Neutral Citation Number: [2014] EWCA Crim 1028

Case No: 2014 02162-02166 B5

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT SOUTHWARK
His Honour Judge Leonard Q.C.
T20137183

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/05/2014

Before :

THE PRESIDENT OF THE QUEEN'S BENCH DIVISION
(SIR BRIAN LEVESON)
LORD JUSTICE DAVIS
and
LORD JUSTICE TREACY

- -

Between :

THE QUEEN	**Applicant**
- and -	
SCOTT CRAWLEY	
DALE WALKER	
DANIEL FORSYTH	
AARON PETROU	
BRENDAN DALEY	**Respondents**

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- -

Sean Larkin Q.C. and **Ben Jaffey** for the Applicant, the Financial Conduct Authority
Alexander Cameron Q.C. and **Lee Adams** for the Respondents
Anthony Peto Q.C. and Peter Woodall for the Lord Chancellor Intervener

Hearing date : 12 May 2014

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Approved Judgment

Sir Brian Leveson P :

1. This is an application by the prosecution for leave to appeal a decision dated 1 May 2014 of His Honour Judge Leonard Q.C. sitting in the Crown Court at Southwark in which he stayed a prosecution initiated by the Financial Conduct Authority ("FCA") in relation to a trial which had been due to commence with a jury on 6 May. Notice of intention to appeal pursuant to s. 58 of the Criminal Justice Act 2003 was given within the period allowed by the judge and it was acknowledged that the respondents would be entitled to be acquitted should leave not be obtained or the appeal abandoned. It has been referred to the full court by the Registrar on the basis that if leave is granted, the appeal will follow. We do grant leave.

2. The background to the indictment has been identified by the judge in the following succinct way (which we gratefully adopt):

> "1. The [respondents] 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.
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> 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 investigation and prosecution have been in the hands of the FCA and it is clearly an extremely important but complex case. Following arrests in November 2011, the respondents (and three others) were subsequently charged in April 2013 with the offences. Having been transferred from the City of London Magistrates Court, on 21 May 2013 it was listed before the Recorder of Westminster when the trial was fixed for 28 April 2014. On 10 July 2013, the court made appropriate representation orders and, on 22 July, the case was classified by the Legal Aid Authority ("LAA") as a Very High Cost Case (VHCC). Counsel were instructed.

4. Meanwhile, a review of legal aid was being undertaken and, in order to bear down on the cost of legal aid in criminal cases, in September 2013 the Ministry of Justice ("MoJ") announced its intention to institute a number of changes including a reduction in the fees payable under the Graduated Fee Scheme and a cut by 30% in the rate of remuneration paid to counsel in VHCC cases. Dissatisfied with this decision, the Bar Standards Board (which had been reviewing the position with the Legal Services Board since 2012), with effect from 6 January 2014, made clear that VHCC cases were not within what had been the 'deeming' provision of Rule 604 (dealing with reasonable remuneration). The concept of deeming has been removed and as the Bar Standards Board has put it:

> "Individual barristers will have to judge for themselves whether the fee offered is a proper fee, whether the work is legally aided or privately funded, and if they reasonably conclude that it is not, objectively, a proper fee, the CRR will not oblige them to take the work."

5. Although the MoJ later revoked the decision in relation to trials commencing prior to 31 March 2014, in all other cases the date upon which members of the Bar were required to decide whether to accept a VHCC contract on the new terms was set at 2 December 2013. The effect was stark. As Judge Leonard put it:

> "In this and every other case which did not fall within the concession provided by the MoJ [counsel] declined to accept instructions."

6. On 14 November, concern was being expressed by a defence solicitor, that there would be insufficient time for counsel to be ready for trial but an application to vacate the trial date was refused: had it been granted, there would have been no question of the prosecution being stayed. By 23 December, with no counsel available, it was submitted that the prosecution was an abuse of process. Some argued that it was premature to decide that issue. In the event the application was adjourned.

7. Ways forward continued to be aired. An offer to declassify the case so that it fell within the Graduated Fee Scheme was rejected on the basis that remuneration for reading beyond 10,000 pages would only be resolved *ex post facto* without guarantee of any payment. Meanwhile, the Public Defender Service ("PDS"), a department of the LAA providing criminal defence services, operating alongside private practitioners, began actively to recruit a pool of employed advocates to take on work that might otherwise have been done by independent advocates. By 23 January, there were three Q.C.s and no juniors but, in any event, there was a concern about potential conflicts of interest. This last issue has since been resolved on the basis that the approach to be adopted by those employed by the PDS reflects the approach taken by independent members of chambers (who frequently act in the same case for those with conflicting interests): before us, Alexander Cameron Q.C. for the respondents accepted that the point had little value.

8. On 17 January, Judge Leonard severed the indictment and on 24 January endorsed a decision that the five respondents should be tried on 28 April (with the jury required on 6 May) with a time estimate of 2½ to 3 months. The remaining three defendants were to face trial on 15 January 2015 with an estimate of 6-8 weeks.

9. In the meantime, while negotiations with the MoJ continued, members of the Bar took part in what were described as days of action and instituted a policy of refusing to accept 'returns' (that is, briefs which the barrister originally instructed could no longer undertake). On 27 March 2014, after the Lord Chancellor had agreed to defer the reductions to Graduated Fees until 2015, the Chairman of the Criminal Bar Association publicly stated:

> "Whilst it is an individual choice for any barrister as to what work they choose to do, there is no objection in principle to barristers who want to work on VHCCs undertaking such cases if they choose to do so."

10. In the event, no suitably qualified advocate was prepared to sign a VHCC contract in this (or indeed any other) case. So it was, on 28 April, a month after the last change of approach but before the position was able to develop further, that Judge Leonard considered an application to stay the prosecution as an abuse of process: at that time, none of the respondents had been able to find counsel to instruct. Mr Cameron Q.C appeared *pro bono* to argue the point on the behalf of all the defendants other than Daniel Forsyth, who was represented by Mr Adams, although, in order to deal with the possibility that they might not have been represented, at the request of the judge Tom Little was instructed by the Attorney General as *amicus curiae*.

The Approach of Judge Leonard

11. A number of principles were broadly agreed between the parties. These were summarised in the skeleton argument submitted by the FCA in support of this appeal as follows:

> "i. In the circumstances of this case, it would be unfair to try the defendants if they wished to be represented and, through no fault of their own, they were not represented.
>
> ii. At the time the trial was due to start (6 May 2014) the defendants would not be represented by advocates who had had sufficient time to prepare the case.
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> iii. The reason for the absence of advocates was the collective refusal of the self employed Bar to accept the reduction in fees payable to advocates under the VHCC regime (as of December

> 2013) leading to advocates returning their instructions or not accepting instructions.
>
> iv. If a competent advocate were available, the defendant could not refuse to instruct him and claim he was involuntarily unrepresented.
>
> v. There was no fault on the part of the FCA."

12. The only difference was in the sixth principle, namely the test to be applied. The applicant articulated the test as whether there was a realistic prospect of competent advocates with sufficient time to prepare being available in the foreseeable future; the respondents, on the other hand, submitted that in place of the words "in the foreseeable future" should be "within a reasonable time frame". In any event, it was agreed that if there was such a prospect (however defined), an adjournment would cure any unfairness. This difference did not affect the nature of the judge's analysis and could not affect the result.

13. In the circumstances, the judge approached the application by considering two issues. The first was whether the then defendants could receive a fair trial at that time (based on the premise that no preparation by any advocate had been undertaken for such a trial). Given that the case was ready for trial, that issue required a consideration of the steps by each defendant taken to find counsel (or anyone employed by the PDS) prepared to undertake the case. The judge reached the conclusion that proper efforts had been undertaken by all defence solicitors to obtain representation so that it was no fault of their own that they were unrepresented. It was common ground that, in those circumstances, to try them would be a breach of their common law rights and, in addition, contrary to Article 6(3) of the European Convention on Human Rights ("ECHR"). This conclusion remains agreed and is not challenged.

14. The second issue was whether he should grant an adjournment (as originally had been sought by at least one of the respondents during the previous December). Before addressing the ultimate question, he analysed a number of considerations, viz. further enquiries to obtain representation, the PDS and the use of court time. He accepted the principle that a stay will never be an appropriate remedy where a lesser remedy would adequately vindicate the defendant's ECHR rights. However, in considering whether it would be appropriate to adjourn, he addressed the question of whether there was a realistic prospect of a fair trial in January or September 2015 on the basis that, if there was not, an adjournment would not provide an adequate remedy to the problem that had arisen.

15. In that context, the judge found that the PDS pool of available advocates (which did, at least prospectively, include a number of Queen's Counsel) was insufficient to cover all the VHCC cases due to be tried, and that the respondents were entitled to delay instructing an advocate until October in order to choose the best available advocate for their case. The judge also took account of the pressure that an adjournment would place on the State's provision of resources to prosecute, the fact that the State is

responsible for providing adequate representation and the consequence of refusing an adjournment, namely that the victims of alleged crime would be deprived of the opportunity to see those that they consider responsible prosecuted.

16. The judge was not satisfied that sufficient PDS advocates would be available to assist the respondents and he did not think there was a realistic prospect that the Bar would accept contracts in VHCC cases on the present terms. His conclusions were that:

> "84. 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. …
>
> 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."

17. As is clear from decisions such as *Attorney General's Reference (No 2 of 2001)* [2004] 2 AC 72, there are two categories of case in which the court has the power to stay proceedings for abuse of process. These are, first, where the court concludes that the accused can no longer receive a fair hearing; and, second, where it would otherwise be unfair to try the accused or, put another way, where a stay is necessary to protect the integrity of the criminal justice system. The first limb focuses on the trial process and where the court concludes that the accused would not receive a fair hearing it will stay the proceedings; no balancing exercise is required. The second limb concerns the integrity of the criminal justice system and applies where the Court considers that the accused should not be standing trial at all, irrespective of the potential fairness of the trial itself.

18. Furthermore, it is clear from the authorities and beyond argument that there is a strong public interest in the prosecution of crime and in ensuring that those charged with serious criminal offences are tried. Ordering a stay of proceedings, which in criminal law is effectively a permanent remedy, is thus a remedy of last resort. As Lord Bingham observed in *Attorney General's Reference (No. 2 of 2001*) *supra* (at para. 24G):

> "The public interest in the final determination of criminal charges requires that such a charge should not be stayed or dismissed if any lesser remedy will be just and proportionate in all the circumstances."

19. The threshold is, therefore, a high one. This is all the more so where the fairness of the trial can be cured by expedition or adjournment or other steps, particularly where there may well be an opportunity as matters develop to repeat an abuse argument.

20. The judge's primary conclusion (that a fair trial amounts to a violation of the process of the court) engages the second of the categories to which we have referred, namely, the integrity of the criminal justice system. His alternative formulation (fair hearing) engages the first. It is appropriate to deal with them in that order.

Violation of the Process of the Court

21. Elaborating upon the law in relation to this head of abuse, it has been described as arising "where it offends the court's sense of justice and propriety to be asked to try the accused in the particular circumstances of the case" (per Lord Lowry in *R v Horseferry Road Magistrates Courts, ex p Bennett* [1994] 1 AC 42, at 74G) and where to refuse a stay would lead to "the degradation of the lawful administration of justice" (per Rose LJ in *R v Mullen* [2000] QB 520, at 534 C-D). The categories of cases in which it may be unfair to try the accused will include, but are not confined to, those cases where there has been bad faith, unlawfulness or executive misconduct.

22. It has been said that "it would be unwise to attempt to describe such cases in advance" (per Lord Bingham in *Attorney General's Reference* at para. 25D) and that "general guidance as to how the discretion should be exercised in particular circumstances will not be useful" (per Lord Steyn in *R v Latif* [1996] 1 WLR 104 at 113A). Cases where the courts have considered this type of abuse of process to arise have tended to involve very serious examples of malpractice and unlawfulness: see, for example, *ex p Bennett (supra)* where the accused had been brought back forcibly to the UK in disregard of available extradition procedures and *Mullen (supra)* in which the security services and police had procured M's unlawful deportation from Zimbabwe.

23. Where there has been alleged bad faith, unlawfulness or executive misconduct, the court is concerned not to create the perception that it is condoning malpractice by law enforcement agencies or to convey the impression that it will adopt the approach that the end justifies the means: the touchstone is the integrity of the criminal justice system. This must be balanced against the potential criticism that the court is failing to protect the public from grave crimes. This no doubt explains why cases which fall into this category "will be very exceptional": see per Lord Bingham CJ in *Attorney General's Reference* that (at para. 25D).

24. Turning to this case, it is important first to underline that, before the judge, Mr Cameron Q.C did not put his application to stay the proceedings on the basis that a stay was necessary to protect the integrity of the criminal justice system: not surprisingly, however, having the benefit of this finding, he sought to support it.

25. Given that the judge had made clear (at para. 25) that his decision had to be taken "without regard to the continuing dispute between the Bar and the Ministry of Justice" and that he was "only concerned … to ensure that a trial is only held if it can be conducted fairly in accordance with the principles long established in this country", it is surprising that he made any decision attributing fault. Neither is this the only

reference to failure and fault. When dealing with the question of an adjournment, the judge said (at para. 79(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."

26. For the prosecution, Mr Sean Larkin Q.C. argues that, by statute, the FCA is not to be regarded as acting on behalf of the Crown, and its members officers and staff are not to be regarded as Crown servants: see para. 16 of Schedule 1ZA of the Financial Services and Markets Act 2000. It is funded by the financial services industry and is a private company performing a public function with operational independence and without any responsibility for legal aid policy. There is thus no question of seeking to benefit from its own failure.

27. On this issue, without demur from the parties, we gave leave to the Lord Chancellor to intervene and Mr Anthony Peto Q.C., on his behalf, argued that the judge had correctly identified the question as whether there was a realistic prospect of securing a fair trial in January or September 2015, and whether present unavailability of counsel could be characterised as the failure of the state was irrelevant. If it was, however, the judge should not have made such a finding (particularly, it might be added, where the respondents were not contending for it) without specifically inviting the Lord Chancellor to deal with it: having (at para. 25) accepted that he should proceed "without regard to the continuing dispute between the MoJ and the Bar", he was failing to follow his own direction. In fact, policy decisions as to allocation of resources (and, indeed, issues of 'fault') involve political value judgments, subject to democratic oversight by Parliament and, in the case of unlawfulness, impropriety or irrationality, judicial review.

28. Mr Cameron Q.C argued that the statutory authority of the FCA was not brought to the attention of the judge and, in any event, that it is not inaccurate broadly to describe the FCA as "an arm of the state"; it is the body charged by the state with the prosecution of certain types of offences. He pointed to the fact that the indictment is brought in the name of The Queen (although that is the convention in relation to prosecutions on indictment even if brought by private prosecutors). Another agency of the state must provide adequate representation for indigent defendants: in that context, an adjournment does allow the state to benefit from its own failure.

29. In our judgment, it is quite wrong, for present purposes, to seek to link, effectively as one, the FCA as prosecuting authority and those responsible for the provision of legal aid or to speak of "its own failure" as if there was a joint enterprise in which both were involved. Some prosecutions are undeniably brought by private organisations (such as the Federation against Copyright Theft); some by independent bodies

established by statute (such as the FCA); others by the Crown Prosecution Service (itself independent of government albeit answerable to the Attorney General). None have any power or ability to affect the exercise by the Lord Chancellor or the Ministry of Justice of its statutory responsibilities for legal aid.

30. Neither would we be prepared to enter into the debate about fault. This dispute arises because the Lord Chancellor has restricted funding for VHCC and independent practitioners are not presently minded to accept contracts under that scheme: they are fully entitled to take that view. It is, however, undeniably the responsibility of the Lord Chancellor to address the need to provide legal representation for those involved in the most complex of cases and the present difficulties clearly flow from his decision to reduce the funding. How the present problem has arisen and whoever is to blame (if that is the right word) is neither here nor there.

31. As Davis LJ observed in argument, the responsibility of the Lord Chancellor to provide resources to permit a fair trial to take place arises irrespective of the cause of a problem in so doing. It would remain if the present unwillingness of the Bar arose not because of his decision to reduce fees but if, say, the Bar had decided to decline VHCC work unless he increased the fees by 30%. Without commenting in any way on the merits of the dispute as to fees or as to the very necessary requirement for its resolution, to conclude that the State has violated the process of the court or that what has happened jeopardises the integrity of the criminal justice system (as opposed to its effective operation) is, quite simply, wrong as a matter of principle. To that extent, the primary reason given by the judge for staying the prosecution is flawed.

Delay and Fair Trial

32. It is first necessary to consider the principles engaged in relation to this limb of abuse of process. The test is encapsulated by Lord Dyson in *R v Maxwell* [2011] 1 WLR 1837 (to which he referred in *Warren v Attorney General for Jersey* [2012] 1 AC 22) at para. 13. A decision to stay under this limb required the conclusion that "it will be impossible to give the accused a fair trial".

33. Neither is it sufficient for there only to have been a delay in proceedings which could amount to a breach of the reasonable time guarantee in Article 6(1) ECHR, if the accused has not also been prejudiced as a result of the delay. Reverting to *Attorney General's Reference (No. 2 of 2001*) *supra* Lord Bingham made it clear (at para. 24H):

> "The prosecutor and the court do not act incompatibly with the defendant's Convention right in continuing to prosecute or entertain proceedings after a breach is established where neither of conditions (a) or (b) is met, since the breach consists in the delay which has accrued and not in the prospective hearing."

34. Furthermore, where there has been a delay in proceedings amounting to breach of the reasonable time guarantee in Article 6(1) ECHR, there is authority for the proposition that such delay may be cured by a reduction in sentence. Thus, in *Spiers v Ruddy* [2008] 1 AC 873, having reviewed the authorities (including those emanating from Strasbourg), Lord Bingham observed (at para 16B):

> "The authorities relied on and considered above make clear, in my opinion, that such delay does not give rise to a continuing breach which cannot be cured save by a discontinuation of proceedings. It gives rise to a breach which can be cured, even where it cannot be prevented, by expedition, reduction of sentence or compensation, provided always that the breach, where it occurs, is publicly acknowledged and addressed."

35. This case turned on the prospective availability of suitably qualified advocates to conduct the defence. We have referred to the recruitment drive by the PDS and in the weeks before the hearing in front of Judge Leonard the facts were constantly being updated. Further, during the course of proceedings on 28 April 2014, a further update from the PDS confirmed that:

i) No QCs are currently available. One will be available in four weeks, another from 2 July and a third "later in the summer", albeit he is recouping from a serious health problem. A fourth is due to start a 12 week trial in September.

ii) Two more unnamed QCs are due to start in June and July and would be available.

iii) There is a list of ten other advocates and two further advocates who are due to join the PDS who will become available.

iv) The PDS was not aware of any plans to recruit any more advocates.

36. In an email dated 28 April 2014 from the Director of Legal Aid Commissioning and Strategy at the LAA, it was stated that "decisions about further expansion will be for the LAA and Ministers. The Government has been clear it will not expand the PDS beyond that which is needed". What was clear was that the position was being carefully monitored.

37. The other side of the coin concerned the demand for representation. With regard to other forthcoming VHCCs, investigation by the FCA revealed that there were due to be eight other trials arising from six prosecutions (listed to begin between September 2014 and September 2015) which required in excess of 23 defendants to be represented in addition to the five respondents and three related defendants in this case.

38. It is not surprising; therefore, that the judge found that the PDS pool of available advocates was insufficient to cover all the VHCC cases due to be tried. With respect, however, he was not concerned with (and neither did he have responsibility for) all the VHCC cases or with representation in any case other than the one that he was concerned to try. In relation to his case, the PDS having indicated that its advocates would accept instructions in the pending VHCC cases on a "first come first served" basis, at that time there was a potential pool of advocates (including leading counsel) who would be available for a trial adjourned to January 2015.

39. Mr Cameron Q.C rightly did not argue that this court should make any qualitative distinction between advocates recruited to the PDS and advocates in private practice; neither did he demur from the proposition that Article 6(3)(c) of the ECHR does not permit the legally aided respondents to hold out for independent counsel of their choice to become available. In relation to the QCs, the advocates concerned will have achieved that rank whilst in private practice, and the appointment to that rank is taken to carry with it the recognition that its holder is especially competent to take the lead in criminal cases of particular gravity and complexity. Further, it is a reasonable inference that, in recruiting advocates as a response to the impasse which had arisen between the Bar and the Lord Chancellor, the PDS was recruiting those of sufficient competence and experience properly to perform their roles in a VHCC case.

40. The judge's finding as to availability of advocates was, however, closely linked to his finding at paragraph 79(g) of the judgment that:

> "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 [2014]."

41. The judge was thus envisaging that the respondents in this case could legitimately delay instructing an advocate until the point at which it would be necessary for preparation to begin in order for the advocates to be trial ready for a January 2015 trial. The judge's reasoning appears to have been that if that occurred, PDS advocates would not, in truth, then be available because they were likely to have been retained in other pending VHCC cases. This, however, has to be set against his finding at para. 79(f) to the effect that:

> "I have no reason to believe that there is a realistic prospect that the Bar will accept contracts in VHCC cases on the present terms."

42. Leaving aside for the moment considerations which arise from the use of the phrase "on the present terms", it seems that the judge was concluding that, by October 2014, no member of the Bar would accept a contract in a VHCC case. On that basis, then,

the only potentially available advocates would be those who were members of the PDS. In those circumstances, it seems to us wholly illogical that in the following subparagraph, paragraph 79(g), the judge was prepared to countenance a delay in instructing advocates until October 2014.

43. If (as appears to be the case) the judge had ruled out the possibility of the Bar participating in this case, there could be no useful purpose in countenancing an entitlement of the defence to wait until October 2014 in order to be able to choose from a wider pool of advocates than those who were members of the PDS. It follows that the rationale for waiting until October 2014 is fatally undermined.

44. Furthermore, earlier in his judgment at paragraph 59 the judge had said:

> "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 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." [our emphasis]

These words represent an important (and correct) qualification to the approach taken by the judge which appears to have been lost sight of in his ultimate conclusions. On the basis of the judge's finding at paragraph 79(f) a delay in instructing advocates until October 2014 would be calculated to jeopardise the date set for trial. Accordingly, on the basis of the judge's own reasoning, he should not have contemplated such a delay and this should not have been a contributory factor to his conclusion that there was no realistic prospect of sufficient advocates being available for a trial to take place in January 2015.

45. The agreed test to be applied was "Is there a realistic prospect of competent advocates with sufficient time to prepare being available in the foreseeable future?" At the date of the hearing before the judge, on our analysis, there was a sufficient prospect of a sufficient number of PDS advocates who were then available who would enable a trial to proceed in January 2015. That pool included a sufficient number of advocates of the rank of QC and was available at the date of the hearing. Consistent with the judge's finding at paragraph 59 that the defence should instruct its advocates at a time which "does not jeopardise the date set for trial", the obvious obligation on the defence should have been to instruct advocates at that point so as to retain them for a January 2015 trial.

46. Not to do so would run counter to what the judge considered necessary, and in our view would not be a reasonable course to adopt. It had been made plain by the PDS that its available advocates would be assigned on a "first come first served" basis, so that prompt action on the part of the defence was necessary to secure their services.

Failure so to act would, if any future application to stay or adjourn were made on the basis of unavailability of advocates, be likely to result in a finding adverse to the defendants.

47. In those circumstances, the finding of the judge that there was no realistic prospect of competent advocates with sufficient time to prepare being available in the foreseeable future cannot be sustained; neither was it reasonable for him to reach it. In any event, it was unjustifiable to proceed on the basis that the position was fixed. It had changed in the weeks that had elapsed and, whether or not the Bar accepted VHCC cases on the present terms, further discussion could not be ruled out. Finally, although it was said that there were no known plans for the PDS further to recruit, the language of the most recent communication put before the judge was more nuanced (to the effect that the PDS would not be expanded "beyond that which is needed") which did not rule out circumstances requiring further action to be taken. That is not surprising given the statutory responsibilities of the Lord Chancellor.

48. While analysing Judge Leonard's reasons, moreover, there are other features of his judgment upon which it is appropriate to comment. First (at paras. 69-72 and 79(c)), he referred to the use of court time and the effect of granting an adjournment: he identified the increase in Crown Court receipts and the stress consequent upon the limited availability of court sitting days. Having cited para. 3.2(2)(f) of the Criminal Procedure Rules (which, in pursuit of the overriding objective require the court to "discourage delay, dealing with as many aspects of the case as possible on the same occasion and avoiding unnecessary hearings") and para. 3.8 (requiring directions so that the case "can be concluded at the next hearing or as soon as possible after that") he said that he had responsibility to take account of the effect on other cases of adjourning the hearing for which court time had been put aside and that to find another three month slot would delay other trials.

49. The principles to which the judge referred are unexceptionable and, of course, any delay that impacts on the trial of this case undeniably fails to accord with the overriding objective. There is equally no doubt that administrative inconvenience will result if the trial has to be patterned into the schedule at some later time. But this point cannot be taken too far: the problems that arise are clearly exceptional and result not from specific failures by the parties (who are constrained to comply with the Rules) but from the breakdown of relationships between the Bar and the MoJ and an overarching dispute as to reasonable remuneration for the work which has to be undertaken. Further, the three month trial window before Judge Leonard will not have been wasted and we have no doubt that other trials (which otherwise would have been brought on later) will now be listed earlier than originally anticipated. Assuming this case is eventually tried, although some time will have been lost while issues such as this application have been argued and as further case management is undertaken, at the end of the day the resulting shortfall should be comparatively modest. In the circumstances, it does not, of itself, require or support the taking of draconian action in the form of a stay.

50. The second feature to which we make reference concerns the effect on the three remaining defendants whose trial had been severed and delayed to January 2015 (which he had not considered unfair). The judge observed that an adjournment of this trial would mean the second trial being deferred by approximately a year "when it might otherwise have been tried with eight defendants". Given that he did not consider a trial even in the latter part of 2015 to be unfair (which, given the fact that it is heavily document based is not surprising), it is difficult to see why this fact should have weighed with him. As for a joint trial, that is a decision which he could revisit if he thought it appropriate. In any event, pulling the other way is the fact that these three defendants who had not expected a trial until 2015 would now doubtless argue that it would be unfair to try them if the trial of the principals was not to take place. That submission might well have arguable merit for reasons of parity of treatment but it is hardly in the interests of justice that nobody should be held to account by trial.

51. That brings us to the third feature of the judgment to which we wish to refer. At para. 79(a), the judge turned to the victims, that is to say those who claimed that they had lost very substantial sums of money as a result of the activities of those being prosecuted. He said:

> "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. "

52. In our judgment, in a case such as the present, this approach is entirely misconceived. Where the police or authorised regulators have determined that it is appropriate to commence criminal proceedings, civil litigation and regulatory action alone will not normally sufficiently address the legitimate aspirations of victims that those who have defrauded them should be brought before the criminal courts and, if convicted, punished accordingly. The suggestion that, in some way, the prospect of these other forms of action in any way lessens the imperative to pursue prosecutions properly brought, or is a feature to be taken into account in this case, is wrong. Mr Cameron Q.C did not himself seek to place emphasis on this part of the judge's judgment and he agreed that the alternatives identified by the judge could not be taken as of themselves an acceptable substitute for criminal trials in this context.

53. Finally, we note that the judge derived some support for his conclusion on a decision of this court in *CPS v Campbell; McInerney v Financial Services Authority; Medicines and Healthcare Products Regulatory Agency v Carlton* [2009] EWCA Crim 997 dealing with applications to stay confiscation proceedings because appropriate representation was not available. He recognised, however, that the issues were different and that he was "dealing with a decision whether to grant an

adjournment in respect of a serious allegation which is as yet unproven". In our judgment, the circumstances are so different that no support at all can be derived from this decision which should be seen as confined to its facts.

Conclusion

54. Section 67 of the Criminal Justice Act 2003 makes it clear that this court cannot reverse a ruling on an appeal in these circumstances unless satisfied that it was wrong in law, involved an error of law or principle or was not reasonable for the judge to have made. We have reached the clear conclusion that this ruling does involve errors of law or principle and, in any event, was not reasonable in the sense that a number of the conclusions reached were not reasonably open to him based on the evidence and, in any event, his ultimate finding did not constitute a reasonable exercise of the discretion open to him. Pursuant to section 66(1) and (2) of the Act, the ruling is reversed and we order that the proceedings on this indictment be resumed in the Crown Court at Southwark.

55. In our judgment, there is no question of a present breach of Article 6 of the ECHR and, should that state of affairs arise in the future, there would, in any event, be remedies short of a stay that could be deployed. We are not saying that there could not come a time when it may be appropriate to order that this indictment be stayed: that time, however, remains very much in the future and problems about representation will have to have developed considerably before such an exceptional order could be justified. It would be a matter for the judge to assess on the basis of how matters stand at that point in time.

56. We cannot leave this case, however, without making some further comment. During the course of the hearing, we made it clear that the dispute between the Bar and the Lord Chancellor about the appropriate level of remuneration for VHCCs was not one in which we could (or should) become involved. It involves a commercial negotiation in which (short of legal challenge) the judiciary can play no part. In any event, it is not before the court and we have received neither evidence nor submissions from any of the protagonists. That is not to say, however, that we are unmindful of or unconcerned about the issues and the underlying impact of the dispute.

57. The criminal justice system in this country requires the highest quality advocates both to prosecute and to defend those accused of crime: in addition, they are the potential judges of the future. The better the advocates, the easier it is to concentrate on the real issues in the case, the more expeditious the hearing and the better the prospect of true verdicts according to the evidence. Poor quality advocates fail to take points of potential significance, or take them badly, leading to confusion and, in turn, appeals and, even more serious, leading to potential miscarriages of justice. We have no doubt that it is critical that there remains a thriving cadre of advocates capable of undertaking all types of publicly funded work, developing their skills from the straightforward work until they are able to undertake the most complex.

58. In those circumstances, it is of fundamental importance that the MoJ led by the Lord Chancellor and the professions continue to try to resolve the impasse that presently stands in the way of the delivery of justice in the most complex of cases: this will require effort by both sides. The maintenance of a criminal justice system of which we can be proud depends on a sensible resolution of the issues that have arisen.