

1 Wednesday, 28 September 2011

2 (9.30 am)

3 LORD JUSTICE LEVESON: Right. Yes. Mr Caplan, we are here
4 on your application so let's start.

5 I received your written submissions, thank you very
6 much, and I think they have been circulated to those of
7 the other core participants who are here. I don't know
8 how many are. Mr Sherborne I am told is here. Yes.
9 And counsel for the Metropolitan Police. Yes. Thank
10 you.

11 None of the other media core participants; is that
12 right?

13 MS PHILLIPS: I am here on behalf of The Guardian.

14 LORD JUSTICE LEVESON: On behalf of The Guardian. Thank you
15 very much indeed. Right.

16 Application by MR CAPLAN

17 MR CAPLAN: Thank you.

18 Sir, may I just begin by thanking you very much for
19 agreeing to be here this morning to receive our oral
20 representations, and can I begin by first of all
21 assuring you I will be as brief as I can. Secondly, I
22 am sure you will understand that Associated Newspapers,
23 whom I represent, do not in any way wish to be
24 confrontational with the Inquiry, but you will also
25 understand of course --

1 LORD JUSTICE LEVESON: The letters didn't quite read like
2 that.

3 MR CAPLAN: Well, they raise issues of concern, can I put it
4 like that.

5 LORD JUSTICE LEVESON: Yes.

6 MR CAPLAN: You will understand, sir, of course, that your
7 Terms of Reference raise very important issues for the
8 future conduct, regulation and ownership of the
9 newspaper industry, and we have raised in correspondence
10 with the Inquiry, I think since the end of August,
11 several concerns regarding the proposed procedures to be
12 adopted and regarding the role of the six assessors who
13 have been appointed.

14 May I say that with regard to our submissions which,
15 as you say, have been circulated to core participants
16 and perhaps other interested parties, we have been
17 informed that the Newspaper Society, the Newspaper
18 Publishers Association, Trinity Mirror and The Guardian
19 support our representations with regard to our
20 application for additional assessors and also with
21 regard to the need for clarification regarding the role
22 and function of the assessors. So they are in support
23 of what I have submitted in writing and am briefly about
24 to elaborate this morning.

25 Fundamental to our concerns, of course, is the

1 difference, of which you will be well aware, under the
2 Inquiries Act, of an Inquiry by Chairman alone, sitting
3 if necessary with assessors to assist him in areas of
4 individual expertise, that's one thing, and that is such
5 an Inquiry here; alternatively, Inquiry by Chairman
6 sitting with panellists who are appointed having regard
7 in particular to sections 8 and 9 of the Inquiries Act,
8 where the Ministers have to be alive to the need for
9 balance of the Panel and to ensure that the Panel has
10 appropriate expertise to investigate the issues raised
11 by the Terms of Reference. In those circumstances,
12 quite clearly, the panellists sit with the Chairman and
13 make findings of fact and play a full role in the
14 Inquiry.

15 If one goes the route of a Chairman alone, being
16 assisted by assessors in their particular areas of
17 expertise, then in our submission the Inquiries Act is
18 clear and the assessors play only an advisory and
19 limited role. I say "limited"; limited to their field
20 of expertise or knowledge for which they have been
21 drafted in to the Inquiry.

22 Section 11, which provides for the appointment of
23 assessors, makes it clear that an assessor comes in
24 because he has the expertise that makes him a suitable
25 person to provide assistance.

1 Now, for whatever reason, sir, Ministers have
2 decided that your Inquiry should not, although it raises
3 very far reaching and important issues, be an Inquiry
4 with panellists who will share the burden with you and
5 assist in the final determination and findings, it
6 should be an Inquiry by you alone, assisted in
7 particular pockets of expertise by assessors.

8 That is an important distinction, in our respectful
9 submission, to bear in mind. It is not one, with
10 respect, which we believe has clearly always been at the
11 forefront of Government or, if we may respectfully say
12 so, the Inquiry itself, and we have referred in our
13 skeleton argument to, for example, the Downing Street
14 website, where the Prime Minister announced today the
15 six Panel members who will assist the judge --

16 LORD JUSTICE LEVESON: That doesn't really take us anywhere,
17 because the fact is that, as was made very very clear,
18 the members are appointed under section 11 of the Act,
19 as you have yourself said.

20 MR CAPLAN: Yes.

21 LORD JUSTICE LEVESON: Whether one has used the word
22 "panellist", and I've called them a panel of assessors,
23 and if that has caused confusion it shouldn't, because
24 the terms of their appointment are on the web and are
25 clear for all to see.

1 MR CAPLAN: Yes. The terminology has been sometimes --
2 "panellists" may have caused confusion. May I refer to
3 another matter which clearly did cause concern, and that
4 is in the first public statement on 28 July, your
5 Lordship did say that:

6 "I intend each of the panellists/assessors should
7 have a central role in the work and that the final
8 report will be a collaborative effort. I will strive
9 for unanimity. If any particular recommendation is not
10 unanimous, I shall make the contrary view clear."

11 Now, although clearly you have never abrogated and
12 would never abrogate from the personal responsibility
13 you have to make your own findings, our concern has been
14 heightened by the fact that the assessors were to have
15 or are to have a central role in the work of the Inquiry
16 and the report will be a collaborative effort and that
17 there will be a striving for unanimity. If assessors,
18 as we contend, have purely an advisory role, limited to
19 their areas of expertise, then there is no purpose for
20 the concept of unanimity or, indeed, for a collaborative
21 discussion about the findings.

22 LORD JUSTICE LEVESON: I'm not so sure I agree with that.
23 The conclusion will be mine and mine alone, but I am
24 very conscious that I step into an area, I hope
25 a profession, which is not the one which I have spent

1 40 years of my life in and, for example, it is critical
2 that I obtain advice on those who have made their lives
3 in this area, not least because I would be keen to
4 understand any flaws in thinking that I might have
5 because of my lack of experience.

6 So when I talk about a collaborative effort, I am
7 not suggesting that I will sit down and say, "Now, what
8 can we do about this?" across the range. I will use the
9 expertise of the assessors in order to check whether my
10 thinking is fundamentally flawed.

11 When I say that I will publish opposing views, that
12 is actually to make it clear to the world where I am
13 different from others who have expertise. I won't be
14 seeking the expertise of the ex-Chief Constable of the
15 West Midlands Police on ethical considerations affecting
16 the press, but I certainly shall in relation to the
17 relationships between the police and the press.

18 Now, I don't see that that in any way contradicts or
19 undermines the position of assessors or my position
20 within the meaning of the Act.

21 MR CAPLAN: Sir, may I just focus on this issue for
22 a minute. Striving for unanimity with the assessors is
23 not a course which, respectfully, we suggest is
24 necessary or, indeed, within their role as advising
25 within very particular areas. Indeed, we now have

1 an assessors' protocol with which we do largely agree,
2 if I may respectfully say so, which we received on
3 Monday night, with the one exception. But the important
4 point -- I am anxious, obviously, because of the issues
5 at stake here and before the Inquiry progresses too far,
6 that we've had the opportunity to put our interpretation
7 of an assessor's role under the Act.

8 Of course, panellists, as I don't think there's any
9 dispute, have a very different function to play.

10 LORD JUSTICE LEVESON: Of course they have, because
11 panellists are judges. In other words, if these six
12 assessors had been appointed panellists, you would be
13 appearing in front of seven judges, each of whom,
14 presumably, would have a full vote and my vote would be
15 neither more nor less valid than anybody else's. That
16 may or may not be so, I have not looked at this, but
17 that's not where we are.

18 MR CAPLAN: If I may just briefly pursue this distinction
19 for one further moment.

20 The reason, of course, that panellists are entitled
21 to play a greater role is, first of all, because before
22 they are appointed the Minister has to have regard to
23 their expertise, of course, and to a balance within the
24 Panel. As far as assessors are concerned, they have no
25 consideration of impartiality; of course, it's not

1 necessary: there's no question of balance, it's not
2 a statutory concept that applies to assessors; they are
3 merely there to provide expert assistance within their
4 particular areas.

5 Our concern is -- and it goes to the point I'm
6 making -- that if assessors are not constrained within
7 their limited role of advising within their specific
8 areas of expertise, then there is a risk, obviously,
9 that if they have a partial view or anything else, that
10 it will filter into the Inquiry and it is outside of the
11 function of an assessor.

12 LORD JUSTICE LEVESON: I would be very interested to know
13 whether it's common ground that assessors do not have to
14 bring any view of impartiality into their work.

15 MR CAPLAN: In that regard, may I just refer you back then
16 to section 11, obviously which is the determining
17 provision as far as the appointment of assessors are
18 concerned.

19 It is 11, subsection (4):

20 "A person may be appointed as an assessor only if it
21 appears to the Minister or the Chairman, as the case
22 requires, that he has expertise that makes him a
23 suitable person to provide assistance to the Inquiry
24 Panel."

25 And I mention the point that if one was a panellist,

1 which is somebody who is participating in findings of
2 fact, then of course section 9 will apply.

3 LORD JUSTICE LEVESON: I understand that. But if you are
4 right in your construction that the assessors do not
5 have to be in any sense -- that they may be entirely
6 partial, it would have been open to them or to me to
7 appoint, for example, Mr Mulcaire. He has expertise.
8 That can't be right, with respect.

9 MR CAPLAN: What is right, it's a proposition which
10 with respect is quite clear, is that assessors are
11 people who come in not as principal participants or
12 fact-finders, because they have a particular area of
13 expertise that will assist the Chairman which is outwith
14 his own expertise or experience.

15 LORD JUSTICE LEVESON: I agree, and I can get expertise in
16 different ways. This is indeed what Sir William Gage
17 did in relation to Baha Mousa.

18 MR CAPLAN: Yes.

19 LORD JUSTICE LEVESON: What he did was say, "Well, I won't
20 appoint assessors, I will obtain the material I need
21 through evidence", and I have made it extremely clear
22 that that's what I intend to do as well.

23 MR CAPLAN: Yes. I think the point I'm trying to make --
24 and we've slightly looked at other issues -- is that
25 assessors have a particular role to assist you with

1 their particular area of expertise, and should not be
2 used for a wider role which does not deploy the
3 expertise for which they have been chosen to assist.
4 It's therefore necessary, and as I understand your
5 protocol now, your assessors' protocol, which has been
6 adopted from the Mid-Staffordshire Hospital Inquiry,
7 that accords with the submission I am making. So
8 I don't think we are at issue.

9 LORD JUSTICE LEVESON: No, I don't think we are, although
10 you do challenge one aspect of the protocol --

11 MR CAPLAN: Yes. I will come to that, if I may.

12 LORD JUSTICE LEVESON: -- in relation to the seminars, which
13 I'm not so sure we will agree about.

14 MR CAPLAN: No.

15 LORD JUSTICE LEVESON: But while we are talking about
16 partiality or impartiality, I am concerned about
17 appendix 1 to your skeleton argument which mounts
18 an argument about one of the panellists, Sir David Bell,
19 which seems to imply that it is not appropriate for him
20 to be participating in any capacity other than perhaps
21 as a witness in the Inquiry.

22 MR CAPLAN: No. That's not the implication. Can I come to
23 that in a minute because it is a separate topic --

24 LORD JUSTICE LEVESON: It's not entirely separate.

25 MR CAPLAN: I am going to address it. There are three

1 issues I need to deal with firstly.

2 First of all, the purpose of our application and our
3 written submissions to you were these:

4 Firstly, to clarify the role of the assessors.

5 I think, if I may say so, with the one exception your
6 assessors' protocol has now done that and does restrict
7 the role of the assessors to areas within their
8 expertise, and they will only be called on to carry out
9 acts and duties so far as it is within their expertise.
10 That is, as I understand, the assessors' protocol which
11 we received on Monday.

12 LORD JUSTICE LEVESON: Yes.

13 MR CAPLAN: There is one dispute with regard to that
14 protocol, which is the one that your Lordship has just
15 mentioned, and that is I think it's paragraph 3(b) which
16 concerns whether or not an assessor should be called on
17 to chair either the whole or a part of a seminar. In
18 our respectful submission, that is a passage from the
19 protocol which should be deleted and we do not,
20 respectfully, support a protocol which delegates to
21 assessors the role of chairing a seminar, unless -- may
22 I just complete -- unless, of course, their function in
23 doing so is to call upon a particular area of their
24 expertise which makes it necessary or desirable that
25 they should fulfil that function.

1 LORD JUSTICE LEVESON: That's exactly the point. I could
2 have asked the editor-in-chief of your clients to chair
3 a seminar. What I wanted to do by the seminars -- and
4 I made this clear, I think at the end of July -- was to
5 encourage a discussion; to start the ball rolling so
6 that people could understand the broad context of this
7 Inquiry.

8 What I said was this:

9 "I intend to hold a series of seminars in October so
10 that we can focus on the perspective of all those
11 involved. These seminars will include among other
12 topics the law, the ethics of journalism, the practice
13 and pressures of investigative journalism, both from the
14 broadsheet and tabloid perspective and issues of
15 regulation, all in the context of supporting the
16 integrity, freedom and independence of the press whilst
17 ensuring the highest ethical and professional standards.

18 "At some stage there needs to be a discussion of
19 what amounts to the public good, to what extent the
20 public interests should be taken into account by whom.
21 I hope that an appropriate cross section of the entire
22 profession will be involved in each discussion, their
23 purpose being to ensure the Inquiry can begin to
24 concentrate on the principal concerns."

25 What I really want to do is to use that not as

1 evidence -- the evidence-gathering process will be very
2 different; it will be formal and the evidence will be on
3 oath -- but then to use the outcome of the seminar to
4 encourage others who won't be called to give evidence,
5 because there must be a limit, not least because of the
6 time of the Inquiry, and also the public to provide
7 evidence, doubtless it's unlikely to be called before me
8 but it will be part of the record, so that we have
9 engaged in the debate.

10 The purpose of the seminar, therefore, is to try to
11 get simply an expression of balance of views. It's not
12 evidence, although it will be part of the record of the
13 Inquiry.

14 The expertise of the chairs will make sure that
15 there's a balance. Now, I don't know who everybody
16 represents and their respective views, but the experts
17 in the field will know, which is why they have been
18 chosen as they have been chosen.

19 As I say, I could have asked Mr Dacre to chair a
20 seminar. I did ask him to participate. Unfortunately,
21 on 6th October he cannot, and I am waiting to hear from
22 him about the 12th. I understand. But the purpose of
23 the chair is to ensure the balance that will come from
24 a knowledge of the area. So it is relying on their
25 expertise.

1 MR CAPLAN: May I just take you to the assessors' protocol.

2 LORD JUSTICE LEVESON: Yes.

3 MR CAPLAN: Paragraph 2, if I may respectfully say so, is
4 simply what I have been submitting to you this morning:

5

6 "An assessor will assist the Chairman in dealing
7 with any matter in which the assessor has expertise."

8 LORD JUSTICE LEVESON: Yes.

9 MR CAPLAN: One goes through the protocol. One can see that
10 there are other specific tasks where you might ask
11 an assessor to do something on any matter relevant to
12 the Inquiry within the expertise of the assessor.

13 The only point I am making is that that as a guiding
14 principle is the one for which we contend, and reflects
15 the limited role of assessors under the Act. But if
16 they are being asked to chair a seminar, which is
17 a principal role, we would suggest, as opposed to
18 an advisory role, unless the subject matter of that
19 seminar is specifically within the expertise of the
20 assessor, it's something which should not be asked of
21 an assessor because it is outside his role, outside the
22 purpose of his being asked to assist you by reason of
23 his expertise, and simply to say that to chair the whole
24 or part of any seminar is in conflict, we will
25 respectfully suggest, with the guiding principle, which

1 is right, in paragraph 2.

2 That is our submission. I don't think I can make it
3 any more --

4 LORD JUSTICE LEVESON: I understand the point. I'd need to
5 think about it.

6 If one reads into 3(b) "the part of any seminar
7 which falls within the area of their expertise", that
8 copes with your point, doesn't it?

9 MR CAPLAN: I think we've put in our written submissions to
10 you that one could envisage a technical inquiry where,
11 for example, taking an extreme, you could have
12 scientific evidence, and for the discussion to be
13 meaningful it would be necessary and desirable that the
14 assessor with that particular field of knowledge chaired
15 the discussions of others. That may be an extreme
16 example; there may be examples which are less extreme.
17 But if it falls within his expertise, then
18 I respectfully agree.

19 LORD JUSTICE LEVESON: But I'm sure you agree that it would
20 be important in a seminar to make sure the different
21 sections of those people who are interested in the area
22 that are the subject of the seminar have the opportunity
23 to speak, albeit briefly. It's merely to start the
24 debate.

25 MR CAPLAN: No disagreement.

1 LORD JUSTICE LEVESON: Right.

2 MR CAPLAN: It is simply that we are anxious that the role
3 of the assessors and any, I hope misconceived, creeping
4 tendency that they will perform tasks outside of their
5 expertise, which is the reason, of course --

6 LORD JUSTICE LEVESON: I hope what I've said this morning
7 does something to reassure you and your clients, and
8 maybe when I write a judgment, as I shall, following
9 this hearing I shall elaborate in such a way that
10 ensures that I retain their confidence, which I hope
11 follows from the fact that each of the media groups have
12 expressed a wish to help me.

13 MR CAPLAN: Yes. Might I just suggest, in the context of
14 any judgment, that I make this submission: on the
15 occasions obviously that assessors are asked to perform
16 specific roles, we would respectfully suggest that
17 consideration is given to the area of expertise which is
18 going to be deployed by them in carrying out those
19 roles, in accordance with paragraph 2, and that on each
20 occasion, as I say, that they are asked to do something,
21 that test is applied, that consideration is considered.

22 LORD JUSTICE LEVESON: But the whole point I want from the
23 seminars is balance. I want to get the whole picture.
24 I fear that rather more attention is being paid to the
25 impact of these seminars than I intended.

1 The purpose of the seminars is merely to start the
2 discussion, to get out the views. Indeed, you ought to
3 be aware that I have been invited in the last three
4 months to lots of seminars in which different organs of
5 the press have been debating the issues that the
6 Prime Minister spoke about. My first reaction, to the
7 first invitation, was that that would be a rather good
8 idea, I actually then decided, as I was inundated with
9 more and more, that my judicial responsibilities meant
10 that I simply could not permit myself potentially to be
11 lobbied, but therefore to be seen to be going to some
12 and not all, and what do you do about those that haven't
13 got the wherewithal to organise a seminar, so I decided
14 I would go to none.

15 That's not to say I am not vitally interested in
16 what absolutely everybody has to say. The task of your
17 clients, and indeed everybody else in this Inquiry, is
18 to educate me and to bring me up to speed to ensure that
19 I can provide a balanced, sensible conclusion that will
20 work.

21 MR CAPLAN: Thank you.

22 LORD JUSTICE LEVESON: That's at the very core of what
23 I believe is very important about the task that I have
24 been asked to undertake.

25 MR CAPLAN: Thank you very much.

1 May I move on to another point, please, which is
2 also foreshadowed in our correspondence and our
3 submission, and that is the number of assessors and
4 their experience.

5 LORD JUSTICE LEVESON: Before you do that, in the
6 correspondence you challenge the briefings -- well, you
7 did.

8 MR CAPLAN: Right.

9 LORD JUSTICE LEVESON: You were concerned that I should have
10 consulted people on who I asked to talk about the law.
11 Has that gone?

12 MR CAPLAN: No. That, I think, is a legitimate interest,
13 obviously, for those involved. Is this the teach-ins?

14 LORD JUSTICE LEVESON: Yes.

15 MR CAPLAN: Obviously people have been selected to come and
16 speak to yourself, and I imagine the assessors as well.

17 LORD JUSTICE LEVESON: Yes. Well, equally because I want
18 them to use their expertise in the areas, but in the
19 context of an understanding of the way in which I'm
20 going to have to operate, namely, what the law is.

21 MR CAPLAN: Yes. I think the selection of the individuals,
22 who selected them and how they were selected, might well
23 be of interest to the interested parties. That's all.

24 LORD JUSTICE LEVESON: I selected those, and I wasn't trying
25 to in any sense get a slant, I merely want the facts.

1 I want the law set out, again so that everybody can see
2 where we are.

3 MR CAPLAN: Thank you.

4 LORD JUSTICE LEVESON: The regulatory regime, the
5 correspondence was concerned that it would contain
6 opinion. I'm not interested in opinion. I want the
7 playing field to be identified within which this debate
8 will occur.

9 MR CAPLAN: Thank you very much.

10 LORD JUSTICE LEVESON: All right?

11 MR CAPLAN: Moving, please, to the question of the
12 assessors.

13 There are six persons who have been appointed as
14 assessors under section 11, and I understand the
15 position that in correspondence with ourselves, at
16 least, in the middle of September, it was stated that
17 neither yourself nor Ministers felt the appointment of
18 further assessors at this point in time was either
19 desirable or necessary.

20 LORD JUSTICE LEVESON: Well, the Ministers did the original
21 appointments and they appointed the persons that they
22 believed were appropriate.

23 MR CAPLAN: Yes. Of course, now we are underway, you can
24 consent yourself to the appointment of further
25 assessors.

1 LORD JUSTICE LEVESON: I've read the Act.

2 MR CAPLAN: Of course. That is to what my submission is
3 directed briefly, please.

4 LORD JUSTICE LEVESON: Yes.

5 MR CAPLAN: No criticism of the six individuals but it is
6 a fact --

7 LORD JUSTICE LEVESON: Well, there is criticism of one of
8 them.

9 MR CAPLAN: Well, I will come to one of them in a minute.
10 It's not actually criticism, but I will come to what it
11 amounts to in a minute.

12 LORD JUSTICE LEVESON: Because had there been a challenge,
13 the time for that was available.

14 MR CAPLAN: Can I come to that in a minute? I respectfully
15 suggest it's not a criticism, but I'll come to it in
16 a minute.

17 Of the six who have been appointed, it is a fact
18 that only three have some newspaper experience, and
19 I think -- just for the purposes of being concise --
20 that experience is principally confined to working,
21 I think, on the Financial Times newspaper and in
22 political reporting.

23 What that means is that of the expert --

24 LORD JUSTICE LEVESON: I think at least one of the assessors
25 has been involved regionally as well. In any event,

1 I take the point. Your point is that there isn't
2 a tabloid journalist.

3 MR CAPLAN: Well, not quite that. A tabloid, mid-market
4 regional press, anybody who has been in the production
5 at a senior management or editorial level of a major
6 national newspaper, and by that I am not meaning to
7 exclude the Financial Times but it does have a fairly
8 niche market, and anybody who has been involved in the
9 news-gathering process, in effect, for the daily
10 production of a newspaper.

11 In our respectful submission, the Terms of
12 Reference, in our submission, would benefit quite
13 clearly, I might submit require, expertise from across
14 the newspaper industry, and we would earnestly suggest
15 and urge you to give urgent consideration to appointing
16 other assessors from across the industry to fill what we
17 perceive as a gap in the expert advice.

18 LORD JUSTICE LEVESON: Aren't I going to get expert advice
19 in lots of different ways?

20 MR CAPLAN: You will have evidence, there are the seminars,
21 but in our respectful submission this is an Inquiry
22 which raises fundamental issues for the future of the
23 newspaper industry, and the omission by not having
24 persons or a person or two persons, whatever it may be,
25 who have some experience of the areas that I have

1 mentioned is one which we would respectfully categorise
2 as being unfortunate. It is a matter, obviously, for
3 you, but we would respectfully suggest that the
4 appointment of an additional assessors --

5 LORD JUSTICE LEVESON: Help me, Mr Caplan. Will it be your
6 case that the ethics of those who are employed in
7 mid-market or tabloid journalism are or should be
8 different to the ethics of those employed by broadsheet
9 journalists?

10 MR CAPLAN: No, I don't believe so, no.

11 LORD JUSTICE LEVESON: I would have expected you to have
12 answered in that way. I agree.

13 MR CAPLAN: But the demands and methods of working and the
14 way you produce a paper in the tabloid or mid-market
15 area is obviously going to be very different.

16 This is another topic, perhaps, for detailed
17 evidence but clearly, in our respectful submission,
18 somebody with that experience and expertise is somebody
19 whose area of knowledge is something we respectfully
20 suggest should be available to you as an assessor.

21 LORD JUSTICE LEVESON: I understand the point and I take
22 your submissions seriously. Of course, the expertise
23 which each of the assessors presently appointed brings
24 is rather different.

25 The former Chief Constable deals with the press and

1 the police from the police's perspective of the police.

2 Lord Currie brings his experience of regulation; not
3 press regulation, but of regulation and regulatory
4 regimes.

5 Shami Chakrabarti brings the balance between
6 Articles 8 and 10 and her day-to-day work in that area
7 with all areas of those concerned, the police, press,
8 politicians.

9 The journalists cover not merely the ethics or
10 ethical approach to journalism, and I expected you to
11 answer the question in the way that you did, but also
12 cover an area which is another part of the Inquiry to do
13 with the relationship with politicians.

14 So it's right to say that we're talking about half,
15 but there are lots of different ramifications to the
16 various Terms of Reference that I have been asked to
17 address without the tape self-destructing within two
18 minutes.

19 I take the point.

20 MR CAPLAN: Thank you.

21 LORD JUSTICE LEVESON: There are other features too.

22 First of all, there is a question of general
23 management.

24 Secondly, there is the importance that I will attach
25 to the evidence that I receive from everyone. It should

1 be no surprise that I am particularly concerned to
2 receive evidence from those areas of the press that are
3 presently represented within the assessors, which is
4 actually the reason why I suggested the seminars in the
5 first place. I am being -- not criticised, that puts it
6 too high, but tested on the seminars, but the idea was
7 to make sure that from the very first moment
8 I understood all the ramifications. Anyway ...

9 MR CAPLAN: Thank you.

10 The points really, then, that I've raised with
11 your Lordship are the clarification, obviously, of the
12 role of the assessors, the protocol, and the question of
13 seminars, and the application for more assessors. It's
14 a matter for you as the Chairman.

15 The last point, please, is this, and it's a point
16 which you have referred to, I think, as a criticism of
17 one of the individuals. The reason the point is made --
18 and may I say it is not a criticism, for reasons I shall
19 explain -- I go back to my earlier submission, that the
20 purpose of appointing an assessor is that he has
21 expertise that makes him a suitable person to provide
22 assistance and the emphasis in the Act is on
23 "expertise". That may encompass some opinion, it may
24 not, but in any event that is the word which is the
25 focus for choosing an assessor.

1 If one was choosing a panellist -- and I know we are
2 not in that ballpark, but if one was choosing
3 a panellist, then the Minister cannot appoint a person
4 under section 9 as a member of the Inquiry Panel:

5 "... if it appears that the person has a direct
6 interest in the matters to which the Inquiry relates or
7 a close association with an interested party."

8 So panellists, obviously, are scrutinised from that
9 point of view. Assessors are not; the focus is on their
10 expertise. That is understandable, because assessors
11 are not fulfilling any fact-finding process, they are
12 there simply to bring to bear their expertise and to
13 assist in that limited area.

14 That underscores, we respectfully suggest, our
15 submission that assessors should be confined to that
16 area, because there is no section 8 or section 9
17 considerations with regard to assessors, and that they
18 should not, unless there is some particular reason for
19 using them within their expertise, for example to chair
20 a seminar and their expertise is required for that
21 purpose, should not perform acts such as that.

22 We have no criticism whatsoever of any views that
23 any of the panellists -- sorry, any of the assessors --

24 LORD JUSTICE LEVESON: It's very easy.

25 MR CAPLAN: Very easy to do. Everybody has done it and I've

1 now done it myself.

2 They are entitled to hold any view they wish. That
3 is clearly a free choice which they're entitled to
4 engage in. The fact of the matter is, however, had the
5 individual I've been talking about been going to be
6 considered, this being a Panel Inquiry, then the very
7 matters I've raised would have been considered under
8 section 9 by the Minister as a matter of law.

9 He is not. He is an assessor. He has views, he has
10 a perspective, which he is entitled to have. I make no
11 criticism of him for having publicly expressed those
12 views and holding them.

13 LORD JUSTICE LEVESON: Indeed, he declared it before we
14 started.

15 MR CAPLAN: Yes. But the fact of the matter is that he has
16 publicly declared those views. He has been a leading
17 light in the Media Standards Trust, which has been very
18 critical of one of the topics which your Inquiry is
19 considering, the Press Complaints Commission and the
20 current system of self-regulation. He is a supporter of
21 the Hacked Off campaign, which is one of the core
22 participants, I believe, in this Inquiry.

23 LORD JUSTICE LEVESON: No, it is not.

24 MR CAPLAN: Well, some of the key members.

25 LORD JUSTICE LEVESON: The core participants are the victims

1 of those who have been the subject of press intrusion,
2 whether by telephone intercept or in other ways.

3 There's a very wide variety of persons whom Mr Sherborne
4 is acting for. The Metropolitan Police and all the
5 others are media groups.

6 MR CAPLAN: Yes. I think there may be some individuals that
7 are supporters -- I don't wish to be inaccurate about
8 this, but I think some of the supporters of the
9 Hacked Off campaign are core participants.

10 LORD JUSTICE LEVESON: It wouldn't surprise me if some of
11 those who fall within the group which I have
12 collectively called "victims", because they cover a lot
13 of different areas of concern, don't support
14 an organisation such as the one to which you've just
15 referred.

16 MR CAPLAN: Yes. So there clearly is a publicly expressed
17 view in relation to a part of the Terms of Reference
18 which you have to consider, and a view which is shared
19 with one or more of the core participants. In our
20 respectful submission, not a criticism, a view you're
21 entitled to hold. Who knows, it may be a view
22 your Lordship will come to yourself in due course, I
23 have no idea. But if the individual concerned is then
24 going to be asked to do acts such as chair seminars and
25 move away from areas of expert assistance, then I think,

1 with very great respect, that does become a concern.

2 LORD JUSTICE LEVESON: Well, chairing a seminar in the field
3 of the area that I asked Sir David to chair, I certainly
4 considered was within his expertise.

5 I don't anticipate that we are going to be littered
6 with seminars throughout. We've talked about it a lot
7 this morning, but I see an area merely of opening the
8 debate and then I'm also visualising, but we're a long
9 way from this, of having seminars at the end to
10 potentially discuss emerging findings. In other words,
11 to get the views of the core participants, and indeed
12 potentially others, on the possible ways forward. In
13 other words, to do the testing that I referred to before
14 publicly. It is that that I am talking about when
15 I talk about wanting to be collaborative and taking
16 a very very different line to that which judges normally
17 take, which is simply to get on with it.

18 I understand the point. By the end of this Inquiry
19 I hope that I will have knowledge from all corners and
20 be able to bring that collectively to bear to reach
21 a conclusion which not only satisfies the competing
22 demands of the press but also those of the public.

23 MR CAPLAN: Thank you. Would you just give me one moment?

24 LORD JUSTICE LEVESON: Certainly.

25 MR CAPLAN: May I thank you very much.

1 LORD JUSTICE LEVESON: Mr Caplan, what I am likely to do,
2 I am going to hear everybody else. I have to make some
3 decisions about certain things immediately, but I am
4 likely to reserve a ruling in relation to the submission
5 you make about assessors, not least because I will want
6 to articulate very carefully the approach that I take on
7 whatever way I decide, if only to assuage concerns which
8 have been expressed.

9 MR CAPLAN: Thank you very much indeed.

10 LORD JUSTICE LEVESON: Right. Mr Sherborne, do you have
11 anything to say about any of this?

12 Submissions by MR SHERBORNE

13 MR SHERBORNE: Sir, can I make a few observations.

14 As regards the role of assessors, the position of my
15 clients, the victims, as we call them, is entirely
16 neutral. This is a matter essentially for the Inquiry.

17 With respect, I would endorse the views you, sir,
18 have expressed. We take the view, if a view is taken,
19 that this is a matter the Inquiry is more than capable
20 of dealing with, being conversant with the rules and the
21 practices and the way in which inquiries are carried
22 out.

23 As regards the identity of assessors, we would say
24 that it's no more necessary or appropriate to appoint
25 assessors from the tabloid press than it is the victims

1 of their misconduct. There is no victim who is
2 represented as an assessor. But, as you've said, sir,
3 you're going to hear from a large number of victims who
4 will explain in their own words and with their own
5 individual concerns the problems and the things that
6 they have suffered at the hands of the press over
7 a number of years. We don't believe, as I say, it's any
8 more necessary or appropriate to have someone
9 representing that group than it is someone representing
10 the tabloid press.

11 Sir, there are three journalists appointed, and
12 a journalist is a journalist, if I may say that in this
13 room.

14 LORD JUSTICE LEVESON: That's why I asked the question.

15 MR SHERBORNE: Yes, and I am glad you did, because I was
16 going to raise that. It's interesting to hear that
17 Associated Newspapers has publicly accepted that the
18 ethical standards that apply to journalists should apply
19 across the board, however much tabloid editors may wish
20 it otherwise.

21 LORD JUSTICE LEVESON: That is a bit unfair. They've not
22 said it, and we will see what they do say. But just
23 being careful, Mr Sherborne, we have a long way to go.

24 MR SHERBORNE: Certainly. We have a long way to go.

25 Can I raise one matter which is related and it

1 concerns the timing of the seminars.

2 LORD JUSTICE LEVESON: Yes.

3 MR SHERBORNE: A lot has been said about seminars and that's
4 why I raise it this morning. It's simply this: we
5 appreciate the pace with which the Inquiry intends to
6 progress these matters, and I say that genuinely, and
7 it's understandable given the present public concern
8 about media practices. It's a pace which is a matter of
9 considerable comfort to my clients, the victims.
10 However, they are equally anxious to have sufficient
11 time to present their own individual concerns about what
12 they've suffered and concerns to ensure that others
13 don't suffer the same.

14 Sir, you'll appreciate there are a very large number
15 of clients that I represent, I think it's 46 at the
16 moment, and they all have their own individual concerns,
17 their own individual experiences. Presenting those in
18 a way that is of most assistance to this Inquiry and
19 presenting, if I may put it this way, the principles
20 that concern them in a way that is most effective to the
21 Inquiry is something which will necessarily take time.
22 The way in which those concerns can be expressed doesn't
23 simply relate to the evidence which they will give in
24 the evidence process, it also concerns the seminars,
25 because that is one way in which, through me, their

1 appointed spokesperson, they can raise concerns, for
2 example about the practical difficulties in obtaining
3 injunctions, the primary remedy for the invasion of
4 somebody's privacy, or the pursuit of legal proceedings.

5 LORD JUSTICE LEVESON: All that will, in fact, come out in
6 the evidence.

7 MR SHERBORNE: It will come out in the evidence, but there
8 are practical problems in this area which it would be
9 useful, in my submission, for the Inquiry to appreciate
10 at the seminar stage, so that the Inquiry will
11 understand what those concerns are when you hear the
12 evidence from the individuals who suffered their own
13 individual experience.

14 LORD JUSTICE LEVESON: But --

15 MR SHERBORNE: All I am saying -- and I don't know if this
16 is necessarily something which is a matter of
17 disagreement -- it is the concern to ensure that there
18 is sufficient time to prepare for these seminars, in the
19 sense of providing either written submissions or
20 providing people who can give expert assistance from the
21 victims' perspective in relation to the topics which
22 you're considering in the seminar.

23 In the same way as you're looking potentially to
24 hear from Mr Dacre or some equivalent editor, in my
25 submission there are individuals who have been involved

1 in the very matters which the Inquiry is looking at, the
2 seminars, who could provide expert assistance in
3 relation to those areas.

4 LORD JUSTICE LEVESON: I'll think about that.

5 I haven't particularly perceived of a debate as to
6 the practical consequences at this stage. I think that
7 my present ideas for seminars, which I want very
8 quickly, I make no bones about it, because what I intend
9 to do, as I explained to Mr Caplan, is to use them as
10 a springboard to encourage interested persons who aren't
11 necessarily core participants to be able to provide
12 evidence which then may or may not fall to be considered
13 publicly or merely form part of the record and the
14 evidence that I've taken.

15 MR SHERBORNE: Can I give you one example, sir? Perhaps we
16 can test it in this way. There is a real problem, as
17 you will have appreciated and as the public appreciates,
18 with individuals who have obtained orders from the court
19 protecting their privacy rights whose orders
20 notwithstanding it has been decided by a judge that they
21 are entitled to that protection, orders have been
22 rendered futile -- and I put this neutrally -- by the
23 activities of the press or the activities of those who
24 use the Internet or Twitter or other media. Now --

25 LORD JUSTICE LEVESON: I don't think it's the activities of

1 the press in that regard. I think it is --

2 MR SHERBORNE: It does concern me.

3 LORD JUSTICE LEVESON: It may or may not be. I am not
4 making a judgment.

5 MR SHERBORNE: That's my point. In order to educate, to use
6 the word that you used; in order to educate the Inquiry
7 as to these types of problems, it's the seminar stage
8 which is key to this, because in terms of evidence
9 that's an entirely different process. Whether one can
10 encourage individuals who have been put in that position
11 to come and give evidence is another point. But raising
12 the difficulty, raising the problems and how that is
13 dealt with, is something which, in my submission, needs
14 to be looked at at the seminar stage. Because if you're
15 looking at --

16 LORD JUSTICE LEVESON: I mean, there's no dividing line
17 between seminars now and evidence later. This will be
18 a continuing process, and I am very willing to organise
19 different types of mechanism for ensuring that all views
20 and all concerns are aired. But I equally want to get
21 on, because evidence is now coming in. A number of
22 people asked for time because of the summer, which
23 I understood and understand; but we have received a fair
24 amount of evidence. I've not yet read any of it, I make
25 it clear. But I will want to start as soon as I can to

1 get the evidence in so that I can start hearing it.

2 I hoped really to begin the process with a number of
3 your clients, not least because they set the scene for
4 all that has come about.

5 I think it's important, not in seminar but in
6 evidence, to obtain from them what has happened, in the
7 sense of the problems you mentioned, but also the
8 personal consequences to them, so that one can get some
9 idea of the importance of the area. I'm not suggesting
10 that they don't fully appreciate it, but it strikes me
11 that this Inquiry is addressing not merely the core
12 participants but also the wider public.

13 MR SHERBORNE: Sir, yes, and I understand that, but I hope
14 two things. Firstly, I hope that it's clear that,
15 whilst we would like to provide evidence from witnesses
16 who cover the full range of the problems, I am not
17 convinced that we'll be able to do so. So there will be
18 problems that are raised in principle that we can't
19 necessarily encourage or persuade an individual to come
20 and give evidence to talk about it.

21 LORD JUSTICE LEVESON: Then that is something which I will
22 be very very keen for you to discuss with the Inquiry
23 team, to make sure that we find a mechanism to ensure
24 that this can happen.

25 MR SHERBORNE: Sir, you'll appreciate the seminar was the

1 stage at which I thought it could be initially raised,
2 but I understand there may be other ways in which this
3 could be raised.

4 The second point is I wasn't asking for this in
5 effect to be put off, the seminars, but merely to have
6 a little more time. I know the date of 6 October has
7 been mentioned and the date of 12 October has also been
8 mentioned. I don't know whether that has been fixed in
9 terms of which seminar will take --

10 LORD JUSTICE LEVESON: I think those dates are fixed in one
11 sense. Whether there is room to adjust what we are
12 going to do, I will need to think about.

13 MR SHERBORNE: Sir, I have raised what I might say --

14 LORD JUSTICE LEVESON: That is very useful. Thank you very
15 much.

16 MR SHERBORNE: I am grateful. Other than that, we have
17 nothing to add.

18 LORD JUSTICE LEVESON: Thank you very much.

19 Ms Michalos, do you have anything to say on this
20 topic?

21 Submissions by MS MICHALOS

22 MS MICHALOS: Sir, my name is Christina Michalos and
23 I appear for the Commissioner of the Police for the
24 Metropolis. Bernard Hogan-Howe has been appointed since
25 the last hearing.

1 As regards the role of the assessors, we welcome the
2 clarification of their role as set out in the assessment
3 protocol and the position now seems clear. It is clear
4 they are not panellists. We don't object to any
5 seminars being chaired by an assessors within their
6 areas of expertise.

7 As regards the appointment of further assessors, the
8 Commissioner's position is neutral. Once the Inquiry
9 has started, Parliament has placed the power to appoint
10 further assessors into the hands of the Chairman. We
11 don't oppose the application of Associated Newspapers,
12 but ultimately we consider it a matter for you, sir, as
13 Chairman, and we don't seek to persuade you either way.

14 LORD JUSTICE LEVESON: Thank you very much indeed. That's
15 helpful. Thank you.

16 You identified you appeared for the Guardian. Do
17 you have --

18 Submissions by MS PHILLIPS

19 MS PHILLIPS: My name is Gillian Phillips and I am the
20 in-house lawyer for Guardian News and Media Limited on
21 the editorial side.

22 LORD JUSTICE LEVESON: You are core participants.

23 Therefore --

24 MS PHILLIPS: We are.

25 Firstly, on the point about the assessors, we are

1 grateful for the clarification that has been provided by
2 the draft protocol that arrived on Monday. That's the
3 first clarification we've had about that.

4 LORD JUSTICE LEVESON: Just pause a moment.

5 MS PHILLIPS: We are grateful for the clarification we
6 received in the draft.

7 LORD JUSTICE LEVESON: We were to discuss it next week, and
8 we will probably use next week to discuss other things
9 as well because there are other topics, but I am sorry
10 that you've had it only for a very short time.

11 MS PHILLIPS: Likewise, I have to say with regard to the
12 draft protocol on redactions, which although it says in
13 the note that it has been sent round before, Monday was
14 the first I had seen of that.

15 LORD JUSTICE LEVESON: I am very sorry about that.

16 MS PHILLIPS: We are grateful, as I say, that the
17 transparency and clarity of the procedure is starting to
18 emerge.

19 On the role of the assessors, I have nothing more to
20 say other than with regard to the possibility of the
21 Inquiry taking on some additional expertise, Guardian
22 News and Media's view is that the tabloid and mid-market
23 press, as well as the regional press, operate and will
24 play a vital part in the story of the narrative that you
25 are very keen to put in place, and we believe that it's

1 important that those assisting the Inquiry reflects the
2 plurality and the divergence of that wider UK media.

3 With regard to that, we would just say that in
4 particular the regional press have a much closer and
5 a much different working relationship with the public.

6 LORD JUSTICE LEVESON: I think Mr Jones has some experience
7 in the regional press.

8 MS PHILLIPS: Yes. They have a very different place to play
9 in the story than the national news media, whether
10 broadcasters or printers.

11 LORD JUSTICE LEVESON: Do you agree with the proposition
12 that I put to Mr Caplan, that I can obtain this
13 expertise in different ways?

14 MS PHILLIPS: I don't disagree with it, but it seems to me
15 that the Inquiry would benefit from having someone with
16 that background to call on, in the same way that it has
17 other people with expertise to call on to its own
18 demands.

19 LORD JUSTICE LEVESON: It may be we'll have to wait and see.
20 I'm not suggesting that, but that may be one of the ways
21 forward.

22 MS PHILLIPS: That's all I wanted to say.

23 LORD JUSTICE LEVESON: Thank you very much.

24 Before I ask Mr Jay, there's just one question
25 I would like to ask you, Mr Caplan.

1 In one of the letters that the Inquiry wrote to you,
2 or wrote to your clients, I think the Secretary asked
3 the question ...

4 MR JAY: Page 47.

5 LORD JUSTICE LEVESON: As you were dealing with this topic:
6 "You say that the Inquiry needs to be provided with
7 expertise from across the industry, in particular the
8 popular press, the regional press and investigative
9 journalism, regardless of the mechanism by which
10 expertise might be provided or received. It would be
11 helpful if you could provide details of any specific
12 individuals you consider the Inquiry would in particular
13 benefit from hearing from on these matters."

14 MR CAPLAN: Yes.

15 LORD JUSTICE LEVESON: You've not responded to that.

16 MR CAPLAN: May I just take instructions?

17 LORD JUSTICE LEVESON: Please.

18 MR CAPLAN: I think this is the letter that was received on
19 Friday evening.

20 LORD JUSTICE LEVESON: Well, I think --

21 MR CAPLAN: Last Friday.

22 LORD JUSTICE LEVESON: Yes. It was sent on the 23rd,
23 with --

24 MR CAPLAN: This is --

25 LORD JUSTICE LEVESON: With great respect, it's in response

1 to letters of the 20th, 22nd and 23rd which you
2 addressed to me.

3 MR CAPLAN: I think it raises a new issue on Friday
4 afternoon. I haven't re-read this. Is this in the
5 context of seminars?

6 LORD JUSTICE LEVESON: No, no. This is in the context --

7 MR CAPLAN: I understand the point. We will respond to the
8 request as soon as possible.

9 LORD JUSTICE LEVESON: All right.

10 Right. Mr Jay, I think we've clarified the
11 difference between panellists under section 4 and
12 assessors under section 11.

13 MR JAY: Yes.

14 LORD JUSTICE LEVESON: Everybody understands that these are
15 assessors, but I would be grateful for your help in any
16 area that you wish to provide it in relation to what
17 Mr Caplan has said, and in particular dealing with his
18 point on the assessor protocol and the need for further
19 assessors.

20 Submissions by MR JAY

21 MR JAY: Yes. The role of the assessors, we derive that
22 from section 11(1), in my submission, and section 24,
23 section 24 by implication. Because in a case where you
24 are, as it were, sitting alone, this is
25 a section 3(1)(a) case. The facts are for you alone and

1 the recommendations are for you alone.

2 LORD JUSTICE LEVESON: Yes.

3 MR JAY: Sir, under section 11(1) it appears to us that the
4 term "assistance" or rather the verb "to assist" must
5 include advice. Informing your conclusions under
6 section 24, you may be assisted by assessors in relation
7 to matters falling within their expertise.

8 There's no reason, in our submission, why you're
9 also not entitled to state in your report if
10 a particular finding or recommendation is contrary to
11 the advice of one or more assessors.

12 LORD JUSTICE LEVESON: Yes.

13 MR JAY: That's a matter for you.

14 It is not a requirement, however, because if you
15 were constituted as a panel under section 3(1)(b) and
16 one member of your panel, as it were, dissented, then
17 the points of disagreement would have to be set out,
18 owing to section 24(5).

19 LORD JUSTICE LEVESON: Yes. I said what I said in an effort
20 to be as open and transparent as possible, in an effort
21 to demonstrate to all where there was a different
22 view --

23 MR JAY: Yes.

24 LORD JUSTICE LEVESON: -- what that view was, so that those
25 responsible for taking forward the recommendations that

1 I make could do so in the full knowledge of the context
2 in which I made them. I was trying to be helpful, not
3 difficult.

4 MR JAY: Yes. Sir, may I deal with the concept of
5 expertise?

6 LORD JUSTICE LEVESON: Yes.

7 MR JAY: We are not in the realm, in my submission, of
8 a hard-edged discipline like chemical engineering or
9 heart surgery. This is far softer, perhaps more fluid.
10 It is for you to decide, in our submission, having
11 regard to what you know of the assessors, whether
12 a particular matter does or does not fall within their
13 expertise. So all these points have been made in
14 a draft assessors' protocol, which, as you know, has
15 taken some time to formulate along with the other
16 protocols and doubtless will be finalised next week at
17 the next hearing.

18 LORD JUSTICE LEVESON: Yes.

19 MR JAY: Sir, the intention is, looking at the protocol,
20 it's page 12 of your bundle, that the guiding principle,
21 the lodestar, as it were, is in paragraph 2:

22 "An assessor will assist the Chairman in dealing
23 with any matter in which the assessor has expertise."

24 And paragraph 3 is subordinate to paragraph 2 and
25 gives particular examples.

1 That which is controversial is only subparagraph
2 (b), the chairing of seminars. A chair of a seminar is
3 only guiding or facilitating discussion, in my
4 submission. As you pointed out, you can choose anyone
5 within your discretion to chair a seminar.

6 LORD JUSTICE LEVESON: Do you agree with that as
7 a proposition of law?

8 MR JAY: Yes. Yes.

9 An assessor will only chair a seminar in whole or in
10 part in circumstances in which his or her experience and
11 expertise will assist the better conduct of the
12 discussions.

13 LORD JUSTICE LEVESON: That was the point I was trying to
14 make with Mr Caplan. Therefore, what do you say if
15 I were to write into this 3(b) "chair the whole or any
16 part of any seminar in an area of their expertise"?

17 MR JAY: It's there, as it were, by implication in any
18 event, because 3(b) is subordinate to (2) but expertise,
19 as we have described it in this rather soft-edged area,
20 will guide who you decide should chair the whole or part
21 of any seminar. It is a matter of your discretion.

22 LORD JUSTICE LEVESON: Yes. I hadn't anticipated that
23 chairing a seminar was going to be controversial or
24 potentially difficult. The reason that I formed the
25 view that I shouldn't chair the seminars was because

1 I didn't want people to start thinking that who I ask to
2 speak from the audience was in some way to be construed
3 as my thinking. I only intend them to be entirely
4 balanced. If they're not, I will notice it very
5 quickly.

6 MR JAY: Sir, given the complexity of the issues in the
7 Inquiry, I think none of us involved in it at the moment
8 have any emerging ideas. We are still learning, and the
9 seminars are designed to prevail the learning process.

10 LORD JUSTICE LEVESON: Right, yes.

11 MR JAY: Sir, that's the intention in relation to
12 paragraph 3.

13 LORD JUSTICE LEVESON: Yes.

14 MR JAY: Sir, we would invite you not to finalise the
15 protocol until --

16 LORD JUSTICE LEVESON: I have no intention of that. Because
17 everybody has to come together on this.

18 MR JAY: Exactly. Not everybody is here and, as the note
19 under which the protocol was sent made clear, the
20 hearing is to be on 4 October, that hearing has been
21 accelerated, that's understood, but the other core
22 participants may have other things to say.

23 LORD JUSTICE LEVESON: I am not trying to bounce anybody
24 into accepting something they haven't had a chance to
25 think about. It wasn't suggested -- I mean, when I was

1 told "We've only had this since Monday", I didn't take
2 that as a criticism -- maybe it was -- but I do want
3 people to have the chance to think about it.

4 MR JAY: Yes. We've made it clear that the protocol has
5 been drawn from the model of another Inquiry, but we've
6 adapted it to meet the circumstances of this Inquiry.

7 May I move on to the issue of additional assessors?

8 LORD JUSTICE LEVESON: Yes.

9 MR JAY: It is true under the Act that matter is solely
10 within your jurisdiction now and not the jurisdiction of
11 Ministers. The six assessors were appointed by
12 Ministers before the Inquiry was formally set up, but
13 now it's a matter for you.

14 In reaching any decision you will have regard, no
15 doubt, to the existing constitution of the assessors and
16 to section 11(4). It merely states the obvious that:

17 "A person may be appointed as an assessor only if it
18 appears to you that he has expertise that makes him
19 a suitable person to provide assistance to the Inquiry
20 Panel."

21 It's axiomatic you are not going to appoint someone
22 who is unsuitable.

23 May I, at this point, deal with the submission
24 Mr Caplan made with which we respectfully disagree.
25 Could you appoint someone who was *parti pris*, who was

1 not independent in relation to whom there might be
2 an appearance of bias? In my respectful submission, you
3 couldn't. It is true that there is a requirement of
4 impartiality in relation to Panel members properly
5 so-called, because we see that under section 9. So in a
6 section 3(1)(b) case the statute makes it clear that
7 "someone cannot be appointed if he or she has a direct
8 interest in the matters to which the Inquiry relates or
9 a close association with an interested party". However,
10 there is an overwriting requirement for you to act
11 fairly. We see that in section 17, and we wouldn't
12 recommend that you appoint someone in respect of whom
13 allegations or suspicions of bias might be made or might
14 arise.

15 LORD JUSTICE LEVESON: Well, that's what I would have
16 thought; but the position in relation to assessors is
17 different. The ones appointed by the Minister have been
18 appointed by the Minister. I read section 11(5) because
19 I wasn't quite sure what Mr Caplan was going to be
20 suggesting --

21 MR JAY: Yes.

22 LORD JUSTICE LEVESON: -- as relevant to some matter that
23 arises subsequent to the date of the Minister's
24 appointment.

25 MR JAY: That must be right. I mean, can we test it in this

1 way: the assessors have been appointed before the
2 setting up date under section 11.2(a), and that was all
3 announced on 28 July. At that point, of course, the
4 assessors gave declarations of interest in the interests
5 of transparency and for the avoidance of doubt. Now, if
6 it is to be said -- and I understand it isn't -- that
7 any one of the assessors is an unsuitable person in view
8 of an appearance of bias, well then a challenge will
9 have to be made to the Minister's appointment under
10 section 11(2)(a) and there, of course, the time limits
11 under section 38 of the Act might be relevant.

12 One cannot bring in the matters through a sidewind
13 through the gate of section 11(5) and invite you, as it
14 were, to terminate the appointment of a particular
15 assessor because the Minister made a wrong decision
16 under section 11(2)(a).

17 Section 11(5) is there because if something comes to
18 light after the Minister's appointment, which the
19 Minister logically could not have known about, well then
20 it's drawn to your attention. It doesn't, of course,
21 have to be anything equivalent to an allegation of bias;
22 it might be something entirely mundane, it might be the
23 health of the assessor, it could be anything of that
24 nature.

25 LORD JUSTICE LEVESON: I quite understand, but the point

1 that I was making was that the position now is
2 different. It is my responsibility --

3 MR JAY: To appoint, yes.

4 LORD JUSTICE LEVESON: -- to appoint.

5 MR JAY: Yes.

6 LORD JUSTICE LEVESON: As I understand the Act, I don't even
7 have to consult the Minister.

8 MR JAY: You don't.

9 LORD JUSTICE LEVESON: Or, in this case, Ministers.

10 MR JAY: There's no express requirement to consult
11 Ministers.

12 LORD JUSTICE LEVESON: But the Ministers took the view as to
13 those that they believed were appropriate three months
14 ago.

15 MR JAY: Yes. Mr Caplan's submission is more: well, without
16 prejudice to whether or not the initial appointment was
17 appropriate, you should appoint further assessors
18 because there is a gap in the expertise. Of course, if
19 there were a gap in the expertise and you believed that
20 it was necessary that further assessors were appointed,
21 then you would have power to act accordingly.

22 In exercising your jurisdiction -- it's a little bit
23 academic at this stage because no candidates have been
24 put forward and so we are debating this in abstract and
25 you are inviting Mr Caplan to indicate whether there

1 were additional persons from whom the Inquiry should
2 hear; but looking at it more broadly, in exercising your
3 discretion you should regard to the existing
4 constitution of the Panel, you should have regard to all
5 the other assistance you are going to receive during
6 seminars, during the evidence sessions, representations
7 made by members of the public, et cetera, et cetera,
8 whether you need a further assessor to assist you.
9 These are all self-evident matters.

10 There isn't, of course, a dichotomy or chasm between
11 the broadsheets and other sections of the press when it
12 comes to the ethical standards that should be applied,
13 though, naturally enough, the pressures on different
14 sections of the press are different. But it's a matter
15 for you to decide whether you need expertise to assist
16 you in relation to identifying those pressures and their
17 effects. You may think that you don't.

18 LORD JUSTICE LEVESON: Well, the trouble is that one has to
19 decide where the line is, because the pressures
20 affecting the Liverpool Daily Post and Echo will be
21 different from the pressures affecting the Mirror or The
22 Sun.

23 MR JAY: Yes.

24 LORD JUSTICE LEVESON: Which will be different from the
25 pressures affecting The Observer or a Sunday newspaper.

1 MR JAY: Yes.

2 LORD JUSTICE LEVESON: I mean, one could break it down and
3 each one will have slight different perceptions of the
4 problem.

5 MR JAY: Yes. It is evaluative, but the issue, I suppose,
6 for you is what assistance you need in making that
7 evaluation.

8 The point has been made in some of the evidence we
9 have read from some newspapers, and I put it in this
10 way: we as a newspaper do not indulge in unlawful and
11 unethical practices because we do not write the sort of
12 stories for which the need for those practices would
13 possibly arise. Now, whether or not that's a good
14 point, one can perhaps imagine which newspapers those
15 might be, when we're looking at newspapers where the
16 pressures are different, where owing to their readership
17 it might be said there is a greater pressure to write
18 these stories, the issue is: do you need to have
19 an assessor to assist you in this regard or can you use
20 your own judgment, having regard to all the expert
21 assistance you have in any event from your assessors and
22 all the evidence you're going to hear? It's entirely
23 a matter for you, in my submission.

24 LORD JUSTICE LEVESON: Yes. The principles are bedrock,
25 I would have thought, but we will have to see. I am not

1 making any decision about anything.

2 MR JAY: Yes.

3 LORD JUSTICE LEVESON: I caveat everything I say throughout,
4 in case people are writing it down in order to derive
5 some conclusions as to where I am or where I'm going.
6 It would be a mistake to do that.

7 MR JAY: Yes.

8 One point that Mr Caplan didn't make, and can I try
9 and put it in this way, I mean his submission may be
10 this: the way you're going to see and interpret the
11 evidence is going to be refracted for you through the
12 prism of your assessors. Therefore, the light that is
13 going to be derived is going to be distorted by that
14 refraction. Therefore, it's essential -- so the
15 argument might run -- in order to ensure that the light
16 beams are pointing in the right direction or in a series
17 of fair directions, that you have someone on your Panel
18 who is going to point your glass in the right direction.
19 I hope this metaphor isn't getting a bit too tiresome.
20 That is the sort of point which Mr Caplan may be making.
21 I think it has been made in a different context by
22 someone else.

23 That is the sort of counterbalance to the other
24 points which would indicate that perhaps further
25 assessors are not required.

1 The only point I am seeking to make is these are all
2 relevant considerations for you in exercising your
3 discretion under section 11(2)(2)(b). There isn't
4 a clear principle that you must follow, there are
5 a series of relevant considerations.

6 LORD JUSTICE LEVESON: But the underlying principles, if
7 they are consistent, simply require to be applied
8 differently.

9 MR JAY: Yes.

10 LORD JUSTICE LEVESON: It would be a mistake to think that
11 I intend to view the evidence that I will hear through
12 the eyes of the assessors. I am charged with making up
13 my own mind, and that's precisely what I shall do.

14 MR JAY: Yes.

15 LORD JUSTICE LEVESON: All right.

16 MR JAY: Yes. Sir, the final submissions Mr Caplan made
17 about Sir David Bell, there are two separate issues, in
18 my submission. Either there is a "problem", in inverted
19 commas, in relation to Sir David Bell because there is
20 an appearance of lack of impartiality, and that's one
21 point, or he should not be chairing a seminar because
22 it's not within his expertise, that's another point.
23 But they are entirely separate points, and one of
24 Mr Caplan's submission was in danger of merging those
25 two points. I would invite you to keep them apart.

1 LORD JUSTICE LEVESON: The seminar that I've invited him to
2 chair is actually within the very area that his
3 expertise touches, it seems to me. That is the purpose
4 of the idea, anyway.

5 All right, let me see where Mr Caplan is in all
6 this. He made the application, so I'll give him the
7 last word.

8 MR CAPLAN: I think we've made our submissions; I don't
9 think it's necessary to add anything.

10 LORD JUSTICE LEVESON: On the basis that I have clarified
11 the position in relation to the seminar, does that part
12 of your submission change in any way? In other words,
13 what I'm asking is whether, in the light of what I have
14 said about how I intend the seminars to operate, and by
15 "chair" I only do mean chair and call upon different
16 people from different sectors to speak and, of course,
17 I have deliberately involved all three of those press
18 people in the seminar that he would chair, does that
19 assuage the concern that you have been expressing?

20 MR CAPLAN: I think I must maintain my submission for these
21 reasons.

22 Firstly, we do ask for a principled approach in the
23 way I have described to the use of the assessors, and
24 I understand the potential amendments you may make to
25 the assessors' protocol.

1 LORD JUSTICE LEVESON: Does that do it?

2 MR CAPLAN: I think that would be a judgment for you to make
3 as to whether or not, in a particular case, their
4 expertise is called into play by reason of the task that
5 you're assessing.

6 LORD JUSTICE LEVESON: But if I clarify -- Mr Jay says it
7 doesn't need to be clarified because 3 is subsidiary to
8 2, but if I did clarify it, if I put those words in,
9 does that deal with the concern that you've expressed?

10 MR CAPLAN: You would have, if I may respectfully say so,
11 then to go on to apply it to particular circumstances.

12 LORD JUSTICE LEVESON: Of course, yes. And I will make
13 a judgment.

14 MR CAPLAN: In our respectful submission, as I say, it is
15 only those matters that are within the expertise of the
16 particular assessor that he should be asked to perform.

17 LORD JUSTICE LEVESON: But --

18 MR CAPLAN: The other matter, may I just respectfully
19 suggest, it is necessary to consider is that it is
20 difficult to foresee, or it may be difficult to foresee
21 how these seminars will actually play out in real life,
22 as to what degree of questioning or leading or debate is
23 going to follow.

24 LORD JUSTICE LEVESON: I don't intend anybody to be
25 questioning anybody.

1 MR CAPLAN: Yes.

2 LORD JUSTICE LEVESON: What I intend, and I am sure you have
3 seen the structure intended for the first seminar
4 because, as I say, the editor-in-chief of your clients
5 was invited to take part.

6 MR CAPLAN: I think he can't be here.

7 LORD JUSTICE LEVESON: No, no, I know. I'm not being at all
8 critical of him. He said he couldn't because he was not
9 in the country, and I'm sorry about that but there it
10 is.

11 MR CAPLAN: Yes.

12 LORD JUSTICE LEVESON: I wasn't for a moment suggesting
13 anything else. I am merely say that you have doubtless
14 seen the structure.

15 MR CAPLAN: Yes.

16 LORD JUSTICE LEVESON: And I intend them to be chaired as
17 one would chair any sort of debate, by making sure the
18 different people from different perspectives have the
19 chance briefly to speak, and to ensure that all the
20 issues are brought out. I don't intend the assessors to
21 be proffering their own views, to such extent as they
22 have them, in any of these seminars. I intend them
23 simply to be facilitating the discussion by others.

24 MR CAPLAN: I think my submission really is as I began, it
25 is a matter of applying the protocol. I understand the

1 amendment that you are contemplating, and it must be
2 a matter for your judgment as to whether or not the
3 expertise is required for a particular task.

4 LORD JUSTICE LEVESON: Right. Thank you very much indeed.

5 Thank you.

6 MR SHERBORNE: Sir, can I raise one point?

7 LORD JUSTICE LEVESON: Yes, please.

8 MR SHERBORNE: It is simply arising from what Mr Caplan or
9 rather what you said, sir. We don't know what the
10 structures of the seminars is.

11 LORD JUSTICE LEVESON: You will by the end of the morning,
12 because I will show you. Well, I won't, but somebody
13 will.

14 So far -- just let me explain -- the team identified
15 speakers from different sections and people were invited
16 to give short speeches. Invitations were due to go out
17 actually a day or so ago -- but they haven't gone out in
18 case I was to cancel the whole thing in the light of
19 what Mr Caplan submitted -- to a wide range of people to
20 attend, including the core participants. The idea is
21 that there would be, I think, in each of the sessions,
22 maybe three people who spend ten minutes from their
23 perspective and then it will be open to anybody else
24 present to add a view and, as it were, to contribute to
25 the debate.

1 For the avoidance of doubt, the seminars will be
2 recorded, streamed and available immediately,
3 a transcript will also be prepared and a summary,
4 because the summary will then be used to promote a wider
5 request for opinion.

6 MR SHERBORNE: I am very grateful.

7 LORD JUSTICE LEVESON: You are very welcome.

8 MR JAY: The seminars will be recorded?

9 LORD JUSTICE LEVESON: Recorded. They won't go out
10 concurrently but consecutively.

11 MR SHERBORNE: I understand.

12 LORD JUSTICE LEVESON: Thank you very much.

13 In relation to the application or at least
14 invitation made by Mr Caplan that I appoint further
15 assessors, I will reserve that decision and provide
16 a ruling in due course.

17 In relation to the briefings, or teach-ins, as they
18 have been sometimes described, and the seminars, I am
19 satisfied that they should take place as I originally
20 envisaged. I shall, of course, be present, and I have
21 no doubt that they will be conducted in the manner that
22 I have described and that they do fall within the area
23 of the expertise of the assessors who have been
24 appointed, who will be in the best position to ensure
25 that all those who speak come from as wide a variety of

1 experiences and professional backgrounds as can be
2 encompassed within the time available.

3 I shall provide the ruling in relation to the
4 application invitation as soon as possible, but before
5 doing so I shall want to review precisely what Mr Caplan
6 has written and what others have written, and what he
7 and others have said.

8 Mr Caplan, I understand I won't have the benefit of
9 your assistance next week, but I am sure that I will
10 have the assistance of Ms Palin or whomsoever your
11 clients seek to send.

12 MR CAPLAN: You will indeed, yes.

13 LORD JUSTICE LEVESON: It is of critical importance to me
14 throughout this Inquiry that I have the help of
15 everyone. I have, as you have identified, a vast and
16 difficult task to address within a comparatively short
17 period of time. I accept the importance that it holds
18 for your clients and for the industry and profession as
19 a whole. I will only start to be able to achieve
20 a sensible resolution of those issues if everybody is
21 pulling in the same direction, albeit from their
22 different standpoints.

23 I'm not asking people to compromise their views or
24 their beliefs but I will want to make sure that I have
25 every point of view, and if there is any perspective

1 which it is thought that I have missed, in the evidence
2 that I propose to call or in any other way, then I will
3 be grateful if your clients and indeed all the other
4 core participants ensure that the team were aware of the
5 gap, as you've sought to in this, so that I can seek to
6 fill it or make sure that I have it well in mind.

7 MR CAPLAN: I am very grateful.

8 May I just reiterate, if it is necessary, that
9 certainly Associated Newspapers apply for core
10 participant status to be able to make, I hope, a useful
11 and valid contribution to the issues which you have to
12 consider.

13 LORD JUSTICE LEVESON: I have no doubt that they do, can and
14 will.

15 MR CAPLAN: Thank you very much.

16 LORD JUSTICE LEVESON: Thank you very much.

17 (11.06 am)

18 (The hearing concluded)

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