Case No: HC 04/C00410

Neutral Citation Number: [2004] EWHC 2939 (Ch)
IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Thursday, 9th December 2004

B e f o r e :

HIS HONOUR JUDGE WEEKS QC
(Sitting as a Judge of the High Court)

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ZAO ASKERI-ACCA **(a company incorporated under the laws of the Russian Federation**	**Claimant**
- and -	
INTERNATIONAL ACCOUNTING STANDARDS COMMITTEE FOUNDATION **(a not-for-profit corporation incorporated in the state of Delaware, United States of America)**	**Defendant**

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MR. GUY TRITTON (instructed by Messrs. DLA) for the Claimant
MR. MICHAEL TAPPIN (instructed by Messrs. Freshfields Bruckhaus Deringer) for the Defendant

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Approved Judgment

Transcript of the Stenographic Notes of Marten Walsh Cherer Ltd.,
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His Honour Judge Weeks QC:

1. In this action I have to decide one question, which is a question of construction of a written licence agreement dated 14th November 1997. When the action started, two days ago, I had to decide a second question, which was a question of rectification. But in his submissions today counsel for the defendant has abandoned the claim for rectification and an associated claim relying on a collateral contract. The dispute between the parties is therefore confined to the meaning of the written licence agreement and I am not required to make any decision as to the preliminary negotiations or subjective intentions of the parties.

2. The agreement concerns the copyright in the Russian translation of the 1998 version of the International Accounting Standards. The parties to the agreement are the parties to this action. The claimant is a one-man Russian company founded by Mr. Askeri in 1991 or thereabouts to translate foreign works, especially works of professional interest, into Russian, and to publish them in Russia. The defendant is an international organisation incorporated in the state of Delaware, which is responsible for the International Accounting Standards. Those standards are a substantial document running to some 800 pages in usual format, and they set out uniform accounting standards which it is hoped by the International Accounting Standards Committee will be applied throughout the world. That is their object and they have recently been successful in obtaining the adoption of those standards by the European Union.

3. In 1994 Mr. Askeri, through his company, translated and published the first Western accountancy practice book to be published in Russia, or the old Soviet Union, since the revolution. This was a book by Mr. Wood. It had been published in England by Pitman and Mr. Askeri secured a licence from Pitman and the venture proved a success.

4. In 1997 the economic situation in Russia looked healthy and Mr. Askeri decided to approach the defendant with the idea of translating and publishing a Russian version of the International Accounting Standards. For that purpose he needed funding because his was a small company. He approached the National Training Foundation for funding, which is a Russian Government body that supports such ventures. Their preliminary response was that they would support it if Mr. Askeri obtained an exclusive licence to publish in Russia.

5. On 18th July 1997 Mr. Askeri came to London to meet the responsible official of the defendant. That was Mr. Ramin, a German national, who is and was at the relevant time the commercial director of the defendant. This was the only meeting between the two before the licence agreement was signed and would have been crucial to the claim for rectification. Since, however, that claim is no longer pursued it is not necessary for me to make express findings as to precisely what was or was not said at that meeting between Mr. Askeri and Mr. Ramin. There is, in any event, a lot of common ground between the two. The discussion took about 45 minutes and what was discussed was Mr. Askeri's request for a licence to translate and publish a Russian version. He wanted to

know the terms on which the defendant would give him such a licence. He asked for an exclusive licence and Mr. Ramin, it is common ground, refused that because it was not the defendant's policy to grant exclusivity.

6. This was a disappointment to Mr. Askeri but he pressed on and they discussed other terms, one of which was a guaranteed upfront advance of £25,000 from Mr. Askeri's company to the defendant. He was also told that the defendant only granted licences for a period of one year. But Mr. Ramin did say that in Mr. Askeri's case the IASC would grant official status to his translation, provided that Mr. Askeri set up an independent editing board to include prominent well-known Russian specialists in accounting matters.

7. What is in dispute between the parties is whether there was any mention of copyright at that meeting. It is not necessary for me to make an express finding on that subject. But since the claim for rectification has been abandoned I can say that I would in any event have accepted Mr. Askeri's version that there was no discussion of copyright at the meeting.

8. Mr. Askeri, after the meeting, went back to Moscow. He had to return to the NTF to give them the news that the defendant would not grant exclusivity. Mr. Sementsov, of the NTF, who perhaps had been encouraged because Mr. Askeri had by now paid off all his debts to the NTF, said that they would still go on with funding him. So the project went ahead. In September the defendant says that it sent a draft of a licence agreement by fax to Mr. Askeri. Mr. Askeri says that he did not receive it. Again, it is not necessary for me to make a finding on that. Certainly on 10th November 1997 Mrs. Bertol, who is the publications director of the defendant, sent a draft proposed licence agreement to Mr. Askeri. That agreement was the defendant's current standard agreement for translation and publication of the International Accounting Standards in a foreign language and had been used in Italy in 1994, in Croatia in 1996, and in Slovenia, Macedonia, Mexico and the whole of Latin America earlier in 1997. In May 1997 a different agreement had been used for Germany which was an agreement not to translate, print and publish, but simply to print and publish. But the standard form was used in the present case adapted to put in the appropriate figures mentioned at the meeting in July and it was received by Mr. Askeri in early November. By that time he had already gathered together an editing board of about ten Russian notables distinguished in the financial or accounting world, who were to oversee the translating of the standards into Russian.

9. When he got the draft agreement Mr. Askeri showed it to Mr. Sementsov of the NTF and he approved it. Mr. Askeri agreed a number of immaterial changes with Mrs. Bertol and signed it on 25th November 1997. The actual agreement is dated 14th November 1997, wrongly I think, but that is the date on which Mr. Ramin, for the defendant, had signed the agreement. The actual date is not of any real significance.

10. Mr. Askeri, in January 1998, paid the advance payment of £25,000, which was a substantial sum for a Russian company of that size, given the state of the economy in Russia and the exchange rates then prevailing. It was not a large sum, however, for the

defendant, because the evidence is that the defendant's annual revenue at the time amounted to $1.8 million.

11. In December 1997 Mr. Askeri or his company started full time work on the translation, employing a Mr. Tarusin to translate with the assistance of two editors, also employed by him, Mr. Terekhov and Mrs. Pushkareva. When the translation was done it was sent from time to time to the editing board who checked it for consistency and supervised the translation. The editing board was paid by the claimant company, with the exception of one member who was employed by the Russian Government and refused all payment.

12. During 1998, the 1998 International Accounting Standards was published in English and Mr. Ramin suggested to Mr. Askeri that instead of continuing to translate the 1997 version he should translate the 1998 version, which contained some new material and Mr. Askeri agreed.

13. In August 1998, however, the Russian economy went into financial crisis. In fairly short order the rouble went from 5 roubles to the dollar to 30 roubles to the dollar. This, of course, had an important effect on the general state of the financial world in Russia and the prospects for a Russian translation of a document such as this. Mr. Askeri, however, persevered and in giving evidence he estimated his total costs of production as being in the region of £100,000.

14. In September 1998, Mrs. Bertol, as the publications director of IASC, reminded Mr. Askeri of the obligation in the contract to insert a copyright notice in a particular form. The final editing meeting of the translation of the 1988 standards took place in Moscow on 18th September 1998. There is a dispute as to whether it was attended by Mr. Ramin. Mr. Ramin says that he did but left fairly rapidly because they were all talking in Russian with which he was not familiar. Mr. Askeri says that Mr. Ramin did not attend at all. Little, if anything, turns on that.

15. In the following month, October, Mr. Askeri sent the cover pages and pages of the introduction to the translation to the IASC in London where they were received and read by Mrs. Bertol. She noticed that there were errors on the cover page in such things as the telephone number and fax address of the defendant and she asked, by fax, for those matters to be corrected, which occurred. Mrs. Bertol also noticed that below the copyright notice which she had insisted on for IASC was a copyright notice for another Russian organisation which Mr. Askeri said was a subsidiary of his. She drew that to Mr. Ramin's attention.

16. As a result of that, there was either one or two telephone conversations between Mr. Ramin and Mr. Askeri. The version of what was said in those two telephone conversations differ, but I prefer Mr. Askeri's version which is backed up by a note, which I find to be contemporaneous in a document which Mr. Askeri intended to be a draft of a letter at the time to Mr. Ramin but which, having second thoughts, he decided not to send. What he did do was to consult a lawyer after the two telephone

conversations. That lawyer advised him to put in the exact wording to comply with the terms of his licence and that was done in the 1998 Russian translation of the accounting standards. Anomalously, therefore, that notice has the date 1997, which is consistent with Mr. Askeri's decision to abide by the letter of the agreement.

17. On 2nd November 1998, the Russian translation was presented at a conference specially organized by Mr. Askeri at his own expense in Moscow attended by a large proportion of the financial community in Moscow and representatives of the Government and also by both Mr. Ramin and Mr. Askeri. The Russian translation contained below the copyright acknowledgment for IASC, a copyright symbol and an assertion of copyright in the translation in Mr. Askeri or one of his companies. Mr. Ramin noticed that at the conference on 2nd November and had a very brief discussion with Mr. Askeri about it. It is, however, significant that he never protested in writing at any time thereafter to Mr. Askeri about the assertion in the 1998 translation of copyright in Mr. Askeri's company.

18. The business relationship between the parties continued. Mr. Ramin wanted to change the terms of the licence agreement, which had been automatically renewed by default for another year, although it did not in itself enable Askeri-ACCA to publish or translate the 1999 international accounting standards. So on 3rd September 1999, Mrs. Bertol sent a draft new licence agreement, this time stating in terms that the copyright in the translation belonged to IASC. Mr. Askeri refused to sign it, but on 8th October 1999, Mr. Ramin relented and wrote a letter to Mr. Askeri extending the licence agreement dated 14th November 1997 and enabling Mr. Askeri, or rather Askeri-ACCA, his company, to translate and publish the 1999 International Accounting Standards. That they did, and in the course of December the 1999 Russian translation was published by Askeri-ACCA. The 1998 version had not been the success anticipated by Mr. Askeri and had sold only between 3,000 and 4,000 copies. How well the 1999 version sold is not clear on the evidence.

19. What happened in the year 2000 is that Mr. Ramin decided to take a harder line. On 8th August 2000, he wrote to Mr. Askeri formally terminating the licence agreement dated 14th November 1997 on the third anniversary. At the same time Mr. Josling of IASC sent Mr. Askeri a revised licence agreement, already signed on behalf of IASC and dated 4th August. This was a licence to publish and distribute only. It was not a licence to translate. It made it clear beyond any doubt that the copyright in the translation belonged to IASC. Mr. Askeri refused to enter into a new agreement on those terms with IASC and so his agreement with them came to an end on 14th November 2000.

20. In the next month Mr. Ramin, on behalf of IASC, entered into a new licence agreement with ZAO PricewaterhouseCooper which is the Russian arm of the well-known international accounting firm. That agreement purported to license PricewaterhouseCooper not to translate the document in which IASC had copyright but to publish and distribute the translation which Mr. Askeri had made of the 1999 International Accounting Standards. In February 2001, IASC delivered an electronic copy of the translation that Mr. Askeri had made of the 1999 IAS to PricewaterhouseCoopers.

21. Mr. Askeri, very shortly afterwards, discovered what had happened, was incensed and started proceedings against PricewaterhouseCooper in the Moscow District Court for breach of copyright. Those proceedings were defended by PricewaterhouseCooper on the basis that they had a licence from IASC, and Mr. Ramin's evidence to the Russian court was that he, on behalf of IASC, had licensed PricewaterhouseCooper to use the translation which had been made by Askeri-ACCA. The 1997 agreement contains a clause which provides: "This Agreement shall be construed according to English law and the parties submit to the jurisdiction of the English courts." The matter was therefore referred to the English courts, and on 6th February 2004, proceedings were issued by ZAO Askeri-ACCA in the Chancery Division against the International Accounting Standards Committee Foundation which is the body that entered into the agreement with Mr. Askeri's company in 1997.

22. The defendant defended the proceedings and counterclaimed for rectification but, as I said, that counterclaim for rectification or for a collateral contract has been abandoned after Mr. Ramin was cross-examined. I, therefore, only have to decide the question of construction. The relevant law is not in doubt. It was stated by Lord Hoffmann in the well-known case of **Investors Compensation Scheme v West Bromwich Building Society** [1999] 1 WLR 896 at page 912. He said:

> "(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.
>
> (2) The background was famously referred to by Lord Wilberforce as the 'matrix of fact', but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man."

23. Then, after dealing with evidence as to the previous negotiations of the parties, which is excluded for reasons of practical policy, Lord Hoffmann goes on:

> "(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax: see **Mannai Investments Co. Ltd. v Eagle Star Life Assurance Co. Ltd.** [1997] 2 WLR 945.
>
> (5) The 'rule' that words should be given their 'natural and ordinary meaning' reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other

> hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously" [in the **Antaios** case].

24. I, therefore, have to construe the document against the relevant background. Among the relevant items in the background, it appears to me that one of the most important is the Berne Convention on copyright to which both the UK and Russia was a signatory at the relevant time. That Convention provides in article 2(3): "Copyright subsists in translations but without prejudice to the copyright in the original work." If nothing is said in the agreement, the copyright in this translation would therefore belong to Mr. Askeri's company.

25. Another relevant fact is that the document on which the agreement was based was the standard form used by IASC on previous occasions for previous translations with the exception of Germany where IASC had made their own translation. IASC, therefore, were submitting their standard form to Mr. Askeri and if there were matters which were of particular importance to IASC, it was up to them to make it clear in their standard form what they intended.

26. Another matter in the background is that the standards were updated annually. Mr. Askeri might hope to obtain permission to translate and publish the standards for subsequent years but had no right to do so. On the other hand, he would be expecting to incur the bulk of his expenditure in the first year in translating the 1997 standards. He would want to recover that expenditure as quickly as possible and to do so he would have to see the agreement renewed because it would take him probably nine months to do the translation, leaving only three months for printing, publishing, marketing and sales.

27. Another part of the background is that both parties had a commercial interest in the matter being a success. Mr. Askeri, of course, was in it for the money but, I suppose, incidentally, for the reputation that this book would give his publishing company. As he said, it was important for him to have an asset which would represent something in the bank, as it were, for his one man company. IASC also had aims which were to some extent compatible with those of Mr. Askeri. They wanted to promote the International Accounting Standards throughout the world, particularly in Russia which was developing and becoming more important economically, and it wanted eventually to have those standards adopted by the Government of Russia.

28. Mr. Tappin submits that allowing Mr. Askeri to own the copyright would be a fundamental bar to his clients' ambitions to adoption of the standards into the national law. In practice, that does not seem to me to be so because if Mr. Askeri was given any copyright it was only in the translation which he was authorized to make of, first, the 1997 version, then the 1998 version and then the 1999 version. If and when the Russian Government came to adopt the standards into national law it would no doubt want to adopt the then current version and not some historic version. It might be convenient in producing that version to use Mr. Askeri's translation of previous versions and for that

Mr. Askeri would have to be compensated. There does not seem to me to be any incompatibility between this object and Mr. Askeri owning the copyright.

29. With that background in mind, I must turn to the licence agreement and see whether expressly or by implication it contains either an assignment or an agreement to assign or possibly evidence of the parties' intention to assign the copyright of the translation. It is not pleaded or submitted that there should be an implied assignment by virtue of the doctrine which used to be called the Moorcock doctrine and was explained by the House of Lords in **Liverpool City Council v Irwin** [1977] AC 239 under which terms are implied into a contract where it is necessary to give business efficacy. That submission is not made to me, nor is it pleaded.

30. I, therefore, have to construe the construe the agreement which I will now read in full or as nearly in full as is necessary to determine the question of construction. It is headed "Licence Agreement": "This Licence is made the 14th day of November 1997 Between International Accounting Standards Committee ('IASC')", of an address in London, "and Closed Joint-Stock Company 'Askeri-ACCA' ('Licensee')", of an address in Moscow.

31. Clause 1:

> "IASC is the author of International Accounting Standards and is entitled to the copyright thereof in all countries and in all languages.
>
> 2. IASC hereby grants to the licensee a 'non-exclusive' licence to permit the licensee to translate the text of the International Accounting Standards ... into Russian, and publish that Russian translation in a designated publication for distribution and sale only in RUSSIA, provided that the licensee:
>
> (a) does not alter in anyway the International Accounting Standards without IASC's express permission in writing;
>
> (b) does not include International Accounting Standards or Exposure Drafts (or any part thereof) in any other publication, electronic database or other media without IASC's separate express permission in writing;
>
> (c) does not dispose of or distribute the designated publication FREE or at excessively discounted prices without IASC's express permission in writing;
>
> (d) acknowledges in both the English and Russian languages IASC's copyright and states IASC's full name and address (as mentioned below) in the inside front cover of all copies of the designated publication."

32. There is then a square box in different type which sets out the wording of the copyright acknowledgment: "Copyright", copyright symbol, "1997 International Accounting Standards Committee, Exposure Drafts, and other IASC publications are copyright of the International Accounting Standards Committee, 166 Fleet Street, London..... All rights reserved. No part of these publications may be translated,

reprinted or reproduced or utilised in any form either in whole or in part or by any electronic, mechanical or other means, now known or hereafter invented, including photocopying and recording, or in any information storage and retrieval system, without prior permission in writing from the International Accounting Standards Committee".

33. The International Accounting Standards have been translated into Russian and are published by Askeri-ACCA, with the permission of IASC.

34. The approved text of the International Accounting Standards is that published by IASC in the English language and copies may be obtained direct from IASC.

35. The 'Hexagon device', 'IAS', 'IASC' and 'International Accounting Standards' are Trade Marks of the International Accounting Standards Committee and should not be used without the approval of the International Accounting Standards Committee."

36. Subclause (e) of clause 2 provides for artwork; (f) provides for royalties on a sliding scale between 13 and 20 per cent of the gross price of every copy sold. Subclause (g) provides that Askeri-ACCA should "pay IASC in respect of the royalties payable under 2(f) above a guaranteed advance of £25,000 (twenty-five thousand Pounds Sterling) within thirty days of signing this agreement."

37. Subclause (h) requires the licensee to pay "the balance of any royalty referred to in 2(f) above, annually, within ninety (90) days of the last day of October in each year of the term covered by this Agreement; (I) supplies to IASC with the annual royalty payment a certified statement showing the number of copies of the licensed publications sold and the calculation of the royalty due; (j) provides IASC with a copy of the licensed publication for its records as soon as it is published in printed format and also in electronic format on disk in RTF format."

38. Clause 3:

> "The agreement will come into effect on 14th November, 1997 and continue for one year, and will automatically be renewed on an annual basis unless notice is given by either party three months before the expiry of the initial term of the Agreement or subsequent annual renewals."

39. Clause 4:

> "The agreement may be terminated by IASC for breach of agreement (subject to reasonable time for rectification) or bankruptcy or similar arrangement of the licensee. In the event of termination, any outstanding royalties due will be payable within thirty days of the termination date."

40. Clause 5:

> The agreement shall be subject to the laws of England and each party agrees to jurisdiction in the English courts."

41. Clause 6 I need not read; that provides that the royalties should be paid gross, plus VAT if applicable. That is the sum total of the two-page document which I have to construe.

42. The clauses relied on by the IASC for an assignment, or an agreement to assign, or evidence of intention to assign, are clauses 1 and 2 (d).

43. Clause 1 is very brief, one sentence:

> "IASC is the author of International Accounting Standards and is entitled to the copyright thereof in all countries and in all languages."

44. Mr. Tappin submits that this must be construed at the very least as showing intention that the Russian translation thereby authorised should be subject to IASC's copyright. That is not how I read clause 1. Clause 1 seems to me to be an introductory statement amounting to what is commonly called a warranty of title, or an assertion that IASC as party to the agreement has the legal status to grant the right which it is about to grant in clause 2.

45. It says quite correctly that IASC is the author of International Accounting Standards, which I take to be the English version, and is entitled to the copyright thereof. "Thereof", I think refers back to International Accounting Standards, i.e. The English version. The sentence goes on, "in all countries", which is a correct statement of the law, as I understand it, that copyright is international. Then it goes on, "and in all languages". It is those words on which Mr. Tappin fastens as a slender peg on which to hang his submission that this amounts to acknowledgement of their IASC's copyright in the Russian version.

46. In my judgment, that is too fragile a peg on which to hang such an inference. All the addition of those words means, in my judgment, is that IASC as the copyright owner of International Accounting Standards is entitled to license the use of that document in all languages. It is a condensed version of an assertion which is important for the purposes of this document because it gives the justification for the grant of the licence to translate into Russian, which occurs in the next clause.

47. The other clause relied on is clause 2(d), which Mr. Tappin accepts would not be sufficient on its own to justify an inference of an intention to assign copyright. This refers only, in my judgment, to copyright in the English version of the International Accounting Standards, as is made clear by the wording in the box that "International Accounting Standards, Exposures, Drafts, and other IASC publications are copyright" of IASC.

48. This Russian translation was not a publication of IASC, as was made clear later on. The Russian translation was published by Askeri-ACCA with the permission of IASC. The result is that, in my judgment, Mr. Askeri was right to put that acknowledgement into the 1998 translation but also right to include as well a copyright notice for his translation. The wording in the Agreement refers to the English version.

49. My conclusion is, I think, consistent with the background to which I have referred. It is also, in my judgment, consistent with a sensible commercial construction of this document. A construction of this document which involved copyright being assigned by Mr. Askeri's company to IASC in the Russian translation, which Mr. Askeri was going to make at his own expense, would, in my judgment, have been a ludicrous document for Mr. Askeri properly advised to have entered into.

50. Mr. Askeri may have been assured at his meeting with Mr. Ramin that if the translation was of high quality there would be no problem in renewing the agreement, but he had no guarantee of that. His only leverage to secure renewal would be his ownership of the copyright, which would mean that if IASC wanted to terminate the agreement and still wanted to have the standards translated into Russian they would at least have to start again. They could do so perfectly legally but they would not be able to use the translation on which Mr. Askeri had spent so much time and money.

51. Without that right, Mr. Askeri would have been entirely at the mercy of IASC who could have terminated the agreement on 14th November 1998, or, if they missed that date, on 14th November 1999, and said, "Thank you very much for the translation" and then (as they in fact did) passed it to another company in Russia who thereupon proceeded to publish it as their own work, thereby depriving Mr. Askeri of a large part of the fruits of his labour and expense.

52. In my judgment, to construe the agreement as has been submitted by Mr. Tappin, as an assignment of the copyright would be close to making it an agreement so one-sided that no person properly advised in Mr. Askeri's position could possibly have entered into. I am pleased that my construction in the light of the background happens to coincide with what I regard as the commercial realities of the situation.

53. I will therefore grant the relief sought by the claimant in this action and dismiss the counterclaim which has been withdrawn.

Yes, Mr. Tritton?

MR. TRITTON: Your Lordship is probably aware that I am -- indeed the whole legal team is -- on a conditional fee in this matter.

JUDGE WEEKS: I am not.

MR. TRITTON: You were not?

JUDGE WEEKS: No.

MR. TRITTON: My Lord, the main reason is simply that Mr. Askeri/Askeri-ACCA has simply no money.

JUDGE WEEKS: I thought it quite possible. Actually, there is no document that tells me.

MR. TRITTON: It was in the bundle. I think it is right to put that. My Lord, that does not impact because that of course is a matter for detailed assessment. The cost order I am going to seek from your Lordship today is a normal cost order in relation to the claim and an indemnity costs order in relation to the counterclaim.

The simple reason I ask for indemnity costs in relation to the counterclaim is because, quite frankly, my Lord, in our respectful submission, it was utterly hopeless. It relied upon the oral evidence of one man and if I may respectfully submit we would say that that person's evidence was at best poor and at worst ----

JUDGE WEEKS: Yes, Mr. Tritton, you are pushing at an open door. I had better hear Mr. Tappin. Mr. Tappin, why should I not make an indemnity costs order?

MR. TAPPIN: My Lord, the position on indemnity costs, the Court of Appeal said in the Excelsior case that there has to be something which takes the case -- I think the words are -- out of the norm, or out of the ordinary. We would submit this is not such a case. This is a case in which, as often happens, you have two parties who meet together. There are different views as to what happened, different evidence as to what happened. If my evidence is accepted, then the counterclaim succeeds. If my learned friend's evidence is accepted, the counterclaim fails.

There is no reason why bringing such a claim is in any way out of the ordinary. There is no way of predicting how the evidence will come out at trial, and in cross-examination will pan out, and so forth.

My Lord, when one looks at the position of my client, it has the evidence of Mr. Ramin, one of its officers, in support of its case. Is it unreasonable for my client to pursue that claim based on the evidence of one of its officers, which, if correct, is going to lead to success of the counterclaim?

This is not a case in which there was documentary evidence against Mr. Ramin's version of events. It turned always on the relative credibility of the two witnesses and that is a matter which is not possible to assess until one has had the evidence.

We would submit my client, the IASCF, can in no way be criticised for bringing a counterclaim based on the evidence of its officer, Mr. Ramin, in circumstances where, if he was shown to be correct in his recollection, the counterclaim would succeed. This is not a claim out of the ordinary, out of the norm, such as to justify the award of indemnity costs.

MR. TRITTON: My Lord, I have one point to say on that. Why has my learned friend dropped it before seeking judgment?

MR. TAPPIN: That is quite clear because it depends on how the evidence comes out. One has taken an assessment after the evidence has come out. I do not think that is in any way a criticism of us for having brought the claim in the first place, which is what my learned friend is seeking to criticise us for.

JUDGE WEEKS: I now have to decide the costs of this action and counterclaim. The claimant has been successful in the action in establishing its construction of the document in question and, of course, is entitled to its costs of the claim to be assessed on the standard basis.

Mr. Tritton, however, submits that as regards the counterclaim his clients should have the costs on the higher indemnity basis. That counterclaim was one for rectification and was withdrawn, quite properly, after all the evidence had been heard.

Indemnity costs is an unusual order to make, of course, but in the present case I am satisfied that it should be made for two reasons. The first is that the counterclaim was one for rectification. It was based on a version of what was said, or not said, at a meeting attended by the commercial director of the defendant company and the sole proprietor of the claimant company. Their versions were so different that there could be no mistake in this matter; one of those two gentlemen had to be not telling the truth about such a crucial matter as the ownership of copyright.

It seems to me that for practical purposes there was no scope for misunderstanding as to whether or not that topic was raised. The parties gave diametrically opposed witness statements on this topic and I would have had to choose the evidence of one or the other.

The abandonment of the counterclaim seems to me to be no more than the recognition that Mr. Ramin's evidence was not credible on that subject, as indeed his evidence on other subjects was found not credible by a judge in the United States. The defendant company was therefore relying on the false evidence of its commercial director to maintain the counterclaim.

The other factor I take into account is that this, I think, was an oppressive claim by a company, albeit a not for profit company but one with large resources, against a small foreign company forced to contract on terms put forward by the defendant which were at best ambiguous, and then to litigate in England over a claim for rectification for which there was, in my judgment, no basis on the evidence.

In those circumstances, I will order the defendant to pay the costs of the counterclaim on the indemnity basis.

Will you agree the order with.....

MR. TRITTON: My Lord, sorry, I just needed to know what your Lordship's judgment on that was. I do seek an interim costs order in this case and the amount I am instructed -- your Lordship will appreciate, or perhaps will appreciate now, that part of the reason we decided to do this case on a conditional fee agreement was because it was thought to be what would be described as an old style construction summons. There had been no information that rectification would be sought in the pre-action correspondence.

Summarily, what happened, as we go for a part 8 construction summons we get this rectification which we try to kick out, but we fail. Suddenly we have, therefore, disclosure, witness statements, and all those matters. I am sure your Lordship has taken that into account when making your finding.

I understand that our costs, and I think I had better be very careful on this one, obviously it has not actually been incurred in the sense my client has not actually paid them out, but I understand they are round about the 150K mark.

JUDGE WEEKS: That is for claim and counterclaim?

MR. TRITTON: Claim and counterclaim, it is the whole lot. We do ask for an interim payment and we are going to ask only for £50,000. I should say that does not take into account any uplift which might be found on detailed assessment.

I am conscious, my Lord, that the defendants may appeal or seek to appeal, or may even seek permission from your Lordship to appeal. We do not want to have to pay that stuff which ultimately is not ours.

What we were going to propose is that that goes into an interest-bearing account pending ultimate resolution of the proceedings.

JUDGE WEEKS: What good will that do you?

MR. TRITTON: The interest will accrue to my client.

JUDGE WEEKS: But you will be entitled to interest on costs, will you not, from the.....

MR. TRITTON: I will take instructions. (*Pause*) I think, my Lord, bearing in mind the financial situation of the defendant, perhaps it is unrealistic to suggest that we will not get our costs from them. My Lord, I think perhaps in those circumstances we do not need to pursue that.

JUDGE WEEKS: I could make an order for interim payment if permission to appeal is not granted within a certain time, could I not?

MR. TRITTON: That I would be delighted with, my Lord, yes. If I could put it like that, yes.

JUDGE WEEKS: But I had better hear the submissions. You wish to ask for permission to appeal?

MR. TAPPIN: My Lord, yes. Could I deal, firstly, perhaps in slightly reverse order on this issue of the interim costs order. The problem is that we have not been provided with a schedule so it is impossible for me to address the issue of whether there should be an interim payment.

JUDGE WEEKS: Just taking a broad-brush approach, £50,000 is realistic, is it not?

MR. TAPPIN: It does not sound outrageous.

JUDGE WEEKS: It is modest, if anything.

MR. TAPPIN: Yes.

JUDGE WEEKS: You know what your own costs are and no doubt they are very much more than that.

MR. TAPPIN: My Lord, just dealing with matters and perhaps going backwards a little. Firstly, on the issue of indemnity costs my Lord made certain observations as to the veracity of the evidence of Mr. Ramin. That is an issue on which I did not address you in my closing submissions, and I did not think it was necessary because the issue of rectification did not arise.

My Lord, had I addressed you on rectification, I would of course have addressed that issue. I think my Lord has drawn an inference from the fact that the counterclaim for rectification was withdrawn that it was an acceptance by my client that the evidence of Mr. Ramin was not credible. My Lord, I would not say that is the right inference to draw. We bore in mind that it needed to be compelling evidence, as my learned friend pointed out in opening, and we took the view that when it came to the evidence of Mr. Ramin as to his recollection of the meeting, particularly my learned friend for him to accept that he could not really remember what was said, we took the view we were unlikely to persuade my Lord that the compelling evidence needed for a claim of rectification was there.

My Lord has made the observations my Lord has made but I think if my Lord has drawn an inference from the way we have in fact abandoned the claim as to the fact that we accept Mr. Ramin's evidence is not credible, I would say that is an inference that should not be drawn, and it would be unfair on Mr. Ramin to draw that inference without having heard me on the issue of his credibility.

I do not propose to do that because that will take up unnecessary time but I would just wish to make that point clear, otherwise I suspect Mr. Ramin will be distressed that such an inference was drawn from the abandonment of the counterclaim.

JUDGE WEEKS: I will note that point.

MR. TAPPIN: My Lord, I should also say that in the case of my Lord's judgment as to the historical background, my Lord made certain observations, firstly, as to who did the translation and who paid for it. Those are matters which were not in issue in these proceedings. We did not cross-examine on them because it was not relevant, and in fact because it is another issue on which my learned friend's clients said at the outset of the proceedings were not relevant therefore we did not go into them. I should say, as I made it clear during cross-examination of Mr. Askeri, we do not accept his account of who did the translation and who paid for it.

Secondly, my Lord made certain findings of fact, and of course, in that part of the judgment as to whose view of events was preferred on various matters, such as the meeting in July 1997 and the contents of the calls in October 1998. Again, those are matters on which I did not address my Lord because of the abandonment of the claim for rectification. My Lord made those observations without the benefit of hearing me on those issues. Again, in case those matters turn out to be relevant in any other proceedings, I wish to put that position absolutely clear.

On the substance of permission to appeal, my Lord, construction of a document is a matter of law and we would submit that my Lord has, with respect, gone wrong in law in regarding the words "in all languages" in clause 1 as being part of a warranty of title or recital which were important so that we could give assurance to Mr. Ramin by way of warranty or recital that we had the rights to grant him. The words "in all languages" are, we would submit, wholly unnecessary in order to give that warranty. What is necessary for a warranty is that we own the copyright in the English version and that we own the copyright in all countries. It is not necessary to recite "all languages" in order to give the warranty of title necessarily.

We would submit my Lord has there gone wrong, with respect, in using those words or regarding those words as part of the warranty of title. We say they are wholly unnecessary for that purpose.

Secondly, we would say my Lord has not properly assessed the background, in particular in regarding it is significant that Mr. Askeri had no guarantee of renewal and has,

with respect, neglected the fact that this was a business contract which may carry a business risk which may be worth running if the prize is seen as great enough. My Lord did not refer to the size of the prize available to Mr. Askeri and when one has that in mind against the assurance of Mr. Ramin as to renewability, one can see that, although there is no guarantee, there may well be a risk worth running.

Therefore, we say my Lord has not properly assessed the background or seen how that makes what my Lord has regarded as commercially -- I do not think my Lord used the word "suicidal" but a word to the same effect is there, turns that kind of contract into one which is by no means commercially suicidal but is well worth the risk in the business sense.

My Lord we would ask for permission to appeal on at least those grounds, those are the ones that occurred to me while listening to my Lord's judgment.

JUDGE WEEKS: No, Mr. Tappin, I think you must ask the Court of Appeal. It is notorious that different minds can reach different conclusions on construction of practically everything, but in this case I think there is insufficient prospect of success to warrant my granting leave. I will give you a certificate to that effect if you want one.

MR. TAPPIN: As to the appeal, we will need one I think.

JUDGE WEEKS: I will see if the clerk has one. That is what I want. I will give it to you before you go.

MR. TRITTON: My Lord, can I just make sure that your Lordship's order does indeed mean that if permission to appeal is not given that within a certain period £50,000 will be paid to my client.

JUDGE WEEKS: No, I have not decided that yet. I was going to hear what Mr. Tappin wants to say about that.

MR. TRITTON: I see, I am sorry. I just wanted to make sure that that did not get lost in the process.

MR. TAPPIN: My Lord, probably the right order is that if no appeal is lodged within 14 days ----

JUDGE WEEKS: You cannot lodge an appeal, can you, before getting permission?

MR. TAPPIN: I am sorry. If no application for permission to appeal is lodged within 14 days, or permission to appeal is refused then ----

JUDGE WEEKS: Should there not be a cut off period so that you will have to get on with your ----

MR. TAPPIN: We have to wait and see what happens. It goes to the Court of Appeal and we are rather then subject to their procedures.

MR. TRITTON: I am happy with that, my Lord.

MR. TAPPIN: One cannot do much about that.

JUDGE WEEKS: If no application is lodged within 14 days or permission to appeal is refused, then payment of £50,000 on account of costs within seven days thereafter.

MR. TAPPIN: Could we say within 14 days thereafter?

JUDGE WEEKS: Are you happy with that?

MR. TRITTON: I am happy, my Lord.

JUDGE WEEKS: Within 14 days thereafter.

MR. TRITTON: I am much obliged, my Lord.

JUDGE WEEKS: You will agree an order between you, will you, and lodge it?

MR. TAPPIN: My Lord, that is all I think.

JUDGE WEEKS: Thank you both for your skeleton arguments.
