SOUTHWARK CROWN COURT

REGINA
-V-
SCOTT CRAWLEY
DALE WALKER
DANIEL FORSYTH
AARON PETROU
and
BRENDON DALEY

RULING ON ABUSE / ADJOURNMENT

GENERAL

1. The defendants are charged with offences of conspiracy to defraud, possessing criminal property and offences contrary to s.19 and 23(1), and s.177(4)(a) of the Financial Services and Markets Act 2000. The evidence is complex and substantial. The volume of papers amounts to some 46,030 pages. There are in addition 194 excel spreadsheets with a combined total of 864,200 lines of entry. The Case Summary covers 55 pages.

2. In essence the Crown alleges that between 2008 and 2011 the defendants were involved in a land banking scheme using, variously, three limited companies. Those companies acquired, or purported to acquire, sites which were then divided into a number of sub-plots. It is alleged that those sub-plots were then aggressively marketed to members of the public – often vulnerable members of the public – who were persuaded to buy based on false representations as to the nature of the company selling the sub-plots, the professionals they employed, as to planning permission, potential purchasers of the sites for onward development and their previous success. Some purchasers were given good title, some were not, and some sub-plots were sold more than once. Various interventions by the FSA (as it then was) to stop the practices were subverted by transferring the fraudulent scheme to a new company.

3. The rôles of the defendants range from the directing minds of the fraud (Crawley and Daley), the senior managers (Forsyth, Peters and Petrou), the salesmen (Mitchie and Hawkins) to the conveyancing solicitor (Walker). There is to be a cutthroat defence run as between Crawley and Walker and it is likely that other defendants will seek to blame co-defendants.

BACKGROUND

4. On 10th July 2013 the Honorary Recorder of Southwark granted representation orders for QC and junior to Crawley and Daley, and leading junior and junior to Forsyth and Petrou. Walker's legal team was privately instructed but he is now on legal aid and his application for extended representation has not been lodged. On 22nd July the Legal Aid Authority ("LAA") notified the parties that the case has been classified as a Very High Cost Case ("VHCC").

5. In about September 2013 the Ministry of Justice ("MoJ") announced their intention to cut fees paid to counsel by 30%. The Bar announced their dissatisfaction with this decision and their intention to undeem VHCC cases. The Bar Standards Board was involved in this and the Code of Conduct was amended to undeem such work.

6. Sensing that a number of cases might be affected, the MoJ allowed the previous rates to be extended to any trial which was due to start before 31st March 2014. In all other cases the Bar were given until 2nd December 2013 to decide whether to accept a VHCC contract on the new terms. In this and every other case which did not fall within the concession provided by the MoJ they declined to accept instructions.

7. At a hearing on 14th November 2013 the defence raised concerns that they would not have counsel for the trial and that there was insufficient time for any counsel who might now be instructed to be ready by April 2014. I judged it to

be too early to decide that a trial could not be heard in April 2014 and refused the application to vacate the trial date.

8. By 27th November 2013 all counsel had returned their briefs.

9. The case was listed on 23rd December for the abuse argument to be heard. The defence were not united in their approach. Mr Nicholas Brett, solicitor acting for Crawley, wrote on 18th December submitting that it was too early to hear Mr Lee Adams, acting on behalf of Forsyth in the first trial and all three defendants in the second trial, who was applying to stay the proceedings. Mr Brett submitted that it would not be in the interests of justice to adjourn the trial to accommodate this dispute (see §17 of his statement dated 7th April 2014 and pp.23-5 of NMB/1). The Crown also submitted that the abuse argument should be adjourned to, at the latest, the first day of trial, and I adjourned the argument which was then fixed for 28th April 2014.

10. At the hearing on 23rd December Robin Heard of the LAA offered to de-classify the case. I am told that counsel considered whether to take advantage of the offer and thereby accept the rates available under the Graduated Fee Scheme. Because counsel would not have been able to obtain interim payments and because any special preparation claim to allow for reading papers exceeding 10,000 pages would only be resolved *ex post facto* with no guarantee that they would be paid for that additional reading (see Shaffron 07/04/14 Stt. §6), the offer was rejected by all counsel. At §24 of his statement Mr Adams supports the view that counsel would be worse off if the case was de-classified.

11. During this same period the MoJ and the Bar were negotiating over proposed reductions in graduated fees. The Public Defender Service ("PDS"), a department of the LAA, began actively to recruit a pool of employed advocates to take on work that might otherwise have been done by independent advocates.

12. On 22nd January 2014 the solicitors acting for the defendants contacted the PDS and provided details of the case. The PDS responded on 23rd January that they had three QC's and no juniors employed by the Service.

13. On 17th January 2014 I formally ruled that there was to be severance, irrespective of whether the defendants were going to be represented. I judged that due to the size and complexity of the case, and the number of defendants to be tried, no jury could properly consider the individual cases of eight defendants in one trial and that there was a real risk that the length of the trial would exceed three months and place an intolerable strain on the jury were they to be tried together.

14. I ordered that Defence Case Statements, witness requirements, admissions etc. should be served, and for skeleton arguments on abuse to be prepared. It was agreed that no jury would be needed before 6th May 2014.

15. On 24th January the Crown identified the defendants to be tried in each trial, their decision being adopted by the court. The first trial remained fixed for 28th April 2014 with a time estimate of 2½ to 3 months and the second trial was fixed for 15th January 2015 with a time estimate of 6 to 8 weeks.

16. One of the reasons for requiring the defence to continue to prepare for trial was to try to ensure that, should I be persuaded that the trial could go ahead with the defendants unrepresented, or should advocates become available at a late stage and some further reading time was required, then the trial could start in May, or after a short delay but within the same time frame.

17. I am grateful to the solicitors in this case for the work they have done to prepare for trial and I judge that, with perhaps the need for some pre-trial management which would occupy a few days, this case is trial ready.

THE ABUSE ARGUMENT 28TH APRIL 2014

18. I ordered and have been provided with a joint skeleton argument drafted on behalf of all the defendants and have had a separate written submission and heard from Mr Adams, a solicitor with rights of audience, but with no experience of trial advocacy.

19. Mr Alex Cameron QC has appeared *bro bono* in these proceedings to advance the argument on behalf of the defendants that I should stay the proceedings because they are unrepresented through no fault of their own and that I should not grant an adjournment because the possibility that at some unknown date in the future an adequately funded advocate may become available is no basis on which to grant an adjournment.

20. The prosecution has been represented by Mr Ben Emmerson QC, Mr Sean Larkin QC, Mr Paul Raudnitz and Ms Polly Dyer. Mr Emmerson QC has been instructed by the FCA specifically to deal with legal issues arising in the course of these submissions and is not instructed as trial counsel.

21. The Crown accepts that involuntary lack of representation would be inconsistent with the European Convention on Human Rights and common law rights and they accept that a fair trial cannot be held now. It is the Crown's submission that there is a reasonable prospect that advocates will be available to represent the defendants in the future and that I should adjourn the trial to a future date rather than staying the indictment. I have also considered their latest note on choice of representation which was served on 30th April.

22. Mr Tom Little, who appeared as *Amicus Curiae* instructed by the Attorney General to assist the court has helpfully pointed out the strengths and weaknesses in the arguments put forward by the Crown and the defence. He points to a stay as an abuse of the process being an exceptional remedy and to the need for me to consider whether an adjournment is likely to bring about an effective trial in the future.

23. It is agreed by both sides that my ruling only affects the five defendants who are listed for trial this week.

24. At previous hearings the solicitors representing the interests of their clients have been keen to stress that they do not want their clients to become the victims of a dispute between the Bar and the Government. I agree with them.

25. Similarly my decision on how to proceed in this case is taken without regard to the continuing dispute between the Bar and the MoJ. I am only concerned with the merits of the arguments put before me and to ensure that a trial is only held if it can be conducted fairly in accordance with the principles long established in this country and which are, additionally, enshrined in Article 6 of the European Convention on Human Rights.

FIRST ISSUE: CAN THE DEFENDANTS RECEIVE A FAIR TRIAL NOW?

26. Having been invited by Mr Larkin QC to strike out the last six lines of §15 of the Prosecution's First Skeleton Argument, for the purposes of this application the prosecution accept that the defence took reasonable steps to find representation up to mid January 2014, that, presumably, being the time by which advocates would have needed to be instructed for the trial to take place in April. It follows that I should approach this argument on the basis that the defendants have not voluntarily or by their own indolence failed to obtain representation.

27. The efforts to find representation included contact with 70 sets of chambers with barristers who hold themselves out as competent to undertake this sort of work in and outside London.

28. By 15th January 2014 there was one silk who put himself forward as willing to accept instructions. He withdrew on 16th January.

29. It is beyond question that the PDS is not in a position to provide sufficient representation for a trial beginning in April 2014. Other avenues were explored which I will summarise later in this ruling.

30. Mr Emmerson QC and Mr Larkin QC, have in written and oral submissions accepted that, where through no fault of the defendants they are unrepresented, to try them would be in breach of their common law rights and in addition contrary to Article 6(3) of the Convention.

31. It follows that there is common ground in respect of the First Issue: the case is ready for trial and the court has set aside the necessary time to hear this case. However none of the five defendants can receive a fair trial unrepresented. It follows that none of the five defendants can be tried now.

32. That is not an end to the matter. At the hearing on 23rd December 2013 I included the following passage in my ruling:

> "I cannot rule at this stage that it would be an abuse of the process of this court to try the defendants in four months time, nor do I know now whether in four months time an adjournment of an unknown amount of time may not cure the problem that the defendants now face…
>
> "I add… that, should any defendant fail to exploit the opportunity to get representation, I judge that to be something I could properly take into account if this application to stay has to be made on 28th April 2014.
>
> Meanwhile I will continue to manage this case for a first trial beginning on 28th April."

33. The Second Issue is, therefore, should I grant an adjournment? First I set out the topics which I have considered in this regard.

FURTHER ENQUIRIES UNDERTAKEN TO OBTAIN REPRESENTATION

34. The continuing failure to secure advocates is relevant to my decision whether to grant an adjournment but I do not intend to review the painstaking enquiries to find advocates which have been undertaken jointly by the solicitors because it is sufficiently set out in the statements of Lee Adams, Ilana Hutton (7th and 24th April) and Amy Shaffron (7th, 24th and 25th April) and in their exhibits.

35. The process was repeated after 27th March 2014 when an agreement was reached between the MoJ and the Bar in relation to the Graduated Fee Scheme (see the Chairman of the Criminal Bar Association's statement, ALS/14). Schedules have been prepared to show the position over time as more and more chambers confirmed that they had no counsel available and willing to work on VHCC cases. The second statement of Ms Shaffron sets out the results of her latest attempts to find counsel. She has responses from 69 chambers to the effect that they are unwilling to accept this case as a VHCC.

36. When the prosecution identified a further 58 sets of chambers who undertook criminal work in their skeleton dated Sunday 27th April 2014, the defence immediately began the task of contacting those chambers on the Monday whilst I heard argument. Of the 35 that they were able to contact, four needed to check with their members but the other 31 had no one available.

37. Enquiries have been made without success with the Bar of Northern Ireland and the Faculty of Advocates in Edinburgh, including those with dual qualifications which allow them to appear in courts in England and Wales.

38. Whilst the solicitors in this case have been invaluable in the preparation of the defence cases to the date appointed for trial, no one suggests that any of the firms have Higher Court Advocates ("HCA") capable of conducting the trial on behalf of their clients. However they conducted enquiries with 90 other firms of solicitors to see whether they could provide HCA's, and none were willing to take on the case (see Hutton Stt. §37).

39. Mr Larkin QC was critical of the process undertaken by the defence, questioning whether the enquiries addressed whether an advocate would be available for April or whether they would be available at some stage in the future to represent a defendant under the VHCC scheme. He pointed to the fact that the hunt for in-house advocates had tended to concentrate on the Magic Circle firms rather than the many smaller firms of solicitors who employ in-house advocates. He also points to whether the Bar's resolve not to accept VHCC work at the present rates may weaken as time passes.

40. In my judgement, whilst Mr Larkin QC raises important issues in this respect, the effort put in by the defence to find trial advocates has been very substantial indeed and has been unsuccessful.

41. Mr Larkin QC also suggests that, if there are insufficient QC's available, the representation order could be amended to allow for two juniors or just a junior acting on his own. For my part, where a certificate for a QC and junior is only given in exceptional circumstances and based on factors including the size and complexity of a case, I can see no reason why the defence should seek to alter the order. I remind myself that it is the duty of the State to provide advocates at the required level of competence and experience pursuant to the court's interpretation of the government's own legislation. It is not for the defence to cut its just entitlement to representation to suit the State.

42. Mr Larkin QC suggested that, in order to make the trial fair and prevent it being stopped as an abuse, were the level of representation to be reduced for the defence then that might result in the prosecution or the judge using his powers of trial management to decline, for instance, to entertain the prosecution's application to adduce bad character. That is an issue pertinent to this case because the prosecution has served a full A4 file of documents in respect of bad character applications.

43. Such a submission, whilst well intentioned, would result in a perversion of the trial process; the better defended a defendant is, the more likely he is to have his bad character adduced. The overriding objective of the Criminal Procedure Rules to deal with criminal trials justly is, therefore, subverted by failure of the State to provide adequate representation.

44. Following the argument to its logical conclusion, and having in mind principles of equality of arms, if the defence were unable to find the QC's to which their Representation Order entitles them, would the Crown be invited to reduce its own representation by removing Mr Larkin QC from the prosecution team which presently comprises a Silk and two juniors? Criminal trials of this complexity rely on the skills of highly competent and experienced advocates on both sides to reduce issues, make matters understandable to a jury and keep trials to a reasonable length.

THE PUBLIC DEFENCE SERVICE

45. The solicitors have been in regular contact with the PDS, with Byrne & Partners taking the lead on behalf of all the solicitors involved in this case. Moving on from initial problems obtaining sufficiently detailed CV's of the QC's who had joined the service so as to give them and their clients the ability to make an informed decision as to choice, on 4th February 2014 Mr Marshalsay of the PDS gave the details of an HCA who had joined the service but seemed to accept that she had insufficient experience to undertake this sort of case (ILH/13).

46. By 7th February 2014 (ILH/15) it became clear that one silk was immediately available to be instructed and that a second would be available by the end of February but issues arose over Paragraph 7 of the original PDS Code of Conduct which did not permit an employee to act for a client where to do so would give rise to a conflict of interest including in circumstances where "…a

client's best interests conflicts with the interests of…another client of the salaried service…".

47. Although the solicitors were told that the Code was under review, they judged, because the Code was binding on all parties, that where there was a potential conflict between the defendants, it would not be ethically proper to proceed until the Code had been amended. I do not criticise them for that decision.

48. By an email dated 20th February 2014 (ILH/19), the defence for Mr Daley set out the issues they had with instructing advocates from the PDS:

(a) It had been determined that the defendant should have a silk and a junior and, the PDS could only offer one silk immediately available and no junior.

(b) In total they were being offered the choice between two silks from the entire list of silks who are able to practice in England and Wales. They would be failing in their professional duty to advise their client, as a matter of expediency, to accept one or those two silks of whom they have had no experience and cannot personally vouch for. They felt bound to advise their client to wait to see whether the choice will increase and a junior counsel will become available.

(c) The conflict of interest issue remained unresolved. The solicitors discovered for themselves that the Code was amended in March 2014. Despite the amendment to the Code, the issue has not gone away. In a letter dated 17th April 2014 (ILH/37) Byrne and Partners raised real practical issues in respect of conflict and have asked for reassurances as to how matters would be handled by the PDS. These have subsequently been addressed in a letter dated 23rd April from the PDS (ILH/41).

49. On 20th March a letter was sent from the LAA to all VHCC contract holders reminding them that they must explore all possible avenues to find representation, reinforcing this requirement with the sanction that failure to do so would amount to a fundamental breach of the contract which may lead to termination of the contract and such termination would be considered in respect of any further tender for a VHCC contract.

50. That same day the PDS was emailed (ILH/26) and asked what the position as to recruitment was. They were told that interviews were taking place at all levels. By 3rd April the PDS informed them that they had completed their "…first and very successful round of recruitment." The recruits would be joining over the "coming weeks". Four CV's were attached and subsequently the solicitors for Mr Daley were told that four counsel were available for the trial. On 21st March the PDS sent an email to Petrou's solicitors (ILH/27) which stated that, having reviewed the position with one of their QC's, it was not thought that there would be sufficient time to prepare. Counsel would be available to apply for an adjournment of the trial to allow for preparation.

51. Clarification of start dates of employed advocates was provided by the PDS on 17th April (ILH/29). The defence were told that both QC's that were to be available were now unwell. The juniors could start with "near-immediate effect". The PDS felt that the advocates could assess how long they would need to prepare and support the defence in putting this information before a court.

52. On 17th April the PDS provided an update on availability (ILH/39) which set out that they had three QC's, one of whom was preparing for a 14 week trial due to start on 8th September 2014, one was ill but could take instructions prior to his return in four weeks and one was unavailable until September. In May two senior and one junior advocate would become available, in June a further QC, five senior and a junior advocate would come into the service and another senior advocate by July. There were further conditional offers for two more

senior advocates who may start in May and June and two QC's who may start in June and July. The expected size of the PDS advocacy unit by the end of July is six QC's, ten Senior HCA's and two junior HCA's.

53. I was provided with a further update during the proceedings by Ms Clare Toogood:

(a) No QC's are available at present. One will be available in four weeks, another from 2nd July, a third from "later in the summer" but he is recouping from, I understand it, a serious health problem and he would need to be spoken to as to when he may be able to read into the case. One is due to start a 12 week case in September. Having in mind the time required for preparation and the burden of preparing and presenting a defence in a complex fraud, I judge that two of those silks are very unlikely to be available to take instructions in this case.

(b) Two more unnamed QC's are due to start in June and July and would be available.

(c) There is a list of ten other advocates and two further advocates who are due to join the PDS who will become available. That list does not distinguish between junior and senior advocates. No criteria have been drawn to my attention as to how the PDS makes that distinction but Ms Toogood has stated that all the senior advocates have led in the past. Whilst the figures do not entirely coincide between the documents, making use of an email received on 17th April (ILH/42) from Mr Marshalsay, I calculate that the overwhelming preponderance of the juniors employed by the PDS qualify as leading juniors.

(d) There are no plans at present to recruit any more advocates.

(e) Advocates will be allotted to cases following the "cab rank rule" on a first come, first served basis.

(f) They are employed to work a 37 hour week but would be expected to work to finish a particular task.

(g) The PDS consider that, with the revised Code, they can manage all conflicts.

54. A number of issues arise in respect of the use of the PDS. Firstly, the defence accept that they are required to make use of advocates employed by the PDS if they are available. Article 6(3)(c) allows everyone charged with a criminal offence the minimum right:

> "to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require."

55. I have been referred to Croissant v. Germany (1993) 16 E.H.R.R. 135 in respect of the right to a choice of representation where the state pays for legal assistance. There is a difference in the emphasis put on this decision by Mr Emmerson QC for the Crown and Mr Cameron QC as to the interpretation to be given to the decision.

56. In that case the court appointed Mr Hauser to represent Croissant although the court knew that he had no confidence in Mr Hauser. At §29 the court stated that:

> "…not withstanding the importance of a relationship of confidence between lawyer and client, that right [to counsel of his own choosing] cannot be considered to be absolute. It is necessarily subject to certain limitations where free legal aid is concerned and also where, as in the present case, it is for the courts to decide whether the interests of justice require that the accused be defended by counsel appointed by them. When appointing counsel the national courts must certainly have regard to the defendant's wishes: indeed, German law contemplates such a

> course. However they can override those wishes when there are relevant and sufficient grounds for holding that this is necessary in the interests of justice"

57. I have reminded myself that in that case the regional Court was of the view that Mr Hauser provided the best guarantees of an adequate defence and Croissant's reasons for rejecting him were not valid.

58. The courts here have taken a similar line: a defendant is entitled to be represented by counsel of his choice if that is reasonably practicable. That, however, will depend on the availability of counsel but also on the availability at the same time of a suitably equipped court, of the witnesses and a timescale appropriate to the case. The overriding consideration must be the requirements of justice for the prosecution and the defence, see R. v. De Oliveira [1997] Crim. L.R. 600.

59. In my judgment the defendants cannot hold out for independent counsel of their choice to become available and Mr Cameron QC does not seek to argue that. However, the solicitor acting for a defendant is under a duty to advise his client on the best counsel available to them and is entitled to hold off instructing anyone until he has the best possible choice available to him, so long as that delay does not jeopardise the date set for trial and the ability of advocates to be trial ready by that date.

60. Mr Cameron QC has raised the issue of the effect on the available PDS employed advocates as a result of the proposed adjournment of this trial. I have ascertained that, were I to grant an adjournment this trial could be heard on 15th January 2015 with the second trial to follow on. If that is not practicable then the case could not be listed until September 2015.

61. He suggests that other cases will become front runners for the available PDS advocates which will not leave sufficient advocates to prepare for and appear in a trial in January 2015.

62. Into that equation I have to consider how long would be required for a PDS advocate to prepare for this trial. Whilst I can see how the requirement to work until they finish a particular task might affect the hours that they work during trial, it would be unreasonable to expect employed advocates to work beyond their contracted hours week after week to prepare for a trial. The first Junior counsel for the Crown has spent 1000 hours preparing this case. That is not surprising bearing in mind the burden he has of preparing the case in respect of eight defendants and drafting a substantial volume of documentation. The Crown has the benefit of a second junior who is instructed in the case and who, I suspect, is largely, but not exclusively, involved in the disclosure process.

63. An advocate appearing for one defendant will need substantially less time to prepare, but it is hard to imagine that it would be less than, say, 450 hours. That would only allow him an hour to read every 100 pages without consideration of the 194 spreadsheets. On the basis of a 37 hour week the advocate will need a minimum of twelve clear weeks out of court to prepare this case. It means that the advocate must be available from early October until trial.

64. Mr Little suggested that there could be merit in all the current VHCC cases being listed before one judge in order to allocate resources accordingly. There are eight other trials arising from six prosecutions which are due to begin between September 2014 and September 2015 and which will require somewhere in excess of 21 defendants to be represented in addition to the eight defendants who need to have representation in this case. Whilst the majority of the cases are listed at Southwark, there are cases listed at several other courts.

65. Whilst Mr Little's submission had its attractions, apart from the improbability that other courts on other Circuits would release their cases, it would involve the nominated judge in decisions which went far outside trial management and which might involve him in selecting which defendants would have first choice of advocate or in making other decisions which would involve the judge in areas which lay outside his remit.

66. In my judgment whether there are sufficient employed advocates to cover this case when those same advocates may be required to prepare for and appear in other cases, is simply another matter which I have to take into account when deciding whether I would, in granting an adjournment, be acting purely speculatively as to whether the trial could ever take place.

CONFLICT AND THE USE OF PDS LAWYERS

67. Mr Cameron QC and Mr Adams identify that there is a conflict between Crawley and Walker. I judge that §7.3(b) of the amended PDS Code of Conduct, which sets out that where conflict arises the PDS lawyer must "explain that the client is free to be represented by other legal representatives outside the PDS Advocacy Service", must envisage other advocates being available in independent practice.

68. Whilst I agree with Mr Little that I should place little value on it for the purposes of this argument because it is unknown whether any defendant would avail himself of that opportunity or would be content to remain with a PDS lawyer and make use of the "enhanced confidentiality provisions" I nevertheless have to allow for the views expressed by Mr Adams that the advice he would expect a solicitor to give to his client in such circumstances is that he should take the option provided by §7.3(b). I should, therefore have in mind whether any legal representatives outside of the PDS will be available to the defendant(s) affected.

THE USE OF COURT TIME AND THE EFFECT OF GRANTING AN ADJOURNMENT

69. I have already indicated that this court could hear this trial on 15th January. The effect of that would be to push the second trial back to March 2015 or, allowing the advocates, and perhaps the judge, a short break between trials, to

April. To accommodate this additional strain on the court's resources, other cases will have to be delayed.

70. It is of note that the figures for trial receipts at this court for the year to March 2014 shows a 58% increase over last year. The London Courts overall have seen a 26% increase in trial receipts. The sitting profile for London, that is the number of court days which each court is allowed to sit, will continue to be under considerable stress for the foreseeable future. It follows that it is highly unlikely that the work which would have to be moved to accommodate this trial in January will find a home in any of the other London courts.

71. It is no wonder that §3.2.(2)(f) of the Criminal Procedure Rules requires the court in furthering the overriding objective which I referred to earlier, to "discourage delay, dealing with as many aspects of the case as possible on the same occasion and avoiding unnecessary hearings". Further, at §3.8 the court is required at any hearing at which the case cannot be concluded to "there and then…give directions so that it can be concluded at the next hearing or as soon as possible after that." The relevance of that paragraph to the adjournment of a trial is emphasised by the first entreaty that follows those words, that is for the trial judge to decide whether, where a defendant fails to attend, the trial should continue in his absence.

72. It is part of my responsibility to take into account the effect on other cases of adjourning the hearing for which court time has been put aside. I remind myself that finding another three month slot for this case is bound to delay the trials of other defendants through no fault of their own.

73. I also remind myself that, in resisting severance, Mr Larkin QC drew to my attention the effect of delay on the second trial. I did not judge that a delay to January 2015 was so detrimental as to make that trial unfair. However if I grant the adjournment of the first trial with the second to follow, I am now

faced with that second trial going back by approximately a year from this April when it might otherwise have been tried with eight defendants.

74. Mr Larkin QC put forward during argument that, if there are insufficient resources to try five defendants together, there should be a trial of an individual defendant or some defendants who have managed to find an advocate and he submitted that this is a better solution than preventing the prosecution from being brought at all. With respect to Mr Larkin QC, his suggestion will result in a series of up to eight trials, each of some substantial length, clogging up this court for perhaps a year or more. It will allow cutthroat defences to go unanswered and cannot be in the overall interests of justice.

SECOND ISSUE: SHOULD THE PROSECUTION BE GRANTED AN ADJOURNMENT?

75. I am invited by the prosecution to grant an adjournment to prevent the case being stayed. No party submits that a temporary stay is available in a criminal trial; that is simply another way of describing an adjournment.

76. The prosecution rely on Attorney General's Reference No. 2 of 2001 [2003] UKHL 68. I accept the principle that a stay will never be an appropriate remedy where a lesser remedy would adequately vindicate the defendant's Convention rights. In the context of this case they argue that, if an adjournment to January 2015 or even September 2015 would allow for appropriate representation of the accused, then that should be the course adopted rather than to stay the proceedings now.

77. However in circumstances where it is accepted that the defendants cannot have a fair trial now, in deciding whether an adjournment would adequately vindicate the defendant's Convention rights, I have to consider whether there is a realistic prospect of a fair trial in January or September. If there is not, then an adjournment cannot cure the problem that has arisen.

78. A “realistic prospect” in these circumstances connotes something less than certainty but which is a real and practical prospect of the trial proceeding within a reasonable time frame. It must be something more than a fanciful prospect. The Crown prefers the wording “reasonable prospect” but I do not judge that there is any material difference in meaning between the two phrases.

79. In determining whether I should grant an adjournment at all and in deciding whether there is a reasonable prospect of this case being tried in the future, I have considered the following factors:-

(a) Failure to grant an adjournment will deprive the victims of crime of the opportunity to see those that they judge responsible prosecuted. To deny them that opportunity should not be lightly taken. Against that I judge that there are other methods available to the victims to recover their losses civilly and there are other regulatory offences which could be brought against the defendants which may not meet the gravamen of the conduct alleged but which could mark out their alleged misconduct and prevent them from being able to take a rôle in corporate activity in the future.

(b) Although the FCA is answerable to HM Treasury rather than the Attorney General, it is nevertheless an arm of the State which brings this prosecution. The responsibility to provide adequate representation at public expense is also the responsibility of the State. I have considered whether the State should in those circumstances be entitled to benefit from its own failure by being granted an adjournment.

(c) The State also provides at public expense the court in which the case is to be tried. An adjournment of the trial will involve an additional stress on the State’s provision of resources to try crime.

(d) Whilst the PDS has provided a pool of available advocates at public expense, it is so small so that it is insufficient to cover all the VHCC cases due to be tried unless control of listing these cases becomes no longer a judicial function but one effectively controlled and dictated by the availability of the PDS advocates. That would be a dangerous precedent, see De Oliveira.

(e) Bearing in mind availability and preparation time required I am not satisfied that sufficient PDS advocates would be available to assist the defendants in this trial. It is not in the interests of justice to try each defendant separately.

(f) I have no reason to think that there is a realistic prospect that the Bar will accept contracts in VHCC cases on the present terms.

(g) Whilst Article 6(3) does not provide the legally aided defendant with the right to an advocate of his choice, it still permits the solicitor to carry out his duty to assess which available advocate would best suit his client's case. A solicitor is entitled to delay that choice until the moment that he judges the pool from which to choose is at its height. That may be at any time between now and early October.

CONCLUSION

80. I have reminded myself that a stay should only be granted in exceptional circumstances and that in most cases an adjournment can cure what otherwise might amount to an abuse of the process of the court.

81. I have taken into account that it is common ground between the parties that where the defendant is not at fault, in a case of this complexity the defendants could not receive a fair trial without advocates to represent them.

82. I have considered The Crown Prosecution Service v. Cambell; McInerney v. The Financial Services Authority; The Medicines and Healthcare Products Regulatory Agency v. Carlton [2009] EWCA Crim 997 in which the Court of Appeal dealt with applications to stay confiscation proceedings because there was no appropriate representation. In giving the judgment of the court, Hooper LJ said:

> "We reached the conclusion that the fact that in the future an adequately funded advocate may be available was no justification for an adjournment. The problem identified in this case is not a new one: see e.g. the decision of HHJ Mole QC reported on BAILII as *P* [2008] EW Misc 2 (EWCC). That decision was handed down over a year ago."

83. I agree with Mr Little that I should not read too much into that decision where the issues were different from those that I face, not least in that I am dealing with a decision whether to grant an adjournment in respect of a serious allegation which is as yet unproven. However it does provide some support for the care that I should take before granting an adjournment where there is no realistic prospect that in the future a suitable advocate will be available.

84. Having considered all these matters I am compelled to conclude that, to allow the State an adjournment to put right its failure to provide the necessary resources to permit a fair trial to take place now amounts to a violation of the process of this court.

85. The knock-on effect on other trials, the waste of court resources and the need to disregard the Criminal Procedure Rules designed to protect the court system from abuse and to ensure that scare resources are used to best effect all, in my judgment, add to the reasons why an adjournment should not be granted.

86. Even if I am wrong about that, I further find that there is no realistic prospect that sufficient advocates would be available for this case to be tried in January 2015 from any of the sources available to the defence, including the PDS. Whatever reason is put forward by the party applying, the court does not ordinarily grant adjournments on a speculative basis.

87. It would be unconscionable to put this trial off to September 2015 with the second trial being heard in 2016. On what I now know, there is no basis on which I could find that the availability of advocates would be any different then than it will be in January 2015. In addition it is likely to lead to a violation of the reasonable time requirement in Article 6(1).

88. In those circumstances I stay the proceedings against these five defendants.

His Honour Judge Leonard QC

1st May 2014