if or when the question of damages had to be debated. The extent to which the Corporation's loss would be recoverable from the defendant is not entirely clear. He has not disclosed his finances but the general manager of Radio Avon has stated in an affidavit that his company will indemnify Mr Inglis in respect of any judgment which he is unable to satisfy from his own resources. Mr Young indicated that it is unlikely that the Corporation would pursue recovery to its ultimate conclusion but that I think is a matter for its own commercial judgment and should not affect the Court's assessment of the extent to which the Corporation's loss would be compensatable if no injunction were granted, . Radio Avon's proposal is not of course a binding commitment and it is somewhat uncertain in its terms, but I must at least take it at its face value.

I conclude that in terms of the adequacy of damages as compensation, the defendant is in a somewhat better position than the plaintiff. That would of itself probably entitle the plaintiff to an injunction but rather than decide the matter simply on that basis I assume for the moment that in terms of adequacy of damages the parties' positions are in balance. I return to what Lord Diplock said in American Cyanamid at p.408:

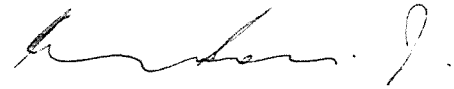
> " Where other factors appear to be evenly balanced it is a counsel of prudence to take such measures as are calculated to preserve the status quo. If the defendant is enjoined temporarily from doing

> something that he has not done before, the only effect of the interlocutory injunction in the event of his succeeding at the trial is to postpone the date at which he is able to embark upon a course of action which he has not previously found it necessary to undertake;...."

Mr Inglis signed this covenant not once but twice. He clearly did so in order to obtain what he must have seen as the benefits of employment with the Corporation. He has now chosen to take a position with presumably greater benefits. He has done so with full awareness of the commitment he undertook to the Corporation and in the hope that he may not be held to it. I see no grave injustice in holding him to it in the meantime. And there is this further consideration, similar to one that weighed quite heavily in the decision reached in the American Cyanamid case, (see p 410). To refuse an injunction now might effectively prevent the Corporation from seeking one at the substantive hearing even if it were held entitled to it. For by then Mr Inglis would no doubt have established himself in the public eye as an announcer with Radio Avon and it may be very damaging indeed for the reputation and the goodwill of 3ZM if he were then to be silenced in full cry. The Corporation would be left with its claim for damages so far as it thought it prudent to pursue it, and it would have lost the impact of the covenant in what I imagine, and Mr Young submitted are the more important months following the defendant's departure. In other words, even if an injunction were obtained restraining Mr Inglis from further broadcasing with Radio Avon, much of the damage which the covenant was designed to avoid may in fact have been done.

Overall I conclude that the balance of convenience is in the plaintiff's favour and it will be granted its interim injunction in terms of the motion. But there must be conditions as to a time-table leading up to and for the trial of the substantive action upon which I suggest I hear counsel in chambers in due course when they are in a position to discuss them.

The question of costs on this motion will be reserved.



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