

Junior Counsel's Note of Various Arguments and the Court's Rulings in respect of the

Audio Recording of Witness Evidence by the Claimant.

Abbreviations in this Note:

HHJ = His Honour Judge Seys Llewellyn Q.C.

LW QC = Lloyd Williams QC, Leading Counsel for the Defendant

18th April 2013

Mr Kirk – I make an application to tape record the proceedings of this witness, I do not have a writer with me or anybody else who may be allowed to take notes.

HHJ – So it's for the purpose of you making your notes, in your own time?

So for those purposes and for those purposes only, generally the rule is that there should not be recording in Court, so that the tape which is kept by the Court is the record, the short answer is you may do that for your own purposes, but not to be passed on to any other person or tape streamed onto your website or anything of that sort.

Mr Kirk – It's for the purpose of private prosecutions.

HHJ – You can use it for your own notes but not for any other purpose.

Mr Kirk – I can't use it for the magistrates court? We need an accurate record of what they say for my private prosecutions.

HHJ – The answer is no, you cannot use it for any purpose, other than to refresh your memory as to what is said. If anyone applies for a transcript for a proper purpose, that can be dealt with by a Judge of this court, but that is the only purpose for which you can use that recording.

I haven't called on you Mr Williams.

LW QC – I am concerned, this is highly unusual, as documents and transcripts end up at all different sites.

HHJ – I will make the order in express terms, so there is no doubt about it. [To Mr Kirk] This is an order, and if you were to break it you would be in contempt of Court. I will do it now, before we start.

[HHJ rose to draft his order].

[Resumed.]

HHJ – Mr Williams, any observations on the terms of the order?

LW QC – None.

HHJ – Mr Kirk?

Mr Kirk – I have nothing to say about the order, I am not in a fit position to comment on the document.

HHJ – The order will be issued today and sealed, Mr Kirk, you are an intelligent professional man, you appreciate if you act in breach of that order you will be dealt with by imprisonment or fine.

...

19th April 2013

Mr Kirk - ... Oh about the tape recording, I have very strong views about this, with that, it will only be for a witness, I don't want to be accused of picking up extraneous conversations in the Court.

LW QC – Does that mean Mr Kirk is recording today?

Mr Kirk – That's a good point, your order names one witness. I am sorry, I meant to ask for the next witness.

HHJ – Is it witnesses today? Mr Driscoll is the next person to be called. On the one hand, it is an exceptional course, what I ordered yesterday made it very plain that the recording was only for the purpose of being able to make a note for the purposes of these proceedings only, not for any other purpose and it will be subject to the same limitations that I very clearly set out. Ordinarily I am aware that one wouldn't do this in a short trial with a litigant in person, it is exceptional, I am conscious that Counsel are accustomed to making their note as they go and are disciplined in being able to remember one incident which may be quite similar in its subject matter to another, anything which makes it more likely that Mr Kirk attributes exactly what the witness did say, not a misremembering, I am not being rude, but there have been occasions when you have misremembered a witness within a couple of minutes.

LW QC – Your Honour, we are concerned about it, yesterday concerned the dangerous driving incident, so be it. Mr Driscoll simply records a crime on behalf of Mr Kirk, maybe Mr Kirk has questions about general chit chat, this is not the most crucial witness, and now if he is to be recorded, why not every single witness from now on, the general rule for all Courts is that litigants cannot record for themselves. In effect he is now asking for all witnesses to be recorded. The way in which Mr Kirk has complied with very gentle directions from this Court and then very firm directions, does not augur well for how these tapes will be treated in the future.

HHJ – What if I make an order directing that he destroy the recording after this trial?

LW QC – Well, Mr Kirk produces documents out of a hat that are 15 years old, so he will keep things.

HHJ – No, the question is, shall I direct they not be kept?

LW QC – May I suggest this, this might be a slower way forward with the witnesses, but if Mr Kirk could sit down at his desk and make his notes as he goes along?

HHJ – I am simply seeking a pragmatic way of dealing with it. I may have a pretty good idea of whether a witness is of huge interest in the case, or very little, but I can't know, but there may be something Mr Kirk wishes to question him about that I have not foreseen.

LW QC – We have witnesses who may not take up the day in any event, so I would urge the Court to allow Mr Kirk to take notes, so what started off as a wholly exceptional witness yesterday does not become the norm for the rest of the case. The additional concern we have, there is no doubt that, not in respect of this case, but in respect of other cases involving Mr Kirk, filming of court proceedings have

been made by him; once there is recording of the court room, we as advocates don't know what is being recorded or not, we have no control or knowledge as to what he is recording. Your Honour will no doubt recall yesterday's afternoon's approach to witnesses.

HHJ – That was yesterday and my attitude has been made very plain about proper conduct in Court. I think that I may reflect on a slightly different way forward but of course I will listen to anything Mr Kirk has to say and consider it.

With a great number of witnesses we have got through perfectly well to date, subject to that issue of recall from time to time. I hope I am being careful and sensitive to everything in the case, maybe rather than take the highly exceptional course as a matter of default, I will see how we go with a particular witness, and if Mr Kirk says he is struggling I will review it on a witness by witness basis.

Mr Kirk, it was a wholly exceptional course I took yesterday, and I don't want to drop into it as a matter of habit, that would be contrary to what the Courts do. In professional experience of 40 years, I have never known a judge do what I ordered yesterday, is there anything you want to say?

Mr Kirk – Yes quite a lot, it has been suggested that I have tape-recorded other court proceedings.

HHJ – I have put that out of my mind.

Mr Kirk – I will be asking the court at a later date for those two to be recalled yesterday, I was still...

HHJ – I am going to concentrate on whether there is recording or no recording.

Mr Kirk – My problem is that some of the uninteresting or boring witnesses turn out to be the best. I have a mental disorder that I cannot get resolved.

HHJ – I am dealing with recording or not, and as far as I know your mental state does not come into that.

Mr Kirk – I have a smashed left wrist, I can't even read my own writing. For me to be able to tape record just the evidence in chief and re-examination is all I need, and as for destroying it all, I would be very happy to destroy it all once proceedings in this case are finished. If there is any aspect of appeal, things hold stay until an appeal, but all my other actions are being stayed, as it has been ruled against my wishes, that actions, 4, 5 and 6 are stayed and I cannot get them to progress through the court system until the outcome of this case. I can foresee the tapes would be needed for anything related to... So Cocksey denying I had been assaulted, that's the fourth action, and he will be giving evidence again and it would be very nice to have had his evidence.

HHJ – Mr Kirk, everything is being recorded, there will be a transcript. If there is any relevant evidence to future proceedings, there will be a transcript for the Court to go on.

Mr Kirk – I have clearly understood your orders that it is purely for my personal use for use during the trial, I will be appealing to a higher Court if I am now restricted.

HHJ – That may be, but I have to decide matters as fairly as I can at this stage. I will just take 60 seconds *to reflect*.

[Judge rose for a short time and then resumed]

HHJ - Yes, a very simple ruling I suppose, Mr Kirk orally makes an application that the evidence of the initial witness today, and I infer, any witness thereafter, should be the subject of permission for him to

record the evidence of the witness on his mobile 'phone. Yesterday I did make an order on the basis of potentially a very significant witness in the case, allowing him to do so, on very stringent conditions, that the recording should be used only for his own purposes in the proceedings, in order that he could prepare a note for his use in the evidence and for use in submissions at the end of the case.

That was a wholly exceptional course, we have progressed for some weeks with witnesses, with Mr Kirk being on his own for the most part, and making his own notes. He says his handwriting is terrible and I agree with that, but the Court has given time for significant answers to be written by him, and there have been many, if not countless times, just as I have been making my full note at length in handwriting, so has Mr Kirk, it seems to me it may well arise again, that in respect of a particular witness, the closeness of attention to every word and detail is such that I may permit a recording, subject to the same limitations, but it should not be simply a matter of course.

If, as matters go forward I perceive that this is a witness where Mr Kirk should fairly be given the benefit of that wholly exceptional facility, then I will intervene to invite him or tell him that he has permission to record and of course he will be able to make that request, but I think that in respect of the witnesses to be called today, so far as I presently see, there is not a need for that, and I will take care that Mr Kirk have time to record answers as has been the case throughout this hearing. It is suggested by Mr Williams QC that Mr Kirk be permitted to sit when asking questions, I would do that, but I suspect Mr Kirk finds it easier to deal with matters on his feet, if it makes it easier to sit so he can write, then of course I shall be sympathetic to that.

In short, there is not permission to record the evidence of the witnesses today, but I shall carefully review as we go along, that permission, when Mr Kirk asks for it, and review when necessary, I hope to be careful to protect him against disadvantage as a lay person, but that is the course I shall take.

Mr Kirk – This lady, Mrs Canterbury, I suspect I shall have absolutely no need to record her evidence. As for the other gentleman, he may be quite innocent as to the information as to what I am after, he may have information about the covert surveillance and he has been involved with my Guernsey vehicles. His evidence is so important to my case that there was a conspiracy between the senior officers, using the junior ones as foot soldiers, that there were requests from another jurisdiction, Guernsey, to cause me trouble.

HHJ – Well I will keep that under review, as we go, but we will start without recording.

Mr Kirk – Right.

...

[After the witness Mr Driscoll's evidence in chief]

Mr Kirk – I want to tape record this.

HHJ – I want to see how we go. Mr Driscoll, it's unusual for there to be a private recording of evidence, in this case if it happens at all, it's simply to assist Mr Kirk in making a note to remember what you have said. For the moment we are going to go on in the usual way, but if I do say Mr Kirk you can record this, *no one need to get particularly alarmed by that. Yes, Mr Kirk.*

[Witness cross-examined by Mr Kirk].

...

23rd April 2013

Mr Kirk – I make application to tape record the cross examination of Mr Huckfield.

HHJ – At this stage, no, but I shall carefully monitor it and direct as appropriate.

24th April 2013

HHJ – Mrs Kirk is here to take a note, there are two others at the back, I would like one person to be the note taker please?

Mr Kirk – I consider that unfair and inequality of arms. We have a QC and a trailing barrister, and two runners for Dolmans solicitors. I want the other person to take notes.

HHJ – Help me, does either Mrs Kirk or your niece have difficulty keeping up?

Mr Kirk – They are not professional note takers, one has a history of a minor affect that affects writing, we have children who suffer from the problem.

HHJ – I will ask directly, Mrs Kirk how confident do you feel making a full note?

Mrs Kirk – I thought I was going to be the only one here, I think I will keep up. I will perhaps record differently to someone else.

HHJ – And I will ask Miss Jeune [Mr Kirk's niece]?

Miss Jeune – I am dyslexic.

HHJ – There are differences from Counsel and solicitors who have obligations to the Court and who are officers of the Court. I am going to say that Mrs Kirk should be the only one. If you are in difficulty Mrs Kirk, just raise your hand.

Mr Kirk – I am grateful but there is the matter of criminal conduct, he is a key witness, do I understand I am going to be able to tape record PC Roche?

HHJ – If you are applying for tape recording or note taking, we won't have both.

Mr Kirk – There is inequality of arms. The day you said I could tape record I didn't have a tape recorder, I then pressed the wrong button.

[HHJ conferred with the Court Clerk Mrs Pahl, who confirmed that the Court equipment had shown no evidence of another recording machine switched on in Court. (It is detected on the speakers.)]

HHJ – The decision is that you can attempt to record and Mrs Kirk can take a note, the reason is, is that the recording equipment shows up whether you are recording. Mrs Pahl tells me you must be right. There will be an order, and it will be that you only retain it for 7 days, so there will be a requirement that you erase the recording after 7 days.

*That's why I am giving you in a quite exceptional course, which I have not known another Judge take, 7 days, which is precisely designed to allow you to catch up over the evenings and have a weekend to survey them.*

LW QC – I would like to show him the photographs. Mr Kirk has just said he wants the recording for his private prosecution.

HHJ – That will not be allowed by the order I make. I will produce another order, in the same terms, I will insert a requirement as to erasure 7 days in respect of this witness' evidence, and I am taking this course, I would say, also because I am perfectly aware that for the purposes of these proceedings certainly it is possible to apply for a transcript on payment of the proper fee. It's very expensive and takes about 3 weeks.

For the avoidance of doubt the only recording that is permitted is the one taken by Mr Kirk.

[Evidence of former PC Phillip Roche]

...

LW QC – I will call Mr Dennis Crutcher

[Witness sworn]

Mr Kirk – I apply to tape record this witness.

LW QC – I would like to make submissions on that.

[Witness asked to wait outside.]

LW QC – We have now had 3 breaches of the normal rule. This relates to Grand Avenue Ely, this is straightforward, he deals with a very small part of the incident and custody, Mr Kirk's note-taker is here. Mr Crutcher is not a person who talks rapidly. We should proceed in the usual way until there is some difficulty.

HHJ – Is there anything special about this witness?

Mr Kirk – Yes, he is the person who kept me locked up all night. It was on his word alone.

HHJ – I shall carefully review if I think there is any inconvenience or difficulty. Mrs Kirk is there to assist you, the answer is notes, yes, recording, no.

HHJ (addressing the persons at the back of Court) Man at the back, don't take notes (HHJ explained the usual rules).

[Mr Crutcher recalled and gave evidence]

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25th April 2013

Mr Kirk – I will lodge an appeal without delay on the use of the tape recordings, I need to give them to an outside police force. Yesterday you restricted the time period in which I could have it to 7 days. I don't think you stopped me from duplicating it and giving it to an outside police force, can I have clarity on that?

HHJ – Since that's a new point, I will think about that at lunchtime and let you have that clarified.

...

LW QC – I will now call Mr Davies.

Mr Kirk – I make application to record Mr Davies' evidence.

LW QC – I object to that on the basis that it's clear from Mr Kirk's comments this morning that he is intending to use the recording for the purposes of further criminal proceedings. I invite the Court to adopt the approach to see how we go with the evidence in chief, and to adopt the usual course, not the exceptional one, of not permitting recording.

HHJ – I will take the same line as I did before, with the last witness, if I think there is a difficulty in getting down, in note form, the evidence of Mr Davies, then I will review the position, for the moment we will do it in the conventional way, and not in the wildly unconventional way.

LW QC – May I just respectfully remind the Court there are two outstanding orders in respect of previous witnesses?

HHJ – Yes, I was going to insert the provision about destruction of the recordings within 7 days.

Mr Kirk – I need a variation to your order, as I want to send the recording to an outside police force. It's just that I have to erase, the evidence was 3 or 4 days ago, I only have 3 days left. I went to Bristol last night, I ran out of time to do it.

HHJ – Just to let you know my initial thought is this. It's very clear and settled law that evidence in proceedings is given primarily for the purpose of those proceedings, so even to contemplate tape recording the proceedings for the purpose of some non-civil proceedings against the witness goes against the grain and the tapestry of the rules.

But I want to reflect on that, rather than make an instantaneous ruling, particularly as you are on your own and I am not hearing a lawyer's submissions on it on your behalf.

Mr Kirk – All I am asking is that you delay the destruction of these so that I am not in breach of your order for more than a week, can I apply for a stay?

HHJ – As you are on your own, I will give you guidance. It's always open for someone to apply for permission to appeal and to say to the appeal Judge, and say "please, until it's been resolved, can you stay that part of the order which requires erasing?".

LW QC – Although Mr Kirk isn't going to start recording this witness, if what he is saying is right, and he wants to pursue a criminal prosecution, each witness will have to be given a warning against self-incrimination.

HHJ – That's a freestanding obligation on my part in any event, so far each witness has shown no sign of giving an answer which would incriminate him or her, I put it very neutrally, if in respect of any witness, if I thought they were approaching a point where they were incriminating themselves I would do so, but I appreciate the spirit in which you raise it.

LW QC – Thank you, I will call Mr Davies.

[Mr Davies' evidence in chief].

Mr Kirk - I make application, in the light of the evidence, that I tape record this?

HHJ – No, I have already made it plain we will see how we go, and if I see that there is a real difficulty for you I will review that.

(To the witness): The context of that, Mr Davies, is that Mr Kirk is on his own and it's whether I allow Mr Kirk assistance by recording as a source for making notes, but we will now get on with the questions themselves.

[Mr Kirk cross-examined the witness].

...

LW QC – Your Honour wanted to consider the orders in relation to tapes. The two witnesses that Mr Kirk has recorded. The second thing is how long Mr Kirk keeps the tape.

HHJ – Yes, [To Mr Kirk] I have been listening to what you said and I undertook to think about it. I am very clear that just as everything in this case is being transcribed, and if there are proper reasons to apply for a transcript they can do so, my ruling will stand, tapes must be erased after 7 days. But I will now say 10 days, simply for the reason that if you are going to appeal that ruling, it can be put before a higher Judge who can hold the fort by ruling no erasure takes place, I am going to make it 10 days from today. Besides which you didn't succeed in recording the first one or the second one, but you shall have the orders anyway. There is only so much that one can do.

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29th April 2013

Mr Kirk – I make an application to tape record the evidence of Mr Roe.

HHJ – Under the same conditions, I will spell it out, they are not for the purpose of anything other than the civil proceedings, and under the same condition as to erasure, after 7 days, the other one was 10 days, this will be 7 days. And to underline it, if you have any private contemplated criminal proceedings, the

recording is not available for that purpose.

LW QC – You raised the issue as to a warning. If the witness could receive the usual warning.



Mr Kirk – So that I can use it until the end of this action.

HHJ – You will guess that I have already thought about it, it is already an exceptional indulgence which can be dealt with in evenings and on weekends, and that should give you time for preparation. So that means permission to appeal in respect of each order as to erasure is refused, but I will fill in the form.

Mr Kirk – May I tape record the next witness?

HHJ – On Friday afternoon I had to deal urgently with an Administrative Court matter, which concerns something which is, or isn't going to happen, at 2pm today, so I ought to deal with that instantly, it will take no more than 15 minutes on paper, so I will need to look at those papers. Meanwhile it's sensible if I say 10 past 11 so that Mrs Rewbridge doesn't have to sit here and then struggle back to the witness room.

Mr Kirk – I have quite an extensive application in respect of today's hearing, I will do it now.

[Mr Kirk made his application, which did not relate to the audio recording of witnesses; he did not make any further reference to wishing to record the evidence of the next witness, so it was not considered by the Court.]

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