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(subject to editorial corrections)

IN THE CROWN COURT OF NORTHERN IRELAND

SITTING AT BELFAST

REGINA

-v-

LOUIS MAGUIRE
AND
CHRISTOPHER POWER

RULING : DEENY J.

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[1] The Court has before it at this stage three applications for the admission of bad character evidence pursuant to the Criminal Justice (Evidence) (Northern Ireland)Order 2004. I have the Crown's original two applications of May 2015 against both defendants. Initially these were pursued under Article 61(1) (c) (d) and (f) of the Criminal Justice (Evidence) (Northern Ireland) Order 2004.

[2] On Tuesday 27th September Louis Maguire gave evidence in his own defence. He alleged that he had witnessed Christopher Power attack and kill Eamon Ferguson and that he, Louis Maguire, was innocent of any crime save, after the event, by creating a cover story for Power. Yesterday, the 28th September, Mr Gavan Duffy QC for Power cross-examined Louis Maguire and alleged that he was the attacker and that Power was not present but upstairs at the time of the attack and was himself innocent of any crime save that he acquiesced in what was alleged to be a cunning charade or cover story by Louis Maguire.

[3] On foot of that the prosecution applied to amend their applications to rely also on Article 6(1)(g) of the Order and there was a further application. There was no objection to the timing of the amendment, which was quite right. In the circumstances this could not have been reasonably anticipated and I grant leave for the amendment while remaining mindful of the judgments of Mr Justice McCloskey and Mr Justice Gillen, as he then was, on the topic of extensions of time in this context.

[4] Mr Stein QC for Louis Maguire then also applied to adduce bad character evidence against the co—defendant, Christopher Power, on the same basis which I have just outlined. Mr Duffy for Christopher Power does not make a similar application in regard to Maguire's record and opposes the other applications. Partly for that reason and partly given the gravity of the charge, it seems to me that I have to deliver a ruling on the matter. Ideally one would have reserved judgment but as Louis Maguire is in the witness box and the Crown understandably wish to put his record to him, it is necessary to deliver this ruling on an ex tempore basis.

[5] The proper approach, therefore, would involve, out of caution, addressing the original basis of the Crown's application in case the matter subsequently comes under close examination. The original applications by the Crown were adjourned on consent from the end of the Crown case with this situation of a cut—throat defence being contemplated at that time.

[6] I turn to the 2004 Order. Of particular importance is Article 6 of that Order which bears the rubric, 'Defendant's bad character'. It reads as follows:

> "(1) In criminal proceedings evidence of the defendant's bad character is admissible if, but only if—
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> (a) all parties to the proceedings agree to the evidence being admissible,
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> (b) the evidence is adduced by the defendant himself or is given in answer to a question asked by him in cross-examination and intended to elicit it,
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> (c) it is important explanatory evidence,
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> (d) it is relevant to an important matter in issue between the defendant and the prosecution,
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> (e) it has substantial probative value in relation to an important matter in issue between the defendant and a co-defendant,
>
> (f) it is evidence to correct a false impression given by the defendant, or
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> (g) the defendant has made an attack on another person's character.
>
> (2) Articles 7 to 11 contain provisions supplementing paragraph (1).
>
> (3) The court must not admit evidence under paragraph (1)(d) or (g) if, on an application by the defendant to exclude it, it appears to the court that the admission of the evidence would have such an

> adverse effect on the fairness of the proceedings that the court ought not to admit it.
>
> (4) On an application to exclude evidence under paragraph (3) the court must have regard, in particular, to the length of time between the matters to which that evidence relates and the matters which form the subject of the offence charged."

Articles 7, 8, 9, 10 and 11 were also opened to me by counsel and I have taken those into account and I may refer to them insofar as it is necessary.

[7] So far as the Crown's application for the admission of bad character evidence against Louis Maguire, with whom I will deal first, under Article 6(1)(c), I am not persuaded that it is properly brought under the heading of 'important explanatory evidence' and I refuse that application.

[8] Insofar as the application relating to Article 6(1)(f) is concerned, 'evidence to correct a false impression', I was not pressed about that and I make no ruling. Those two negative rulings apply also in the case of Christopher Power, i.e. refusal of (c) and no ruling on (f). It is however I think wise to deal with Article 6(1)(d) where the Crown say the bad character is admissible as:

> "it is relevant to an important matter in issue between the defendant and the prosecution."

[9] The 'important matter' here is, in fact, guilt or innocence, in the sense of who participated in the attack on the deceased, Eamon Ferguson. In pursuit of that the Crown draw my attention to Article 8 of the Order, which reads:

> "8(1) For the purposes of Article 6(1) (d), the matters and issue between the defendant and the prosecution include:
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> (a) the question of whether the defendant has propensity to commit offences of the kind with which he is charged, except where his having such a propensity makes it no more likely that he is guilty of the offence;
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> (b) the question of whether the defendant has propensity to be untruthful, except where it is not suggested that the defendant's case is untruthful in any respect.

> 8(2) Where Paragraph 1(a) applies, a defendant's propensity to commit offences of the kind with which he is charged may (without prejudice to any other way of doing so) be established by evidence that he has been convicted of:
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> (a) an offence of the same description as the one with which he is charged, or
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> (b) an offence of the same category with which he was charged."

[10] It can be seen therefore that the legislature uses three different terms of overlapping meaning in these two articles - kind, description and category. It is, I think, sufficient for these purposes to note that Mr Ciaran Murphy QC for the prosecution relied on R v Hanson [2005] 1 WLR 3169; [2005] 2 CAR 21, as authority for an expansive interpretation of Article 8 to allow the Court using the words in parenthesis in Article 8(2) in particular to admit such evidence even if the offences to be introduced in evidence in support of the propensity are not of the same description or categories strictly speaking as the offence before this Court. As there is no submission to the contrary, I accept that submission and will proceed.

[11] Louis Maguire has a criminal record the Crown seeks to adduce in evidence and put to him in cross-examination. Mr Maguire was born on the 27th February 1988. He is therefore still only 28 years of age but he has 64 offences on the copy of the record before me, although that might not be fully up-to-date. The Crown sought in its original application to rely on only some of those offences and there was a discussion at an earlier occasion when this matter was the subject of argument before the Court as to the appropriateness of the introduction of some of the offences. The Crown itself was willing not to persist with some, and I observed on that earlier occasion dealing, as I am dealing now, with Article 6(1)(d), that first of all they were right to exclude some of those earlier offences but that I would also be minded to exclude offences that were committed prior to 2006 and I will return to that in a moment.

[12] Now, the attitude of Mr Stein QC for Maguire was I believe a sage and mature one by which he accepted that admission was justified under Article 6(1)(d) and indeed (f), but in any event was going to become inevitable under 6(1)(g) i.e. a mutual attack on the character of another person by his client, the other person being Christopher Power. Mr Duffy was unable to make the same concession and objected to any evidence of bad character being admitted against Power, at least initially, and hence as I have indicated the necessity to address the matter more fully.

[13] There is helpful authority on the point as to the approach of the Court and the leading case remains R v Hanson op. cit. and that has been expressly approved on more than one occasion by the Court of Appeal in Northern Ireland, including R v

Rogers [2013] NICA 71. The Lord Chief Justice in that case expressly approved the summary of Lord Justice Rose in the Hanson case as to the approach that a Judge in my position should adopt in applying Article 6, Article 6(1) and the rest of the article as well. I quote from Paragraph 7:

> "Where propensity to commit the offence is relied upon, there are thus essentially three questions to be considered: (1) does the history of convictions establish a propensity to commit offences of the kind charged? (2), does that propensity make it more likely that the defendant committed the offence charged? (3), is it unjust to rely on the convictions of the same description or category and in any event will the proceedings be unfair if they are admitted?"

[14] That third matter can be seen to be a reworking of the words of Article 6(3).

[15] In deciding whether these convictions show a propensity to commit murder and to make it more likely that the defendant, Maguire, did, commit the murder, one has to look at the nature of the killing here. It is not by poisoning. It is not by hiring a contract killer. It is not by terrorists in the pursuit of some alleged political aim. It is not by drowning or by motor vehicle. It is the application of brute force to another human being, in this case with a hammer.

[16] In that context it seems to me that previous assaults or, to a degree, threats of assault, do demonstrate a propensity to assault; that is undeniable. The situation here is that the fatal attack on Mr Ferguson was an assault at one extreme of a scale of gravity of assault. The opposite end of that scale is a simple threat to punch someone which in law is an assault. In one sense at least, therefore, the history of wounding, assaults and threats are of the same kind as this type of murder. It seems to me that decisions of this sort are likely to be fact specific and I note the express finding of the Court of Appeal in England that it will be slow, as our Court has been slow, to interfere with the exercise of judgment by a Trial Judge in these circumstances.

[17] One might not admit in evidence a single such incident, particularly a minor one of assault even in a murder flowing from an assault. One might not admit something from many years ago. Indeed the statutory provision expressly contemplates that. Article 6(4) reads:

> "On an application to exclude evidence under Paragraph 3, the Court must have regard in particular to the length of time between the matters to which that evidence relates and the matters which form the subject of the offence charge."

[18] Of course that provision is binding on me but I would add for my own part a hesitation about availing in evidence against a defendant in a court of law a conviction committed when he was still in law a child. But evidence, as here, of assaults or threats within the last decade committed by an adult do, in my view, show a propensity to commit offences of the kind alleged here, i.e. assaulting another human being so as to cause his death.

[19] I accept the submission made under Mr Power's application by Mr Duffy that of course a weapon is used here and that is a valid distinction, but the use of a weapon is an exacerbation of the basic principle of assault. The weapon is not a gun. Here it is a blunt instrument which seems to have been in the house or even in the room before the fatal attack.

[20] Therefore the answer to the first of the questions envisaged by R v. Hanson is, yes, this record of convictions does establish in my view a propensity to commit offences of the kind charged. So far as Maguire is concerned, Mr Stein contemplated, completely correctly, that such a propensity makes it more likely for the defendant to have committed the attack, that is more likely than someone who doesn't have a record of wounding, assaults and threats as in the case of the first defendant.

[21] The third question is phrased by the Court of Appeal in the way that I have read it out, "Is it unjust to rely on the conviction of the same description or category or will the proceedings be unfair?"

[22] I note the strong wording of Article 6(3) which might conceivably be viewed as stronger than the way that the Court of Appeal has put it there, i.e. that I

> "must not admit evidence under paragraph 1(d) or (g) if, on an application by the defendant to exclude it, appears to the court that the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it."

[23] Well, that is clearly not the case here in my view. The unfairness would be to the community and to the family of the deceased if, in the light of the legislation and the decision of parliament to allow the admission of such evidence, I were to hide this record and propensity from the jury. Therefore the answer to the third question is that it is not unjust to admit it.

[24] However, having admitted it in principle I have to contemplate what should be admitted. Happily there is a fair measure of agreement between senior counsel in that regard. I have already indicated that I won't admit the juvenile offences of the first defendant, which in fairness the Crown were not proposing to do in any event, save that they wanted to put in two offences of 2004, but I exclude those from the record to be put in.

[25] In saying that and taking a ten year stopping point, I am not promulgating a general rule here. These decisions are facts specific, they are for the individual Trial Judge. It may be proper in certain cases to put in an older conviction, but as I have indicated the combination here of him being in law a child at that time and it being ten years ago leads me to exclude matters of that kind.

[26] There is a passage in R v Hanson which I drew to the attention of counsel at Paragraph 12 where Lord Justice Rose said as follows:

> "It will often be necessary before determining admissibility and even when concerning offences of the same description or category to examine each individual conviction other than merely to look at the name of the offence or the defendant's record as a whole. The sentence passed will not normally be probative or admissible at the behest of the Crown, though it may be at the behest of the defence."

[27] Now, it seems to me, that sentences may sometimes be in ease of the defendants. The jury hearing of wounding with intent or assault occasioning actual bodily harm or robbery might have expected these men to have got longer sentences than the ones they have received. They may consider that a more condign punishment was warranted. So it seems to me that here the sentences do not have any prejudicial effect on the defendants and Iunderstand counsel for both the defendants to take the same view. They are not objecting to sentences going in if the record is going in. Louis Maguire has no convictions in the Republic of Ireland so the record is confined to his Northern Ireland record.

[28] Now I will then turn to Mr Ciaran Murphy's amended ground which is that we are now presented with a situation under Article 6(1)(g) of the 2004 Order, namely that the defendant has made an attack on another person's character. That is indisputable and it is realistic that the earlier view that I took that Maguire's record should only go in insofar as it related to wounding, threats to kill, assaulting police, aggravated assault and common assault should be widened given his very general attack on the character of another person. I don't understand that to be in dispute, so that the record starting at Belfast Crown Court on the 14th April 2008 seems to be admissible. It still has to be relevant and so if there are one or two minor road traffic offences, they need not be put in. But for reasons that I will outline in a moment, offences of dishonesty, it seems to me, are also relevant here.

[29] I turn to the applications regarding Christopher Power, both those of the Crown and those of the first defendant. Christopher Power has a criminal record in Northern Ireland, although he is originally from County Offaly. There is a simple drunk and possession of Class C drug in 2013. So that would not be appropriate, and perhaps I will return to his record at the conclusion of my remarks.

[30] In more detail likewise there are offences in 2014 dealt with by Laganside Magistrate's Court on the 6th January which don't seem to me to be relevant. But there is also an assault occasioning actual body harm at the same court committed on the 20th August 2013, i.e. less than a year before this offence and dealt with by the Court in September. There is furthermore a criminal damage in 2014 and threats to damage property in 2014.

[31] In addition the prosecution have obtained from the Republic of Ireland details of offences committed by Mr Power in that jurisdiction. They include a robbery of a filling station on the 18th October 2011 for which he received a sentence of four years' imprisonment suspended on conditions. Then there is a further conviction for robbery arising out of an incident on the 30th July 2011. It's fair to say that it sounds, on the facts outlined and the very helpful email of Detective Garda Tom O'Sullivan of the Interpol Office of Garda HQ in Dublin, it sounds rather more of the character of a theft. So my initial view when operating under Article 6(1)(d) would be that that would not be admissible but I have to revisit that now. Mr Stein urges me to revisit that now. There also is a burglary and he has several incidents of offences of threatening or abusive behaviour in the Republic of Ireland.

[32] Now, there is nothing of the gravity of the wounding offence and nor are they as numerous as the offences of Mr Maguire, but nevertheless one is faced with someone who a year before was guilty of assault to kill occasioning actual bodily harm, be it possibly not the gravest offence of that kind, and not that long ago, five years ago, was guilty of robbery and over the years but excluding any offences in 2002, in fairness to him, has also been guilty of threatening behaviour on occasions. So I must ask myself the same three questions as I asked with regard to the first defendant. Does that history of convictions establish propensity to commit offences of the kind charged? Well it does suggest a measure of violence. The violence may be under the influence of drink or to obtain drink but then that is relevant to the tragic circumstances here. It seems to me that the matter is not as clear cut as in the other defendant's case, but there is enough there to show a propensity. Does that propensity make it more likely that the defendant committed the offence charged? Well again one has to ask more likely than who?

[33] Mr Duffy will no doubt be arguing to a jury in due course that it makes it less likely that he did it than Mr Maguire. He is perfectly entitled to do that and indeed the charge may reflect such a distinction. But on the other hand he is more likely to commit the offence than a person who hasn't previously been convicted of assaulting somebody or robbing somebody. So it seems to me that the answer to the second question is probably yes.

[34] Thirdly, answering the third question as to unfairness in my discretion and the need not to introduce material which is seriously adverse to the defendant, it seems to me that that would not be the case here. In fact, of course, once one moves

from Article 6(1)(d) to 6(1)(e) and 6(1)(g), that really is palpably and plainly obvious. But my view is on balance that even 6(1)(d) and the Crown's original application was a justified application and that I should grant it.

[35] We will move on to 6(1)(e), that is Mr Stein's application on behalf of the co-defendant and 6(1)(g), Mr Murphy's amended application. One has to take into account very carefully the written and oral submissions made on behalf of Christopher Power by his counsel, Mr Gavin Duffy. I hope in summarising these I do not do them any injustice.

[36] First of all he raised some issues in detail about what were the facts around the earlier offences. Counsel have already begun to discuss ways of agreeing those and I will invite them to continue with that. The programme of the trial will allow that to be done before they have to be put to Mr Power or proved in evidence by a Crown witness. As I said these applications were adjourned originally so the Crown case closed with the reservation that they could still call back character evidence. But I would hope that counsel may be able to agree the details of what may be put.

[37] Secondly, Mr Duffy relied on the decision of the Court of Appeal in the R v West [2006] EWCA Crim. 1843 as authority in his submission against the proposition that his client's record should go on evidence. I have considered that judgment and it does not seem to me that it assists Mr Power. It's clear that the Court of Appeal did think that the convictions of Mr O'Toole were of substantial probative value, to use the phrase from the equivalent English provision which is the same as the phrase in our provisions under 6(1)(e). They may well be stronger I agree than the convictions of Mr Power here but certainly they were considered of substantial probative value. The reason why they were excluded by the Trial Judge is to be found at Paragraph 16 of the judgment of Lord Justice Gage. In essence I don't think I need read those out in full, but in essence that is because the application to serve them was made late and after the defendant, West, had given evidence and that it was not fair to admit them at that stage. I respectfully agree with those conclusions but I don't think it advances the second defendant's case further.

[38] Next Mr Duffy pressed me, as he was perfectly entitled to do, with the importance of Article 6(3). I have already read that in the course of this judgment and I remain very mindful of it. But even before hearing Mr Stein's response, it occurred to me that it would be grossly unfair to the first defendant, Louis Maguire, if Mr Power's counsel and subsequently Mr Power were allowed to attack the character of Mr Maguire but he was not allowed to defend himself by pointing out any defects in the character of Mr Power. I reiterate that their records are different, but the distinctions between them can be drawn to the attention of the jury and will be evident to them. So I am content that the use of the discretion which is applicable to 6(1)(g) is not a bar to admission here.

[39] While on that topic Mr Stein points out that that does not apply to 6(1)(e) where he has to show instead substantial probative value in relation to an important

matter and issue. Well there couldn't be a more important matter in issue between the parties as to who delivered the blows. He says the fact that Power has a bad character also is of substantial probative value there, and again I have not detected authority to the contrary.

[40] Mr Gavan Duffy also relied on R v Platt [2016] 1 Cr. App. R. 27. I don't think it's necessary for me to go to that. I have considered that and I do not think it effects the decision to which I am coming.

[41] His final substantive submissions were of considerable interest. They related to some observations in the Court of Appeal in R v Hanson to the effect that even if I was against him on the offences of violence or assault et cetera on the part of his client, I should not admit offences of dishonesty committed by Mr Power. He pointed to Paragraph 13 in particular of the judgment of the Court of Appeal in Queen v Hanson. Perhaps it's best if I read that:

> "As to propensity to untruthfulness, this, as it seems to us, is not the same as propensity to dishonesty. It is to be assumed, bearing in mind the frequency with which the words 'honest' and 'dishonest' appear in the criminal law, that parliament deliberately chose the word 'untruthful' to convey a different meaning, reflecting a defendant's account of his behaviour or lies told by the committing of an offence. Previous convictions whether for offences of dishonesty or otherwise are therefore only likely to be capable of showing a propensity to be untruthful where, in the present case, truthfulness is an issue and, in the earlier case either there was a plea of not guilty and the defendant gave an account, on arrest, in interview or in evidence, which the jury must have disbelieved, or the way in which the offence was committed shows a propensity for untruthfulness, for example, by the making of false representations. The observations made above in Paragraph 9 as to the number of convictions apply equally here."

[42] As I listened to Mr Duffy, and with great respect to their Lordships, I felt a degree of uneasiness about that view. It seems to me that if one was approached by an individual with a proposition of a business kind which was dependent on the truth of what he was telling you, one would be less likely to accept the truth of what he said if one knew him to have a conviction for an offence of dishonesty. The reality is that we rely on the truth of statements by people of unblemished record if we know them to have an unblemished record more readily than those with one or more convictions for dishonesty. That is common sense and as Lord Diplock said in

The DPP v Hester [1972] 3 Al ER 1056, 1072, common sense is the mother of the common law.

[43] I note further, as I have just read out, that their Lordships were dealing with the propensity to untruthfulness which seemed to me a more specific consideration than the one I was dealing with here. It was therefore pleasing that Mr Stein was able to point to a clear authority to that effect in his helpful response and that was R v Lawson [2007] 1 W. L. R. 1191. I think for completeness I should read paragraphs 33 and 34 of that judgment as this point may arise in other applications before the Court. This is the judgment of Lord Justice Hughes, as he then was, giving the judgment of the court.

> "33. This Court pointed out in R v Hanson [2005] 1 WLR 3169 Paragraph 13, that untruthfulness is not synonymous with dishonesty, and that a previous conviction for an offence of dishonesty will not necessarily be capable of establishing a propensity for untruthfulness.
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> The court was there considering applications made by the Crown to adduce evidence of the bad character of the defendant on trial. In such a case, particular attention has to be paid if the evidence is suggested to be relevant only to truthfulness or credit, to the danger that the jury may even sub-consciously and despite careful direction be influenced by the evidence on the question of propensity to offence and thus directly as to guilt. Whether upon examination of the test of relevance under gateway (d), or an application of the discretion under Section 101(iii), it remains essential that a cautious test of admissibility should be applied to applications of this kind made by the Crown in relation to the character of the defendant who is on trial.
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> 34. It does not, however, follow the previous convictions which do not involve the making of false statements or the giving of false evidence or incapable of having substantial probative value in relation to the creditability of a defendant, when he has given evidence which undermines the defence of a co-defendant. No doubt in this case also there exists the risk that a jury may subconsciously and despite direction be influenced by the evidence on the question of propensity to offend as charged as it exists in the case of an application made by the Crown

> against a defendant on trial. But it remains nevertheless wholly irrational that the degree of caution which is applied to a Crown application against a defendant who is on trial when considering relevance or discretion should not be applied when what is at stake is a defendant's right to deploy relevant material to defendant himself against a criminal charge. A defendant who is defending himself against the evidence of a person whose history of criminal behaviour or other misconduct is such as to be capable of showing him to be unscrupulous and/or otherwise unreliable should be enabled to present that history before the jury for its evaluation of the evidence of the witness. Such suggested unreliability may be capable of being shown by conduct which does not involve an offence of untruthfulness; it may be capable of being shown by widely differing conduct, ranging from large scale drug or people trafficking via house breaking to criminal violence. Whether in a particular case it is in fact capable of having substantive probative value in relation to the witness's reliability is for the trial judge to determine on all the facts of the case."

[44] So, it seems to me that Mr Stein is quite right in his submission that there is a very different situation where a man is charged here with the most serious offence (with the exception of treason) in the criminal calendar between that and any other situation and that he is entitled to defend himself by responding to the attack on him by showing the bad character of the person, in this case the co-accused, who is making this attack, and that bad character would include offences of theft and criminal damage in his submission, although he accepts the exceptions that I was making of very old offences or offences made before the age of 18 or irrelevant offences such as road traffic offences or sexual offences.

[45] As previously indicated, therefore, I find in favour of the applications of the first defendant and the Crown in regard to 6(1)(d) and 6(1)(g) against Christopher Power. The offence of ABH in 2013 may be admitted and the two offences of 2014 in Northern Ireland, and then all the matters set out in the detective Garda's email of the 30th June 2014 which was appended to the application by the Crown except the offence of 2002. In fairness to this accused I will draw the same time line as with the first defendant.

[46] The precise detail surrounding circumstances, as I say, should be discussed between counsel. Now, is there anything further that needs to be determined in this regard?

MR STEIN: No, my Lord.

MR DUFFY: No, my Lord.