Neutral Citation Number: [2019] EWCA Crim 1728

Case No: 201903073 - B4

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CENTRAL CRIMINAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17 October 2019

Before:

LORD JUSTICE DAVIS
MR JUSTICE EDIS
and
MR JUSTICE ANDREW BAKER

- -

Between:

R	**Appellant**
- and -	
S	**Respondent**

- -
- -

Mr Kennedy Talbot QC and Mr Michael Newbold for the **Appellant**
Mr Pavlos Panayi QC for the **Respondent**
Mr Joseph Curl for the **Interested Parties (the Trustees in Bankruptcy of S)**

Hearing date: 4 October 2019

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Judgment Approved by the court for handing down

Lord Justice Davis:

Introduction

1. On 24 May 2016 the West Yorkshire Police commenced an investigation into suspected offences of money laundering. One of those under suspicion and subject to the investigation was the respondent, S.

2. On 29 August 2018 a Crown Court judge in the Central Criminal Court made an all assets Restraint Order against S and certain companies and other persons connected with him. However, the judge discharged that Restraint Order on 23 July 2019. She did so pursuant to s.42(7) of the Proceeds of Crime Act 2002, on the basis that proceedings for the alleged offence had not been started within a reasonable time. The Crown Prosecution Service now seeks to appeal, pursuant to s.43(2) of the 2002 Act, against the judge's decision to discharge the Restraint Order. We have granted leave to appeal. The judge had stayed the discharge of the Restraint Order pending any appeal, so it has remained in place since the hearing before her.

3. The appeal raises, albeit in the context of the particular facts and circumstances of the case, questions as to the proper meaning and application of s.42(7) of the 2002 Act. The appellant says that the judge misapplied the statutory provisions and that her decision to discharge the Restraint Order was wrong. The respondent, on the other hand, says that the decision to discharge was justified.

4. Before us, the Crown Prosecution Service was represented by Mr Kennedy Talbot QC and Mr Michael Newbold. S was represented by Mr Pavlos Panayi QC. The trustees in bankruptcy of S were represented by Mr Joseph Curl. We would like to acknowledge the thoroughness and care with which the submissions, written and oral, were presented to us.

Background

5. It is neither necessary nor desirable to set out the background (as alleged) in any great detail. It is in fact very helpfully summarised in the careful judgment delivered by the judge in making the Restraint Order on 29 August 2018.

6. S was the sole director and shareholder of a limited liability company incorporated on 24 November 2014, which may be called SC. S himself presented as a man of considerable wealth and, further, at the time was married to a woman who herself was very wealthy (although there has since been a divorce). The principal business of the company was, or appeared to be, that of precious metal production. It had no employees but was VAT registered.

7. Another company, FO, was a jewellery company based in Bradford. Its director was a man who may be called GF. It appears that GF was well-known to S and indeed GF was also styled a Vice-President of SC. From 2013 FO began to receive huge sums in cash deposits. It was estimated that between 2013 and 2016 it received in its account around £266 million, nearly £144 million being received in the first 8 months of 2016 alone. Subsequent examination of CCTV showed cash being delivered in various receptacles; some of those individuals making the deliveries were identified as convicted criminals.

8. Very significant sums of cash were also identified as delivered to the premises of SC in Central London: over £28 million, for example, was delivered between 2015 and September 2016. The cash was then collected and delivered to FO, when it was paid into the account of FO and used, or purportedly used, to buy gold. Bank transfers, moreover, were then made back in favour of SC, with a total of some £46.7 million being paid to SC between 2015 and September 2016.

9. In addition to these close links between GF and S, there was an Agreement made between SC and FO to buy and refine scrap gold, on a profit sharing basis. It further appears that part of FO's apparent trading activities were undertaken from SC's premises in Central London. SC itself, however, never registered as a high value dealer. Further, no formal accounts of SC were filed at Companies House until January 2017 (after the investigation had commenced) and the filed accounts did not declare any significant profits.

10. In addition, very large sums, out of those paid by FO to SC, were paid into personal accounts of S. It is said that these were never declared for income tax purposes and have no obvious link to any legitimate commercial activity. It is further said that email messages and other documentation indicate S's involvement in the decision-making of SC (albeit with others also involved) and in the receipt of personal financial benefit.

11. S was interviewed on a number of occasions. It was not suggested to us that he had sought to obstruct the investigation.

12. On 28 August 2018 the Crown Prosecution Service made an application in the Crown Court, ex parte, for a Restraint Order. The application was accompanied by a statement, 488 paragraphs in length, dated 16 August 2018 and made by Neil Barker, a Financial Investigator accredited for the purposes of the 2002 Act. That very fully set out the background, as revealed by the investigation thus far. It also gave details of assets identified as belonging to S or to companies controlled by S. These included various very valuable residential properties in London (some of which were subject to identified mortgages to secure loans recently taken out by S); numerous expensive cars (including Lamborghinis, Rolls Royces, Bentleys and so on); various bank accounts; and a valuable wine collection. Valuable works of art were also referred to.

13. As we have said, the judge, HHJ Sarah Munro QC, made the Restraint Order as sought on 29 August 2018. She gave full reasons in writing for so doing. In those reasons she among other things recorded: "I note that a charging decision is expected towards the end of 2018."

14. The Restraint Order itself, made pursuant to s.40 and s.41 of the 2002 Act, extended to all the assets of S (and relevant companies which he controlled, including SC), both within and outside the jurisdiction. A living expenses proviso was included. It is unnecessary for present purposes to detail the terms of the Restraint Order. However, it should be noted that paragraph 11 of the Restraint Order required the prosecutor to report on the progress of the investigation six months after the date of the Order by way of written report "and every six months thereafter, but such requirement shall cease if the Alleged Offender is charged by the Prosecutor in relation to the matters currently under investigation." Liberty to apply to vary or discharge was, as is usual practice, also included.

15. Solely for the purposes of this appeal (although there may be issues for the future) it is accepted on behalf of S that the Restraint Order is to be regarded as having been properly made. The only issue on this appeal, therefore, is whether the judge was justified in discharging the Restraint Order.

Events following the Restraint Order

16. It had been indicated by Mr Barker in his first witness statement that it was intended that the relevant files should be sent by the West Yorkshire Police to the Specialist Fraud Division of the Crown Prosecution Service based in Manchester during September 2018. However, there was oversight and slippage (which was to be explained in a subsequent witness statement) and the complete files were not in fact provided in readable form until early November 2018. At all events, the previously expressed hope that a charging decision might be made by the end of the year proved over-optimistic.

17. On 25 February 2019 Mr Barker filed a statement by way of reporting requirement, pursuant to paragraph 11 of the Restraint Order. He noted that apart from S (who was not on police bail but still under investigation) there were 10 individuals on police bail and 6 others who had been released but were still under investigation. He among other things stated: "Since my statement dated 16 August 2018 the investigation team have continued to build a file which has now been passed to the Crown Prosecution Service to consider charges." He identified that in the investigation 29 individuals had been interviewed, resulting in 16 being still under investigation; 253 financial accounts had been analysed; 154 electronic devices (mobile phones and computers) had been analysed, generating over 30,000 items for review; 500 hours of CCTV were being reviewed; 4258 other items had been considered, resulting in 744 exhibits in the prosecution files; and 127 witness statements had been placed on the file.

18. It was further noted by Mr Barker in his progress report that the Crown Prosecution Service had two lawyers currently reviewing the case and had also appointed leading counsel to assist with the review. The statement concluded: "The Crown Prosecution Service have indicated that they are currently working towards concluding their considerations by the end of May 2019."

19. Both before and after this date various applications, six in total, had been made by S to vary the original Restraint Order. These were the subject of agreement; the last such variation (permitting the sale of two valuable paintings to discharge certain debts) being made on 29 May 2019.

20. On 6 June 2019 S was made bankrupt, on a creditor's petition, by order of the High Court. It was and is common ground, however, that the Restraint Order takes priority, as it were, over the bankruptcy and that by reason of s.417(2) of the 2002 Act the assets which are the subject of the Restraint Order, while in force, are excluded from the bankruptcy estate.

21. By an application dated 5 June 2019 S had applied to vary or discharge the Restraint Order. The application was accompanied by voluminous evidence. The grounds included, but by no means were confined to, delay on the part of the prosecution in starting proceedings. Much emphasis was placed in the evidence on the prejudice said to arise for S and his creditors by reason of the Restraint Order continuing to be in place.

22. Shortly thereafter, there was a change in the legal team acting for S, new solicitors and new counsel (Mr Panayi QC) being instructed. The emphasis of the application then changed. Whilst the other points raised have by no means been disclaimed, the focus for immediate purposes was now on seeking a discharge under s.42(7) of the 2002 Act; although it was also maintained, among other things, that at any rate the Restraint Order should be varied so as to permit the release of assets to permit payment to various creditors, in circumstances where the debts due to some of them were accruing interest at a very high rate indeed. At all events, the actual argument before the judge (HHJ Munro QC) was confined to the point arising under s.42(7).

The legal scheme and applicable principles

23. The making and discharge of Restraint Orders are governed by the terms of sections 40 to 47 of the 2002 Act, as amended.

24. Section 40 sets out the various conditions that are, as the case may be, to be fulfilled before a Restraint Order may be made. The relevant condition in the present case was that set out in s.40(2):

> "The first condition is that –
>
> (a) a criminal investigation has been started in England and Wales with regard to an offence, and
>
> (b) there are reasonable grounds to suspect that the alleged offender has benefited from his criminal conduct."

Section 41(1) then provides:

> "If any condition set out in section 40 is satisfied the Crown Court may make an order (a restraint order) prohibiting any specified person from dealing with any realisable property held by him."

We should note the provisions of s.41(7B), inserted by amendment in 2015:

> "The court –
>
> (a) must include in the order a requirement for the applicant for the order to report to the court on the progress of the investigation at such times and in such manner as the order may specify (a "reporting requirement"), and
>
> (b) must discharge the order if proceedings for the offence are not started within a reasonable time (and this duty applies whether or not an application to discharge the order is made under section 42(3))."

That connotes, among other things, that the court in such circumstances can act of its own motion.

25. Section 42(3) relates to applications to discharge or vary: any person "affected by the order" being amongst those entitled so to apply. In such a situation, subsections (5) to (7) then apply: s.42(4). In particular, for present purposes, s.42(5) and (7) provide as follows:

> "(5) The court-
>
> (a) may discharge the order;
>
> (b) may vary the order.
>
> …
>
> (7) If the condition in section 40 which was satisfied was that an investigation was started –
>
> (a) the court must discharge the order if within a reasonable time proceedings for the offence are not started;
>
> (b) otherwise, the court must discharge the order on the conclusion of the proceedings."

26. Two initial observations as to the operation of s.42(7) may be made at this stage.

27. First, an application to vary or discharge made under s.42(3) and (5) in terms connotes that the court has a discretion as to whether to discharge or vary. However, s.42(7) operates on a different basis. For that – as does s.41(7B) – stipulates that, if the relevant condition in s.40 which was satisfied was that an investigation was started, then the court *must* discharge the order if within a reasonable time proceedings for the offence are not started. So in such a situation no residual discretion is available: discharge is mandatory.

28. Second, and connected to that, it is a general principle that the powers of the court in this regard, for the purposes of the 2002 Act, are to be exercised by reference to the matters set out in s.69(2) of the 2002 Act: the "legislative steer", as it is often called. But those matters are necessarily subordinated, where proceedings are not started within a reasonable time, to the provisions of s.42(7) themselves: for in such a scenario, where it is adjudged to arise, the court is not exercising a power but is under a statutory obligation to discharge.

29. What, then, is the required approach to the evaluation of whether or not proceedings have been started within a reasonable time?

30. In our judgment, the words of the sub-section are to be taken as they are found. They are not to be glossed. Nor is it helpful (indeed it is likely to be unhelpful) to seek to invoke allegedly comparable phrases in other statutes.

31. Some reference, however, was made in argument before us to the provisions of s.40(7) of the 2002 Act – and which are at least contained in the same part of this Act – and to the observations of a constitution of this court in the case of *R and W* [2016] EWCA Crim 1938 (and for which reporting restrictions have long since been lifted): in fact a case to which this court drew the parties' attention. The facts of that case, however,

were very different from the present. Further, s.40(7), which was the relevant sub-section in that case, relates to the position after charge and where the court "believes" that there has been "undue delay" in continuing proceedings which had been instituted. So both the context and the statutory wording are different from the present case. That said, it is easy to agree with the court's statement in *R and W* that "undue delay" for the purposes of s.40(7) is not confined to cases of delay amounting to an abuse of the process. Further, in that case the court, in our view plainly correctly, observed as a general proposition that the more complex a case is the greater the need for time in which to prepare and the greater the likelihood of delay in preparation. The court also referred with approval to the remarks of the judge at first instance that in complex cases involving very large sums of money delays were "very likely, perhaps almost inevitable". It is, however, with respect, rather less easy to agree with the court's (in fairness, somewhat tentative) suggestion that a finding of undue delay, such as to deprive the court of the power to make a confiscation order, will "only be made in exceptional circumstances." Whilst one of course would hope that undue delay ought, as a matter of prosecutorial efficiency, to be exceptional in the continuance of such proceedings, it is difficult to see that s.40(7) itself calls for any such gloss of exceptionality.

32. At all events, no requirement of exceptionality, in our judgment, is to be written into s.42(7). The words are to be read as they stand. No doubt a court will think long and hard before it discharges a Restraint Order: just as it should think long and hard before it makes one in the first place. But that is a different matter altogether. As a constitution of this court held in the case of *I and Erin Aviation Limited* [2007] EWCA Crim 2802 there is no reason to qualify in any way the words "reasonable time" as used in s.42(7) and they are not to be "read restrictively": see paragraph 15 of the judgment.

33. As to the statutory purpose behind s.42(7) that is clear enough. Any Restraint Order – and most particularly an all assets Restraint Order – significantly impacts on the life of the individual concerned and on the liberty of an individual to deal as he or she chooses with his or her property: an individual, moreover, who is to be presumed innocent, who may never be charged and who, if charged, may never be convicted. The provisions of Article 1 Protocol 1 and of Articles 6 and 8 of the European Convention on Human Rights are obviously relevant context here. It is further inherent in such an order that it may impact on the family or creditors of a restrained individual.

34. As to the required approach in assessing reasonableness, we consider that useful general assistance is afforded by some of the observations of Lord Bingham in the Privy Council case of *Dyer v Watson* [2002] UKPC 1, [2004] 1 AC 379. That was a case of alleged delay in bringing a matter on to trial after charges had been laid such that a breach of Article 6(1) was asserted: the case therefore was different from the present. But, speaking in the context of that case and of Article 6(1) considerations, Lord Bingham said this at paragraph 55 of his opinion:

> "… It is plain that contracting states cannot blame unacceptable delays on a general want of prosecutors or judges or courthouses or on chronic under-funding of the legal system. It is, generally speaking, incumbent on contracting states so to organise their legal systems as to ensure that the reasonable time requirement is honoured. But nothing in the Convention jurisprudence requires courts to shut their eyes to the practical realities of

> litigious life even in a reasonably well-organised legal system. Thus it is not objectionable for a prosecutor to deal with cases according to what he reasonably regards as their priority, so as to achieve an orderly dispatch of business. It must be accepted that a prosecutor cannot ordinarily devote his whole time and attention to a single case. Courts are entitled to draw up their lists of cases for trial some time in advance. It may be necessary to await the availability of a judge possessing a special expertise, or the availability of a courthouse with special facilities or security. Plans may be disrupted by unexpected illness. The pressure on a court may be increased by a sudden and unforeseen surge of business. There is no general obligation on a prosecutor, such as that imposed on a prosecutor seeking to extend a custody time limit under section 22(3)(b) of the Prosecution of Offences Act 985, to show that he has acted "with all due diligence and expedition". But a marked lack of expedition, if unjustified, will point towards a breach of the reasonable time requirement, and the authorities make clear that while, for purposes of the reasonable time requirement, time runs from the date when the defendant is charged, the passage of any considerable period of time before charge may call for greater than normal expedition thereafter."

35. We consider that those observations are valuable both in reminding courts, where dealing with issues of reasonableness where delay is asserted, of the need to have regard to the "practical realities" of litigious life and in displacing any notion of there being any general obligation on a prosecutor of the kind applicable, for example, to cases of custody time limits for the purposes of s.22(3) of the Prosecution of Offences Act 1985.

36. We were also in argument briefly referred to the situation, suggested to be analogous, where the court is considering making or discharging a *Mareva* injunction or freezing order. Thus in *Lloyds Bowmaker Ltd v Britannia Arrow Holdings plc* [1988] 1 WLR 1337, Dillon LJ said at p.1349, in the context of an application to discharge a *Mareva* injunction:

> "…where a party has obtained a *Mareva* injunction, that party is bound to get on with the trial of the action – not to rest content with the injunction."

37. No doubt it is easy to agree with that sentiment in general terms. But, for the present purposes of the operation of the 2002 Act, that kind of sentiment is in any event to be taken as subsumed within the language of s.42(7) itself. In fact, we would express very considerable reservations about bringing in at all to this particular statutory jurisdiction relating to the grant, variation or discharge of Restraint Orders the approach and principles which may apply in the civil jurisdiction relating to the grant, discharge or variation of freezing orders. The positions are significantly different. A civil case involves a private lis between the parties: and a freezing order is sought to preserve the benefit of any money judgment that might thereafter be obtained. A criminal prosecution (actual or prospective) raises quite different issues. The public interest issues are different; the need to investigate others may be different; the disclosure and

preparation issues are different; and so on. Moreover, in cases such as the present where confiscation is prospectively in issue the underlying rationale, as reflected in the legislative steer set out in s.69 of the 2002 Act and as confirmed in the Supreme Court decision in *Waya* [2012] UKSC 51, [2013] 1 AC 294, is that criminals should not profit from their crimes: and a Restraint Order is thus a means of furthering that particular public interest. Accordingly, we suggest that, for the purposes of applications under this part of the 2002 Act, reliance on principles and authorities relating to civil freezing orders is not normally likely to assist.

38. Overall, therefore, s.42(7) is to be read without any gloss. It is then for the court to decide, having regard to all the circumstances of the particular case, whether or not the proceedings have been started within a reasonable time.

39. Just what those circumstances are, and the weight to be ascribed to them, will necessarily vary from case to case. It is not possible to identify by way of exhaustive list just what the relevant circumstances will be in every case. But in the ordinary way, we suggest, the following, in no particular order, at least will usually be likely to be relevant (there may of course, we stress, be others in any given case) where s.42(7) is under consideration:

    (1) The length of time that has elapsed since the Restraint Order was made;

    (2) The reasons and explanations advanced for such lapse of time;

    (3) The length (and depth) of the investigation before the Restraint Order was made;

    (4) The nature and extent of the Restraint Order made;

    (5) The nature and complexity of the investigation and of the potential proceedings;

    (6) The degree of assistance or of obstruction to the investigation.

40. It is the obligation of the judge to evaluate all the relevant circumstances of the particular case in reaching his or her judgment as to whether or not proceedings have been started within a reasonable time. If they are adjudged not to have been started within a reasonable time then the Restraint Order *must* be discharged; and accordingly the consequences flowing from such discharge are then irrelevant.

Investigation and disclosure obligations before starting a prosecution

41. A considerable part of Mr Talbot's attack on the decision of the judge was based on the prosecution's asserted obligations of disclosure preparation and of careful investigation and consideration before starting a prosecution. We should therefore refer to some of the materials placed before us (some of which were before the judge but others not: even though the overall point was certainly raised before her).

42. Thus in the Code for Crown Prosecutors (October 2018), issued by the Director of Public Prosecutions under s.10 of the Prosecution of Offences Act 1985, it is made clear that ordinarily prosecutors must only start a prosecution where the case has passed both stages of the Full Code Test. That, among other things, requires pursuing all reasonable lines of enquiry and deciding whether there is sufficient evidence to prosecute. It is explicitly stated at paragraph 4.8:

> "Is there any other material that might affect the sufficiency of evidence?
>
> Prosecutors must consider at this stage and throughout the case whether there is any material that may affect the assessment of the sufficiency of evidence, including examined and unexamined material in the possession of the police, and material that may be obtained through further reasonable lines of inquiry."

43. Under the 2015 Code of Practice, issued under Part II of the Criminal Procedure and Investigations Act 1996, it is stressed (paragraphs 3.4 and 3.5) that it is an essential part of the duties of the officer in charge to ensure that all material relevant to an investigation is retained and made available to the disclosure officer or to the prosecutor; and that all reasonable lines of enquiry should be pursued. Relevant material which may not form part of the prosecution case is to be scheduled (paragraph 6.2). In addition, under the Attorney-General's Guidelines on Disclosure detailed guidance is further given. At paragraph 50, for example, under the heading "Large and Complex Cases in the Crown Court", this is said:

> "The particular challenges presented by large and complex criminal prosecutions require an approach to disclosure which is specifically tailored to the needs of such cases. In these cases more than any other is the need for careful thought to be given to prosecution-led disclosure matters from the very earliest stage. It is essential that the prosecution takes a grip on the case and its disclosure requirements from the very outset of the investigation, which must continue throughout all aspects of the case preparation."

The need for a clear strategy, and for an approach to disclosure recorded in a Disclosure Management document, is further stressed at paragraph 51.

44. In the Crown Prosecution Service Disclosure Manual (revised in December 2018) the need to compile schedules of unused material and to pursue all reasonable lines of enquiry is further emphasised. Of the Disclosure Management Document this is said:

> "The DMD is a living document and should be started by allocated prosecutors at the very outset of the case. It is essential that disclosure issues are addressed pre- charge where possible and that disclosure is approached by both investigator and prosecutor through the exercise of judgment and not simply as a schedule completing exercise."

It is also indicated that such document is to be served on the defence and the court prior to the PTPH. There is further emphasised, in Chapter 29, the need for careful administration and preparation in large scale cases.

45. Finally, in very recent internal guidance to the Specialist Fraud Division (which was not before the judge) the need for prosecutors to satisfy themselves pre-charge that the investigators have complied with their core duties is reiterated. It is also said: "Unless

there are exceptional circumstances, a positive charging advice should only be issued once the prosecutor has satisfied themselves that they will be able to comply with their post-charge CPIA duties and the CPR…". It is then said:

> "Once a case is charged, the prosecution team is bound by the pre-trial timetable. If the initial disclosure exercise is not complete at the time of charging experience shows that the prosecution can quickly get into difficulty.
>
> That is why 'it is essential that the prosecution takes a grip on the case and its disclosure requirements from the very outset of the investigation'…"

It is stated as a Principle:

> "In any serious or complex case the CPS Prosecutor will not authorise charging, notwithstanding the strength of the evidence, unless the disclosure exercise has been front loaded."

Indeed it is also said that serving initial disclosure at or around the time of charging has a number of (identified) advantages: which are then listed.

46. This recommended approach – that is, in effect front-loading the disclosure exercise by reference to the time of charge – had been approved and confirmed by a constitution of this court in *R (Practice Note)* [2015] EWCA Crim 1941, [2016] 1 WLR 1872. After citing extracts from a number of the relevant Guidelines and other materials, Sir Brian Leveson P. said this at paragraph 34:

> "In order to lead (or drive) disclosure, it is essential that the prosecution takes a grip on the case and its disclosure requirements from the outset. To fulfil its duty under section 3, the prosecution must adopt a considered and appropriately resourced approach to giving initial disclosure. Such an approach must extend to and include the overall disclosure strategy, selection of software tools, identifying and isolating material that is subject to legal professional privilege ("LPP") and proposing search terms to be applied. The prosecution must explain what it is doing and what it will not be doing at this stage, ideally in the form of a "Disclosure Management Document". This document, as recommended by the Review and the Protocol, is intended to clarify the prosecution's approach to disclosure (for example, which search terms have been used and why) and to identify and narrow the issues in dispute. By explaining what the prosecution is – and is not – doing, early engagement from the defence would be prompted. Plainly such an approach requires early and careful preparation from the prosecution, tailored to the needs of the individual case. This approach is now embodied in the process for the document-heavy cases forming part of the Better Case Management ("BCM") initiative. Moreover, it is reflected in the approach to "initial disclosure" (see further below) adopted by the Serious

> Fraud Office, as helpfully summarised in the respondents' *Focused Response*, at paras 20-22."

In fact, *R* can, on its facts, be taken as almost a paradigm of the disasters that can ensue if the disclosure obligations are not sufficiently addressed and disclosure schedules prepared before charge but are left to the course of the proceedings themselves after they have been started. (The prosecution in *R* was in fact the subject of the further decision in *R and W* cited above.)

The application before and the decision of the judge

47. We turn to the decision of the judge.

48. As we have indicated, the application rather changed its shape after initial issue. At all events, when the matter came back before the judge on 17 July 2019 she made an order giving certain directions. She adjourned the matter to 23 July 2019 and directed the prosecutor to serve a witness statement addressing the question whether the investigation had been conducted within a reasonable time, for the purposes of s.42(7): and in particular addressing why the file was not sent to the Crown Prosecution Service until 12 November 2018; providing a detailed chronology of steps since taken; and stating whether leading counsel had provided an advice as to charge. She also required an explanation as to why a charging decision was now, as she had been told, not anticipated until ("are now working towards") September 2019: this last piece of information being conveyed by Mr Barker in a further statement dated 20 June 2019, he stressing that he himself was not involved directly in the charging decision.

49. The upshot of these directions was that a Detective Sergeant put in a witness statement explaining why the delay occurred before the file was sent by the West Yorkshire Police to the Crown Prosecution Service in November 2018. But, contrary to the judge's directions, the prosecutor put in no witness statement. Instead a letter and chronology, with accompanying narrative, was provided by a specialist prosecutor based in Manchester and appended to the statement of the Detective Sergeant. It was among other things asserted in that letter that it was "not the policy of the Crown Prosecution Service for prosecutors to make witness statements in their own cases". This was, to put it at its lowest, a thoroughly high-handed and unsatisfactory way to respond to the judge's specific direction (we were also told that neither the specialist prosecutor nor a deputy even attended the hearing on 23 July 2019). However, perhaps charitably, the judge was prepared to entertain the chronology so provided.

50. The chronology emphasised the "complexity and size of the case", involving numerous suspects. It asserted that "a great deal of effort has been put into the case…to isolate the evidence against each suspect in order that the case against each can be clearly put before a court…in the event that the case is charged."

51. The chronology indicated that, after receipt of the file in November 2018 by the Crown Prosecution Service, leading counsel was involved in assisting the legal team to clarify the issues in respect of each suspect. There was then a case conference on 10 January 2019 and disclosure schedules were requested from the West Yorkshire Police. These, when received and considered at a further case conference, were briefly described in the chronology as "not adequate". Revised schedules were requested. On 13 February 2019, there was a consultation with leading counsel when, among other things, a note

was circulated "setting out the areas where further evidence will be required." A detailed case conference was held on 14 February 2019, when evidential issues and disclosure issues – including preparation of a Disclosure Management Document and preparation of schedules – were among matters discussed. There was then an unparticularised delay until 2 May 2019, when revised disclosure schedules and a report were submitted for review. There was a further case conference on 16 May 2019: "the current progress in the case is discussed and it is clear that further work is required on the disclosure schedules". In addition, reference was made in the chronology to new evidence emerging in Germany from a suspect who had absconded and been arrested there.

52. Further meetings and steps in May and June 2019 were identified. On 5 June 2019 a draft request to the German authorities was discussed. On 19 June 2019 a revised disclosure schedule was sent to the Crown Prosecution Service by the Disclosure Officer. There was then an unexplained gap until 10 July 2019 when, as the chronology states, "Disclosure Review of the revised schedules started."

53. The specialist prosecutor then referred in the chronology to aspects of the Code for Crown Prosecutors (in particular, paragraphs 4.3 and 4.8) and other materials. It was stated that:

> "In this case due to the complexities in the evidence, the need to ensure that the disclosure schedules and Disclosure Management Document are ready and fit for purpose and the additional enquires that are being made the charging decision has not yet been made but it is anticipated that once the matters outlined above are successfully resolved the case can progress to charge."

It was also stated that, while leading counsel continued to advise, no advice on charging had been given. The chronology concluded:

> "It is anticipated that, subject to the requirements of the Code and the [Full Code Test] being met, the case is now moving towards a charging decision."

54. No explanation is there given as to the basis for and then departure from the originally indicated estimate time for charging given when the Restraint Order was made; for and from that given by Mr Barker in his second statement of 25 February 2019; and for that given by Mr Barker in his third statement of 20 June 2019.

55. We were told that the hearing before the judge took around 2 hours. Mr Newbold, Mr Panayi and Mr Curl made oral submissions to her to supplement their written submissions. She retired for around three-quarters of an hour and then delivered her decision, which she had reduced to writing.

56. The judge noted that nearly 11 months had now elapsed since she made the Restraint Order. She accepted that "this was a complex investigation involving a large number of suspects." She also recorded, among other things, the submissions made about the new information emerging from Germany and about the need for proper investigation and for compliance with disclosure rules prior to charge. She further summarised the

respective submissions of counsel (and, for the avoidance of doubt, we think that paragraph 13 of the Ruling was designed to record part of Mr Panayi's submissions).

57. The judge recorded at paragraph 16 of her ruling, before stating her conclusion, that she had raised with counsel what would happen if the Restraint Order were discharged. It had apparently been suggested to her that, if it was discharged, the bankruptcy proceedings "can be concluded within a short period of time (a matter of weeks)." That, we interject, seems a remarkably optimistic view. At all events, the submission was also recorded that, on the basis that identified assets would amply suffice to pay off identified creditors (in around the sum of £12 million), the bankruptcy could then be annulled. At that stage, as is recorded by the judge:

> "…the CPS could intervene and if appropriate apply for a further RO. It seems to me that such an application is only likely to succeed if by then charges have been preferred or, at the very least, are imminent."

That last observation is particularly puzzling, not least given that the judge proceeded to discharge the Restraint Order on the basis that proceedings had not been started within a reasonable time.

58. The judge referred to, and distinguished, the decision of Gross J in *Al Zayat* [2008] EWHC 315 Crim. That case, among other things, had involved an obstructive defendant and some eight jurisdictions: the present case did not. She also said that the position about the suspect in Germany was unparticularised and "tangential". She went on:

> "Whilst it might be argued that the investigation is proceeding methodically, that is not the test which is, for me, a simple one: whether the time taken by the CPS to charge (or not to charge) is reasonable."

59. The core of her reasoning is set out in paragraph 21 of her ruling. That reads as follows:

> "On balance I have concluded that s 42(7) is satisfied and that I must discharge the RO. There must be a reasonable requirement to act as rapidly as possible where a draconian order such as the RO in this case is in place with the financial detrimental consequences to [S] and more importantly to others which are set out in the material which has been produced to me by those acting for the TIBs and by Mr Georgiou instructed by [S]. The test of what is a reasonable time must, in my view, depend on the circumstances and here the circumstances are that there is an all assets RO in place. An analogy can, in my view, be drawn between the need to act expeditiously when a defendant is in custody and more laxity allowed for someone on bail. The test of what is/is not a reasonable time will be different in those different circumstances."

60. She discharged the Restraint Order accordingly. However, she granted a stay pending appeal to this court. In the meantime, no further progress report was filed in August 2019, as it should have been.

Submissions of the parties

61. Without disrespect to the full and careful submissions made to us, we can for present purposes summarise them shortly.

62. Mr Talbot submitted that the decision to discharge cannot stand. He said that the judge, in what she had accepted was a complex case, simply failed to take into account, or at the least take sufficiently into account, the investigative and disclosure preparation responsibilities of the prosecution before charge and the requirement that disclosure be "front ended" so that the necessary schedules were available at the time of charge. Further, the position had to be assessed by reference to the investigation in the round and in circumstances where there were numerous suspects: it was not justifiable to focus solely on the position with regard to S, in isolation.

63. He went on to submit that the judge had so interpreted and applied the provisions of s.42(7) as to place too onerous a duty on the prosecution, as was illustrated by her remarks in paragraph 21 of her ruling and by her (as he would say) unjustified glossing of the actual plain words of s.42(7): which was also, he said, contrary to the warning given by Lord Bingham in *Dyer v Watson* (cited above). He submitted that while there "might have been some departure from the ideal" on the part of the prosecution the lapse of time of some 11 months which had occurred here (and some 8 ½ months since the Crown Prosecution Service actually received the file) was not one properly to be categorised, in the circumstances, as unreasonable for the purposes of s.42(7).

64. Mr Panayi in essence submitted that the conclusion of this experienced judge was properly open to her. That some judges, perhaps, might have reached a different conclusion was not to the point. He said that the judge directed herself correctly in law. She had been provided with a limited and unsatisfactory explanation for the delay by the prosecution: in circumstances where, he particularly stressed, an all assets Restraint Order was in place. Further, he drew attention to the lengthy period of time that had elapsed since the investigation had started and before the Restraint Order was made and to the depth of knowledge that had by then evidently been acquired, as illustrated by Mr Barker's very lengthy first statement. He also referred to the National Disclosure Standards and in effect said that what was required here of the police and prosecution was not "rocket science". He submitted, overall, that there had been "inertia" on the part of prosecution and police and a failure properly to prioritise the charging decision in this case. He further criticised the prosecution for "doing its trial preparation during the pre-trial stage." Overall, therefore, his submission was that there was no proper basis for interfering with the evaluative judgment of the judge.

65. Mr Curl, while saying that the position of the trustees in bankruptcy was neutral, drew attention to the impact of the Restraint Order as set out in the evidence. Quite apart from the inevitable impact on S himself (a point which Mr Panayi had understandably also stressed), a number of the secured loans, for example, were at an exceedingly high rate of interest, causing the net indebtedness to increase markedly and when such loans could not be discharged while the Restraint Order was in place. If the Restraint Order were discharged, on the other hand, the assets would then vest in the trustees in bankruptcy. Due administration in bankruptcy, he said (where, as it is suggested, the identified available assets of S exceed identified liabilities) would then achieve in such circumstances an orderly payment of creditors; with any balance available to meet any

confiscation order that might thereafter be made. That, he said, was an altogether more desirable and beneficial way of dealing with the matter.

Disposal

66. Having reflected on the submissions made, we conclude that Mr Talbot is right. The order to discharge cannot stand.

67. We say this for a number of reasons.

68. The judge had directed herself that the test was whether the time taken to charge (or not charge) was reasonable. That was correct. She further directed herself that what is a reasonable time must depend on the circumstances. That was correct too. But unfortunately the judge did not stop there. For, as her reasoning in paragraph 21 of the ruling shows, she evidently considered that there was a requirement to act "as rapidly as possible" where an all assets Restraint Order such as this was in place. But the words "as rapidly as possible" are not there in the statute.

69. We do understand Mr Panayi's point that what was in effect an ex tempore judgment is not to be minutely parsed by way of close textual analysis. But this was not just loose language: for the point is then reinforced by the judge's express reference, by way of analogy, to the need "to act expeditiously" in custody cases. But that too incorporates different language and a higher test – s.22(3) of the Prosecution of Offences Act 1985 in fact refers to "all due diligence and expedition" – than that contained in s.42(7) itself. This is precisely, indeed, the kind of approach which Lord Bingham had, in the context of an Article 6(1) case, said in paragraph 55 of his opinion in *Dyer and Watson* (cited above) was to be avoided.

70. We further consider that the judge's reasoning was in any event flawed by its failure to engage with the points made about the prosecutor's obligations as to investigation and disclosure prior to charge. In particular, whilst she records the submissions made as to disclosure and preparation, she nowhere makes findings in that respect or indicates how, if at all, such points – which clearly were material – were evaluated by her.

71. We think that Mr Talbot's submissions were well made in this regard. He was not in fact disposed to place much, if any, emphasis, on such further complexities, if any, in the investigation as may have been engendered by the development in Germany (and which the judge herself had discounted). His particular emphasis was on disclosure and the need for preparation of proper schedules of material, including unused material. The obligations of disclosure and the need to prepare proper schedules of unused material prior to charge are fully set out in the various Codes and Guidelines which we have summarised above; and the need for early preparation is confirmed in the decision in *R* (cited above). It is not right, in our view, to criticise – as Mr Panayi did – the Crown Prosecution Service and police for in effect doing, as he would have it, trial preparation at the pre-trial (pre-charge) stage. To the contrary, front loading such disclosure in a case such as this is the recommended procedure, in order to avoid disruption and delay in the management of proceedings once started. Moreover, these considerations also have to be put in the context of the fact that there were here a number of suspects under investigation. For obvious reasons, there was a requirement to consider the investigation and potential proceedings as a whole (in what clearly would give rise, if a decision to bring charges were made, to potential charges of conspiracy or joint

substantive charges). It would be wrong to consider the position solely by reference to S himself. Thus whether the prosecution was in a position, in evidential terms, to make a charging decision with regard to S (if it was) was not of itself determinative of the issue of reasonableness: the position of the other suspects and the position with regard to overall disclosure also had to be borne in mind. In general terms, therefore, to proceed to charge should involve being ready, within reason, thereafter to pursue with reasonable expedition the ensuing proceedings. Assessment of a reasonable time within which to start such proceedings ordinarily should allow for that.

72. In these respects, it is not altogether clear what findings, if any, the judge actually made. She does not seem to make any finding that the prosecution had in fact reached the point where a charging decision could and should have been made with regard to S but unreasonably had not done so. Thus it may be that she was proceeding on the basis that the prosecution *ought*, by July 2019, to have reached the point where they were able to make a charging decision. But she made no relevant findings in that respect. Indeed, on one reading of her judgment, she perhaps had accepted – or at all events not rejected – the proposition that the prosecution had been proceeding "methodically": which, if so, is scarcely an indication of unreasonableness. At all events, if she was intending to say that the prosecution's approach to disclosure and preparation of the schedules was unreasonable then she made no such express finding and gave no reasons for any such conclusion.

73. We do not, of course, overlook the fact that here an all assets Restraint Order was in place: clearly a material consideration in deciding whether proceedings had not been started within a reasonable time. But that factor could not of itself be decisive, even if (regrettably) aspects of the evidence put in by the prosecution do not seem to connote that such a matter was always borne well in mind throughout. It was one (albeit important) factor among others. Yet the judge's reasoning in paragraph 21 seems to indicate that she regarded that in substance as of itself the determining factor, in the context of the time that had elapsed.

74. Moreover, we were also rather troubled by the judge's reference to what the consequences might be if the Restraint Order were discharged (as set out in paragraph 16 of her ruling). It is difficult to think that such matters did not play at least some part in the judge's ultimate conclusion: otherwise, why refer to them at all? But those matters were not relevant. They were not relevant just because the sole issue was whether or not proceedings had been started within a reasonable time. If they had not been then the court was required to ("must") discharge the restraint order; and consideration of any consequences, desirable or otherwise, arising from discharge then fell away.

75. For like reasons we discount many aspects of Mr Curl's submissions: which in essence were to the effect that a discharge of the Restraint Order, with consequent vesting of the assets in the bankruptcy estate, would be much fairer and more beneficial all round than if the Restraint Order remained in place. That is not the approach permitted by s.42(7) of the 2002 Act. Moreover, it is in any event to be borne in mind that it is open to a creditor or any other affected person to apply for a discharge or variation of a Restraint Order under s.42(5), if undue prejudice is said to be occasioned by it.

76. For all these reasons, we cannot, with every respect to her, uphold the reasoning of the judge. She misapplied the statutory provisions; did not take into account a material consideration; and took into account an immaterial consideration.

77. In so saying, we make clear that there were undoubtedly some unsatisfactory aspects of the prosecution evidence lodged on this application: quite apart from the lack of any witness statement, as such, from the specialist prosecutor particularly involved, notwithstanding the judge's previous directions. Mr Talbot protested that the judge had given only limited time for such evidence. Further, he observed, it can be a delicate task as to how much to reveal in such a situation, in case tactical advantage, and an appreciation of the perceived strengths and weaknesses of, or any lacuna in, the prosecution case is provided to a defence team. We understand those points in general terms and we also understand his forceful point as to the need to avoid extensive satellite litigation. But they by no means provide a complete answer in this case. For example, the second statement of Mr Barker, by way of progress report dated 25 February 2019, makes no reference at all to perceived difficulties in collating disclosure and preparing proper schedules of unused material. There is almost a complete disconnect between what he was then saying in February 2019 and what the specialist prosecutor records in the chronology as occurring at that time. In fact, the explanation for the delay as being primarily due to the need to revise and complete disclosure schedules only really emerged for the first time in the chronology produced shortly before the hearing of 23 July 2019. Nor is there any explanation provided for the giving of the estimated charging times as variously proffered by Mr Barker but not fulfilled. Nor, again, does the chronology itself offer any explanation as to what was going on, for example, between 14 February 2019 and 2 May 2019 and between 19 June 2019 and 10 July 2019.

78. Mr Panayi submitted that, in all the circumstances, if we concluded that the judge's reasoning was flawed – as we do conclude – then we should remake the decision for ourselves and by that route uphold the discharge of the Restraint Order. He was less keen on the idea that we should remake the decision for ourselves and refuse to discharge the Restraint Order (which was Mr Talbot's submission); if we were not minded ourselves to discharge the Restraint Order then, Mr Panayi said, we should remit the matter to the judge for further decision.

79. We have to have regard to realities and practicalities here. We are a very long way from concluding that, putting to one side the judge's flawed reasoning (as we have found it to be), a conclusion in July 2019 that proceedings had not been started within a reasonable time nevertheless was and is inevitably right. Certainly a period of some 11 months (and 8 ½ months from delivery of the files) does not strike us as of itself obviously unreasonable, in circumstances where the case was complex, where there were numerous suspects and where, on any view, there were significant disclosure issues to be addressed. But in any event we are now in October 2019. A charging decision still has not been made, notwithstanding the indication of Mr Barker in his third statement of 20 June 2019 that the prosecution were "working towards a charging decision by September 2019". Nor has there been provided, as there should have been, a progress report in August 2019. All that Mr Talbot could tell us on instructions when we enquired – and such enquiry from the court must have been anticipated as inevitable – was that the "issues" with the disclosure schedules had continued but that it was anticipated that, if such schedules when supposedly finalised were adequate, a charging

decision might be made in the course of November 2019. He was no more precise or specific.

80. In such circumstances, remittal now, in our judgment, would serve no purpose. A progress report should have been filed in the interim and it now should be. It will need to be appropriately specific as to the current state of play. If there continues to be no real and positive movement towards a charging decision identified in the progress report and if continued vague and bland generalisations as to charging are given, a fresh application to discharge can be made and/or the judge can proceed under s.41(7B). It may be that, if such an application is made and if no charging decision still has been made or is imminent by the time of the hearing, the judge may, in the absence of proper explanation, draw an adverse conclusion, for the purposes of s.42(7) or s.41(7B), against the prosecution. That will be entirely a matter for her on the materials then before her. In the meantime, of course, and particularly in the light of the concerns raised by Mr Curl, we reiterate that there remains the right of any affected person to apply to vary the Restraint Order; and moreover, as we apprehend, S himself still has outstanding the other aspects of his application.

Conclusion

81. In all the circumstances, we reverse the judge's decision to discharge the Restraint Order. The Restraint Order will stand.