Neutral Citation No. [2022] EWHC 2214 (SCCO)

SCCO Reference: SC-2021-CRI-000052

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

IN THE MATTER OF AN APPEAL AGAINST A REDETERMINATION

R v R (Das UK Holdings Ltd) v Paul Asplin and Others, Southwark Crown Court

T20167360 and T20167366

Thomas More Building
Royal Courts of Justice
London, WC2A 2LL

Date: 22nd August 2022

Before:

COSTS JUDGE WHALAN

DAS UK HOLDINGS LIMITED
v
ASPLIN and Others

Judgment on Appeal under Section 17 of the Prosecution of Offences Act 1985 and Regulation 10 of the Costs in Criminal Cases (General) Regulations 1986

Appellant: DAS UK Holdings Limited

Mr. Rupert Cohen, Counsel, instructed by Edmonds Marshall McMahon, for the Appellant
Mr. Michael Rimer, Government Legal Department, for the Respondent

The appeal has been successful (in part) for the reasons set out below.

Costs Judge Whalan

Introduction

1. DAS UK Holdings Ltd ('DAS'), the Appellant, appeals against the decisions of the Determining Officer at the Legal Aid Agency, the Respondent, in the assessment of a bill prepared pursuant to s.17 of the Prosecution of Offences Act 1985, following an order in a private prosecution that costs be paid out of central funds.

2. The Determining Officer's assessment and reasoning is recorded in two Written Reasons dated 9th February 2021 (31 pages, plus appendices) and 26th April 2022 (13 pages). The Appellant challenges some of the decisions set out in the first written reasons in an Appellant's Notice lodged on 19th April 2021. The decisions set out in the second written reasons were separated from the original decision-making process, as the issues were stayed pending the Divisional Court's decision in Football Association Premier League and another v. Lord Chancellor [2021] 1 W.L.R. 3035. The second written reasons were published during the week before this appeal was listed on 3rd and 4th May 2022. At the appeal hearing, the Appellant sought permission to abridge time and vary the usual procedure, relying on a detailed Appellant's Note to stand effectively as an Appellant's Notice and Grounds of Appeal. No objection was made by the Respondent – indeed both parties considered it desirable to hear and decide all outstanding disputes without recourse to a disruptive adjournment – and so the court agreed exceptionally to include these recent issues in this Determination.

3. The disputed issues concern the assessment of various disbursements incurred by DAS, which can be set out as follows:

   (i) **Michael Brompton QC;** fees claimed at £133,839.99, but allowed at £89,250.

   (ii) **Richard Whittam QC;** claimed as a fixed fee in the sum of £335,000, but allowed (following re-determination) at £227,000.

(iii) **Andrew Bird, senior junior counsel;** fees claimed at £486,000, but allowed at £269,675.

(iv) **Henry Hughes, junior counsel;** claimed at £222,100, but allowed at £97,193.75 + various interlocutory hearing appearance fees, the quantum of which is unclear from the written reasons.

(v) **Rebecca Chalkley, disclosure counsel;** fees claimed at £259,164.90, but allowed at £80,000.

(vi) **Noting Briefs;** claimed at £9,200, but disallowed by the Determining Officer.

(vii) **Emily Campbell, pensions counsel;** written fee claimed at £2,500, but disallowed by the Determining Officer.

(viii) **Price Waterhouse Cooper ('PwC');** total fees claimed of £1,444,004.28, but allowed at £80,250.

(ix) **Ernst & Young ('EY');** total fees claimed of £1,970.631.60, but allowed at £122,702.30.

Background

4. DAS Legal Expenses Insurance Ltd insures the cost of litigation brought by insured clients against third parties, including claims for damages for personal injuries. It is a subsidiary of DAS UK Holdings Limited which is owned ultimately by Munich Re, a major European insurance group with headquarters in Germany. DAS's relevant trading operations were conducted from Bristol.

5. Mr Paul Asplin ('the first Defendant'), was employed by DAS throughout the indictment period of 2000 to 2014 as the Managing Director and then the CEO. Mr David Kearns ('the second Defendant'), a solicitor, was employed until 31st December 2004 as Head of Claims and General Manager. Ms Sally Jones ('the third Defendant') had worked for DAS as Head of Marketing, but she left in October 1999 when she began a relationship with Asplin. They married in 2001 but divorced in May 2005.

6. The three defendants were prosecuted successfully by DAS in 2018 (along with three other defendants who were acquitted) for conspiracy to defraud the company. The allegations, in broad terms, alleged that the defendants used their senior status in the company to exploit the way in which DAS did business in order to allow them to make secret profits, in breach of their fiduciary duties and without DAS being aware of their actions. The course of relevant conduct began in 2000 and was successfully concealed until 2014.

7. In 2000, Asplin and Kearns established a company called Medreport Limited ('Medreport') for the purpose of providing forensic medical reports relevant to personal injury claims. Medreport was structured so that the beneficial interests of the first and second defendants were deliberately concealed through the use of nominees and trusts. Asplin and Kearns, in other words, worked for DAS while in effect owning Medreport. They then arranged that DAS contracted with Medreport for the provision of medical reports, to the extent that over 90% of DAS's requirement was directed to Medreport. Over the years DAS placed an immense amount of business in the way of Medreport, to the very considerable profit of Medreport and its management and owners. Further, loans or funding arrangements were sometimes provided by DAS to Medreport, to the ultimate benefit of it and its covert owners. The third defendant was, for a time, involved in the management of Medreport, with a remuneration of £240,000 per annum. She later became a co-owner and director of Medreport, continuing to run the company after Asplin had transferred his interests to her.

8. In 2003, the first and second defendants also established a law firm called CW Law ('CW'), which was then retained as one of the firms on a panel operated by DAS to act in litigation. Two very large sums were paid by DAS to CW. Again, Asplin and Kearns were alleged to have concealed their covert beneficial interests in CW and to have profited from the receipts.

9. Gradually suspicion arose as to the nature of the relationship between DAS, Medreport and CW and that some form of secret interest existed in favour of DAS's directors. An article appearing in a national newspaper in 2006 referred to the first defendant's use of the company to benefit his former wives, who by then included the third defendant. DAS commissioned enquiries and investigations, but the true

position that Medreport was improperly profiting from DAS was successfully concealed by the defendants.

10. The second defendant sold his interest in Medreport in 2007 and the first defendant sold his in 2008. The third defendant continued to run Medreport. Contracts were renewed between DAS and Medreport after the ending of the interests of Asplin and Kearns.

11. In 2011 certain non-UK executives from within the DAS group insisted upon a tendering process being carried out for the allocation of expert reports. Medreport failed in this process, but the contract with Medreport was, nonetheless, renewed after Jones caused a letter to be written to Asplin threatening to reveal the truth to DAS, a letter described later in court as a "classic blackmail letter".

12. In 2012 the board of DAS decided to terminate the relationship with Medreport. Medreport, led by the third defendant, sued DAS. Ignorant of the conspiracy, DAS settled the case in July 2013, paying a sum in excess of £800,000.

13. CW, meanwhile, was taken over by William Graham Law in 2007, the purchase being in fact financed to the tune of £3,000,000 by DAS. These proceeds were received by a Mr Culpan, who was ostensibly the sole proprietor of CW. In fact, one-third of the business was owned by the second defendant, while the first and third defendants shared another third. Banking documents disclosed subsequently that at least £950,000 (and perhaps more) of the sum paid in 2007 was transferred into an account of, inter alia, the second defendant.

14. In November 2014, DAS instructed Ernest & Young ('EY') to conduct an investigation into the relationship between DAS and Medreport. The investigation, in summary, comprised an accounting review, an investigation of the relevant supply contracts, interviews conducted with at least twenty individuals and consideration of voluminous, relevant documentation. EY produced an initial 143-page report in February 2015.

15. As a result of this investigation, DAS contacted the Financial Conduct Authority ('FCA'), who referred the matter to the Serious Fraud Office ('SFO'). In April 2015,

the SFO declined to prosecute. DAS had also referred the matter to Avon & Somerset Police, but in March 2015 they also declined to prosecute.

16. DAS duly instructed Edmonds Marshall McMahon ('EMM'), to pursue a private prosecution. EMM were instructed in April 2015 and in July 2015 a *Norwich Pharmacal* application was issued in the Queen's Bench Division, seeking disclosure of relevant documents held by, inter alia, the third defendant. The order was granted on 13th July 2015 and thereafter several tranches of relevant documents were produced by the defendant and her company Medreport.

17. PwC was then instructed by DAS to oversee the process of disclosure, a necessary part of the prosecution. This included disclosure from the defendants, other third parties and, indeed, DAS itself. Initially almost 4.3 million documents were identified occupying a workspace that was roughly 432Gb in size. This was gradually reduced (the process is discussed in more detail in respect of PwC's fees below) until ultimately 42,500 relevant documents were disclosed.

18. Summonses were issued against the defendants and served on 15th June 2016. The first hearing was before District Judge Purdy in Westminster Magistrates' Court on 8th July 2016. The case was sent to Southwark Crown Court, with a First Appearance on 5th August 2016, followed by the service of a revised Indictment and a final Case Summary in September 2016.

19. On 7th November 2016, the defendants issued an application to stay the proceedings on the basis that the prosecution was failing to abide by its disclosure obligations, to the extent that it was impossible to have a fair trial. A 5-day abuse of process application hearing was heard in March 2017 before HHJ Korner QC. Mr Michael Brompton QC was instructed by EMM for the prosecution. A reserved judgment was handed down on 31st March 2017 and the judge, having concluded that the defendants could not receive a fair trial, stayed the prosecution for abuse of process. DAS then appealed that decision to the Court of Appeal and in July 2017 it overturned the judgment of HHJ Kroner QC, recording that her findings were "*unjustified*" and "*simply cannot stand*".

20. In August 2017, the main prosecution recommenced and the case was listed for Mention and a PTPH before HHJ Beddoe, the allocated trial judge. EMM had by

then instructed Richard Whittam QC as prosecutor, in place of Mr Brompton QC. The defendants were arraigned and entered pleas of Not Guilty.

21. Between September 2017 and the final trial in April-July 2018, the prosecution endured a fairly tortuous interlocutory process. All the defendants were represented by leading or senior counsel and several further unsuccessful applications were made to dismiss or stay the prosecution.

22. The trial was heard between 9th April and 3rd July 2018, with jury deliberations on 4th, 5th and 6th July 2018. The trial thus lasted for 58 days and was described by the prosecution as being "incredibly hard fought", notwithstanding the fact that none of the defendants gave evidence.

23. On 9th July 2018, the first, second and third defendants were each convicted of conspiracy to defraud DAS, and the first defendant was also convicted of false accounting.

24. Sentencing took place on 13th July 2018. The first defendant was sentenced to seven years' imprisonment and was disqualified from acting as a director for twelve years pursuant to section 2 of the Company Directors Disqualification Act 1986. The second defendant was sentenced to four years and three months' imprisonment. The third defendant was sentenced to three years and nine months' imprisonment and was disqualified from acting as a director for eight years.

25. Confiscation proceedings then followed. On 19th July 2019 HHJ Beddoe found that the total loss suffered by DAS as a result of the conspiracy amounted to £11,231.397. Confiscation orders were made against the first defendant, £5,285,300 (to be paid within 6 months or 8 years in default), the second defendant, £1,439,729 (6 months or 6 years in default) and the third defendant, £1,558,155 (6 months or 6 years in default).

26. On application, HHJ Beddoe also granted the prosecution its costs out of Central Funds pursuant to s.17 of the Prosecution of Offences Act 1985. This 'Costs Order' is copied at pp 4/5 of Appeal Bundle 1 and at paragraph 3 of the Order the court made the following findings:

(a) There were no circumstances known to the court that made the award of full costs inappropriate [s.2A].

(b) The prosecutor was required to make an application to the High Court in respect of evidence to be admitted in the criminal court. The court finds that the application (and all associated proceedings) are "proceedings in respect of an indictable offence" within s.17(1) and that the prosecutor's unrecovered costs in that civil claim are expenses properly incurred by it in the proceedings that, accordingly, should be granted.

(c) The instruction of Leading Counsel (Mr Whittam QC) and the two junior counsel (Mr Bird and Mr Hughes) and the instruction of disclosure counsel (Ms Chalkley) was appropriate bearing in mind the importance and complexity of the matter.

Legal framework

27. Part II of the Prosecution of Offences Act 1985 ('the 1985 Act') concerns defence, prosecution and third party costs in criminal cases. Sections 16, 16A and 17 concern the award of costs out of central funds.

28. Section 17 deals with prosecution costs:

> ***17. Prosecution costs***
>
> *(i) Subject to [subsections (2) and (2A)] below, the court may –*
>
> *(a) in any proceedings in respect of an indictable offence; and*
>
> *(b) in any proceedings before a Divisional Court of the Queen's Bench Division or the [Supreme Court] in respect of a summary offence;*
>
> *order the payment out of central funds of such amount as the court considers reasonably sufficient to compensate the prosecutor for any expenses properly incurred by him in the proceedings.*

29. The Costs in Criminal Cases (General) Regulations 1986 ('the 1986 Regulations') deal, at Part III, with the payment of costs out of central funds. Regulation 7 provides (so far as relevant) as follows:

> *7 -*
>
> *(1) The appropriate authority shall consider the claim, any further particulars, information or documents submitted by the applicant under reg 6(5), and shall allow such costs in respect of*

(a) such work as appears to it to have been actually and reasonably done; and

(b) such disbursements as appear to have been actually and reasonably incurred.

(2) In calculating costs under para (1) the appropriate authority shall take into account all the relevant circumstances of the case including the nature, importance, complexity or difficulty of the work and the time involved.

(3) Any doubts which the appropriate authority may have as to whether the costs were reasonably incurred or were reasonably ... shall be resolved against the applicant.

(4) The costs awarded shall not exceed the costs actually incurred.

(5) Subject to paragraph (6), the appropriate authority shall allow such legal costs as it considers reasonably sufficient to compensate the applicant for any expenses properly incurred by him in the proceedings.

30. Regulation 9 concerns the redetermination of costs by an appropriate authority. An applicant who is dissatisfied with the costs determined under the Regulations by an appropriate authority (other than before a magistrates' court) may apply to the appropriate authority to redetermine them. The regulation makes provision for the procedure to be followed on a redetermination, which can lead to an increase or decrease in the level previously determined, or involve a confirmation of that level. If so requested, the appropriate authority must give reasons for its decision.

31. Regulation 10 concerns appeals to a Costs Judge from the appropriate authority. Regulation 10(12) provides:

12. The Costs Judge shall have the same powers as the appropriate authority under these Regulations and, in the exercise of such powers, may alter the redetermination of the appropriate authority in respect of the sum allowed, whether by increase or decrease, as he thinks fit.

32. In Fuseon Ltd v. Senior Courts Costs Office and Another [2020] Costs LR 251, Lane J re-affirmed (from para. 18) the importance of private prosecutions, particularly in complex financial or fraud cases, where the statutory authorities may not have the resources to pursue every meritorious case. In Mirchandani v. Lord Chancellor [2020] EWCA Civ 1260, Davis LJ noted again (at para. 79) that: 'Parliament has decided that, in appropriate cases, private prosecutions serve a public interest'. In that

case, where the issue was the costs of confiscation/enforcement proceedings, the court proceeded to note (at para. 80) that this public interest would be undermined if the prosecutor was not able to recover costs out of central funds. It is clear that what Parliament envisages is a compensatory scheme, as to assess costs by reference to another criteria would deter necessarily private prosecutions. This point was re-affirmed in Football Association Premier League and another v. Lord Chancellor [2021] EWHC 755 (QB) where Nicol J acknowledged again (at para. 44) the public interest in private prosecutions, particularly in the fields of fraud and intellectual property rights. This case confirmed that investigative costs could be recovered (as "costs in proceedings") out of central funds, as without this provision, "private prosecutions would not get off the ground".

33. Mr Cohen, counsel representing the Appellant, cites these authorities and emphasises the important public interest in private prosecutions, particularly in complex financial fraud or intellectual property cases, along with the concomitant conclusion that a prosecutor's costs should be assessed by reference to a compensatory principle, rather than the principles that govern usually costs in criminal proceedings.

34. Mr Rimer, a Senior Lawyer at the Government Legal Department representing the Respondent, acknowledges these decisions, but emphasises the requirement that costs be properly and reasonably incurred. Sufficient compensation, in other words, does not mean necessarily that the prosecutor is entitled to recover from central funds every pound spent on the prosecution, but only those expenses properly and reasonably incurred.

The appeals

35. These appeals were heard on 3rd and 4th May 2022, when, as noted, the Appellant was represented by Mr Cohen, counsel and the Respondent by Mr Rimer, a Senior Lawyer at the Government Legal Department. The Respondent's submissions are set out in Written Reasons dated 9th February 2021 and 26th April 2022. Mr Rimer also filed a Position Statement (4 pages) dated 26th April 2022, which effectively adopts the Determining Officer's reasoning and her written reasons as the Respondent's skeleton argument in these appeals. The Appellant's case is set out in a Skeleton Argument

(27 pages) drafted by Mr Cohen and dated 28th April 2022 and, in respect of the most recent written reasons, an Appellant's Note (6 pages) dated 28th April 2022.

My analysis and conclusions

General matters

36. Two matters of general application require an initial consideration.

37. The first issue concerns the court's approach to the question of redetermination in the event that any of the Determining Officer's assessments are set aside on appeal. The Appellant's initial submission was that whereas it would be appropriate for the court to reassess the fees of counsel in the event that the Respondent's determination is challenged successfully, any reassessment of the PwC and EY disbursements should be remitted to the Determining Officer for further redetermination (see, for example, Skeleton Argument para. 72 re the S&N element of PwC's costs). Upon reflection, however, in oral argument Mr Cohen submitted that any decision successfully appealed should be redetermined by the court, without remittance back to the DO. Mr Rimer, on behalf of the Respondent, raised no objection to this; indeed my impression was that he was quite willing for the court to assume the role undertaken hitherto by the DO. I agree. The SCCO has considerable, regular experience of assessing large commercial disbursements, not exclusively in inter partes' assessments. Mr Rimer remarked during the hearing that the bill lodged by EMM in this case comprised by far the largest private prosecution bill ever submitted to the LAA, so that the assessment of large commercial disbursements was necessarily outwith the experience of the Determining Officer. I indicate accordingly from the outset that in the event that any of the Respondent's assessments are set aside on appeal, this court will proceed to redetermine the relevant item or disbursement.

38. The second issue concerns the question of counsel's hourly rates and the relevance of these rates to the assessment of counsel's disbursements. In four instances the DO reduced the hourly rates claimed by counsel in circumstances where these reductions comprised a determining factor in her consideration. The issues can be tabulated:

Counsel	Hourly rate claimed	Rate allowed
Michael Brompton QC	£400	£350
Andrew Bird	£300	£200
Henry Hughes	£200	£150
Rebecca Chalkley	£170	£100

39. Mr Cohen spent some time in his written and oral submissions in challenging the Determining Officer's assessment and reduction of these hourly rates. Mr Rimer, in reply and having taken instructions, then conceded the appeal on this point, agreeing that the hourly rates claimed should be those allowed on assessment. I note accordingly that in the course of my determination, the rates claimed by counsel should be allowed on assessment. One qualification to this principle concerns Andrew Bird, as it is apparent from his fee notes that his clerk volunteered a 10% reduction in the event that the bills were discharged expeditiously, which they were. For Andrew Bird, therefore, while the notional hourly rate allowed is £300, this is reduced in practical effect to £270 ph.

Michael Brampton QC

40. Mr Brampton's fees totalled £133,839.99 (which included £19,500 for court appearances). The DO allowed £89,250 (£78,400 for preparation and £10,850 for court appearances).

41. Given that the Respondent now concedes an hourly rate of £400, the relevant sections of the DO's written reasons are as follows:

> Counsel's brief fee was based on 320 hours' work at £400 per hour. Having consulted his work log, all time claimed seemed reasonable. However, it was my view that it would have been reasonable for you to have sought to limit or recoup some of his fees as his withdrawal was as a result of his failure to follow instructions.

> You have conceded, in the concluding paragraph of Mr Marshall's statement, that "*[your] client's overall costs of remedying matters in the Court of Appeal (alone) have been in excess of £420,000 net*".
>
> In the circumstances, I consider that it would be unreasonable for the public purse to bear the costs completely and so, after assessing the brief fee as £112,000, I applied a 30% reduction, which was roughly equivalent to the costs of preparation for the abuse hearing, counsel's attendance at that hearing and any fees incurred after the hearing.
>
> …
>
> Counsel's claim for £133,839.99 included £19,500 for court appearances. With the exception of the abuse of process argument, which he billed at £3000 per day, all other appearance fees were billed at £1500, regardless of their length.
>
> …
>
> I dismiss this assertion; I assessed each appearance fee on its own merits, taking into account what the case was listed for, how long counsel was at court, the length of the hearing and counsel's involvement in that hearing.
>
> To apply a fixed fee to each appearance is not a reasonable approach, as this does not remunerate "such work…actually and reasonably done". For example, on 7 October 2016, Counsel attended court for a mention. According to the court log, the case was listed at 11am, it was called on at 11am and lasted 26 minutes; directions and timetabling were discussed. In my judgement, nothing remarkable happened at this hearing and so to allow counsel the sum of £1,500 would be disproportionate.
>
> Similarly, on 31 March 2017, the case was listed for the judge to give judgment. It was listed at 10 o'clock, commenced at 10:19 am and concluded just before 12pm. The only time that Mr Brompton was on his feet was for one minute to ask for an adjournment to allow for an appeal to be lodged. Again, in my judgement, a fee of £1,500 was unreasonable.

42. The DO's reasoning, in other words, can be summarised as follows: (i) she imposed a 30% reduction to his preparation fees as, in effect, a penalty for his performance in the first abuse of process hearing; and (ii) purported to assess his court appearance fees by reference to an hours x hourly rate formula, as opposed to a standard half or full-day appearance rate.

43. Mr Cohen, having submitted that the DO's "reasoning is opaque", argued that her approach to assessment was conceptually incorrect. The question, he submits, was not whether it would be "unreasonable for the public purse to bear the costs", but rather whether these disbursement costs were "actually and reasonably incurred" (reg.

7(1)). As such, her 30% reduction was "arbitrary" and contrary to the compensatory principle of the costs regime. Turning to court appearances, Mr Cohen submits that even by application of the DO's hours x hourly rate formula, the figure should be £14,200, plus relevant preparation and travel time.

44. Mr Rimer relies on the reasoning of the Determining Officer as set out in her written reasons.

45. I much prefer the submissions of the Appellant to those of the Respondent on this issue. The DO was wrong, in my conclusion, to apply a 30% reduction to Mr Brompton's fees on the purported grounds that it would 'be unreasonable for the public purse to bear the costs'. Not only did she pose the wrong test, she then, in my view, applied it incorrectly. The Appellant proceeded to the Court of Appeal because the judge, HHJ Korner QC, had incorrectly stayed the prosecution on the grounds of abuse of process. The Court of Appeal reversed this decision in fairly forthright terms. Although the Appellant subsequently changed counsel (but not until December 2017), it was wrong fundamentally to perceive this in terms of his conduct or performance. Ultimately the DO was wrong to apply any sort of performance based analysis or review on assessment, quite apart from the fact that the assessment undertaken was arbitrary and incorrect. Turning to court appearances, I accept Mr Cohen's submission that the Determining Officer's assessment comprised a flawed application of his hours x hourly rate formula. I would, in fact, go a step further. It is reasonable, in my conclusion, for leading counsel's appearance fees in a large, complex financial fraud prosecution, to be agreed and assessed by reference to a standard half or full-day rate. Regardless of how long the hearing lasts for, or how long counsel is on his or her feet, an irreducible minimum comprising preparation, travel, hearing time and pre and post-hearing conferences, is incurred necessarily. It is common (and reasonable) practice for counsel's clerk to agree such attendances by reference to a standard half or full-day rate. Mr Brompton's rates of £1500 and £3000 are reasonable and should accordingly be allowed.

46. I conclude, therefore, that the disbursement fees of Michael Brompton QC should be redetermined and allowed in the sum of £133,839.99, as claimed.

47. The fee claimed was £335,000. The Determining Officer allowed £227,000, comprising £150,000 for preparation and £77,000 for refreshers.

48. The Determining Officer's reasoning is set out in the written reasons at pp 7-10 as follows:

> On determination I disallowed a brief fee for two reasons – I had no detail of the work undertaken and I wanted more information in respect of Mr Brompton's withdrawal. I allowed £77,000 for refreshers, this included 39 full day refreshers at £1,750 per day and 10 half-days at £875.
>
> …
>
> I agree that it was wholly reasonable to instruct leading counsel; five out of the six defendants had a QC.
>
> Mr Whittam was called to the Bar in 1983 and has been a Queen's Counsel for over 10 years. His fee covers instructions from December 2017 to the conclusion of the trial in July 2018, so a period of 7 months.
>
> All these factors were considered when I assessed the reasonable fees on re-determination. I also consulted the CPS guidance in relation to fees and although I did not make a direct comparison, I believe that it was fair to take this into consideration.
>
> [She then cited a passage from D Limited v. A and Others [2017] EWCA Crim 1604]
>
> A rough calculation makes a fee of approximately £73,000. To that I added an element of "special preparation" taking into account the large number of pages of evidence, complexities in this case, etc.
>
> [She then cited extracts from R v. Martin [SCCO Ref: 115/06], R v. Went [SCCO Ref : 297/12] and R v. Khan [SCCO Ref: 64/16]]
>
> …
>
> In the circumstances, it is my view that a brief fee of £150,000 (in addition to £77,000 refresher fees) provides "reasonably sufficient" compensation to "the applicant for any expenses properly incurred by him in the proceedings".
>
> [She then replied to the Appellant's submission that her approach to remuneration of refreshers was "arbitrary".]
>
> I cannot agree with that assumption. Drawing on my experience as a court clerk for a number of years, it was common that counsel did not necessarily attend every day of the trial. Therefore, just because Mr Bird attended court it

cannot be assumed that Mr Whittam attended also, nor that if he attended, the hours were the same. In the absence of Mr Whittam's work log, I relied on the court log.

49. Mr Cohen de-constructs the DO's approach at paragraphs 30, 31 and 32 of his Skeleton Argument. He submits that her "rationale is unsatisfactory" and that "she provides no reasoning for the figure of £150,000". Her approach to refreshers was wrong and, in any event, factually inaccurate, as the reference to "39 full days and 10 half-days" is incorrect. He submits that "the court just needs to ask itself whether the figure of £355,000 is reasonable". He then attempts an ex post-facto analysis of an hours x hourly rate determination, in order to demonstrate that leading counsel's preparation was the same as that of his juniors (Bird and Hughes), then his hourly rate would equate to a reasonable £430-456.

50. Mr Rimer relied again on the reasoning of the Determining Officer set out in her written reasons.

51. The correct approach to assessment is, in my view, as follows. First, the court should decide whether it was reasonable for EMM to retain leading counsel on a fixed fee. Second, it should then consider whether, in December 2017, the agreed fee of £335,000 was 'reasonably incurred'. It should be determined primarily by reference to the circumstances as known in December 2017. Whilst it may be interesting, even instructive, to submit the assessment to a retrospective analysis, by reference to the events as they unravelled between December 2017 and July 2018, the determination should focus on the date the fixed fee was agreed, namely December 2017.

52. I am quite satisfied, on the facts of this case, that it was reasonable for EMM to retain leading counsel on a fixed fee. Although, at that point, the prosecution was proceeding to a trial sometime in 2018, EMM were aware already that the case would be hard fought by the six defendants, five of whom were represented by QCs. It was foreseeable that aside from the inevitable, routine interlocutory hearings (eg. the CMH on 22nd December 2017 and the PTR on 13th March 2018), that there would likely be other interlocutory applications, possibly to challenge again the process of the prosecution. Fixed fees, particularly in a complex case where, insofar as the interlocutory process is predictable, it is foreseeable nonetheless that numerous twists and turns would ensue, have the advantage of a certain predictability that caps the

payee's liability, specifically in circumstances where that liability has the potential to grow in circumstances not within the direct control of the paying party. Indeed, the DO could not really challenge the conceptual fact of a fixed fee, and Mr Rimer acknowledged in oral argument the fixed fee was reasonable per se, albeit (he argued) at a much lower figure.

53. Mr Whittam had 34 years' experience in 2017 (he was called to the Bar in 1983) and he had been a Silk for over 10 years. More importantly, he was First Senior Treasury Counsel from 2013-15. In December 2017 it was foreseen that the trial would be listed in mid-2018 and that the time estimate would be approximately 60 days. I understand that Mr Whittam's general hourly rate at that time was £500-£600 per hour. This may well have been a little high for this private prosecution. The Respondent nonetheless could not dispute an hourly rate of £400+. By any rough comparable, the fixed fee of £335,000 allowed reasonably for 800-850 hours of work. This, I find, falls well within the reasonable expectation of the parties in December 2017. As it happens, the two junior counsel (Bird and Hughes) would ultimately invest between 777 and 825.5 hours on the prosecution, which reflects the reasonableness of the approach taken by EMM in December 2017. The DO's assessment was reduced unreasonably by a failure to undertake this methodology and a similarly erroneous approach to the assessment of refreshers. Again, the anticipated listing was 60 days and the trial lasted ultimately 58 days. The DO's approach to calculation, insofar as this has any relevance to assessment, was flawed, as her calculation of 39 whole and 10 half-days was simply wrong.

54. I am satisfied that the fixed fee agreed by EMM for Richard Whittam in December 2017 falls squarely within the perimeters of a reasonable range for a complex prosecution like this, and that, as such, this disbursement was reasonably incurred. It follows that the fees of Mr Whittam QC are allowed in the sum of £335,000, as claimed.

<u>Andrew Bird</u>

55. Fees were claimed in the total sum of £486,030. This comprised: (i) preparation, £330,105 (1101.5 hours x £300 per hour); (ii) court appearances, £30,450; and (iii) refreshers, £125,475.

56. The Determining Officer allowed a total of £269,675. This comprised: (i) preparation, £219,700, based on a disallowance of 3 hours to 1098.5 and an hourly rate reduced from £300 to £200; (ii) court appearances, £7,100; and (ii) refreshers, £42,875.

57. The written reasons, insofar as they are now relevant to this disbursement – are set out at pp 11-12 as follows:

> In relation to the fees allowed for court appearances, I adopted the same approach as I did when assessing Mr Brompton's appearance fees – each appearance was assessed on its own merits, taking into account what the case was listed for, how long counsel was at court, the length of the hearing and counsel's involvement in that hearing. It is my submission that all preparation is subsumed in the brief fee and the fee allowed for the hearings is for attendance only.
>
> …
>
> In relation to Counsel's trial refreshers, fees were allowed £42,875, based on 43 full days refreshers at £875 per day and 12 half days at £437.50 per half day.
>
> You queried why I had only granted 43 refreshers. On determination, I had access to the court log and noted Mr Bird's presence in court on 55 days out of the 58 days the case was listed for trial.
>
> …
>
> The allowance of the refresher fee should provide reasonable compensation to the applicant for the expense of the work reasonably done by counsel having regard to the application of the relevant factors, the total time during which counsel was occupied and the Brief Fee. The emphasis should be on allowing a reasonable fee, taking into account the realistic total time in which counsel was deployed on the case, and not reduced the hearings to a mathematical calculation.

58. Mr Cohen de-constructs the Determining Officer's approach at paragraphs 37-40 of his Skeleton Argument. Mr Rimer relied again on the reasoning of the Determining Officer set out in the written reasons.

59. Redetermination of the preparation fee is straightforward. Mr Cohen conceded the 3 hours deducted by the DO and Mr Rimer concedes that the hourly rate should be £300. Accordingly, the preparation element of this fee is re-assessed at £329,550 (1098.5 hours x £300).

60. Mr Cohen submits (and Mr Rimer did not challenge this analysis) that the DO's allowance for court appearances, £7,100, comprises "a mere £750 per day for each day of the abuse hearing in March 2017 (4 days), a mere £350 for the mention hearing of 3rd November 2017, £750 for the abuse hearing on 7th March 2018 and £750 for the s.8 disclosure hearing on 13th March 2018". The DO was, he argues, "simply wrong to have made these reductions", as each hearing required either a full day at court and/or a half day with a conference following.

61. First, the Determining Officer's conceptual approach (set out on p.11 of the written reasons) is, in my conclusion, wrong. Assessments should refer to the listing and the length of the hearing. It does not follow that all preparation should be excluded in this part of the assessment, as some modest, hearing specific preparation would be incurred necessarily. I do not see that 'counsel's involvement in that hearing' is a relevant factor on assessment. Second, the DO's assessment was clouded invariably by her decision to reduce the hourly rate from £300 to £200, a deduction of 1/3.

62. I have considered the claim for court attendances as carefully as I can from the information disclosed to me. As I have indicated elsewhere, I consider it reasonable for counsel's interlocutory appearances to be assessed by reference to the standard half or full day rate. Given the now conceded rate of £300ph, I can see nothing in the papers that could lead to the conclusion that Mr Bird's court appearance fees are unreasonably high. It follows that the disbursements should accordingly be assessed at £30,450, as claimed.

63. Turning to refreshers, I repeat the conclusion that counsel can be retained reasonably by reference to a standard half or full day rate. Mr Cohen submitted in oral argument that a day at court invariably comprises about 10 hours, when preparation, travel etc. was included. A more conservative allowance of eight hours a day at £300ph would produce a reasonable daily refresher of £2,400, or £1,200 per half day. Utilising this methodology, and the DO's reference to '43 full day refreshers and 12 half days', totals which are challenged by the Appellant, the total exceeds £117,000. My assessment is that the £125,475 claimed falls comfortably within the perimeters of reasonable allowance and that, accordingly, this part of the fee should be assessed in that sum.

64. It follows that the fees of Andrew Bird are re-assessed in the total sum of £485,475.

Henry Hughes

65. Fees claimed were £222,100. This comprised: (i) preparation, £102,750 (513.75 hours x £200ph); (ii) refreshers, £109,400 (547 hours logged); and (iii) court appearances, £9,950 (49.75 hours).

66. The Determining Officer's total is unclear. She allowed (i) preparation, £75,975 (506.5 hours x £150ph); (ii) refreshers, £21,218.75 (43 full and 13.5 half-days); and (iii) various (partly unparticularised) costs for court appearances.

67. The DO's relevant reasoning is set out at pp 12-15 of the written reasons. Of note is her approach to the assessment of court appearances, wherein she allowed these at ½ the rates for Andrew Bird and ¼ of the QC's fees for the 5-day abuse hearing.

68. Mr Cohen challenges the Determining Officer's analysis at paragraphs 41 and 42 of his Skeleton Argument. Mr Rimer again relies on the DO's reasoning in her written reasons.

69. Reassessment of Mr Hughes's preparation time is straightforward. Mr Cohen accepts the DO's deduction of 7.25 hours to a total of 506.5 hours. Mr Rimer, in turn, concedes a rate of £200ph. Accordingly, this part of the disbursement is reassessed in the sum of £101,300 (506.5 x £200).

70. The approach to be adopted to refreshers is more complex. The Determining Officer calculated 42 full days and 13 half days (i.e. 48.5 days). Mr Hughes, in contrast with some of his colleagues, kept a detailed work log, which recorded 547 hours at court in the relevant period, and Mr Cohen's submission relies on this. Hitherto I have allowed counsel's refreshers to be assessed by reference to full or half day rates. Applying, notionally, the relevant hourly rate of £200 and Mr Cohen's allowance of 10 hours per day, this would produce standard refreshers of £2,000 per day and £1,000 per half day. Here, however, counsel has proffered a detailed work log. I have considered this carefully, and erred ultimately on a consistency of approach, meaning that the principles applicable to Mr Bird should, in turn, be applied to Mr

Hughes. I did not need to be specific as to the definition of full or half day in the assessment of Mr Bird's fees. In relation to Mr Hughes, I accept Mr Cohen's submission that a refresher should be based notionally on 10 hours or so per day. On this basis, therefore, and adopting the DO's reference to 48.5 days (which is not challenged explicitly by Mr Cohen), this produces a total of £97,000 for refreshers.

71. The Determining Officer's approach to court attendances is not really outlined with sufficient particularity in the written reasons. What is clear, is her conceptual approach, namely to allow either ½ of Mr Bird's fee or ¼ of the QC fee for the abuse hearing. I agree with Mr Cohen that this approach is unsustainable. Although Mr Bird was described as 'senior junior counsel' and Mr Hughes 'junior counsel', this approach is impossible to sustain. Mr Hughes was 13 years call when he was instructed in June 2016 and his rate of £200ph is, in my consideration, relatively modest. I am unable to piece together the specifics of the DO's allowance, as confirmed in the written reasons, so in this instance the only appropriate option is to endorse the calculation of the Appellant. Logged hours of 49.75 x £200ph gives a total of £9,950, the sum claimed, and I consider this to be the reasonable figure on re-assessment.

72. I accordingly re-assess the fees of Henry Hughes in the total sum of £208,250.

Rebecca Chalkley

73. Fees were claimed in the total sum of £259,164.90, based on 1524.5 hours x £170ph. The Determining Officer allowed the 'broad brush' figure of £80,000.

74. The Determining Officer's reasoning is set out at pp 15and 16 of the written reasons. Mr Cohen challenges this analysis at paragraphs 44-50 of his Skeleton Argument. Mr Rimer again relies on the DO's reasoning for his submissions.

75. The Determining Officer relied essentially on three propositions in her assessment. First, she reduced the rate of £170ph to £100. Second, she disallowed 50.75 hours of time for the period 17th-28th June 2017. Third, she then purported to apply a 'Singh discount', namely the broad-brush approach endorsed in R v. SCCO ex p John Singh [1997] Costs LR 49.

76. The hourly rates decision (which comprised a reduction of 41%) is now conceded by the Respondent, who accepts that Ms Chalkley's rate of £170ph is reasonable.

77. Mr Cohen challenges (para. 44 of his Skeleton Argument) the DO's deduction of 50.75 hours for the period 17th-28th June 2017. The DO recorded that this time was undertaken in "reviewing KM e-mails for disclosure and advising" and that, as such, it should be disallowed, as KM (Kate McMahon) was subject to criticism in the Court of Appeal. The relevant section of the written reasons is as follows:

> In the course of the abuse of process argument before HHJ Korner, the defendants had severely criticised Kate McMahon's actions, a senior fee earner at EMM.
>
> You submitted in your application for re-determination, that "While at first instance, HHJ Korner criticised the efficacy of the disclosure process, these criticisms were roundly rejected by the Court of Appeal".
>
> I disagree with that view; it was my judgment that the work undertaken by Rebecca Chalkley would not have been necessary if Ms McMahon's actions had not been open to criticism.
>
> …
>
> It was my view that the costs incurred by Rebecca Chalkley were not "expenses properly incurred by [the applicant in the proceedings] since it as Kate McMahon's actions that led to that work being done.

78. There are, as Mr Cohen points out, two broad problems with this analysis. First, any sustainable criticism of Kate McMahon had nothing at all to do with disclosure, the role for which Ms Chalkley was retained. KM was subject to some criticism concerning her conduct in approaching third parties, but this was irrelevant, argues Mr Cohen, to the question of disclosure. Put another way, it was still incumbent on counsel to review KM's e-mails because they were potentially disclosable, irrespective of any transgression on KM's part. Second, it seems to me that the criticism relied on by the DO was difficult to sustain ultimately. Whatever criticisms levelled by HHJ Korner QC in the abuse of process judgment, this decision was robustly overturned by the Court of Appeal. Ultimately, therefore, I agree with Mr Cohen that the DO had no grounds to disallow 50.75 hours.

79. The 'Singh discount' comprises perhaps the most problematic aspect of the Determining Officer's consideration. The principle arising from Singh (ibid) is that

when dealing with the solicitor's bill of costs in relation to a criminal matter, a determining officer is entitled, after carrying out an 'audit exercise', to stand back and make a decision as to the overall validity of the claim, although it is not necessary for a taxing master on appeal to examine each and every item individually. The reasoning is set out explicitly by Henry LJ at p.56 of the judgment:

> The second point taken is this: whether the determining officer and taxing master could take an overall view and reduce the hours for each individual class of work over the broad in the way that they did. The task to be performed in this taxation is preserving the balance between reasonable remuneration of the legal profession for work done on legal aid and protecting the fund against making an open-ended commitment to pay for more hours work than the task reasonably required. The judge dealt with it in this way at page 16:
>
> > *…The notice of appeal…essentially challenged the Determining Officer's right to stand back from the individual items in the bill and determine that the aggregate produced from those individual items, although not capable of being impugned as separate items, nonetheless produced a result which established that the time claimed was unreasonable. It seems to me that that must be one of the necessary functions of the Determining Officer, once he has carried out what might be called the audit exercise in relation to the individual items on the bill.*
> >
> > ...
>
> I agree with that passage entirely. How else can the unreasonable claim be controlled?

80. Singh (ibid) referred to a straightforward taxation in a criminal case. It was considered in Fuseon (ibid) that the approach may apply equally to the assessment of costs in a private prosecution. Lane J set out the relevant reasoning at para. 91 (p.292) of the judgment:

> 91. So far as the "Singh" discount is concerned, the claimant does not contend that it had no part to play in any assessment of costs incurred by a private prosecutor who is seeking recovery from central funds.

Mr Cohen's argument in this case is that the Determining Officer, while purporting to apply a Singh discount, simply failed to undertake the exercise in a lawful manner. Her reasoning in the written reasons was brief and summarised (at p.15) as follows:

> It was my judgment that the number of hours, taken together with the hours allowed for the disclosure process within EMM, was excessive. In addition,

> Price Waterhouse Cooper (PwC) were instructed to build a disclosure platform to sift and review disclosure using various keyword searches and phrases.

Here, submits Mr Cohen, the DO ran rapidly into error, as she failed to understand the disclosure process per se, and specifically the roles undertaken by EMM, PwC and Ms Chalkley respectively. (I analyse this process in much more detail in my judgment below relevant to PwC.) A consequence of this failure was the perception that Ms Chalkley's time was, in part, unreasonable, as it overlapped or duplicated the work of EMM and/or PwC. When combined with the reduction of counsel's hourly rate applied by the DO, the result was a decision that, although broad necessarily, was essentially unparticularised. Mr Rimer, although relying on the DO's reasoning, conceded tentatively in oral submission that her approach to the Singh discount may well have been incorrect.

81. A similar situation occurred in Fuseon (ibid). Quoting again from para. 91 of Lane LJ's judgment:

> There was, however, some disagreement between Mr Cohen and Mr Boyle as to whether the Master's decision had been "arbitrary", and that there had been no attempt to apply the discount by reference to particular classes or categories of costs incurred. I agree with Mr Cohen that there is a lack of clarity in the Master's decision on this issue even if one assumes, as Mr Boyle submitted, that the Master was, in effect, not departing from the categorisation exercise that had been employed by the determining officer. I do not consider that "Singh" was concerned with classes or categories merely because the Regulations then in force demanded that attention be focused on those issues. The importance placed on them bites deeper. I agree with Mr Cohen that, as a general matter, if the *Singh* discount is to be applied in way that is comprehensible to those affected by it, the exercise needs to be undertaken.

82. I agree with Mr Cohen that in this instance the Determining Officer's reasoning cannot be sustained. She gave very brief reasons for purporting, in effect, to reduce Ms Chalkley's hours from 1524.5 to 800. Insofar as any reasoning was outlined, it turned on a mistaken understanding of the disclosure process, specifically the distinct roles undertaken by EMM, PwC and Ms Chalkley, as disclosure counsel. I have no option, in these circumstances, than to set aside the DO's assessment.

83. Ms Chalkley, as specialist disclosure counsel, was called to the Bar in 1999. Mr Rimer concedes her (comparatively modest) rate of £170ph. The disclosure exercise (described in more detail below) produced a 35 page Disclosure Management

Document. She recorded 1524.5 hours and, insofar as the hours worked are concerned, the specific issue (taken, I find, incorrectly by the DO) was the 50.75 hours disallowed for the period 17th – 28th June 2017. Bearing all these factors in mind, I have reached the conclusion that Ms Chalkley's fees should be allowed as claimed, in the sum of £259,154.90. The hours worked, 1524.5 were recorded properly and undertaken reasonably. Her rate of £170ph was conceded by the Respondent. The Determining Officer applied incorrectly a Singh discount. Had she approached the matter correctly she would not have applied this deduction.

Noting briefs

84. The Appellant retained during the trial the services of various junior counsel as noting briefs at a rate of £200 per day with total costs of £9,200. This disbursement was disallowed in its entirety by the Determining Officer.

85. The Determining Officer's reasoning is set out p.17 of the written reasons:

> On determination, I refused to allow any costs on the basis that you claimed attendance of between one and three fee earners, (excluding the disclosure officer), in addition to the QC and two juniors, (excluding disclosure counsel). In my view, the expense of a noting brief was not an expense which was properly incurred in the proceedings.
>
> It is common to allow a noting brief where a defendant has pleaded guilty and there is a trial of the co-defendants, for example. In those circumstances it would be reasonable for the costs to be incurred since it is reasonable to expect the defendant to know what, if anything, is said which could directly impact his or her case. In this case, no such scenario existed.
>
> To justify this cost, you stated that the EMM lawyers and trial counsel were occupied on the following tasks:
>
> [Various tasks are tabulated]
>
> You provided several quotes for a verbatim transcript. They range from £120,000 revised to £78,000 from Opus 2, £52,800 based on £880 per day for a court typist, and £30ph for "other" professional typists.
>
> You further submitted that it was on counsel's request that a daily transcript was produced and the rate of £200 per day for a noting brief was exceptionally cost effective.

> I agree that compared to the quotes obtained, the instruction of a noting brief was cost effective, but it was my judgement that the costs should not have been incurred in the first place. Between the two junior counsel which I allowed I would have expected them plus any fee earner who was in court that day to make notes. Merely because counsel "required" a verbatim note did not itself justify including the costs of such an exercise.

Mr Cohen deals with this issue briefly at paragraph 51 of his Skeleton Argument. He relies on the DO's indication that £200 a day was "exceptionally cost effective" and this, combined with the fact that this was a complex, heavily contested matter, renders the disbursement reasonable.

86. I agree, in this instance, with the Determining Officer. It is wrong to compare a 'verbatim note' or transcript with the type of note taken by counsel retained for that purpose. The latter can never be as detailed, comprehensive or reliable as the former. But essentially the DO is, in my conclusion, correct in noting that as the Appellant had three counsel, a QC, a senior junior and a junior, along with one to three fee earners from EMM, it was not reasonable to incur the additional (albeit modest) expense of a noting brief. This disbursement is disallowed.

Emily Campbell

87. A fee of £2,500 was sought for an advice from specialist counsel as to whether the defendants' pensions could fall within the terms of a confiscation order. The fee was disallowed by the Determining Officer who stated (at p.18 of the written reasons) that: 'I disallowed the costs and queried the relevance to the preparation of the prosecution. In my view this work related to potential Confiscation Proceedings'. This was not, in fact, a rejection per se, as the DO acknowledged that the fee may be recoverable as costs of the confiscation proceedings, but as 'those costs are yet to be assessed', could not be recoverable at this stage.

88. Mr Cohen addresses this briefly at paragraph 52 of his Skeleton Argument. He notes (as, I think, the DO concedes) that enforcement proceedings fall within s.17 (see Mirchandani v. Lord Chancellor [2020] EWCA Civ 1260). In oral submission he argued that this fee could fall within either the trial or the confiscation costs.

89. The advice itself is copied at pp 199-202 of Addendum bundle 2 produced in this appeal. It is dated 29th June 2015, which informs my conclusion that the fee is

recoverable in this bill, as this was more than 3 years' pre-trial. In my redetermination, therefore, I set aside the Determining Officer's decision. No quantum assessment was undertaken by the DO as she disallowed the fee on what might be described as 'jurisdictional grounds'. The advice – described as a 'note' – is four pages long and the advice conveyed appears reasonably straightforward. While, therefore, it was reasonable for specialist counsel to be instructed, I am not satisfied that the fee of £2,500 claimed was reasonable. Doing the best I can, I assess a fee of £1,750. As Mr Cohen acknowledged, there can be no double assessment or recovery, so this fee should not appear in any subsequent confiscation bill.

PwC

90. The PwC invoices in the bill totalled £3,504.315.53 (+ VAT), covering the period 2015-2018. The Appellant now concedes that the claim is incorrect as it included a claim for fees that were irrecoverable, namely for work undertaken prior to August 2015. The correct figure claimed is £1,444,004.28. The Determining Officer, on re-assessment, has allowed a total of £80,250.

91. The work undertaken by PwC is explained in detail in a Disclosure Management Document compiled by Ms Rebecca Chalkley and dated 9th September 2016 (Addendum 2, pp 161-192) and in a 'Final Report Project Rochester' dated 22nd April 2022 (Addendum 1, pp 27-69, + Appendices). I have read these documents carefully and propose to reproduce an outline summary in this determination.

92. Ernst & Young ('EY') were instructed by DAS in November 2014 to conduct an investigation into the suspected fraudulent misconduct of Asplin and others. EY acted as investigative accountants and also performed an accounting review. EY produced an initial 143-page report in February 2015. As a result of this investigation, DAS contacted the SCO, who referred the matter to the Serious Fraud Office. In April 2015, however, the SFO declined to prosecute. In July 2015 the SCO contacted DAS and lodged formal information requests. DAS, meanwhile, instructed EMM to pursue a private prosecution.

93. PwC were engaged in August 2015 to provide forensic technology services in connection with the disclosure exercise. DAS, as prosecutor, bore an onerous, statutory disclosure duty under sections 3, 4 and 7A of the Criminal Procedure and Investigations Act 1996. Material was gathered and collated from a wide range of sources, including DAS systems, employees and ex-employees, as well as executives of DAS's parent company, Munich Re, third party suppliers, banks and employees of companies used by the defendants as vehicles for their fraud.

94. PwC amassed initially 4.3 million documents. These documents were uploaded onto a specialist platform developed by PwC and called 'Relativity'. The documents were then processed by a four-stage review. (In fact, Stage three was sub-divided into two-separate reviews, a + b, as various complications had arisen.) In the first review, the 4.3 million documents were reduced to 400,000 relevant documents, by means of, inter alia, key word searches and checks designed to exclude duplication. In the second, third and fourth reviews, the 400,000 documents were reduced progressively to a total of 42,500 documents. This was the material disclosed by the prosecution.

95. The work undertaken by PwC was sub-divided accordingly into three distinct workstreams as follows:

(i) The **S&M workstream,** claimed in the sum of £975,291.08. This comprised time spent on building the Relativity system, uploading (transfer and processing) the documentation onto the system, along with management of the Relativity platform.

(ii) **Documents review costs**, claimed in the sum of £211,144.45. This comprised the time spent by PwC on undertaking the first level review, which reduced the initial total of 4.3 million documents to 400,000 documents of potential relevance.

(iii) The **EMM Technical Support costs**, claimed in the sum of £357,568.75. This constituted the second, third and fourth level reviews, which reduced the 400,000 documents of potential relevance to a total of 42,500 disclosable documents. Aside from documents search and review, the process invoked issues of review, batching, quality control, ACL, de-duplication, creation of LPP schedules and identifying family documents.

Given that the PwC invoices identified these three distinct workstreams – and, indeed, that the DO also considered and assessed the workstreams individually – it is necessary to consider S&M, Document Review costs and EMM Technical Support costs separately. The sequence of assessment undertaken by the DO (and followed by the Appellant in this appeal) does not correspond necessarily to the chronology and sequence of work undertaken by PwC, but it comprises a more approachable framework for the purposes of assessment and appeal.

(i) EMM Technical Support costs

96. Claimed in the sum of £257,568.75 and allowed by the DO in the sum of £60,000.

97. The DO outlined her reasoning in respect of EMM at pp 23 and 25-26 of her Written Reasons. She accepted, taking into account the large volume of documents involved in the case, that it was necessary for DAS to use a document review platform and, in turn, instruct PwC. Turning to EMM, she stated that she was 'not provided with a breakdown of the hours expended on each task" save that: "Without this detail I could not assess whether the level of employee and hours claimed were reasonable'. Then, acknowledging her comparative inexperience in assessing disbursements like this, she 'took into account the experience of colleagues who had previously assessed disbursements such as disclosure platform'. She then compared the hourly rates claimed by PwC (from Partners to Associates) to the Guideline Hourly Rates (2010) applied (or referred to) inter partes detailed assessment of costs. Bearing in mind that PwC was based in London WC2, she 'concentrated on London 2 rates'. Her conclusive reasoning is then set out in the following paragraph (at 26) of the Written Reasons:

> I therefore assessed [that] the work involved came somewhere between a grade C, a qualified solicitor or fee earner of equivalent experience, and a paralegal.
>
> Whilst I accept that the work involved to build the platform from the outset may have been costly, the subsequent work, such as key word searches, was undertaken on instructions from EMM. It was EMM's responsibility to decide the key word searches and search terms, liaising with counsel and the defence team. Although my experience of disclosure platforms is limited, I found it hard to accept that this work would need the level of employee such as Director and senior manager.

> Whilst I agree that it was reasonable to use a disclosure platform and the volume of papers subject to the disclosure task was voluminous, the costs claimed, in my judgment, were disproportionate. In the circumstances, I made no increase [on re-assessment] to the £60,000 allowed for this work.

98. Mr Cohen submits this analysis to a sustained critique in his written and oral submissions. Some of the DO's analysis, he argues, reflect fundamental errors of legal interpretation. The s.17 regime is (i) compensatory; and (ii) not subject to a proportionality test. Thus, while an assessment of the hourly rates claimed may be subject to a reasonableness test, it cannot be properly carried out by a comparison with the Guideline Hourly Rates from 2010 and, specifically, an analogy with junior solicitors/paralegals. He also criticises the DO for undertaking and then relying on discussions with "unknown colleagues concerning unknown cases", describing this as "improper and a procedural failing/denial of natural justice".

99. Ultimately the DO's failures, submits Mr Cohen, derived from her admitted lack of experience and, specifically, her failure to appreciate the nature and complexity of the disclosure exercise undertaken by PwC and that the undertaking, by definition, provides an abstract product. The disclosure exercise, in other words, was necessarily a reductive exercise, whereby 4.3 million documents were filtered down to 42,500 documents for disclosure. It is not, in other words, a process whereby the time spent can be demonstrated by reference to, say, the pages of evidence to be read or the drafting of a skeleton argument. In her inexperience, argues Mr Cohen, the DO failed to really understand the process and, in turn, assess the play by picking "an entirely unreasonable figure of £60,000".

100. Mr Cohen submits that a proper approach to be undertaken by the DO was that set out as Senior Costs Judge Gordon-Saker in two judgments in Deutsche Bank AG v. Sebastian Holdings Inc and Vik [2020] SC 2019-BCB-000531. In a judgment dated 5th June 2020, Senior Costs Judge Gordon-Saker set out the following guidance applicable to the assessment of a disbursement for expert litigation support, in that case by Deloitte:

> 48. In my experience no other profession records its time in the same way as solicitors. Not even counsel. Paragraphs 5.12 to 5.22 of Practice Direction 47 sets out detailed requirements for how solicitors' work should be claimed in a bill. There are no similar requirements for disbursements.

> 49. Paragraph 5.2 of Practice Direction 47 requires the receiving party to serve with the bill "copies of the fee notes of counsel and of any experts in respect of fees claimed in the bill" and "written evidence as to any other disbursement which is claimed and which exceeds £500".
>
> 50. In most detailed assessments, the fee notes of the experts instructed will contain limited information. Often they will be the gross sum without a breakdown. Sometimes there will be a breakdown itemising the works that was done and the hourly rate. But I do not recall ever seeing an experts' fee note which contains the same level of detail as that required of solicitors.
>
> 51. It is not the first detailed assessment in which I have seen very large sums claimed for work done by accountants with only broad descriptions of the work done. We will not have the working papers of Deloitte or attendance notes or file notes made by them. We will probably have only the products of their work, communications between them and the Claimant's solicitors and attendance notes of meetings at which date both they and the solicitors were present. There will therefore be evidence of the work that they did. Whether that evidence justifies the time claimed in any particular fee note will have to await the line-by-line assessment.
>
> 52. Inevitably the way that disbursements are claimed means that they are assessed with a broad brush. The court cannot scrutinise ever item of work done by an expert in the way that it scrutinises work done by solicitors. Provided that there is evidence to show the work that was done by the expert then the court can make an assessment of whether it was reasonable for the receiving party to incur the cost of that work and whether the sum claimed is reasonable.

101. Then, in a second judgment dated 8th March 2021, he set out the following, further guidance and the approach to the assessment of Deloitte's fees:

> 84. …There are no specific provisions as to the form or content of evidence in respect of disbursements apart from the requirement in paragraph 5.2(b) that written evidence must be served with the bill of any disbursement claimed in excess of £500. …
>
> 85. …In my view there was no duty on Deloitte to record its time in any particular way, other than by reason of anything agreed with its client, and there is no duty on the claimant to present Deloitte's fees for assessment in any particular way, other than the obligation to provide the written evidence required by CPR PD47 paragraph 5.2(b).
>
> …
>
> 90. …While we are not told in an invoice or breakdown who did precisely what and on which day, for most of the work described that is not required. The court would simply not be assisted in gauging the reasonableness of the fees claimed by knowing that a particular fee earner spent a particular amount of time writing a particular e-mail; just as, in the most straightforward case,

> the court would not be assisted by knowing how much time a medical expert spent looking at X-rays for medical records, as against the time spent dictating the report. However where more detail is required to enable the court to determine the reasonableness of the sum claimed, that sum must be disallowed.
>
> …
>
> 92. The assessment of costs is not of course as precise as many think and is a great deal less precise than many assessments of damages. While the results are expressed as arithmetically, almost every decision on assessment involves a value judgement as to the amount of time reasonably spent. Because of the common ground between the parties, the main issue on this assessment, where there is sufficient detail to form a judgement, is the valid judgement that the court should make as to the reasonableness of the time claimed. That is inevitably rough justice or as Russell LJ. explained, more elegantly, than describing the taxation of costs: "Where justice is in any event rough justice, in the sense as being compounded a much sensible approximation" (Re Eastwood (deceased) [1975] Ch 112.

102. It should be noted that Senior Costs Judge Gordon-Saker was considering the assessment of disbursements in an inter partes' detailed assessment subject to CPR47, while CPR47 para 5.2(d) outlines some (albeit modest) procedural/ evidential requirements for bills/disbursements. The regime under s.17 of the 1985 Act and the 1986 Regulations does not really invoke even these modest requirements.

103. Mr Cohen's submission, therefore, is that the principles to be taken and adopted from Deutsche Bank v. Vik are as follows:

(i) The court should not expect disbursements to exhibit anything like the detail required of solicitors in an inter partes' bill nor should such work be equated with the work done by a solicitor;

(ii) Disbursements should be assessed by reference to the time spent and the product;

(iii) This assessment should be undertaken with a broad brush;

(iv) The court should not scrutinise the work as it does of a solicitor;

(v) They should bear in mind that a court is not assisted by knowing what a particular fee earner spent his particular time on at a micro/daily level;

(vi) Finally, that the court's approach should be one of sensible approximation.

I would emphasise the necessity of exercising a value judgment as to the matter of time reasonably spent. Provided there is sufficient evidence to show that the work was done by the expert, in other words, then the DO and the court can and should make an assessment as to whether it was reasonable for the receiving party to incur the cost of doing that work and whether the sum claimed is reasonable.

104. Mr Rimer, in his written and oral response, points out again that the compensatory principle at s.17 "does not mean that the prosecutor is entitled to recover from central funds every penny and pound that was spent on prosecuting a case". In relying formally on the reasoning and conclusions of the DO, Mr Rimer notes again that the sums claimed are, in his experience, atypically (even experientially) high. He acknowledges, however, that the approach of the DO may not have been perfect, as the sums claimed in this private prosecution are outwith the experience of anyone of the Legal Aid Agency. Ultimately Mr Rimer seemed content – even keen – for this court to assume the burden of assessing these disbursements. Should I set aside the assessment of the DO, in other words, he argues that the claim should not be remitted to the DO for reassessment but should be reassessed by the Costs Judge. I repeat my earlier note that Mr Cohen now agrees that any re-assessment should be undertaken by me; he no longer relies, in other words, on paragraph 72 of his Skeleton Argument, which submitted that the disbursement should 'be assessed anew by the DO'.

105. I am satisfied that the DO's assessment of the EMM's Technical Support fees was flawed and that it should be set aside. It is clear that the DO's core reasoning misapplied the test applicable under s.17 of the 1985 Act and the 1986 Regulations, namely that she concluded that 'the costs claimed, in my judgment, were disproportionate', when a s.17 claim is not subject to proportionality. I do not think that the DO really understood or appreciated the compensatory nature of the s.17 regime and an assessment conducted by reference to the fees allowed to lower grade solicitors under the GHR 2010 in inter partes' assessments was undoubtedly incorrect. Not all of Mr Cohen's criticisms of the DO are sustained. It is not wrong, in my view, for her to seek the advice of more experienced colleagues. That can be a natural part of the judicial process and it is quite reasonable, as long as the final decision is taken by the judge (or tribunal) him or herself. It is certainly not "improper" or a "denial of

natural justice", as argued by Mr Cohen. Nor, indeed, would I wish to direct any personal criticism towards the DO herself. This bill, as Mr Rimer emphasised, comprises the largest sum ever claimed in a private prosecution, a total that was not only atypically high, but way above the ordinary experience of the DO and her colleagues. Evidently she did not have the assistance of the careful and helpful guidance given by SCJ Gordon-Saker in Deutsche Bank v. Vik (ibid). This court, in contrast, has experience in the assessment of large bills and fees for disbursements.

106. I am satisfied that the Appellant has adduced sufficient evidence to show that the work done by PwC in the EMM Technical Support workstream was done by the experts. Aside from the invoices served with the bill (which, it must be said, erroneously claimed irrecoverable fees, so that the sum claimed initially had to be conceded downwards during this appeal), DAS has disclosed in Appendix 1 the detailed schedule of the EMM costs for the period November 2015 to March 2017. The schedule comprises a month-by-month breakdown by reference to the various grades of fee earner. It is a detailed and accurate schedule which confirms fees for the EMM workstream of £257,568.75. I am satisfied that it was reasonable for DAS to instruct PwC to undertake this work. The disclosure exercise is mandated by statute and, in the context of this complex and difficult prosecution, it was inevitably a long, complicated and comparatively expensive exercise. My assessment of reasonableness must refer not only to the costs incurred during this workstream, but also by PwC generally in the course of this prosecution. This workstream comprised the second, third and fourth level revisions, reducing 400,000 documents of potential relevance to a disclosable total of 42,500 documents. They comprise part of an overall disbursement of £1.4m in a prosecution that led to, inter alia, confiscation orders in excess of £8m. While ad hoc comparisons with other cases may be generally unhelpful, it is notable that the Deloitte fees claimed in Deutsche Bank v. Vik (ibid) exceeded £20m. Applying a broad brush, I am satisfied that the sums claimed in the EMM workstream were reasonable and, in turn, recoverable by the Appellant in the s.17 claim. This part of the PwC disbursement is assessed as claimed at £257,568.75.

(ii) S&M workstream

107. S&M costs were claimed in the sum of £975,291.08. The claim was disallowed in its entirety by the DO.

108. The DO's reasoning is set out briefly at p.28 of the Written Reasons. After recording that Slaughter & May ('S&M') were legal advisers to DAS in respect of the notice of investigation from the Financial Conduct Authority ('FCA'), she held:

> Whilst I accept that some work may have benefited the prosecution, ultimately, the work has been undertaken for the purposes of the FCA investigation. Furthermore, for fees that totalled almost £1m, I would have expected a breakdown of the hours expended, who was responsible for that work and their hourly rate.

109. In reaching this conclusion, the DO 'had in mind' the judgment in Khazakhstan Kagazy Plc & Ors v. Zhunus & Ors [2015] EWHC 404 (Comm) in which it was held (at para. 13) that:

> In a case such as this where very large amounts of money are at stake, it may be entirely reasonable from the point of view of a party incurring costs to spare no expense that might possibly help to influence the result of the proceedings. It does not follow, however, that such expense should be regarded as reasonably or proportionately incurred or reasonable and proportionate in amount when it comes to determining what costs are recoverable from the other party. What is reasonable and proportionate in that context must be judged objectively. The touchstone is not the amount of costs which it was in the party's best interest to incur but the lowest amount which it could reasonably have been expected to spend to have its case conducted and presented proficiently, having regard to all the relevant circumstances.

110. It might be observed, therefore, that the DO cited three (not necessarily consistent) reasons for disallowing the S&M costs. First, as a matter of principle, the work was irrecoverable as it was undertaken for the purposes of the FCA investigation, not the prosecution. Second, because of the failure to adduce evidence (by means of a breakdown or schedule) to demonstrate what work was undertaken and by whom. Third, because of a broad conclusion that the costs were not 'reasonably or proportionately incurred or reasonable and proportionate in amount'.

111. Mr Cohen again subjects the DO's reasoning to a sustained critique in his written and oral submissions. As to the second point, the Appellant adduced Appendix 1 that sets out a detailed schedule of the S&M work undertaken between August 2015 and August 2016. This schedule, in addition to the original invoices submitted with the

claim, more than satisfies the evidential expectation cited by SCJ Gordon-Saker in Deutsche Bank (ibid). As to the third point, while recovery turns (in part) on a test of reasonableness, there is no proportionality test in s.17 claims and so the DO's reliance on Khazakhstan Kagazy (ibid) is wrong in law.

112. Turning to the first objection, Mr Cohen points out that the DO accepted 'that some work may have benefitted the prosecution'. It is accepted, in other words, that the work undertaken had a dual utility, insofar as it benefited both the prosecution and the FCA investigation. As such, the proper test for recovery is that set out in Re Gibson's Settlement Trust [1981] Ch 179 and Roach v. Home Office [2009] EWHC 312 (QB), Davis J. These judgments established the principle that such costs are recoverable where: (i) the work was of use and service in the claim; (ii) the work was of relevance to an issue in the claim; and (iii) the need for the work can be attributed to the opponent's actions or omissions. That these principles apply in the context of a s.17 claim was confirmed by the Senior Costs Judge in R (Blinkhorn) v. Camilleri [2019] SCCO Ref: AGS/57/19. He held (at paras. 39-42) as follows:

> 39. In *Re Gibson's Settlement Trust* [1981] Ch 179 Megarry VC identified three strands which should be taken into account when considering whether costs should be allowed in principle:
>
> a. Whether the work was adduced in service in the claim.
>
> b. Whether the work was of relevance to an issue in the claim.
>
> c. Whether the need for the work can be attributed to the opponent's actions or omissions.
>
> 40. The question whether costs incurred in one set of proceedings can be incurred in another set of proceedings has arisen particularly when the costs of attending and participating in an inquest are claimed in subsequent civil proceedings arising out of a death. In *Roach v. Home Office* [2009] EWHC 312 (QB) Davis J (as he then was) decided that the claimants could, in principle, recover part of the costs of civil claims for damages arising out of deaths in custody the costs of representations at inquests into those deaths. In the cases where this question has arisen, the costs judges have tended to allow those parts of the inquest costs which relate to the gathering of evidence in the civil claim; work is of use and service in the claim.
>
> 41. There is of course a distinction between the statutory powers to award costs in civil claims and to order prosecution costs out of central funds. Section 51 of the Senior Courts Act 1991 gives the court discretion in respect

> of "the costs of *and incidental* to all proceedings" whereas Section 17 of the 1985 Act refers to "expenses properly incurred by *in the proceedings*".
>
> 42. However it seems to me that, for present purposes, that is a distinction of no difference. The costs of gathering evidence for the purpose of criminal proceedings are costs incurred in those proceedings. Should the costs of obtaining permission (or a dispensation of the need for permission) to use evidence in the criminal proceedings be treated differently to, say, writing a letter to a third party seeking evidence to be used in the proceedings? The only purpose for pursuing the application in the County Court was to obtain evidence for the criminal proceedings. (There is an obvious distinction here with, for example, the costs of attending the inquest for obtaining a particular verdict may be objective in addition to the obtaining of evidence for the civil claim.)

113. Mr Rimer, for the Respondent, again relies formally on the decision and reasoning of the Determining Officer.

114. It seems to me that the relevant legal principles were actually (although inadvertently) conceded by the DO. She accepted in her Written Reasons that the S&M work 'may have benefited' the prosecution, that it had (at the very least), in other words, a dual utility. Given that the S&M work was relevant to the building of the Relativity platform, then the transfer and processing of 4.3m documents onto the platform, as well as the management of the same, it is difficult to avoid the conclusion that this work, fundamental as it was to the disclosure exercise, was anything other than relevant to the prosecution. Axiomatically, the work was also triggered by the defendants' actions or omissions. I must conclude, therefore, that the DO's assessment of the S&M costs be set aside. They are recoverable in principle subject to assessment by reference to the principles outlined by SCJ in Deutsche Bank (ibid).

115. Appendix 1, as noted, sets out a detailed schedule of the S&M costs, totalling £975,291.08. I am satisfied that this is sufficient evidence to demonstrate the work undertaken and similarly that it was reasonable for the receiving party to incur the cost of doing that work. My assessment of the reasonableness of the sum(s) claimed invokes necessarily the application of a broad brush. Looking at Appendix 1, there can be no criticism, it seems to me, of the work undertaken at the Associate, Senior Associate and Manager level. Similarly, work at Partner level was almost de minimis. I am concerned, however, about the amount of work undertaken at Senior Manager and Director level, particularly during September, October and November 2015. Whilst some oversight and involvement from fee earners with more than 7/10 years

experience was reasonable, it seems to me that there came a point when their collective involvement became unreasonable, so that some adjustment must be made of the sum claimed. Doing the best I can, I assess the S&M workstream costs in the sum of £850,000.

(iii) Document review costs

116. Document review costs were claimed in the sum of £211,144.45 but allowed by the DO in the sum of £20,250.

117. The DO's reasoning is set out at pp 26-27 of her Written Reasons. Again: 'On assessment, I drew on the experiences of colleagues who have dealt with both private prosecution and DHCC cases where disclosure platforms were allowed'. She then asserted that:

> I was not able to determine from that document, or the work schedule and invoices, how many hours were expended on each task or the level of employee. Without this information, I could not assess the reasonable fees.

She then cited and relied on the case of The Capital Markets Company (UK) Limited & Anor v. Tarver & Ors [2017] EWHC 2885 (Ch), a case concerning cost budgets in a claim for breach of contract. Her ultimate conclusion was that this part of the claim could comprise reasonably the cost of five licences per month at the rate of £150 per licence per month for 27 months, a rather ad hoc calculation which totals £20,250.

118. Mr Cohen's analysis is set out at paragraphs 67-69 of his Skeleton Argument. He submits that the DO really made 'no attempt to actually engage with this head of cost'. The PwC document review team comprised 18 specialists whose job was to undertake the first level review, an exercise which involved condensing the 4.3 million documents to 400,000. This was a "largely mechanistic exercise" so the majority of the hours (or at least 75%) was spent by reviewers at £70ph. Appendix 1 sets out clearly the hours claimed and the relevant hourly rates for an activity that was integral to the prosecution applying the requirements of the 1986 Regulations. Put simply, argues Mr Cohen: 'It is impossible to fathom how the DO thought that…the right course…was to simply allow licence fee costs for EMM to operate a system which comprised an entirely different item of costs'. Her purported reliance on the

Capital Markets Company case (ibid) was 'troubling' as the judgment bore no connection or relevance to the principles applicable to this part of the disbursement assessment.

119. Mr Rimer relied formally on the decision and reasoning of the Determining Officer.

120. I agree with the submissions of the Appellant. Again, I am disinclined to engage in any criticism of the DO personally, as this part of the assessment was entirely outwith her experience, and those colleagues whose advice she sought. Nor did she have the benefit of the legal submissions provided to me on appeal. It must follow, nonetheless, that I set aside her assessment of the Document Review costs.

121. Appendix 1 confirms the incidents of the expenditure claimed, namely £211,144.45. Clearly, in my conclusion, it was reasonable for the receiving party to incur the cost of doing that work, insofar as it comprised a necessary compliance with the prosecutor's duty of disclosure pursuant to the 1986 Regulations and the 1996 Act. The schedule at Appendix 1 demonstrates, as Mr Cohen submits, that the majority of the work was undertaken by a Reviewer, a comparatively junior fee earner. Some reasonable assistance was required from a Senior Reviewer and a Manager, recognising that the latter would typically have 5-7 years relevant experience. I am satisfied that the sum(s) claimed for the Document Review costs was reasonable. I assess this part of the disbursement as claimed in the sum of £211,144.45.

122. It follows that I assess the totality of the PwC claim in the sum of £1,318,713.10.

Paul Eccleson

123. Paul Eccleson was the Chief Risk and Compliance Officer at DAS. He was in charge of the internal investigation which led to the prosecution. The Appellant's bill claimed costs referable to his work in the sum of £75,039.50. The claim was disallowed by the DO.

124. The DO's reasoning was set out at p.29-31 of her Written Reasons. In summary, as Mr Eccleson 'was not an expert … the work did not constitute expert work'; it was 'more a case of fact-finding work based on [his] familiarity with DAS's business'.

She held, in other words, that Mr Eccleson's work comprised 'investigation costs', which were not, as a matter of law, recoverable.

125. Mr Cohen's challenge to this is straightforward and rests on the recent authority of Football Association Premier League & Anor v. Lord Chancellor [2021] 1 W.L.R. 3035, which confirmed that 'investigation costs are costs incurred in the criminal proceedings and are, as such, prima facie recoverable'.

126. The DO engaged in no real quantum assessment of the Eccleson's costs; her reference (at p.29) to a total of 66 hours at £111.50 per hour was subject to her own (incorrect) definition of 'in the proceedings'.

127. I am satisfied that it was reasonable for the Appellant to incur the cost of the work undertaken by Paul Eccleson and the hourly rate claimed (£111.50) is, in my conclusion, reasonable. There are, I find, no arguable grounds for challenging the time claimed as unreasonable.

128. It follows that I set aside the DO's assessment of the Paul Eccleson costs and conclude that these costs should be assessed and allowed in the sum claimed, £75,039.50.

BDO fees

129. BDO fees were claimed in the sum of £25,000 and disallowed by the DO.

130. BDO were instructed to provide an expert report comprising a valuation of CW Law, the law firm at the centre of the conspiracy to defraud in count 2 of the indictment.

131. The DO's reasoning is set out at p.31 of her Written Reasons. She began by stating that: 'I do not dispute that the work was undertaken and, very helpfully, you have produced a copy of the report dated 16th September 2016, to support that'. Then:

> However, my task as the determining officer was "to allow such disbursements as appeared to [me] to have been actually and reasonably incurred". Whilst the report supported the contention that the work was actually done, without a breakdown of the hours and hourly rates charged it was not possible to assess whether the costs were "reasonably incurred".

132. Mr Cohen submits that in the light of the guidance set out in Deutsche Bank v. Vik (ibid) this decision cannot stand. He notes, as the DO recorded, that 24,000 pages of material were provided to BDO for the purpose of producing an expert report. The Expert Report produced by David Mitchell on 16th September 2016 comprises 33 pages, plus Appendices 1-4 and Exhibits A-F. BDO's Invoice (at p.266 of Appeal Bundle 2) confirms a charge of £25,000 (+VAT). This was a fixed fee agreed pursuant to a 'Proposal for Valuation Services' (19 pages) produced prior to BDO's engagement. The Appellant, in other words, agreed a commercial fixed fee, which not only identified their liability from the outset, but also limited their risk should the work ultimately involved in valuing CW Law exceed the original estimate.

133. I agree that the DO's approach to assessment was incorrect and I set aside her decision. Having reviewed not only BDO's invoice, the initial Proposal and the Expert Valuation Report itself, I am satisfied that the work commissioned and undertaken was reasonable, and that the costs incurred were reasonable in amount. Accordingly, I assess the BDO fees as claimed, £25,000 (+VAT).

Ernst & Young ('EY')

134. The DO's assessment of various investigation costs incurred in the prosecution were stayed initially to await the judgment of the Divisional Court in Football Association Premier League v. Lord Chancellor (ibid). She provided her assessment of the investigation costs in supplemental Written Reasons dated 26th April 2022. This 11-page assessment concerned costs incurred in respect of EY and also Mintz Group, Burford C, Financial Investigations Limited and Counsel's Fees incurred in seeking a Norwich Pharmacal Order. Only the EY costs are subject to appeal. The EY costs totalling £1,970,631.69, moreover, break down into nine separate work phases, as tabulated at paragraph 4 of Mr Cohen's Supplemental Skeleton Argument dated 28th April 2022. Only the first two workstreams, 'Investigation Fees' and 'Processing Devices' are subject to appeal.

135. EY were instructed to investigate the persistent suspicions surrounding Asplin and his co-defendants. In 2004, DAS had instructed a Bristol-based accounting firm, Solomon Hare LLP to investigate and audit commercial relationships held by the senior management at DAS UK. Further, in 2005 and 2008, DAS UK's parent

company, ERGO, commissioned two independent investigations by the ERGO Special Audit group. These investigations and audits again considered the suspected misconduct of Asplin et al. These investigations uncovered no wrongdoing, yet the concerns and suspicions continued and intensified. It was concluded, in these circumstances, that a further investigation should be commenced, this time led by one of the 'Big Four' accounting firms. Thus, EY was instructed to undertake the investigation that led to the successful prosecution of Asplin and his co-defendants.

136. EY were given considerable disclosure and scope to interview relevant witnesses. Mr Cohen, at paragraph 7 of his Note, tabulates (in some detail) the separate tasks undertaken by EY in the course of this investigation. Without summarising this information in any real detail, it comprised a full review of the relevant datum, searches of relevant premises (such as Asplin's office) an accounting review and the interview of 20 potential witnesses. In February 2015 EY produced a 143-page forensic report.

137. The EY costs claimed totalled £1,970,631.69. The DO allowed £122,702.30. The items now subject to appeal are as follows:

Work	**Claimed**	**Allowed**
Investigation Fees	£1,412,729.00	£0.00
Processing Devices	£47,082.50	£0.00

(i) Investigation Fees

138. The DO's reasoning is set out at pp 3-4 of her Written Reasons dated 26th April 2022. I reproduce the relevant paragraphs in their entirety:

> The largest reduction of costs for EY related to the investigation costs. The invoices were not supported by a breakdown of what the fees included; or the number of hours expended or who conducted the work or the hourly rates charged. I was provided with a PDF of the worklog which was subsequently converted into an Excel spreadsheet to assist my assessment. The costs

> totalled £1,823.639.50 based on 7200.1 hours. The work was divided into 5 headers – Archiving, General, Mimecast processing, Processing non-Mimecast data and Review Support/Project Management.
>
> I took the view that the costs claimed for the investigation appeared to be wholly disproportionate and were wholly unsupported by any evidence of work actually undertaken or any benefit derived, other than the 143-page report that EY produced. Applying Regulation 7(3), as I had doubts about whether the costs were reasonably incurred or were a reasonable amount, this point was resolved against the prosecutor.

139. Mr Cohen submits that 'this decision simply cannot stand'. First, while the DO did ultimately focus on whether the costs 'were reasonably incurred or were a reasonable amount', her (very brief) reasoning also held that the 'costs claimed…appeared to be wholly disproportionate'. Again, therefore, she appeared to be applying a proportionality test, in an assessment under s.17 of the 1985 Act that does not invoke proportionality. Second, the DO's conclusion that the claim was 'unsupported by any evidence of work actually undertaken' is simply wrong. As her own reasoning illustrated, she was provided with a detailed PDF worklog which was subsequently converted into an Excel spreadsheet. I am provided with this (or a) spreadsheet at pp 1614-1687 of Addendum Bundle 3, Part 2. It comprises a comprehensive breakdown by reference to date, task, fee earner and hours logged. It constitutes as much information as any paying party could reasonably expect to be provided with in any type of assessment. As it is, for reasons set out by SCJ Gordon-Saker in Deutsche Bank v. Vik (ibid), the evidential requirements relating to disbursements are not onerous, so there is no requirement for a receiving party to provide a breakdown of time spent.

140. Mr Rimer, for the Respondent, was content to rely on oral submissions at the hearing on 4th May 2022. After pointing out that the DO allowed £122,702.30 for EY costs, a not insignificant sum, he conceded that "the DO might have been in error" in respect of this part of the assessment.

141. I have no real hesitation in setting aside the DO's assessment of this part of the EY costs. Again, it would be unfair to indulge a personal criticism of the DO. It is clear to me that she was presented with a difficult task, one that was wholly outside her general experience, and that she did not have the clear legal assistance available to

me. Nonetheless, for the reasons broadly outlined by Mr Cohen, I must set aside her determination.

142. Mr Cohen and Mr Rimer were again desirous of the court re-assessing the EY Investigation Fees, as opposed to remitting the assessment to the DO. I have considered carefully the 143-page Investigation Report produced by EY, the submissions of Mr Cohen and, in particular, the comprehensive information provided in the Schedule/Spreadsheet. This was a difficult and demanding investigation, one which EY concluded successfully after other experienced firms had failed to uncover any wrongdoing. I remind myself, however, that this is 'investigative' work, so that much of the sifting could be reasonably undertaken by less-experienced fee earners. It seems to me that some of the hourly rates claimed as exhibited in the schedule are unreasonably high for this type of investigative work. Whilst, therefore, I am satisfied that it was reasonable for the receiving party to incur the cost of this investigative work, I am not satisfied that the total sum(s) claimed was wholly reasonable. I must apply necessarily a broad brush to my careful consideration of the relevant evidence. My conclusion, doing the best I can, is that EY Investigation Fees should be allowed in the sum of £1,000,000.00.

(ii) Processing Devices

143. The sum claimed, £47,082.50, was disallowed by the DO.

144. The DO's reasoning is set out on p.4 of her Written Reasons dated 26th April 2022. I reproduce her findings in their entirety:

> The fees for this work spanned two invoices – 12/12/14 and 14/01/15. There is no clear explanation of what work was involved. However, the client care letter mentions applying search terms to 5 devices and custodian's e-mail data and a full review of data from two mobile devices.
>
> Without knowing the number of hours spent on this task, the level of employee and what work was involved it was impossible to assess the reasonable fees for this work. Applying Regulation 7(3), as I had doubts about whether the costs were reasonably incurred or a reasonable amount, this point was resolved against the prosecutor.

145. Mr Cohen submits that this 'decision cannot stand'. He relies again on the guidance in Deutsche Bank v. Vik (ibid) and the fact that a comprehensive breakdown was actually filed by the Appellant.

146. I am satisfied, in respect of the Processing Devices costs, that the work was undertaken reasonably and that the sum(s) claimed was reasonable. The Written Reasons disclose no sustainable grounds for either disallowing or reducing the sums claimed in this part of the disbursement. I conclude accordingly that the Processing Devices costs should be allowed as claimed, namely in the sum of £47,082.50.

Summary of Conclusions

147. I tabulate – for ease of reference – my findings in these appeals as follows: the sum stated in bold is the sum I allow on appeal:

(i)	Michael Brompton QC:	**£133,839.99**
(ii)	Richard Whittam QC:	**£335,000.00**
(iii)	Andrew Bird, Senior Junior Counsel:	**£485,475.00**
(iv)	Henry Hughes, Junior Counsel:	**£208,250.00**
(v)	Rebecca Chalkley:	**£259,164.90**
(vi)	Noting Briefs: **Disallowed**	
(vii)	Emily Campbell, Counsel:	**£1,750.00**
(viii)	PwC:	
	(a) EMM workstream:	**£257,568.75**
	(b) S&M:	**£850,000.00**
	(c) Document Review costs:	**£211,144.45**

	Sub-total	**£1,318,713.10**
(ix)	Paul Eccleson:	**£75,039.50**
(x)	BDO Fees:	**£25,000.00**
(xi)	EY:	
	(a) Investigation Fees:	**£1,000,000.00**
	(b) Processing Devices:	**£47,082.50**
	Sub-total:	**£1,047,082.50**

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