Neutral Citation Number: [2020] EWCA Crim 1596

Case No: 201901315 B5 & 201901457 B5

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM SOUTHWARK CROWN COURT
HIS HONOUR JUDGE BARTLE QC
T20177310

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/11/2020

Before:

LADY JUSTICE NICOLA DAVIES DBE
MR JUSTICE HILLIARD
and
MR JUSTICE WALL

- -

Between:

(1) ANTHONY BOND **(2) STEPHEN GOBLE**	**Appellants**
- and -	
REGINA	**Respondent**

- -
- -

David Spens QC and Tom Doble (instructed by **Mishcon de Reya LLP**) for the **First Appellant**
Peter Rouch QC (instructed by **Representation Order of the Court**) for the **Second Appellant**
Mark Bryant-Heron QC and Jane Osborne QC (instructed by **Crown Prosecution Service**) for the **Respondent**

Hearing dates: 23 October and 3 November 2020

- -

Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII, if appropriate, and/or publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be at 10.30am on Friday 27 November 2020.

Lady Justice Nicola Davies:

This is the judgment of the Court, to which we have all contributed.

1. On 13 March 2019 in the Crown Court at Southwark the appellants were convicted, by a majority of nine to one, of conspiracy to cheat the Revenue contrary to section 1(1) of the Criminal Law Act 1977 (count 1). The Particulars of the Offence stated:

> "ANTHONY BOND, STEPHEN GOBLE, [TS], [CC], JAMES CHITTOCK and ELIA VASSOS ELIA between 1 January 2008 and 25 March 2014, with intent to defraud and to the prejudice of Her Majesty the Queen and Her Commissioners of Revenue and Customs, conspired together and with Ian Stewart, Eddie Ellis and Andrew Charalambides, to cheat Her Majesty the Queen and Her Commissioners of public revenue by:-
>
> (i) Using, or permitting to be used, companies and/or trading entities ('defaulting traders') which failed to account for or pay Value Added Tax ('VAT') on sales or purported sales to companies namely Precious Waste Recovery Limited, Eco Logic Solutions Ltd., Bullion Bond Limited, Dentalloy Limited and Stewart Nicol Solutions Limited ('the Bond Group companies');
>
> (ii) Using, or permitting to be used, defaulting traders to be entered in the trading records of the Bond Group companies as vendors of goods to the Bond Group companies when no such sales from those companies took place;
>
> (iii) Using, or permitting to be used, defaulting traders and traders which purported to purchase goods from the defaulting trader and sell on to the Bond Group companies;
>
> (iv) claiming VAT credits (input tax) on behalf of the Bond Group companies which the Bond Group companies were not entitled to claim."

2. On 4 April 2019 the trial judge, HHJ Bartle QC, sentenced Bond to seven years and six months' imprisonment and Goble to five years' imprisonment. Bond was disqualified from being director of a company for a period of ten years. Counts 2, 3 and 4, conspiracy to cheat the Revenue, were alternative counts and were ordered to lie on the file. The jury were unable to reach verdicts in respect of the co-accused TS (count 1 and 2). No evidence was offered against Ella Elia on counts 1 and 4 on the grounds of ill-health. James Chittock was acquitted on counts 1 and 3.

3. The appellants appeal against conviction by leave of the single judge.

4. The appellant Bond was the director of five companies referred to as the "Bond Group" which traded in scrap and precious metals, buying and selling gold, silver and other high-value metals. The prosecution identified Bond as the architect and

principal of the fraudulent scheme. The appellant Goble was the bookkeeper to the Bond Group and worked closely with Bond.

5. The five Bond Group companies traded from the same premises in Chesham. During the indictment period (1 January 2008 to 25 March 2014), bank receipts were in the order of £118 million (this included cash deposits of £4.8 million). The Bond Group charged and accounted for VAT on their sales. The companies' declared sales figures on the VAT returns for this period were £132,841,677.91. The declared purchases figures were £119,242,851.10.

6. During the period the trading records for the Bond Group companies showed purported purchases of £117,807,751.48 made from 38 companies identified as missing or defaulting traders or connected with missing traders ("the defaulting traders"). The VAT input tax figure declared in the Group's trading records, from the defaulting traders is £17,972,993.17.

7. The prosecution case at trial was that the appellants were part of a conspiracy to dishonestly abuse the VAT system to their financial advantage. The prosecution alleged that Bond was a party to the conspiracy, providing or permitting the provision of invoices for sales, knowing there were no such sales or no sales as described in all the invoices between the Bond Group and the defaulting traders. VAT would not be paid by those traders on sales which did not take place but the Bond Group companies would claim input tax on such purported sales to which they were not entitled. As the conspiracy required the provision and use of supplier companies which were VAT registered, it was necessary to have a ready supply of companies, a number of which either did not make VAT returns or made zero rated VAT returns.

8. Bond directed which companies were to be traded with, the purchases and sales and the movement of large cash sums which were withdrawn from the company accounts. Companies which made no genuine sales to the Bond Group companies were used as vehicles to create the paperwork necessary to enable the Bond Group companies to make false input tax claims. Those companies owed substantial sums to the HMRC in VAT output tax charged on their sales to the Bond Group. They defaulted on this VAT liability or they did not declare it to HMRC. The defendants who were responsible for the supplier VAT registered companies were paid money into their accounts under their control in return for allowing their companies to be used in this way.

9. Goble was in a position of trust at the Bond Group. It was the prosecution and defence case that Goble worked to the instructions of Bond. It was his job to make the entries on the SAGE accounting system which formed the basis of the VAT reclaim. As invoices were received he entered them into the system. He was responsible for completing the VAT returns for the companies which claimed the input tax and for maintaining the cash books. The prosecution maintained that Goble falsified the Group's trading records in order to give credibility to the inflated input tax claims. The cash withdrawals from the bank bore no relation to the purchase invoice amounts. He made entries in the cash book allocating the cash to supplier companies. Goble admitted that he had allocated cash to suppliers "almost at will". On some occasions he did so on the basis that he knew the particular trader was a customer with the Bond Group and there were outstanding invoices which had not been allocated, on others, he did what he was told by Bond. As a result of scrutiny by

HMRC, VAT monitoring visits were conducted between July and October 2013 at the Bond Group. Goble dealt with members of HMRC during this period.

10. On 25 March 2014 at 11.50am in Park Royal, London, Bond was arrested. He was taken to the trading premises of the Bond Group companies at an industrial estate in Chesham. At the companies' units on the estate, HMRC officers were present and had executed a search warrant. There, Goble had been arrested after Bond. Both appellants were transported to Aylesbury Police Station in the rear of a police van. The van was equipped with covert audio recording equipment, authority having been granted and extended pursuant to the Regulation of Investigatory Powers Act 2000 ("RIPA"). On route to the police station comments were made by both appellants which, the Crown contended, confirmed their involvement in this criminal activity.

11. Bond was interviewed on three occasions. He denied all the allegations and stated that he had never knowingly made a fraudulent or false misrepresentation to any government department or dealt with criminal property. On the advice of his lawyers, he made no comment to further questions asked. At the final interview on 30 June 2015 Bond provided a prepared statement which gave details of his business, personal wealth, the companies, purchases and sales, his arrest, the items seized and the covert conversation with Goble.

12. Goble was interviewed on 25 March 2014. He did not seek legal representation and stated that he had done nothing wrong. He answered all questions asked of him. He was interviewed on 23 October 2015, on this occasion he was legally represented. He provided a prepared statement which confirmed the answers he had provided at the initial interview. He denied that he had acted dishonestly. A final interview on 29 June 2015 was held at which he answered all questions asked of him.

13. At trial it was Bond's case that, as a man of hitherto good character, he ran a legitimate business and that he or his staff dealt with the supplier companies in good faith. He was not responsible for, and had no part in, the fact that they defaulted on their VAT liability. He did not make VAT returns or keep paperwork reflecting their sales to the Bond Group. He denied being a party to any conspiracy to cheat the Revenue.

14. The defence case for Goble was that he acted on the instruction of Bond in carrying out his duties as the Bond Group bookkeeper. He received invoices and entered them on the system. He had nothing to do with the trading side of the business. He acted in good faith and did not believe that any fraud was taking place.

Grounds of appeal

15. The appellants rely upon two identical grounds of appeal. Individually and collectively they are stated to render unsafe the conviction of each appellant. The grounds are:

    i) The judge was wrong to allow the prosecution to amend the indictment during the course of Mr Bond's evidence so as to add three individuals who were not before the court, Ian Stewart, Eddie Ellis and Andrew (Doros) Charalambides, as named co-conspirators and parties to the indicted agreement. In particular:

a) There was no proper or sustainable case that Mr Stewart, Mr Ellis or Mr Charalambides was party to the indicted agreement, such that there was no proper foundation for the amendment;

b) The amendment could not be made without injustice, and the judge failed to satisfy himself that no injustice would result, instead conducting a balancing exercise which was contrary to the statutory scheme.

ii) The judge erred in admitting evidence of a covertly recorded discussion between Mr Bond and Mr Goble following their arrest. In particular:

a) As the judge found, the surveillance was neither necessary nor proportionate and was therefore conducted unlawfully in breach of RIPA;

b) The judge was wrong to conclude that the surveillance had not been conducted in breach of section 30 of the Police and Criminal Evidence Act 1984 ("PACE"), or that any such breach would make no difference to the exercise of his discretion. There was in fact a deliberate flouting of the statutory scheme liable to lead to the exclusion of the evidence;

c) In all the circumstances, the judge failed properly to exercise his discretion to exclude the evidence under section 78 PACE.

Amendment of the indictment

16. The power to amend the indictment is contained in section 5(1) of the Indictments Act 1915 which provides that:

> "Where, before trial, or at any stage of a trial, it appears to the court that the indictment is defective, the court shall make such order for the amendment of the indictment as the court thinks necessary to meet the circumstances of the case, unless, having regard to the merits of the case, the required amendments cannot be made without injustice."

The trial

17. The trial commenced on 1 October 2018, the jury retired on 11 February 2019. At the outset of the trial and throughout a substantial part of the prosecution case, the indictment contained the single count of conspiracy to cheat the Revenue in the terms identified in [1] above.

18. The prosecution alleged that the 38 companies, the defaulting traders (or linked to such traders) were part of the scheme to fraudulently claim VAT operated by Bond. Many of the companies were not operated by any named defendant. The prosecution did not identify who the "others" said to have conspired with the defendants were, or upon what evidential basis they were alleged to be party to the indicted agreement.

19. Ian Stewart, Eddie Ellis and Doros (Andrew) Charalambides were not identified as being parties to the alleged conspiracy. Between 2010 and 2012 Stewart was

employed by the Bond Group to deal with due diligence. Ellis was an associate of Stewart, he ran a limousine business and was said to have numerous contacts. Charalambides was a precious metal trader based in Harrow, known to Bond since about 2008.

20. In his prepared statement dated 30 June 2015 Bond identified connections with Stewart, Ellis and Charalambides and defaulting trader companies as follows:

i) Global Metalworks. Bond's companies purchased stock from this company which was introduced to him by Charalambides. He had not met the director Elia. Stewart conducted the due diligence.

ii) Adem Wholesale. The company was recommended by Charalambides who knew the director, Bond had not met the director.

iii) KRH Antiques. The Bond companies purchased stock from this company which was introduced by Charalambides. Bond conducted the due diligence, he had not met the director of the company.

iv) Metal Trader Ltd. Bond confirmed that his companies had dealt with this company which was introduced through Stewart via his associates Ellis and Neil Percival. Stewart conducted the due diligence on the company, Bond met the director.

v) 3 Li Ltd. The owner and director TS was introduced by Stewart and Ellis.

vi) Barnet Scrap Metal. This company was introduced by Stewart and Ellis. Bond did not meet the director.

vii) Pan Antiques. This company was introduced by Charalambides, Bond had never met the director.

viii) Argentum Metals. The company approached Bond to do business, he knew the director Steven Charalambides who is the son of Andrew Charalambides with whom his companies had traded in the past.

ix) UK Trading and Marketing. The company was introduced to Bond by Stewart and Ellis. He had never met the director of the company, the due diligence was conducted by Stewart. Stewart and Ellis received the payments for the metal traded through this company.

x) Card Chambers. This company had been referred by Ellis. Bond did not meet the director. Stewart carried out the due diligence.

xi) PD Metals. The company was introduced by Stewart and Ellis and traded predominantly with Eco Solutions Ltd. Stewart carried out due diligence.

xii) S Gurney & Co. This company was introduced by Stewart and Ellis. Bond had never met the director. Due diligence was carried out by Stewart. Ellis delivered goods and collected cash on its behalf.

21. The same information was contained in the Defence Statement dated 10 May 2018. In response to a defence request for information concerning the prosecution investigation in respect of Stewart and Ellis, on 1 June 2018 the prosecution stated that "HMRC take the view that they do not hold enough information to indicate involvement in these offences either to justify arrest or to invite the individuals in for a voluntary interview."

22. Requests for further disclosure were made, the responses indicated that there remained no intention to speak to Stewart or Ellis. HMRC disclosed that they were in possession of intelligence which indicated that Ellis, who had been the subject of covert surveillance, was allegedly involved in moving large sums of money around, VAT frauds and other scams. Charalambides was interviewed under caution on two occasions in 2014 and in June 2015 but was not charged.

23. On 5 November 2018, shortly before the close of its case, the prosecution applied to amend the indictment in order to add a number of "named conspirators" as parties to the agreement ("the first application"). Stewart, Ellis and Charalambides were not identified as individuals to be joined.

24. On 9 November 2018, prior to the determination of the first application, the prosecution made a further application to amend the indictment ("the second application"). This sought to add as alternatives to the general agreement in count 1 separate counts alleging sub agreements as between Bond, Goble and each of the defaulting trader defendants, namely: count 2 TS/3 Li Ltd; count 3 CC/Do-Buy Ltd; count 4 Chittock/PD Metals; count 5 Elia/Global Metalworks.

25. The reasoning behind this application was that the prosecution were seeking to address a perceived risk that the jury might conclude that whilst the defaulting trader defendants (TS, CC, Chittock and Elia) had agreed that false VAT claims should be made in respect of their own companies, they were not party to a wider agreement to cheat the Revenue. It was accepted that following *R v Griffiths* [1965] 1 QB 589, *R v Mehta* [2012] EWCA Crim 2824 and *R v Shillam* [2013] EWCA Crim 160, in order for a defendant to be convicted of participating in the overarching agreement alleged in count 1, it was necessary to prove that the defendant in question was aware of a scheme which went beyond the illegal acts which he agreed to. The prosecution withdrew the first application upon the basis that "the prosecution are not in a position to asset that individual non-defendant operators of defaulting suppliers had knowledge of the wider scheme".

26. The prosecution sought to retain the inclusion of "with others" in the particulars of count 1, conspiracy, on the basis that there was a suspicion that further individuals may have been party to the agreement. Those individuals included Stewart, Ellis and Charalambides. In the prosecution skeleton application to amend it was stated that:

> "It is undoubtedly the case that there are individuals in addition to the defendants who are parties to this conspiracy. There are a number of individuals who are named in defence statements as actors in the operation of this conspiracy. It is uncontroversial that supplier companies, which were used to cheat the revenue, were introduced to Anthony Bond by other non-defendants. Those named in defence statements include

> Doros Charalambides, Ian Stewart, … Eddie Ellis …. The evidence in relation to these individuals is likely to develop during defence evidence. The correct position, therefore, is to retain the word 'others' in the indictment. Should the position arise where the evidence makes it appropriate to name certain individuals, the issue can be revisited."

27. The application was opposed by the defence. In a ruling dated 15 November 2018 the trial judge allowed the prosecution application to amend the indictment to add the alternative sub-conspiracies as new counts 2 to 4. As to the reference to "with others" the judge ruled that it should be removed from the particulars of both the overarching conspiracy (count 1) and the alternative sub-conspiracies holding that:

> "… In my judgment, if potential conspirators are known they must be identified. If they cannot be identified, they can be referred to as 'persons unknown' … That is not this case. The prosecution know the identity of the people concerned but accept that there is insufficient evidence to charge them as co-conspirators. Therefore, they should not be referred to as 'others' in the indictment … If there comes a time when the prosecution apply to join an identified person as a co-conspirator that application will be dealt with on its merits."

28. Bond commenced giving evidence on 3 December 2018. On 13 December 2018, during the cross-examination of Bond, the prosecution applied to amend the indictment for a third time ("the third application"). On this occasion the prosecution sought to add Stewart, Ellis and Charalambides to the particulars of count 1 as parties to the overarching conspiracy as well as "others unknown". In its written application the prosecution stated:

> "10. The position now is that the evidence of Anthony Bond, which is evidence in the case generally, is that the three named individuals played extensive roles in the trading activity of a number of defaulting supplier traders. It has always been the prosecution case that Anthony Bond acted, in part, through others in securing trading supplier companies to carry out the alleged fraud. The inference from Anthony Bond's evidence is that these individuals were not innocent agents, but were parties to the alleged conspiracy, because of the number of defaulting suppliers they were associated with.
>
> 11. The principle [sic] (although not the only) issue between the prosecution and Anthony Bond on this point is whether these individuals used defaulting trader companies as a vehicle for evidencing trade without Anthony Bond's knowledge, or whether they conspired with Anthony Bond to cheat the revenue. The proposed amendment clarifies this issue for the jury."

The defence objected to the application.

29. In a ruling dated 13 December 2018 the trial judge allowed the application to amend in respect of Stewart, Ellis and Charalambides. The judge's ruling included the following:

> "What the prosecution say is that they did not have sufficient material to make the application before now, but that taking account of all the evidence, including what Mr Bond has said in the course of his evidence-in-chief and in cross-examination, the position has now changed, and that while there was evidence hitherto, namely, before Mr Bond gave evidence, from all the evidence in the case as to the roles which these three people play it was not, as I have said, according to the prosecution, sufficient for them to add these three people as co-conspirators. In my judgment, the stance of the prosecution cannot be criticised as far as that is concerned. Self-evidently that was the view of the prosecution. Had they taken a different view they would have continued to pursue the application to add them as named conspirators, but in the light of the evidence at that stage they withdrew the application. Part of that evidence included Mr Bond's prepared statement, which self evidently is not evidence in the case until he goes into the witness box, and, of course, no prosecutor can know before the defence case is adduced whether or not a defendant is going to give evidence, and it would not have been evidence in the case, as the prosecution submit, unless Mr Bond did give evidence. Well, he has given evidence, and in the course of his evidence he has made it clear that the people who are now said to be co-conspirators were people who were not simply either suppliers or co-workers but were people with whom he says that he traded. Of course his case is that he traded lawfully with these people. Mr Bond's case is that nothing that he did was unlawful, and to the contrary that he ticked every box; he paid every penny; he did everything he was asked to do. There is no question that Mr Bond is saying that he was involved in any conspiracy.
>
> But what has become clear in the course of his evidence is that he is saying that Mr Charalambides on the one hand, and Mr Stewart and Mr Ellis on the other, were people with whom he traded in respect of a large number of the suppliers who are the subject of the Crown's case. So, in relation to Mr Charalambides, Mr Bond has said that it was Mr Charalambides with whom he was trading, not solely in respect of Red Bus, which is the company which Mr Charalambides ran, but also in relation to many other companies, Pan Antiques, Global Metalworks, KRH, Argentum, and Adem. And in respect of Mr Stewart and Mr Ellis, again, Mr Bond has said that the trading was being conducted with Mr Stewart and Mr Ellis for a variety of suppliers, the subject of this case, that

> includes Punto, Barnett, PD Metals, S Gurney, Metal Trader, Card Chambers, and Conrad.
>
> And while, as I have said, in the prepared statement there were undoubtedly references to these defendants, in my judgment, Mr Bond has gone further in the course of his evidence to justify the prosecution submission, along with the fact, as I have already said, he has now given evidence whereas the prepared statement was not evidence in the case. It is perfectly true that the prosecution had material about the proposed co-conspirators, that is not in dispute, but in my judgment that was not sufficient for them to apply at an earlier stage to make them co-conspirators and, to coin a cliché, the proof of the pudding is that they did not do so."

The judge did not accept the submission made by counsel on behalf of Bond that the evidence had not changed or had not changed in a material way. For the reasons set out in the extract of the ruling above the judge stated in respect of Bond's evidence that: "In my judgment it has changed."

30. The judge addressed the issue of unfairness or prejudice as follows:

> "And so the fundamental question, therefore, is is it unjust to allow this amendment? In my judgment it is not. The defendant, Mr Bond, has said repeatedly in the course of his evidence that he was involved in trading with these defendants in relation to the suppliers whom I have identified. It will be for the jury to decide but, in my judgment, it is entirely appropriate to amend the indictment to include these three defendants for the jury to decide if the conspiracy, which the prosecution allege, was one which involved these people who the jury may conclude were also involved in the conspiracies which the Crown allege.
>
> As far as timing is concerned, of course it is late. There cannot be any doubt about that. It comes very late indeed, and it comes in the course, as I have said, of Mr Bond's evidence, but I ask rhetorically when else could the prosecution have made this application? I have already explained, and I am not going to repeat, what the history of this matter is. The prosecution made a decision that they could not proceed with any application to amend before the close of their case, and they now do so correctly, in my judgment, while Mr Bond is giving evidence because if the amendment is allowed then they must put to Mr Bond what their case is. So, although, of course, it is late, nobody could possibly disagree with that submission. In my judgment it is the correct time to do so.
>
> Fundamentally, therefore, I have to ask myself does this mean that the amendment will cause such injustice to the defendants that I should refuse to allow it? I am sure that although there

> may be issues of disclosure, which the defence are perfectly entitled to pursue, the fairness of the position is to allow this amendment, and I am not satisfied that such injustice, if there is any to the defendants, outweighs the fairness overall in allowing this amendment. In my judgment it is a correct application and I allow it, and I am not satisfied that any injustice to the defence is sufficient for me to refuse it. If I have not dealt in this ex tempore judgment with all of the points made I have, however, taken them into account in reaching my judgment."

31. Following the granting of the application the amended indictment was given to the jury and the judge informed the jury that all three names were added as alleged co-conspirators to count 1. Stewart and Ellis were added as co-conspirators to count 3 and Charalambides was added as co-conspirator in relation to count 4. Having discussed and agreed the direction with counsel, the judge gave the following direction to the jury in respect of the amended indictment:

> "The position as in the previous amendment which was made is that you should not hold it against the defendants that these names have been added. It is the prosecution case that those who have been added are, as I have said, alleged co-conspirators, and it remains, as it always has been throughout the trial, for the prosecution to prove the case in respect of each of the defendants in the way the prosecution explained to you when they opened the case."

32. The jury having received the amended indictment, Bond resumed his evidence. Thereafter, Mr Bryant-Heron QC on behalf of the Crown put the case in respect of the three new alleged co-conspirators to Bond. No point is taken on this appeal with this aspect of Bond's evidence.

The appellants' submissions – Ground of appeal 1(a)

33. The primary submission made on behalf of both appellants is that as there was no proper or sustainable case that either Stewart, Ellis or Charalambides was a party to the indicted agreements and, in particular, the overarching count 1 agreement in respect of which the appellants were subsequently convicted, the amendment should not have been allowed.

34. It is accepted that on a charge of conspiracy, where the evidence discloses that the accused conspired with other persons who are not before the court, this should be averred in the indictment. Where the person concerned can be identified he should be named. It is the appellants' case that before a person who is not before the court may be named in the indictment particulars, such that a jury could convict a defendant for conspiring with that person alone, the prosecution must identify a proper and sustainable case that he was party to the indicted agreement. Relying on *R v Mehta* (above) the appellants contend that before the prosecution can allege that an individual (identified or otherwise) is party to the indicted conspiracy a "proper foundation" must be laid. In *R v Thompson (Emmanuel)* [2018] EWCA Crim 2082,

the court identified a number of basic principles which could be derived from *Mehta* at [58]:

> "It is as well to remind ourselves of some basic principles relating to the offence of conspiracy. They can be derived from the decision of this Court in *R v Mehta* [2012] EWCA Crim 2824. First, the essence of the offence is an agreement between at least two persons. If the prosecution cannot prove that an accused has made an agreement with at least one other person to commit a crime he cannot be guilty of conspiracy. Second, although 'the other person' need not be identified by name, there must be a sustainable case to demonstrate that another person was party to an agreement with the accused. Third, the alleged conspirators must have a common unlawful purpose or design i.e. a shared design."

35. Prior to Mr Bond's evidence the prosecution accepted that there was insufficient evidence that any non-defendant was a party to the count 1 agreement such that he could be named as a co-conspirator on the indictment. In order to assert that any of the three individuals was a party to the overarching conspiracy the appellants contend that it was necessary for the prosecution to prove in respect of each individual that:

    i) he was associated with one or more of the defaulting traders, either by introducing them to the Bond Group or trading on their behalf (element 1);

    ii) he was party to an agreement with Bond to defraud the Revenue (element 2); and

    iii) he had knowledge of a wider agreement between Bond and others, such that he could properly be said to be party to the single overarching conspiracy alleged by the prosecution (element 3).

36. The appellants accept that evidentially element 1 was met, but contend that there was insufficient evidence in respect of elements 2 and 3, in particular element 3, in order to meet the requirement of a proper and sustainable case such as to permit the amendment.

37. The essence of the appellants' argument is that the evidence which the appellant Bond gave did nothing to remedy the evidential shortfall which had been identified by the Crown in its previous applications in respect of co-conspirators. Bond gave evidence that groups of traders had been introduced to the Bond Group by the three named individuals, but that evidence was consistent with his prepared statement made in June 2015. The judge, in allowing the third application, recognised that the height of Bond's evidence was that he traded with Stewart, Ellis and Charalambides and that these men were linked to a large number of defaulting suppliers but that Bond maintained he had traded legitimately with each of the three men. It is accepted that Bond gave further evidence of the three men's involvement with defaulting traders but it is submitted that he provided no additional evidence that they were party to an agreement with him to defraud the Revenue (element 2) or, crucially, that they were aware of any wider agreement involving Bond to do so (element 3).

38. Mr Spens QC (who, with Mr Doble, did not appear at the trial) on behalf of Bond accepted that the judge had indicated that others could subsequently be added to the indictment when ruling upon the second application. The submission of Mr Spens QC was not that such an approach took the defence by surprise but rather that there was not a sound evidential basis upon which to make the application.

Anthony Bond's evidence at trial

Charalambides

39. Bond identified six companies with which he dealt with Charalambides as follows: "I dealt with Andrew through Pan Antiques. It was one of his six companies that I dealt with, with Andrew." The other companies were Red Bus Silver Co., Global Metalworks, KRH Antiques Ltd, Adem Wholesale and Argentum. Bond was introduced to Charalambides by the co-accused CC. Bond stated that CC and Charalambides would always be at CC's business premises in Hatton Garden. Trade moved from Pan Antiques to the Red Bus at Charalambides' instigation. Bond was introduced to Global Metalworks by Charalambides. He dealt and negotiated exclusively with him. All money was paid to Charalambides in cash with the exception of £29,000 which was paid by bank transfer to Global Metalworks. The cash was delivered to CC's premises in Hatton Garden. Cash paid to KRH Antiques was also delivered to CC's premises. Argentum Metals Ltd were paid in cash directly to Charalambides, who signed receipts for the cash and would leave the metals. Adem Metals was the contact for Adem Wholesale, Bond did a small amount of trading in catalytic converters through the company. KRH supplied silver, antique or bric-a-brac. Charalambides was not a director, Bond described him as the person of significant control. He did not meet the director of the company, nor did he have any dealings with him. Bond said: "I just dealt with Andrew predominantly". Bond described a "continuous business" from Charalambides through Global Metalworks, KRH and "a couple of other companies". Charalambides wrote all the invoices in front of Bond and gave them to him.

40. The effect of Bond's evidence was also to identify the connection between Charalambides and CC, who was the director of Do-Buy 925. The prosecution relied upon the fact that monies were being delivered to CC's premises and meetings were taking place between Bond and CC at those premises as evidence that Charalambides was aware of the wider conspiracy outside of his dealings with Bond and Goble.

Ian Stewart and Eddie Ellis

41. Stewart was employed by the Bond Group between September 2010 and September 2012, a period of peak trading for the group. Stewart was referred to by Bond during the covertly recorded conversation in the police van when he said "I had so many wrong people in, you know it all started with Ian onwards, up until that point you know." Bond gave the following evidence in respect of the roles of Stewart and Ellis and defaulting trader companies:

    i) The Punto Centre Ltd. Bond described it as one of the very first customers of Ellis and Stewart delivering catalytic converters directly to his unit. No relevant invoices were found but Bond maintained that he had seen them. He did not know why they were not returned from HMRC;

ii) UK Trading and Marketing. Bond described the role of Stewart and Ellis as being the same as that for the Punto Centre;

iii) Barnet Scrap Metal. Bond described this as a Stewart and Ellis company, they introduced the company to Bond and they were trading on behalf of this company with his group;

iv) PD Metals. Bond also categorised that as a Stewart and Ellis company. Stewart was said to be in control of the company, it was one of the main businesses that he had "brought to the table". Also involved with PD Metals were Ellis and Neil Percival. Some of the payments from the Bond Group to PD Metals would have been made by Stewart;

v) S Gurney. Bond described it as one of Stewart's contacts. Bond said he had no dealing with the company, he was aware of deliveries being made from it, some by Stewart who physically brought the silver in. Stewart would also collect the cash for the deliveries. Asked if anyone other than Stewart was involved with S Gurney, Bond replied "If I say Ian Stewart, it would be Ian Stewart, Eddie [Ellis]";

vi) Metal Traders. Stewart was said to have initially conducted the trading then Ellis and the Percival bothers;

vii) Card Chambers. One of Stewart's companies, no-one else dealt with them;

viii) Conrad Lea Ltd. A company connected to Stewart and Ellis;

ix) Concept Metals Ltd. Although connected to another person, it was also connected to Stewart.

42. Bond said that when he mentioned Stewart and Ellis in relation to companies, they were his introduction to the companies, he did not meet the directors or have anything to do with the individuals of those companies. Ellis and Stewart dealt with the companies, they handled the trade, they handled the business. Bond described Ellis and Stewart as being "very well known, lots of people know them, they've got lots of contacts".

11 February 2014 meeting

43. On 11 February 2014 a meeting took place between Bond and the HMRC Compliance Officer. On the same day, HMRC investigation officers were carrying out surveillance of Bond and he was seen to meet Charalambides and Stewart in Costa Coffee Chesham. They entered the café together and engaged in conversation. Charalambides left the meeting first, with Stewart and Bond remaining together for approximately 45 minutes before leaving together.

Ground of appeal 1(b): Amendment not without injustice

44. The power to amend the indictment may only be exercised if the amendment can be made "without injustice", there is no question of a balancing exercise: if prejudice or injustice is likely to result from an amendment to the indictment then it ought not to be permitted *R v Thompson* [2012] 1 WLR 571.

45. On behalf of the appellants it is contended that the potential significance of the three individuals was clear to the prosecution from 30 June 2015, the date of Bond's prepared statement. Thereafter, the prosecution was under a duty to pursue all reasonable lines of enquiry capable of establishing the knowledge and involvement of the individuals, retain and record all relevant material obtained and review the same for the purposes of disclosure. The prosecution declined to approach Stewart and Ellis on the basis that the HMRC did not hold sufficient information to indicate involvement of either in the offences, either to justify arrest or to invite the individuals for a voluntary interview. That stance is inconsistent with the assertion made by the prosecution in making the application, which was made very late.

46. The late amendment undermines the safety of Bond's conviction in that it allowed the prosecution to assert that the three individuals were party to the alleged agreement where the evidence did not support such a contention. This permitted the jury to convict Bond on a basis that should not have been open to them and obscured what would otherwise have been a structural flaw in the prosecution case, namely that Bond was said to have been party to a conspiracy involving the systematic use of defaulting suppliers in circumstances where the individuals introducing many of those companies to Bond could not be said to be party to the conspiracies themselves.

47. The amendment permitted the prosecution to advance a case having failed to discharge the investigative burden which that case demanded. The timing of the amendment gave the clear impression that Bond had incriminated the three individuals in the course of evidence, thereby weakening his own position and his credibility before the jury.

The appellant Goble's submissions

48. Mr Rouch QC on behalf of the appellant Goble adopted the submissions made on behalf of the appellant Bond. As to Goble's role, Mr Rouch stated that the allocation of cash, whether to the Bond Group's cash book or SAGE system, was not time critical. Goble made no secret of the fact that he was late in allocating cash in respect of purchases, whether in the cash book or the SAGE system. He disclosed this information to the HMRC officers at the meetings. Following his arrest, Goble continued to allocate cash through the SAGE system, a fact unchallenged by the Crown. When allowance was made for late allocation of cash, the books balanced.

49. It is contended on behalf of Goble that he could only have been found guilty if the jury were first sure of Bond's guilt. The judge directed the jury to find Goble not guilty, if they found Bond not guilty. If the conviction was unsafe, on either or both of the grounds advanced on behalf of Bond, it must have been unsafe for Goble.

The respondent's submissions

50. The evidence of Bond placed the three men at the heart of the conspiracy. In their deliberations the jury were bound to question what exactly the Crown's position was in respect of the three men as they were no part of the indictment. The evidence of Bond had elevated the role of each of the men from an introducer to full trading status and control of groups of defaulting traders. In such circumstances it was necessary to clarify the position prior to the retirement of the jury. The *modus operandi* of the operation was the sequential involvement of defaulting traders who could provide a

false basis for the Bond Group to claim VAT. Looking at matters sequentially, Pan Antiques gave way to Red Bus Silver, which was followed by Global Metalworks, all of which were controlled by one of the three individuals. The companies were used as shells, a conduit to provide VAT registration documents. Once the companies became deregistered the fraudulent system moved on to new companies in which the companies' directors had nothing to do with the fraudulent trading.

51. The control by Ellis and Stewart of trading with companies in conjunction with the Bond Group had one fact in common, which is that all the companies with which Ellis and Stewart were involved were defaulters. The inference could be drawn that these men were parties to the wider conspiracy set out in count 1.

52. This was an ongoing course of conduct through which the Bond Group could fraudulently claim VAT to which it was not entitled. It was an ongoing *modus operandi*. Anyone engaged to the extent of each of the three had been undertaking a course of conduct in conjunction with the Bond Group. It was not limited just to their own companies.

53. The involvement of the men with Bond is thrown into sharp focus by the meeting on 11 February 2014. This took place on the same day but following the HMRC visit to Bond. By this time Bond was aware that HMRC had identified a large number of defaulting traders and was alleging a substantial VAT loss. HMRC were seeking information. The timing was consistent with that of a crisis meeting. It took place six weeks before the arrest of Bond and Goble.

54. On the evidence given by Bond prior to the prosecution's third application there was evidence upon which the jury could conclude that the three individuals were party to the wider conspiracy. The Crown was faced with an assertion of involvement of three individuals. The Crown was concerned to clarify the position in respect of each of the individuals as there was potential for confusion by the jury as to their role if they remained unnamed on the indictment. The amendment did no more than clarify issues for the jury. It was neither unfair nor prejudicial to the appellants.

Discussion and conclusion – Ground of appeal 1

55. On 9 November 2018 the prosecution made its second application to amend the indictment ([24] above). The prosecution was seeking to address a perceived risk that the jury might conclude that whilst the defaulting trader defendants had agreed that false VAT claims should be made in respect of their own companies, they were not party to a wider agreement to cheat the Revenue. In the same application the prosecution sought to retain the inclusion of "with others" in the particulars of count 1, conspiracy, on the basis that there was a suspicion that further individuals may have been party to the agreement. Those individuals included Charalambides, Stewart and Ellis. They are identified in the prosecution skeleton argument in support of the application to amend which stated that "those named in defence statements include Doros Charalambides, Ian Stewart … Eddie Ellis … the evidence in relation to these individuals is likely to develop during defence evidence."

56. In ruling upon the second application the judge determined that the phrase "with others" should be removed from the particulars of both the overarching conspiracy (count 1) and the alternative sub-conspiracies, holding that:

> "… In my judgment, if potential conspirators are known they must be identified. If they cannot be identified, they can be referred to as 'persons unknown' … That is not this case. The prosecution know the identity of the people concerned but accept that there is insufficient evidence to charge them as co-conspirators. Therefore, they should not be referred to as 'others' in the indictment … If there comes a time when the prosecution apply to join an identified person as a co-conspirator that application will be dealt with on its merits."

57. It follows that the appellants were on notice of the possibility of the prosecution later applying to join an identified person as a co-conspirator if there was sufficient evidence to charge that person. This is a point accepted by Mr Spens QC in this appeal. It is his contention that by the time of the third application, Bond's evidence had not changed and further, did not provide a sound evidential basis for the proposed amendment as it did not resolve the central question, namely was Charalambides, Ellis or Stewart using Bond or his business in order to carry out their own fraudulent conspiracy or were they acting together with Bond? The evidence of Bond regarding his involvement with the three men is said to establish only that they were involved in trading with the Bond Group on behalf of defaulting traders not that they did so as party to the wider agreement with Bond to defraud the Revenue.

58. The first issue for this court is whether the judge, in determining the third application, was correct to find that Bond's evidence had changed. We are satisfied that by the time the application was made, the evidential position as regards Bond had developed beyond his first prepared statement dated 30 June 2015. Firstly, Bond's prepared statement was not evidence in the case generally unless and until he went into the witness box and repeated it. No prosecutor could have known whether or not Bond was to give evidence. When he did so, his evidence became evidence in the case generally. Secondly, in his ruling, the judge said that in his evidence, Bond had made it clear that the three men who were now identified as co-conspirators were individuals with whom he traded in respect (of a large number) of defaulting trader companies, they were not simply suppliers or co-workers. In respect of Charalambides, he had not only introduced but was trading with Bond in respect of the six companies identified in [39] above. As to Stewart and Ellis, Bond said that trading was being conducted with the two men in respect of a number of defaulting traders which included The Punto Centre Ltd, Barnett Scrap Metal, PD Metals, S Gurney & Co, Metal Trader Ltd, Card Chambers, and Conrad Lea. The judge noted that Bond's evidence had changed and changed in a material way. In our view, the judge was correct so to do.

59. The second issue to be addressed is whether on the evidence there was a proper and sustainable case that each of the co-conspirators was party to an agreement with Bond to defraud the Revenue (element 2) and that each co-conspirator had knowledge of a wider agreement between Bond and others, such that he could properly be said to be party to the single overarching conspiracy alleged by the prosecution (element 3).

60. In our judgment, the striking feature of the trading between the Bond Group companies and the defaulting traders during the indictment period is the sequential nature of the supplier companies. It is graphically illustrated in a schedule prepared

by the Crown which includes the following entries in respect of the defaulting traders linked to Charalambides, Stewart and Ellis:

Gross and VAT figures for defaulting traders trading with the Bond Group in the period 1st January 2008 to 31 March 2014					
Figures on VAT returns			Cash Payment figures	First Trade Date	Final Trade Date
Defaulting company	Gross	VAT			
Pan Antiques Ltd	£5,745,164.94	£854,513.48	£5,587,211.85	02/12/2009	29/10/2010
The Punto Centre Ltd	£3,334,291.47	£526,898.89	£3,247,129.71	09/07/2010	09/09/2011
UK Trading and Marketing	£4,374,832.74	£694,073.10	£4,195,577.37	16/09/2010	03/06/2011
The Red Bus Silver Company	£1,408,850.00	£231,850.00	£1,398,850.00	06/12/2010	29/07/2011
Barnet Scrap Metal	£1,645,464.50	£274,244.08	£1,645,464.50	05/01/2011	03/02/2012
PD Metals	£6,479,657.44	£1,080,126.24	£6,130,802.84	27/04/2011	22/07/2012
S Gurney & Co	£2,798,891.37	£466,481.88	£2,798,891.37	09/06/2011	24/02/2012
Global Metalworks	£32,183,794.13	£5,282,604.30	£24,673,548.62	02/09/2011	26/09/2012
Metal Trader Ltd	£8,733,255.70	£1,455,542.61	£4,133,280.63	06/04/2012	22/02/2013
Card Chambers	£122,586.55	£20,431.09	£0.00	20/07/2012	20/07/2012
Conrad Lea	£116,101.80	£19,350.30	£0.00	12/10/2012	12/10/2012
KRH Antiques	£27,439,944.47	£4,573,324.10	£765,000.00	01/10/2012	10/06/2013
Adem Wholesale Ltd	£464,610.00	£77,435.00	£0.00	05/10/2013	02/12/2013
Invoices on SAGE but not on VAT Returns					
Argentum Metals	£826,060.00	£137,681.20	£0.00	03/12/2013	27/02/2014
Conrad Lea	£210,690.72	£0.00	£0.00	12/10/2012	12/10/2012
Duplicated Invoices					
The Punto Centre Ltd	£182,136.62	£27,866.62			
Barnet Scrap Metal	£74,773.50	£12,462.25			
PD Metals	£83,960.40	£13,993.40			
Metal Trader Ltd	£97,705.20	£16,284.20			

61. What is clear from the schedule, and it was the Crown's case at trial, is that as one defaulting trader company ceased trading another took its place. Further, the companies associated with these three co-conspirators provided a significant amount of the trading of the Bond Group during the indictment period. Bond's companies were consistently involved with these defaulting traders and claimed VAT on purchases from them.

62. We accept the contention of the Crown that the modus operandi of the operation was the sequential involvement of defaulting traders who could provide a false basis for the Bond Group to claim VAT. From that evidential basis there was an inference

which was open to be drawn by the jury that this was not simply sequential trading by defaulting trader companies but evidence of a wider conspiracy to cheat. At the centre of this conspiracy was the Bond Group, Bond was the controlling mind and Goble was responsible for entering the invoices, allocation of cash and completing the VAT returns.

63. Critical to the ongoing nature of this central conspiracy was the supply of defaulting trader companies. Charalambides, Stewart and Ellis were central to the trading of a significant number of defaulting traders with the Bond Group as is demonstrated by the number of companies with which they were involved and the high value of their trading during the indictment period. In our view, in the circumstances of this particular case, these facts provided an evidential basis upon which the inference could properly be drawn that not only was each of the three co-conspirators involved in a conspiracy with Bond to cheat HMRC but each had knowledge of the wider agreement between Bond and others, such that he could properly be said to be a party to the single overarching conspiracy.

64. The fact that there were others who were used by Bond to further his aim of cheating HMRC does not displace the inference that the three individuals were repeatedly engaged in trading as or with defaulting traders and that they were party to the agreement to defraud HMRC.

65. A particularly important circumstance was the meeting which took place on 11 February 2014 between Bond, Stewart and Charalambides ([43] above). We regard the meeting as significant, taking place as it did on the same day as the Bond meeting with officers of HMRC. The fact that these three men were together and talking at such a crucial time is evidence from which a jury could conclude that they were conspiring together, aware of the difficulties identified by HMRC, and were party to the bigger agreement. It is of note that the arrests of Bond and Goble took place just six weeks later.

Unfairness/Prejudice

66. The defence had been on notice since the second application of the possibility of the Crown seeking to add named co-conspirators to the indictment. Bond's evidence, which included his trading involvement with the three proposed co-conspirators in respect of the identified defaulting traders, provided the evidential basis for the amendment. The judge acknowledged the application was very late but rhetorically asked the question "When else could the prosecution have made the application?" Had the judge not allowed the amendment, it would have left open the argument for the defence to pursue that the prosecution case was fatally flawed in that it implied the involvement of the three men who were neither charged nor referred to in the indictment as co-conspirators. It is of note that when asked, leading counsel, then acting on behalf of Bond, was unable to say how he would have run the case differently had he known from the outset that the three men would be named on the indictment.

67. In addressing the issue of unfairness or prejudice the judge identified the "fundamental question" and asked himself: "… is it unjust to allow this amendment". It was the right question and the judge considered it carefully and fairly.

68. The judge accepted that if the amendment was to be allowed then the matters contained within it had to be put to Bond, which was done by the Crown.

69. In determining the third application the judge acknowledged that issues of disclosure could arise. A failure of adequate disclosure has not been pursued at this appeal.

70. The direction which was given to the jury, in respect of this amendment, was agreed by experienced defence counsel. It contained the direction that the jury were not to hold the amendment, which added the three names, against the defendants. In our view, the direction adequately addressed the issue of any prejudice to Bond, and, by implication, Goble.

71. For the reasons given, ground one of the appeal is dismissed in respect of each appellant.

Ground of appeal 2

72. The details of the arrest of Bond and Goble are set out in [10] above. Prior to the arrest, the decision had been made to take both men to Aylesbury police station for interview. Bond and Goble were placed into the back of the same police van at 1:15pm. They were driven to Aylesbury, arriving at approximately 2:15pm. The appellants were not aware of the presence of the listening device in the van and were not told of its presence by the police.

73. During the journey Bond and Goble conversed. Some of the recorded conversation was indistinct. The prosecution and defence separately instructed an expert to listen to the recordings and to provide a report setting out what each asserted could be heard. There were elements of disagreement as between the experts. A joint experts' report, setting out the points of agreement and disagreement, was produced for trial.

74. It was the prosecution case at trial that in the course of that conversation each appellant made remarks which implicated him in the crime with which he was later charged. Amongst the remarks the prosecution relied on as incriminating were the following:

- Having greeted Bond, Goble said to him "I still don't think that they can nail it on you" and he told Bond that he didn't know the reaction of others in the office, because he has been kept isolated from them;

- In response, Bond told Goble that "I just haven't been in control of my offences [this word was disputed by the defence] …" and said "I should have just stopped, I'm doing it because it just became a … rollercoaster". He said that he didn't want to stop and fail, but that he should have stopped years ago when Taylor came on;

- When discussing how the police came to arrest them, Bond asked whether Taylor might have talked and Goble said "he's so deep in it, he's too deep, no". Bond floated the idea that Taylor might himself be arrested, and Goble agreed that it is possible "one day";

- They discussed whether it was "all these companies that were melted down" that triggered the arrests;

- They talked about their phones, and computers and both agreed that there was nothing on the computers of any concern to them, only the accounting data which HMRC already had 99 per cent of in any event;

- They discussed a previous HMRC investigation of which they were aware relating to a supplier company called "Concept" based in Wales;

- Goble commented "we've got to 58/59 and it's the first time we've been caught".

75. The appellants and others had been the subject of surveillance prior to their arrest. That surveillance had been authorised by Alan Nelson, an HMRC Senior Investigation Officer, on 16 May 2013, 13 August 2013, 12 November 2013 and 7 February 2014. On the last occasion upon which he gave the necessary authorisation Mr Nelson questioned the need for further on-going surveillance.

76. The post arrest covert surveillance carried out on 25 March was authorised by Eamonn O'Neill on 23 March 2014, an officer of equivalent rank to Mr Nelson. In evidence at the voir dire held during the trial, Mr O'Neill said that he had been asked to grant this authorisation as Mr Nelson was unavailable. No reason has been given by the respondent as to why he was unavailable. It was at one stage reported that Mr Nelson had been on leave but on further investigation that appeared not to have been so. The request for authorisation was made to Mr O'Neill by the investigating officer, Ralph Walding.

77. Application for the authority to covertly record any conversation in the van was applied for and granted under section 28 RIPA:

> "**28 Authorisation of directed surveillance**
>
> (1) Subject to the following provisions of this Part, the persons designated for the purposes of this section shall each have power to grant authorisations for the carrying out of directed surveillance.
>
> (2) A person shall not grant an authorisation for the carrying out of directed surveillance unless he believes— (a) that the authorisation is necessary on grounds falling within subsection (3); and (b) that the authorised surveillance is proportionate to what is sought to be achieved by carrying it out.
>
> (3) An authorisation is necessary on grounds falling within this subsection if it is necessary - (a) in the interests of national security; (b) for the purpose of preventing or detecting crime or of preventing disorder; (c) in the interests of the economic well-being of the United Kingdom; (d) in the interests of public safety; (e) for the purpose of protecting public health; (f) for the purpose of assessing or collecting any tax, duty, levy or other

> imposition, contribution or charge payable to a government department; or (g) for any purpose (not falling within paragraphs (a) to (f)) which is specified for the purposes of this subsection by an order made by the Secretary of State.
>
> (4) The conduct that is authorised by an authorisation for the carrying out of directed surveillance is any conduct that— (a) consists in the carrying out of directed surveillance of any such description as is specified in the authorisation; and (b) is carried out in the circumstances described in the authorisation and for the purposes of the investigation or operation specified or described in the authorisation."

78. It was undisputed that the surveillance sought and authorised was covert directed surveillance and that Mr O'Neill was an officer of appropriate rank to grant the same.

79. At trial each appellant objected to the admissibility of the evidence of what was said in the van upon the basis that it was unlawful for the police to have recorded their conversation. Exclusion of the evidence was sought pursuant to section 78 PACE.

80. The prosecution case was that the surveillance was necessary and proportionate. It was necessary pursuant to section 28(3)(b) RIPA for the detection of crime; proportionate because the appellants were being prosecuted for serious criminality (albeit serious economic crime) and this was the only way in which evidence of what was said between conspirators after arrest could be obtained.

81. The appellants contended that the evidence was improperly obtained because the surveillance was neither necessary for a legitimate end nor proportionate. It was obtained in breach of section 28 RIPA, as a result it should be excluded pursuant to section 78(1) PACE:

> "In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it".

82. The judge held a voir dire to determine admissibility. He heard evidence from Mr Waldin and Mr O'Neill. He found that there had been no bad faith in the making or granting of the application. He correctly applied the two-stage test of deciding whether firstly the officer granting the authorisation believed that it was necessary and proportionate and secondly whether that was objectively justified. He determined that Mr O'Neill was genuinely of the view that it was: (a) necessary for a legitimate aim; and (b) proportionate to grant the application for authorisation. He found that the decision to authorise the covert recording had not been "a deliberate stratagem to circumvent the defendants' statutory rights". However, he found that objectively the prosecution had not established that the authorisation was either necessary or proportionate. Thus, he held that the evidence had been obtained in breach of section 28 RIPA. He went on to consider whether he should exclude the evidence pursuant to

section 78 PACE. The judge decided that he should not. He relied on the fact that the listening device was installed and used by officers who were acting in good faith and that the police had employed "no oppression, no inducement, no misrepresentation and no entrapment". He said that "no lies were told to induce an admission" and that what had happened amounted to no more than providing an opportunity for the two men to speak to each other.

83. The primary ground in respect of this aspect of the appeal is that the judge, having found that the surveillance was objectively neither necessary nor proportionate, should thereafter have excluded the evidence pursuant to section 78 PACE. The findings of the judge on the voir dire were not the subject of challenge.

84. A review of the relevant authorities identifies the following points:

i) The decision to exclude evidence is fact specific and depends on the view to be taken of the seriousness and significance of the breach and any perceived unfairness arising from it. In *R v Khan and Mahmoud* [2013] EWCA Crim 2230 the police placed a listening device into a van being used to transport defendants from the police station to the Magistrates' Court post charge. Incriminating remarks were made. The police believed that they were acting pursuant to an appropriate authorisation but were found to have been acting outside of that authority. The judge found that they acted throughout in good faith. McCombe LJ accepted that in acting as they did, the police might have breached the suspects' article 8 rights but held that on the facts of the case the evidence was properly left for the jury to consider. In so doing he weighed up a number of factors including that there had been "no misrepresentation, entrapment, trickery, oppression or coercion" involved in getting the defendants to say what they did. At [55] McCombe LJ stated: "the police had simply made use of the opportunity afforded to the two appellants to talk to each other".

In *R v King & others* [2012] EWCA Crim 805 the police placed suspects together in a police van used to transport them to the police station post arrest. A listening device had been fitted in the van. In the course of their conversation in the van, the suspects incriminated themselves in the crimes under investigation. Pitchford LJ stated at [26]:

> "In our judgment, the deliberate flouting of a statutory duty for the purpose only of creating an opportunity for a covert recording may, depending upon the circumstances, result in the exclusion of evidence. In the present case, however, considerations material to the issue of the fairness of the proceedings include the following: (i) During the period of an hour while Mr King and Mr Newin were under arrest and awaiting developments they remained under the supervision of police officers who, as instructed, did not engage them in conversation about their arrest; (ii) The placement of the accused in the same police car provided no more than an opportunity for them to speak together in the belief that they were not being overheard; (iii) No trick or subterfuge was practiced upon the accused so as to lead them to believe that

> they must make some response to their arrests; (iv) The covert recording took place before interview under caution but that fact placed them at no greater disadvantage than if they had been covertly recorded in police custody after interview under caution".

ii) Bad faith is a pointer in favour of excluding the evidence but is not a determinative factor on its own. The presence of bad faith will often result in evidence obtained being ruled inadmissible. The absence of bad faith will often have the opposite result but will not necessarily do so.

iii) Section 78 PACE is designed to ensure that the trial process is fair; it is not there to punish the prosecution or the investigating authorities for misconduct. The trial judge's focus must be on looking to protect the fairness of the trial process: *R v Mason* [1988] 3 All ER 481; *R v Chalkley* [1998] QB 848.

Discussion and conclusion – Ground of appeal 2

85. In our view, it is of importance that the judge, having considered the evidence, did not find that those concerned had acted in bad faith. Once the authorising officer had purportedly granted the authority, thereafter the investigating officers were acting in reliance upon an authority apparently properly given. Although the judge found that this was an authority which should not have been granted, the seriousness of the breach was mitigated by the fact that all the officers acted in the genuine belief that the authority was properly granted and in place.

86. The judge also found that: (i) the covert listening device was not used to circumvent the appellants' legal rights; and (ii) what was said was not obtained through oppression, inducement, misrepresentation, entrapment or as a result of the appellants being lied to. The police made no attempt to question them while they were in the van such as to have breached Code C PACE (Rules designed to prevent the questioning of suspects by the police other than when there are present the safeguards attendant upon a police station interview).

87. What the appellants said was done so of their own free will. The police did no more than give the two suspects the opportunity to talk and then record what they chose to say. This is an analogous situation to that in *R v Bailey* [1993] 3 All ER 513, in which two men after interview were placed in a cell together. A listening device had been installed in the cell. The two men made incriminating statements that were recorded and used at trial. The judge was held to have correctly admited those statements even though they were made after interview and charge when the police would have had no right to interview the men further.

88. Further, the evidence obtained as a result of the listening device being placed in the van could be properly tested as part of the trial process. Recordings were made and were available for the jury. They listened to them. They were assisted by the evidence of two experts who listened to the conversations and transcribed them. They had the assistance of a joint report from the experts which identified what the experts agreed could be heard from the recordings and what was in dispute. The fact that there were live issues as to exactly what was said on the recordings does not render the recordings inadmissible. It was for the jury to decide what they were sure was

said and assess its importance. The jury also heard the evidence of Bond and Goble. Each was able to explain what he said, why he said it and what was meant by it. The jury had the benefit of speeches from counsel and a clear summing up from the judge as to how to use that evidence. This all ensured that the evidence could be safely tested and a balanced and fair view taken by the jury of its relevance and importance.

89. For the reasons above, we do not find that the judge was wrong to determine that the breach of section 28 RIPA should not lead to the exclusion of the evidence.

Section 30 PACE

90. A second point was taken on this aspect of the appeal. It was submitted that the actions of the police breached section 30 PACE and that this additional breach should have been factored into the decision of the judge upon admissibility. The section states as follows:

> "(1) Subsection (1A) applies where a person is, at any place other than a police station — (a) arrested by a constable for an offence, or (b) taken into custody by a constable after being arrested for an offence by a person other than a constable.
>
> (1A) The person must be taken by a constable to a police station as soon as practicable after the arrest."

91. It was submitted on behalf of Bond that the police, having arrested him, did not take Bond "to a police station as soon as practicable after the arrest" but rather drove him to Chesham. That is said to have delayed his arrival at the police station and therefore constituted a breach of the protection afforded to suspects by section 30.

92. This was not a point taken at trial by Mr Trollope QC, experienced counsel then instructed for Bond. This creates difficulties for the appellant in now seeking to make that point. The only mention of section 30 PACE at trial came in written submission made on behalf of Goble. The point there made was more limited. It amounted to a submission that the police had driven the van in which Goble and Bond were seated on a circuitous route between Chesham and Aylesbury which therefore delayed their arrival at the police station. It was based solely on the assertion that the journey between Chesham and Aylesbury took longer than experience suggested it ought to have done. The inference being that the police deliberately delayed the arrival of Bond and Goble at the police station to give them more time to talk in the hope that they would say things to incriminate themselves. The court was told that this written submission was not pursued in oral argument before the judge. In any event the judge dealt with it briefly in his ruling and dismissed it. He found that the evidence did not establish a breach of section 30 and, even if it had, it would not have affected his decision on admissibility.

Conclusion – Section 30 PACE

93. There is insufficient evidence before this court to begin to determine the reasons why Bond was taken to Chesham and how long, if at all, it delayed his transportation to Aylesbury police station. Chesham lies along the route between Park Royal, where Bond was arrested, and Aylesbury where he was being taken. The failure to take that

point at trial means that there is no evidence on the point for this court to consider and no findings of fact to review. Mr Spens QC accepts that it would have been better had that course been followed but nevertheless urges this court to draw factual conclusions on the incomplete evidence before it. We decline to take that course. There is no evidence other than the relative geographical locations of Park Royal, Chesham and Aylesbury and pure speculation as to why Bond was transported as he was. In any event the more serious aspect of this case is that the covert recordings were carried out in breach of the necessary authority. Having determined that the evidence was admissible despite that breach, it is difficult to envisage that a relatively short unlawful delay in taking the appellants to the police station, if established, would affect that decision.

94. Accordingly, and for the reasons given, ground of appeal 2 is dismissed in respect of each appellant.

95. It follows that the appeals of the appellants Bond and Goble are dismissed.