Beddoe Applications

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1. To begin at the beginning, a *Beddoe* summons is a type of application to the court, made by trustees, for directions. But not every such application is a *Beddoe* application. This term is specific to an application for directions about litigation against third parties. Essentially, the trustees are asking for permission from the court to begin or continue litigation against an outsider. There are therefore two sets of proceedings, and I shall distinguish them by referring to the *main action*, which is a claim brought by or against a third party, and the *Beddoe* application in which the trustees are applying for permission to litigate the main action.

2. One classic example occurs where a new set of trustees is considering suing previous trustees for breach of trust. That is, in fact, one of the most difficult situations. A simpler case might be trustees pursuing a claim for breach of contract. Those are examples of trustees as claimants. But similar situations arise with trustees as defendants.

3. The classic applicants are trustees, but the same procedure is available for executors and administrators of deceased persons' estates, and also for the liquidators and administrators of a company in liquidation. The common feature is a fiduciary relationship with the real beneficial owners, the beneficiaries or the creditors and shareholders of the company. In this talk I shall concentrate on settlements and will trusts.

4. The real point of all these applications is to obtain an indemnity for costs. If the court is satisfied that the trustee, or other fiduciary, is justified in bringing or continuing the litigation, or in defending it as the case may be, then the order of the court will direct that the trustee has an indemnity out of the trust fund, not only for his own costs, but also for any costs which are awarded against the trustee if he loses the main litigation.

5. You may think that this is a win-win situation. Great for the Chancery Bar, great for the trustees. But what about the rest of the world? We shall see.

Why?

6. You may also wonder why this jurisdiction has developed. The answer is that, historically, the courts showed considerable tenderness towards trustees involved in litigation. Part of the reason for that attitude was that trustees were typically unpaid. The other part of the reason is that trustees would typically have no personal interest in the outcome of the main litigation. The law is comparatively tough with trustees if they behave dishonestly, and we all know that the remedies for breach of trust can be very painful for the trustee. On the other hand, if the trustee behaves reasonably when he finds himself thrust into litigation, the court is generally inclined to be reasonable in return. This goes some way to explaining why the courts are sometimes tempted, even at the end of unsuccessful litigation, not to punish the losing trustees personally with an adverse personal costs order. This tenderness might be evidenced by ordering the costs to be paid out of the relevant trust fund.

7. And yet beneficiaries, who are not necessarily the parties to the litigation, might well be aggrieved by such tenderness. 'What have our trustees been doing,' they might ask, 'running up unnecessary professional fees in pursuit of an unattainable goal in litigation?'

8. Some of these motives are visible in the famous judgment of Lindley LJ in ***In re Beddoe, Downes v Cottam*** **[1893] 1 Ch 547 (CA)** at page 558 : —

> 'I entirely agree that a trustee is entitled as of right to full indemnity out of his trust estate against all his costs, charges, and expenses properly incurred : such an indemnity is the price paid by *cestuis que trustent* for the gratuitous and onerous services of trustees; and in all cases of doubt costs incurred by a trustee ought to be borne by the trust estate and not by him personally.'

9. The facts in the case were that the life tenant of settled land had asked the trustee to give her the title documents so that she could sell it. The trustee resisted this request in reliance on the advice of counsel and later defended the subsequent litigation, but lost. In fact, more than once in the course of the proceedings, the life tenant's solicitor had repeated the request and put the trustee on notice that he would seek an

adverse costs order. Even so, the trustee's solicitor did not consult counsel again in the face of those repeated requests. Instead he made matters worse by issuing a summons applying to stay the action. That was dismissed, and the costs of the summons were made costs in the action, thus increasing the amounts at stake. In the event the main action was not seriously resisted, and the life tenant won.

10. The trial judge and later Kekewich J in a separate action nevertheless ordered the costs of the action to be paid out of the trust fund. The beneficiary appealed, and the result of the appeal was to restrict the trustee's recovery of costs to what would have been allowed if he had applied to the court for an indemnity in advance. The Court of Appeal were reluctant to send the case back for further consideration, or to order what was then called a taxation of costs, and instead fixed the trustees' recoverable costs at £35 (against the taxed costs of £65 : those were the days).

11. Lindley LJ went on to say, just after the passage quoted above,: –

> 'But, considering the ease and comparatively small expense with which trustees can obtain the opinion of a Judge of the Chancery Division on the question whether an action should be brought or defended at the expense of the trust estate, I am of opinion that if a trustee brings or defends an action unsuccessfully, and without leave, it is for him to show that the costs so incurred were properly incurred. The fact that the trustee acted on counsel's opinion is in all cases a circumstance which ought to weigh with the Court in favour of the trustee; but counsel's opinion is no indemnity to him, even on a question of costs.'

12. The implication of that is that, if the trustee does apply to the court in advance, and obtains his indemnity, then he is at no risk. So long as he follows the directions of the court, it will not be open to a beneficiary of the trust to claim that costs of the action ought not to be borne by the trust fund. On the other hand the costs in the main action are unaffected.

13. But if the trustee does not apply for *Beddoe* relief, the danger is that he may have to pay the costs of the main action personally if he loses. The ***Beddoe*** case itself was not

so harsh as that, merely halving the trustee's right of indemnification. In fact you may wonder why the trustee in the ***Beddoe*** case would have got an indemnity if he had applied for one, and I think the answer is that his defence depended on a point of law which may at least have been arguable. So the court would have accepted there was a doubt.

When not?

14. There are some types of litigation by and against trustees which are not suitable for *Beddoe* applications. These are cases entirely internal to the trust. They include non-contentious construction cases and applications to vary the trusts. These are too obvious. But they also include breach of trust claims against one or more of the trustees. In these cases the trustee defendants are ordinary litigants and must defend the claim at their own expense, their own risk. It is wrong for them to use trust money to fund their own defence. There is a danger that trustees may try to act in breach of this rule, because they are the trustees currently in control of the trust assets and income.

15. In addition the trust deed itself may provide expressly for the trustees to participate in third-party litigation without the need for a *Beddoe* application.

How?

16. I am not going to burden this talk with details of procedure. I am conscious also that many of those here do not practise in England and Wales. Those who do will need to be familiar with Part 64 of the Civil Procedure Rules and the Practice Directions associated with the rules in that Part, specifically 64BPD. This contains quite lengthy guidance, and some of its points are points which I shall mention in passing.

17. In one way the Practice Direction is helpful in emphasising the desirability of dealing with *Beddoe* applications on paper without the need for an oral hearing.

18. But in other respects the procedure seems almost designed to increase up-front costs. For example, the trustees' evidence is supposed to explain what consultation there has been with beneficiaries, and with what result. It should also state whether the

practice direction on pre-action conduct has been complied with, and whether the trustees have undertaken mediation, or propose to do so, and if not, why not. Importantly, the procedure requires the trustees to exhibit instructions to an appropriately qualified lawyer together with his Opinion on those instructions, advising on the merits. If there are minor beneficiaries as defendants, then they will need written advice as well.

19. It seems therefore that the Master or Judge is expected to rely on the advice of at least one lawyer, very often two or more, normally counsel. It is hard to reconcile this with the original assessment of Lindley LJ that applying to court was better value than taking counsel's opinion.

What could possibly go wrong?

20. The answer is, plenty. Lewin on Trusts (18th edition) contains a substantial section on *Beddoe* applications at the end of Chapter 21. These 10 pages contain a good and thorough account of the general nature such applications and also details of the procedure, especially the evidence which needs to be given in support of the application. In addition there are earlier parts of the same chapter which contain thoughtful discussions of many situations of difficulty which arise in practice.

21. Before dealing with those, I shall mention three general factors which tend to limit the usefulness of the *Beddoe* procedure : disclosure; cost; hard cases.

Full disclosure

22. The general principle is that full and proper disclosure needs to be made, otherwise the trustees' indemnity is not going to be secure. In other words, if it later turns out that the trustees have omitted or suppressed some important fact or document, which would have persuaded the court not to give them the required indemnity, then they would again be at risk as to their costs. And the circumstances then might well be very much against them.

Costs of the application itself

23. Generally the trustees, executors or administrators will be entitled, virtually automatically, to their costs of actually making the *Beddoe* application. Also the beneficiaries who have been made necessary parties will also be entitled to their costs, provided they have not behaved unreasonably in response to the application.

24. There are, however, exceptions to this general rule. In fact it is not a rule at all, merely a distillation of normal practice where all the parties have been well advised. By contrast it sometimes happens that the application has really been made necessary solely by the attitude adopted by one recalcitrant beneficiary, often the one who is also the hostile litigant in the main action. In a case like that the hostile litigant may well not get his costs awarded out of the trust fund, and he may even have to face a hostile costs order himself, though that would be highly unusual. At the other extreme it may be the trustees themselves who are the parties behaving irrationally, and in those extreme cases it is they who fail to get their costs awarded or even have costs ordered against them. That is even more unusual, but it does happen.

Hard cases : limited indemnities

25. In a plain case it is possible for the court, probably the Master, to give an open-ended indemnity to cover the whole of the future conduct of the main action. But sometimes the first order may limit the indemnity to a certain stage in the proceedings, such as until one month after disclosure of documents. Then, it would be necessary for the trustees to return to the court, now with greater knowledge of the factual issues which the case contains, inviting the court to continue the indemnity, or alternatively the court may be persuaded instead to bring the indemnity to an end. That would effectively turn off the tap. After that, the trustees would either have to settle the action on such terms as they can, or proceed at their own risk or (more probably) with the benefit of personal indemnities from adult beneficiaries.

26. I have also heard anecdotally of a judge who imposed a different type of limit on the trustee's action, by giving him permission to continue the proceedings but only until his costs had reached a stated level. I was told that the level in question was £25,000.

In these days that is an unrealistic level, and it would probably have been only a matter of weeks, if that, before the trustees would be back in court seeking a more extensive indemnity.

27. But even if the amount of such a limit were reasonable, this would not be an appropriate way to case-manage the proceedings, attractive though it might be to the beneficiaries. The reason is that it is simply arbitrary. What the court needs to know at a renewed hearing is what has happened during the next crucial steps in the preliminary stages of the case. It is useless for the court to be told that the trustees have got (say) three-quarters of the way through the preparation of written evidence before their solicitors announced that the cash-limit had been reached. What the judge needs to know is what the evidence reveals, on the trustees' side at least, and also what has been revealed by the disclosure of documents. Then a more informed view can be taken on the prospects of success or failure.

Unfairness to the hostile party

28. There is one major loser in all this procedure, and he may not even be a party to the *Beddoe* application. This is the litigant on the other side of the main action.

29. Suppose he is a claimant asserting an entitlement to the principal asset in a deceased person's estate, perhaps relying on a constructive trust or a proprietary estoppel. If the executors have obtained a *Beddoe* indemnity to defend the claim, but in the end they lose and the adverse claim succeeds, the indemnity will allow the executors to retain their own costs out of the estate, and it will, academically, also extend to the winning claimant's assessed costs. The winner will be entitled to whatever is left of the estate, but he will effectively have borne the whole cost of the litigation on both sides at the expense of what turns out to be his own entitlement.

30. In an extreme case the costs may exceed the value of the estate, and both sides may finish with nothing. That is exactly what happened in the famous fictional case of ***Jarndyce v Jarndyce*** in Charles Dickens' legal masterpiece Bleak House. It was an outcome which only the legal inhabitants of Lincoln's Inn find amusing.

31. This was well illustrated in ***In re Evans deceased*** **[1986] 1 WLR 101 (CA)**. The deceased died intestate leaving his estate worth £76,000 to his six adult nephews. But one of them claimed entitlement to the whole estate. To begin with the administrator, another of the nephews, defended the claim without a court indemnity and served a counterclaim for possession of premises comprised in the estate. But later he applied for permission to continue the defence and counterclaim, and it was recognised that an indemnity could prejudice the plaintiff nephew.

32. In that case a solution was found. The plaintiff in the main action offered an undertaking to make all the remaining nephews defendants to the main action, and on the basis of that offer asked for the *Beddoe* application to be dismissed. The Master did so. The administrator successfully appealed, but the plaintiff appealed successfully in his turn to the Court of Appeal, and the Master's order was reinstated. The point of the case is that with adult beneficiaries the realistic course may be to compel them to accept the commercial risks of the main litigation. Cases of this kind depend heavily on their own particular facts, and different results might be achieved if, for instance, there were minor or unborn beneficiaries involved, or if the adverse claim appeared weak.

33. The cases of real difficulty fall into four main categories : —

(1) Creditor claims;

(2) Adverse beneficiary claims;

(3) Claims against previous trustees;

(4) Claims against beneficiaries.

And in all these cases the issue which the Judge faces, and therefore the issue which the parties to the application need to address, is an assessment of risk : what is the prize; what is the stake; what is the risk? In other words what benefit is to be achieved by pursuing the main action, what is it going to cost (win or lose), and what are the odds of winning and of losing? The parties will obviously argue for the best outcome for them individually, but the Judge's task is to decide what is in the interests of the beneficiaries as a whole.

(1) Creditor claims

34. These are commercial claims against the trustees as such. The category extends to claims by a trustee in bankruptcy of the settlor, or a claim by an overseas tax authority or the Serious Fraud Office. In these cases the real task is to see whether there is anyone other than the trustees, such as the principal beneficiary, who should be made to shoulder the commercial cost of the defence. But if there is no beneficiary in that position, then the trustees may well be given permission to defend. There is after all a principle, though not an overriding principle, that a trustee should generally defend the validity of his own trust against adverse claims, and in particular that a trustee should not unnecessarily assist an adverse claim. For this reason, incidentally, trustees should avoid drawing attention to *future* claims against themselves, which are no more than potential.

35. Rather different issues arise if a trustee suspects one of his own beneficiaries, probably the settlor, of money-laundering offences or tax evasion or other serious crime. The trustee may have a duty to report his suspicions, and then to withhold payments from the trust, contrary to his ordinary duty as a trustee. In such cases an application to court is normally impossible, because it would amount to tipping-off. Faced with such difficulties you would be wise to familiarize yourself with ***Bank of Scotland v A Limited*** **[2001] 1 WLR 751 (CA)**.

36. Somewhat different again are claims by a divorcing marriage partner about information and documents relating to the trust. Assuming the ancillary relief proceedings are being fought out in a different jurisdiction, trustees will be wise to apply for directions in their own jurisdiction. Generally courts discourage trustees from becoming party to the overseas proceedings. But trustees may well finish up providing the parties or their solicitors with information and trust documents, on strict terms as to the use which may be made of them, in order to avoid more damaging inferences being drawn by the overseas judge.

37. As usual it is the interest of the beneficiaries as a whole which is in issue here, not just that of the defendant to the ancillary relief proceedings. So when I say 'damaging inferences' I mean inferences which are damaging to the interests of the beneficiaries as a whole. In a case where the interests of different beneficiaries do not coincide, it is

the *Beddoe* judge's task to balance the different interests, and it is the task of the trustees and their advocates to guide the judge toward the best answer for the trust.

(2) Adverse beneficiary claims

38. These can be regarded as similar to creditor claims with the distinction that the claimant, if successful, will end up as the beneficial owner of the trust property. It may be an out-and-out claim for beneficial ownership, such as a claim by an estranged or divorcing marriage-partner based on an allegation of sham, constructive trust or proprietary estoppel. Or it may be a claim to be an additional beneficiary of a continuing trust, for instance a claim by an illegitimate child not previously recognised by the parent. A claim against an executor based on a rival will is another example. I mentioned the duty of a trustee not to assist an adverse claim or undermine the interests of his own beneficiary, but in a case like this who is his own beneficiary?

39. This feature has at least two consequences, first that the trustee is wise to remain as neutral as possible when making the *Beddoe* application, and second that he and the court might have to look more closely than usual at the merits of the main claim, at least if that claim seems to be a strong one.

40. In these cases the practice relating to *Mareva* injunctions, or freezing orders, is instructive, especially where the claim is for a proprietary interest in property vested in the defendant. Here too the issue is whether the defendant should be permitted to use money for the legal costs of defending the action, and for living expenses, and if so how much, given that the plaintiff may turn out to be the true owner of the property in question. Normally in those cases the court does not examine the merits of the claim in detail unless the claimant can show that the proprietary claim is overwhelming. In all other cases the defendants right to pay lawyers to defend the claim is regarded as paramount.

41. That is not the end of the story, as was shown in ***United Mizrahi Bank v Doherty* [1998] 1 WLR 435**. This case decided that, although the defendants were free to apply funds in discharge of their legal fees, as provided expressly by the usual proviso to that effect in the freezing order, this did not itself protect the solicitors who received their

fees from a later claim by the claimants based on knowing receipt. As in the famous comment about Wagner's music, this is not as bad as it sounds, because normally the solicitors will be able to defeat the claim for knowing receipt anyway if ***Carl Zeiss Stiftung v Herbert Smith & Co (No 2)*** **[1969] 2 Ch. 276 (CA) is** still good law.

(3) Claims against former trustees

42. It is clear that a new trustee has a duty on appointment to collect in the trust assets. This is known to include some kind of duty to consider whether there may be a claim against former trustees for breaches of trust. Failure to make such a claim may itself amount to a fresh breach of trust by the new trustee. I shall come back to a notorious case of this kind in a moment, but in the meantime I merely say that it is essentially a commercial decision in such a case whether the claim is worth pursuing. The duty to pursue former trustees is not absolute : ***In re Forest of Dean Coal Mining Company*** **(1878) 10 Ch D 450**. That was a case about a company director, who was held not to have been at fault, when he became a director, for not making a claim against the promoter of the company even though the director knew that the promoter had taken a back-hander when the company acquired its property, but Sir George Jessel MR included a well-known passage at pages 453–454 about new trustees in his (typically) extempore judgment :

> 'Analogy or illustration is sometimes useful. In the case of new trustees newly appointed, their liability extends to seeing that they get the trust funds into their hands; but did anybody ever imagine that their liability extended beyond that, or that they are bound to enquire into all the dealings with the trust fund from the origin of the trust, and to pursue every past trustee who might by any means whatever have become liable to pay more than the actual trust funds? The case I would put in illustration is this : suppose a trust of £10,000 consols, and one of the trustees with the connivance of the other sells out the stock and engages with it in trade; ten years afterwards he replaces it; five years after that the trustees retire, and new trustees are appointed in their place, who find the fund intact. One of the trustees is then told, "It is all right now, but the money has only been paid in five years before," and is told that

> one of the former trustees had used it in his trade. It is intolerable to suppose that the new trustees should be made liable for not filing a bill, as it was formally under the old procedure, or bringing an action, as it is now, against the former trustee, or his representative, supposing he is dead, with the value of getting from him either the extra interest over and above the interest of the consols, or the profits he might have made from the use of the money in his business. Is that sort of liability on the part of a former trustee one which the new trustee is bound to enforce, though no doubt it would be one which the *cestui que trust* has power to enforce?'

Is the same attitude correct today? Discuss.

(4) The adverse litigant as one of the beneficiaries

43. There is a well-known difficulty which arises where the opponent in the main action is also one of the beneficiaries. It is quite clear that such a beneficiary, like all the others, is entitled to be joined as a defendant to the *Beddoe* application. And yet it makes no sense for that person to be provided with too much detail about the trustees' case against him. Particularly, it may be inappropriate for him to see counsel's Opinion and the instructions on which it is based. It may also be inappropriate for him to hear submissions made by the trustees or by other beneficiaries as to the merits of the claim.

44. In theory this is not only a well-known problem, but one with a well-known solution. An important case of this kind was ***In re Moritz deceased*** **[1960] Ch 251**, a decision of Wynn-Parry J. He decided that, although the hostile beneficiary had to be a party to the *Beddoe* application, the practice was that he should not be present in court when the matter was debated and should not be furnished with the evidence on which the court was asked to act.

45. This procedure was clarified later in ***In re Eaton deceased*** **[1964] 1 WLR 1269**, a decision of Wilberforce J. The clarification was that some of the evidence could legitimately be served on the hostile beneficiary, but that it was the practice for the

exhibits containing the sensitive material not to be served on the hostile defendant. If necessary, the court can be asked to adjudicate on what should and what should not be served in that way. Then, during the hearing of the application, the hostile beneficiary may well be present during some, or even most, of the hearing. But he is then excluded from any part of the hearing during which the secret evidence or secret submissions are being made.

46. I have experience of cases involving a kind of revolving door, where the hostile beneficiary is absent during part of the hearing, then returns in order to make his own submissions, requesting that the non-hostile beneficiaries should then be absent while his evidence and submissions are heard. In the ***Eaton*** case, it was revealed that the practice at that time was for the hostile beneficiary to provide the court with a written statement, which was read to the court by the trustees. This is not the practice today, and the hostile beneficiary normally submits a witness statement with his own exhibits in the normal way. Whether he is strictly entitled to have the other beneficiaries excluded during his own part of the proceedings is uncertain.

'Unusual, complicated and disturbing'

47. But one of the principal problems with the whole concept of the *Beddoe* application is that, in those cases where the adverse litigant is also a beneficiary of the trust in question, and sometimes in other cases as well, if there is a significant difference of approach between different beneficiaries of the trust, the application by the trustees can sometimes be hi-jacked and turned into a kind of surrogate for the main action. The trustees themselves may feel that they are certain to be awarded their own costs of the *Beddoe* application itself to be met out of the trust fund, and it is normal for all the other parties as beneficiaries of that trust to have their costs paid out of the trust fund too. But that creates a frame of mind, in the lawyers as well as their clients, that they have free rein to rehearse the whole vendetta at someone else's expense.

48. This can lead to startling results. Normally the facts of such cases remain confidential, because the *Beddoe* application is generally heard in private and there is therefore no published report of the proceedings or their outcome. But if the case goes to the

Court of Appeal the confidentiality disappears, and it was in just such a case in July 2011 where the facts of a particularly extreme case became public.

49. The case is called ***Howell v Lees-Millais*** **[2011] EWCA Civ 786**. The main judgment was given by Lord Neuberger, now President of the Supreme Court but then the Master of the Rolls, and he described the circumstances as 'unusual, complicated and disturbing'. In one sense the facts were quite simple. The claimants were trustees of two settlements. In December 2006 they issued a *Beddoe* application applying for permission to pursue various claims for breach of trust and professional negligence. The trustees were in favour of pursuing the litigation. The defendant beneficiaries were not, except for a professional negligence claim against a firm of solicitors. The judge agreed with the defendants. He made it clear in the course of his judgment that, in his view, the trustees had acted in an inappropriately partisan way.

50. After judgment there was a dispute about the costs of the application. In the course of 2009 and 2010 the Court of Appeal judgment mentions sums of £200,000-odd, £350,000-odd and £175,000-odd for the three beneficiary defendants respectively. Towards the end of his judgment Lord Neuberger addressed two additional points. One was about the confidential nature of such proceedings generally, which could be a whole new subject of its own. The other was about the nature of the particular application before the court : —

> '42. First, the history of this application . . ., the costs incurred in connection with it (as may be inferred from the sums negotiated in March and April 2010), the court time this whole application has taken (eight days plus four days on costs, not to mention interim hearings and this appeal), and the duration of the application (which started over fifty months ago) are all unquestionably inappropriate, and appear to be little short of scandalous.
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> '43. In *Re Beddoe, Downes v Cottam* [1893] 1 Ch 547 a trustee was refused permission to take his costs out of the trust in relation to certain proceedings in which he had taken part on behalf of the trust and had been unsuccessful. Justifying that refusal Lindley LJ referred at page 558 to "the ease and comparatively small expense with which trustees can

obtain the opinion of a Judge of the Chancery Division on the question of whether an action should be brought or defended at the expense of the trust estate". To the same effect Bowen LJ mentioned at page 562 the "inexpensive method" available to a trustee who "is doubtful as to the wisdom of pursuing or defending a lawsuit".

'44. The possibility that an application of that type would involve well over twelve days of court time, would require more than 3,000 pages of evidence, would take some five years (or more than eighteen months if one ignores the costs issue) to resolve, and would incur the parties in costs exceeding the equivalent of £1 million in present day value, would have seemed inconceivable to those two experienced judges. This should never happen again. In expressing this view I am not seeking to suggest any particular person is to blame. The Judge may have thought that the trustees carried a large proportion of the blame, but it would be unfair and inappropriate for us to express any view on the point.'

I am told anecdotally that the costs of the trustees were far higher than these hints reveal.

Is there a solution?

51. I repeat the sentence : 'This should never happen again.' And I finish with more rhetorical questions. Is any reform of the law feasible? Should the Trust Law Committee (a law-reform body on which I sit on the executive) work on a proposal for reform? Should the whole procedure be abolished? Should judges and masters be tougher in limiting the expense of the application? Should the adverse litigant be restricted to a statement (two sides of A4?) to be read to the court by counsel for the trustees? How could restrictions of that kind be reconciled with the requirement of full disclosure? How would it be compatible with the requirement of the Human Right Convention article 6(1) for a public trial? Would any of that have helped in the ***Lees-Millais*** case?