IN THE COURT OF APPEAL
CRIMINAL DIVISION

Case No: 2021/04035/B1
NCN [2022] EWCA Crim 427

Royal Courts of Justice
The Strand
London
WC2A 2LL

Thursday 24th March 2022

B e f o r e:

LORD JUSTICE HOLROYDE

MR JUSTICE JAY

MR JUSTICE BENNATHAN

R E G I N A

- v -

PAUL BOND

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Mr H A Godfrey QC and Mr R W Fitt appeared on behalf of the Applicant

Mr M J Brompton QC, Miss G Jones QC and Mr F Baloch
appeared on behalf of the Serious Fraud Office

J U D G M E N T

Thursday 24th March 2022

LORD JUSTICE HOLROYDE:

Introduction

1. This applicant was convicted of two offences of conspiracy to give corrupt payments. He was subsequently sentenced to a total of three years and six months' imprisonment. His application for leave to appeal against his sentence was dismissed by this court, differently constituted, on 10th December 2021. He now applies for an extension of time (271 days) in which to apply for leave to appeal against conviction. The Registrar has referred the application to the full court.

2. The applicant was one of four men charged by the Serious Fraud Office ("SFO") on an indictment containing five counts alleging conspiracy to give corrupt payments, contrary to section 1 of the Prevention of Corruption Act 1906. The other accused were Basil Al Jarah ("BAJ"), Ziad Akle ("Akle") and Stephen Whiteley ("Whiteley"). Count 1 (against BAJ and Akle), count 2 (against all four accused) and count 3 (against BAJ, Akle and Whiteley) alleged conspiracies to give corrupt payments to Oday Al Quoraishi ("Oday"), an agent of the South Oil Company. Count 4 (against BAJ and the applicant) and count 5 (against BAJ alone) alleged conspiracies to give corrupt payments to public officials in Iraq. In each of the counts, the persons named as co-conspirators included Ata, Cyrus and Saman Ahsani (collectively, "the Ahsanis").

3. In very brief summary, the charges alleged corrupt activity in respect of lucrative contracts which were to be awarded by the Government of Iraq in relation to the export of crude oil from that country. Counts 2 and 4, in which the applicant was charged, related to a project ("the SPM project") involving the installation in the Persian Gulf of Single Point Moorings: floating buoys which allow tankers to load oil offshore. A fuller summary of the allegations is contained in the judgment of 10th December 2021, which has been published as *R v Akle and Bond* [2021] EWCA Crim 1879. All relevant parts of that judgment should be treated as incorporated into this judgment.

4. The applicant pleaded not guilty to counts 2 and 4. In his defence statement dated 15th April 2019 he stated the general nature of his defence: he did not admit that any corrupt payments were made as alleged in the charges; and if they were, he denied any knowledge of their corrupt nature, and denied being party to the alleged (or any) conspiracy. He referred in some detail to the matters with which he took issue and, in stating his reasons for taking issue with those matters, he again indicated that he did not admit that there had been a conspiracy to give corrupt payments to anybody.

5. On 15th July 2019, BAJ pleaded guilty to the counts which he faced. He subsequently asked for a number of similar (but more serious) offences to be taken into consideration when he was sentenced.

The First Trial

6. The trial of the remaining three accused ("the first trial") was heard in the Crown Court at Southwark, before His Honour Judge Beddoe and a jury, between January and June 2020. As in this court, Mr Brompton QC was the leading counsel for the SFO and Mr Godfrey QC for the applicant. Akle (who was first on the indictment) was convicted of the offences charged in counts 1 and 2 and was subsequently sentenced to five years' imprisonment. Whiteley (who was second on the indictment) was convicted of the offence charged in count 2 and was subsequently sentenced to three years' imprisonment. Count 3, on which the jury could not reach any verdict, was left to lie on the file against those defendants.

7. In the applicant's case, the jury could not reach any verdicts. In January 2021 he was retried, before the same judge, on what had been counts 2 and 4 of the indictment, now renumbered as counts 1 and 2. At the conclusion of that retrial he was convicted and sentenced as we have indicated.

Akle's Appeal

8. Akle appealed against both conviction and sentence. His appeal was heard in October 2021, as was the applicant's application for leave to appeal against sentence. The reserved judgment of the court was handed down, as we have said, on 10th December 2021.

9. Akle's grounds of appeal related to three rulings given by the judge in the course of the first trial, and to what were alleged to have been serious failings in disclosure by the SFO in relation to the activities of David Tinsley ("Tinsley"), an American citizen who was actively involved in assisting the Ahsanis in relation to their prosecution in the United States of America. The nature and extent of Tinsley's activities, and of his contacts with the SFO, are set out in the judgment of 10th December 2021, and need not be repeated here.

10. The three rulings to which we have referred were as follows:

> (i) On 21st January 2020, the judge heard and refused an application made by counsel for Akle, to stay the proceedings as an abuse of the process. Akle's counsel had argued that the SFO had acted with Tinsley in a way which breached Akle's right to a fair trial, and he had sought (not for the first time) disclosure of all material which might reasonably be considered capable of assisting that argument. The judge accepted that aspects of the SFO's contacts with Tinsley had been "ill-advised", but rejected the submissions that Akle could not have a fair trial and/or that it was not fair to try him. In giving his ruling, the judge acknowledged that he did not have "the whole picture" and was only dealing as best he could with the material he had.
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> (ii) Also on 21st January 2020, the judge granted an application by the SFO to adduce BAJ's guilty pleas before the jury as evidence of the existence of the conspiracies and of BAJ's participation in them. He refused an application on behalf of Akle to exclude that evidence on grounds of fairness, pursuant to section 78 of the Police and Criminal Evidence Act 1984 ("PACE"). The judge was satisfied on the material before him that BAJ's pleas were freely entered into and were a true reflection of his guilt.
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> (iii) Later in the trial, counsel for Akle sought leave to cross-examine the officer in charge of the case about the involvement of Tinsley with the Ahsanis, the SFO, BAJ and Akle. He did so because Akle's case was that BAJ's guilty pleas had been obtained by improper means, were not genuine pleas of guilty and were therefore unreliable as evidence of the matters which the SFO sought to prove by them. The judge refused to permit such cross-examination. He gave a number of reasons for his decision, one of which was that Akle's defence involved a denial of his own participation in any conspiracy, but did not seem to deny that there was or may have been corruption of Oday and others.

11. In relation to the rulings on 21st January 2020, we understand that both Mr Godfrey on behalf of the applicant, and leading counsel representing Whiteley, had briefly indicated that they supported the submissions made on behalf of Akle. They had not submitted separate skeleton arguments, and were discouraged by the judge from developing any oral submissions.

12. The effect of the rulings was that the SFO were able, pursuant to section 74 of PACE, to rely on BAJ's guilty pleas as conclusive evidence of the existence of the conspiracies and of BAJ's participation in them. In his closing submissions on behalf of the applicant, Mr Godfrey accepted that there had been corruption and focused on the applicant's denials of any knowledge of, or participation in, the making of corrupt payments.

The Disclosure of Additional Documents

13. In his appeal against conviction, Akle again pursued requests for disclosure of material relevant to his arguments relating to the activities of Tinsley. This court directed the SFO to disclose certain material. As a result, a bundle of documents, some 650 pages in number, was for the first time provided to Akle's representatives. We shall refer to this, for convenience, as "the new material". It was not at that stage provided to those representing the applicant, because he was appealing only against his sentence.

14. The new material proved to be of central importance to Akle's appeal against conviction. Counsel for Akle, Mr Darbishire QC, submitted that it allowed an understanding of what had previously been obscure. Some of the key features of the documents are noted at [68] to [86] of the judgment of 10th December 2021.

15. At [91] to [94] of that judgment, the court summarised the relevant law in relation to the SFO's duty of disclosure under the Criminal Procedure and Investigations Act 1996 ("CPIA"), the Code of Practice made under that Act, and the Attorney General's guidelines on disclosure. It noted that by section 3 of CPIA, the disclosure test will be satisfied where material might reasonably be considered capable of undermining the case for the prosecution against the accused, or of assisting the case for the accused; that in applying that test, the parties' respective cases should not be restrictively analysed; that the purpose of disclosure is to enable an accused person to present a tenable case in its best light; and that in deciding whether material satisfies the disclosure test, consideration should be given to, amongst other things, its capacity to support submissions which could lead to the exclusion of evidence, or to a stay of proceedings where the material is required to allow a proper application to be made.

16. The court's conclusions about the new material in relation to Akle's appeal against conviction are set out in [95] to [108] of the judgment. The following points are of particular relevance to the present application:

(i) The SFO had accepted that the new material had been relevant to the issue of abuse of process. In the court's view, it was also relevant to the issues relating to the admission or exclusion of BAJ's guilty pleas. The court held at [96]:

> "… When copies were requested by the defence, they should have been provided. The refusal to provide them was a serious failure by the SFO to comply with their duty."

(ii) The court added at [97]:

> "That failure was particularly regrettable given that some of the documents had a clear potential to embarrass the SFO in their prosecution of this case. We do not suggest that any individual official of the SFO deliberately sought to cover anything up. We are however entirely satisfied that the result of limiting disclosure to the summaries in the schedules was that neither the

> defence nor the judge had anything like the full picture which is now available to this court. …"

(iii) The court also accepted, for reasons which it set out at [99] to [104], that if the documents had been provided to the defence before or at the start of the trial, Akle's counsel "would have had significantly stronger arguments available to him on the issues relating to BAJ's guilty pleas" [98]. Further, if the documents had been available, "the defence would have been able to present their case in its best light" [102].

The Quashing of Akle's Convictions

17. We should set out in full (though omitting footnotes) the conclusion which the court reached at [105] to [107]:

> "105. In summary, we are satisfied that there was a material failure of disclosure which significantly handicapped the defence in arguing that the evidence of BAJ's convictions should be excluded pursuant to section 78 of PACE. We think it striking that in resisting the application to exclude such evidence, the SFO relied on the fact that BAJ was legally represented when he decided to plead guilty to the charges against him, and on the concession by defence counsel that it was not possible to discharge the burden imposed on the defence by section 74 of PACE. Had the documents been disclosed, neither of those arguments would have been available to the SFO: the documents would have shown, much more clearly than appeared from the summaries in the schedules, that the SFO knew that Tinsley was deliberately operating behind the backs of BAJ's lawyers, and that Tinsley wanted to control whom BAJ spoke to; and we think it wholly unlikely that the concession, which was made on the basis of the schedule entries alone, would have been made.
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> 106. As we have noted, the judge expressly recorded that he did not have 'the full picture'; and even without the full picture, he rightly held that the SFO should have had nothing to do with Tinsley. If the documents which have belatedly been provided had been available to the defence at trial, both they and the judge would have had a much fuller picture. The defence would have been better equipped to submit that the SFO should not be permitted to rely on BAJ's guilty pleas to prove the existence of the precise conspiracies with which Akle was charged, and thereby to gain the evidential advantage which they had mentioned to Tinsley. As it was, the defence were denied the stronger position to which they were entitled. In consequence, through no fault of the judge, Akle did not have a fair trial. We find it impossible to say that the judge, if addressed by counsel in possession of all relevant information, would inevitably have made the same decision on the application to exclude evidence of BAJ's guilty pleas.
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> 107. Furthermore, even if the judge had permitted the SFO to

> rely on BAJ's convictions to prove the existence of the conspiracies, and BAJ's participation in them, the defence would have been in a significantly stronger position when applying to adduce evidence relevant to the reliability of those convictions as evidence that BAJ was guilty of the offences charged. Once BAJ's convictions were before the jury, Akle was entitled to seek to persuade the jury, on the balance of probabilities, that BAJ was not in fact guilty of the conspiracies which he admitted. As Mr Darbishire submitted, that would in practice involve the defence seeking to put before the jury an explanation why BAJ might have admitted crimes of which he was not guilty. The documents which have now been provided were the source of relevant evidence in that regard, but they were withheld from the defence. If trial counsel had had them, we are confident that he would have been able to make effective use of that evidence, in particular by cross-examination of the relevant SFO officers. We cannot accept Mr Brompton's submission that the evidence was irrelevant to BAJ's guilt and therefore inadmissible: evidence could have been placed before the jury which was relevant to BAJ's guilt, because it was capable of suggesting an alternative reason for him to have pleaded guilty, namely that his pleas were part of a package which freed him from the risk of prosecution for more serious offences."

18. For those reasons, the court concluded that Akle's convictions were not safe. His appeal was accordingly allowed and his convictions set aside.

The Applicant's Ground of Appeal

19. The applicant brings his present application in the light of, and in reliance on, the decision in Akle's case. His ground of appeal is:

> "1. The SFO fundamentally failed to comply with its duties of disclosure in relation to material that would have permitted the defence on behalf of Mr Bond to:
>
> (a) mount a potentially successful opposition to the SFO's application to adduce the guilty pleas of BAJ as evidence going to prove the existence of the conspiracies; or alternatively,
>
> (b) mount a potentially successful application to exclude those pleas under section 78 of PACE; or alternatively,
>
> (c) in the event that the pleas of BAJ were admitted into evidence by the learned judge, mount through the trial process an attack on the reliability and credibility of those pleas as true evidence of BAJ's guilt and therefore as true evidence of the existence of the conspiracies.

> 2. The Court of Appeal has already found that there was material non-disclosure of documents by the SFO regarding the question of the admissibility and reliability of BAJ's guilty pleas. The court has found that this material non-disclosure means that Ziad Akle did not receive a fair trial. It is submitted that the same logic applies to the case of Mr Bond and it follows that his trial was also unfair and his convictions should be quashed accordingly."

20. Having received that ground of appeal, the SFO rightly disclosed the new material to the applicant's representatives.

Summary of the Applicant's Submissions

21. On behalf of the applicant, Mr Godfrey first submits that the court should exercise its power under rule 36.3(a) of the Criminal Procedure Rules to extend the time in which to apply for leave to appeal, on the grounds that the applicant's representatives did not know the significance of the new material until the judgment of 10th December 2021 was handed down, that they then acted promptly, and that it is in the interests of justice to hear the appeal.

22. Mr Godfrey goes on to submit that the new material shows that the SFO were aware of, and encouraged, the activities of Tinsley in seeking to persuade BAJ to plead guilty, and that the SFO's motive was to strengthen the case against the applicant as well as against Akle. In this regard, Mr Godfrey points to the willingness of the SFO to allow BAJ to plead guilty to the offences on the indictment and to have other, more serious offences – relating to BAJ's role in five other conspiracies, concerning contracts worth in excess of 1 billion US dollars – taken into consideration. He also points to the fact that one of the items in the new material is a record of a phone call on 12th September 2019 in which Tinsley indicated to the SFO case team that he was confident that BAJ would plead guilty, that Akle was very close to pleading guilty, and that he thought that both the applicant and Whiteley would follow.

23. Mr Godfrey acknowledges that Tinsley did not have any direct contact with the applicant. He nonetheless submits that if the new material had been disclosed at the time of the first trial, it would have enabled all three defendants to argue against BAJ's guilty pleas being adduced in evidence. Although other evidence was available to the prosecution if those pleas were excluded, he submits that the jury may or may not have accepted it as proving the existence of the conspiracies. The applicant would therefore have been able to maintain the approach indicated in his defence statement. Once BAJ's guilty pleas had been admitted, however, it was unrealistic for the applicant to do anything other than accept the existence of the conspiracies. It was also unrealistic, at the retrial before the same judge and without any relevant change of circumstances, to seek to re-litigate submissions which had been considered and rejected by the judge at the first trial. Mr Godfrey emphasises that decisions as to the conduct of the defence case were necessarily taken on the basis of the evidence and unused material then available, which did not include the new material.

Summary of the SFO's Submissions

24. Mr Brompton accepts that this court has already found that the SFO made errors of disclosure relevant to the admissibility in evidence of BAJ's pleas. He further accepts that if the new material had been disclosed to Akle before or during the first trial, it would also have been disclosed to the applicant and Whiteley. He submits however that the matters which led to the quashing of Akle's convictions have little or no bearing on the issues in the applicant's case, and that the failures of disclosure identified in Akle's case did not prejudice this applicant

and did not prevent his having a fair trial. He accordingly submits that the application should be refused. He submits that at the first trial this applicant made no application for disclosure, made no application to stay the case against him as an abuse of the process, served no skeleton argument seeking to exclude evidence of BAJ's guilty pleas, and merely said that he supported the submissions made by counsel for Akle. Mr Brompton points out that at the retrial the applicant did not apply to exclude the guilty pleas of BAJ, or the convictions of Akle and Whiteley on which the SFO also relied. He points to those omissions as indicating that the new material related to matters which were of no real relevance or assistance to the applicant's defence. He also emphasises the fact that the applicant originally sought leave to appeal against sentence only, and makes submissions as to the strength of the case against the applicant.

25. Mr Brompton argues that Akle's primary defence was that there was no conspiracy as alleged, and that payments to Oday had been made for a legitimate and not a corrupt purpose. In contrast, he submits, the applicant's defence at his retrial was that there was a conspiracy to give corrupt payments, but that the applicant was not party to it. It is submitted that BAJ's guilty pleas were therefore "largely irrelevant" to the applicant's case, and that accordingly there was no proper basis on which he could apply to exclude those pleas. Moreover, the fact that the business Unaoil was corrupt was actively relied on as part of the defence case at the retrial. The issues related to whether the applicant had played any knowing part in the admitted conspiracies, as to which it is submitted that the SFO were able to adduce strong evidence that he had. Even if the pleas and convictions of others had not been before the jury, Mr Brompton submits that there was "a huge body of evidence" establishing the existence of the conspiracies. He submits that the admission of BAJ's guilty pleas therefore did not prejudice the applicant's defence.

26. We are grateful to counsel for their detailed written and oral submissions, and we are also grateful to all those who have assisted leading counsel in the preparation and conduct of this application. Although we have summarised the arguments briefly, we have taken them all into account.

Analysis

27. As we have noted, the general nature of the case disclosed in the defence statement was not merely that the applicant denied participation in any conspiracy to give corrupt payments: it also included the important point that the applicant did not admit that the alleged conspiracies existed. The SFO was thereby put on notice that it would have to prove that element of the charges against the applicant. Whatever the strengths or weaknesses of the other evidence available to the SFO on that issue, they in fact proved it by adducing evidence of BAJ's convictions. They did so in the face of opposition by counsel for Akle, supported by Mr Godfrey. There was an obvious advantage to the SFO of proceeding in that way: the effect of section 74(2) of PACE is to create a presumption that a person who is proved to have been convicted of an offence "shall be taken to have committed that offence unless the contrary is proved".

28. Once the evidence of BAJ's convictions had been admitted by the judge, it is in our view unsurprising that the applicant did not seek to argue that there were no such conspiracies as were alleged. There was nothing improper in the applicant's tacitly accepting that that argument had effectively been taken away from him, and therefore shifting his focus to other issues in the case.

29. The important point, for present purposes, is that the applicant took that course in ignorance of the existence of the new material, which we have no doubt was relevant to the admissibility of BAJ's convictions. The judge, similarly, made his rulings in ignorance of the existence of the new material. This court has already found that the new material should have been

disclosed to Akle, and it is accepted that, if it had been, it would also have been disclosed to the applicant. We have quoted passages from the judgment of 10th December 2021 which explain how the failure of disclosure significantly handicapped the presentation of Akle's case. In our judgment, it also caused a handicap to the presentation of the applicant's case. We are bound to say that it is an unattractive stance for the SFO first to fail in their disclosure obligations and then to seek to rely on decisions as to the conduct of the case which were all made by the defence on the basis of incomplete information.

30. Whatever may be said about a lack of vigour on the part of the applicant's representatives in supporting Akle's applications, and whatever tactical shift there may have been in the focus of the applicant's case by the end of the trial, the simple fact is that the first two rulings were made by the judge at a time when there was a live issue between the SFO and the applicant as to whether there had been any such conspiracies as alleged. The applicant had explicitly put that in issue in the defence statement which he had properly given in accordance with section 6 and 6A of CPIA. The new material was unarguably relevant to that issue. The failure of the SFO to disclose the new material to the applicant was therefore as serious as the SFO's failure to disclose it to Akle. It is in our view unrealistic to think that the non-disclosure had no material effect on the applicant's ability to present his case in its best light.

31. Similar considerations apply to the SFO's reliance on the fact that, at the retrial, the admissibility of BAJ's guilty pleas was not expressly challenged by the applicant, even on the basis of a formal challenge accepting that the judge had already ruled on the point. We agree with Mr Brompton that a formal challenge of that nature often is made at a retrial, and it could have been made in this case. But the key point, once again, is that decisions as to the conduct of the case were made on the basis of insufficient disclosure and therefore in ignorance of the existence of the relevant material. Moreover, at that stage of the proceedings the SFO were also able to rely on the conviction of Akle to prove the existence of the conspiracy alleged in count 2 (count 1 at the retrial). Thus a further obstacle to any successful submission by Mr Godfrey at the retrial was the ability of the SFO to rely on a conviction which this court has subsequently found to be unsafe. It is, again, unrealistic to think that the applicant's case would have been conducted in the same way if proper disclosure had been made.

Conclusion

32. For those reasons, we accept Mr Godfrey's submission that the logic of the decision in Akle's case applies equally to the applicant's case. Like Akle, the applicant was prevented from presenting his case in its best light. We are satisfied that his convictions are not safe.

33. For reasons which he has explained, Mr Brompton does not ask this court to exercise its power under section 7(1) of the Criminal Appeal Act 1968 to order a retrial. That is, in our view, a proper and fair position for the SFO to take.

34. We therefore grant the necessary extension of time and give leave to appeal against conviction on counts 2 and 4 (counts 1 and 2 at the retrial). We allow the appeal and quash those convictions.

35. **MR GODFREY:** My Lord, thank you very much. The only matter that remains to be dealt with is the question of costs.

36. **LORD JUSTICE HOLROYDE:** Yes.

37. **MR GODFREY:** Mr Bond, whose employers had a Directors and Officer Insurance Policy, was covered by insurance for the costs of the trial and retrial, and indeed for the costs of today's hearing. I would wish to make an application for costs to be paid, to follow the

event, and to be paid by the SFO to the insurers who have funded Mr Bond's legal fees. I have no information at present as to quantum in any shape or form, but would invite the court to allow submissions to be made in writing in relation to such application, as I know – I do not know the detail, but I know was done in the case of Mr Akle.

38. **LORD JUSTICE HOLROYDE:** Yes. It is not necessarily as simple a proposition as costs following the event in this context, Mr Godfrey.

39. **MR GODFREY:** I appreciate that.

40. **LORD JUSTICE HOLROYDE:** So you apply, in effect, for time to put in written submissions on that topic?

41. **MR GODFREY:** I do, my Lord, yes.

42. **LORD JUSTICE HOLROYDE:** And no doubt you would wish to discuss with counsel for the SFO whether any accommodation can be reached between the parties?

43. **MR GODFREY:** I do.

44. **LORD JUSTICE HOLROYDE:** Yes. Mr Brompton, on that basis, do you want to say anything about this application?

45. **MR BROMPTON:** No, my Lord.

46. **LORD JUSTICE HOLROYDE:** You will no doubt have much to say about the application itself .

47. **MR BROMPTON:** I am sure I will, yes.

48. **LORD JUSTICE HOLROYDE:** But until you have seen what it is, you are not really in a position to respond to it?

49. **MR BROMPTON:** Just that, my Lord. May I ask, so far as the timetable is concerned, for relatively prolonged periods of time in order to give the parties the opportunity to liaise?

50. **LORD JUSTICE HOLROYDE:** Yes.

51. **MR BROMPTON:** I am sure it should be possible to do so.

52. **LORD JUSTICE HOLROYDE:** Yes. We will just rise for a moment, just to consider.

(The court adjourned briefly to confer)

53. **LORD JUSTICE HOLROYDE:** Mr Godfrey, Mr Brompton, we think it is eminently sensible of you both to speak in terms of a fairly generous period of time to make the submissions. In addition to all the other complications which arise in an application of this nature, my Lord, Jay J, murmurs the word "subrogation" for your consideration, which will no doubt be a further paragraph or two of any application.

54. So, what we have in mind – unless either of you wants to argue against it – is to direct, Mr Godfrey, that you make any application within six weeks from tomorrow, that would by 6th May; and then, Mr Brompton, a reply six weeks after that, which would be 17th June. At that

stage, we will give written directions as to any further steps which need to be taken. There is obviously no need at the moment for any hearing to be listed. We will address that if and when it becomes necessary.

55. **MR GODFREY:** I am very grateful, my Lord. Thank you very much.

56. **LORD JUSTICE HOLROYDE:** Anything else, gentlemen?

57. **MR GODFREY:** No, thank you very much.

58. **MR BROMPTON:** Thank you.

59. **LORD JUSTICE HOLROYDE:** Thank you all.

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