Neutral Citation No.[2023] EWHC 2731 (SCCO)

Case No: T20157243

SCCO Reference: SC-2022-CRI-000070

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

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

Date: 31 October 2023

Before:

COSTS JUDGE LEONARD

R (ALLSEAS GROUP SA)
v
PAUL SULTANA

Judgment on Appeal under Regulation 10 of the Costs in Criminal Cases (General) Regulations 1986

Appellant: **Allseas Group SA**

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

COSTS JUDGE LEONARD

1. This appeal concerns the determination or assessment (the words being interchangeable for present purposes) of the costs payable to the Appellant from central funds by virtue of an order made under section 17 of the Prosecution of Offences Act 1985 ("the 1985 Act").

2. The Appellant has appealed on 17 grounds, 10 of which have been resolved by agreement. This judgment addresses those grounds which have not. I should express my gratitude to Mr Bacon KC for the Appellant, and to Mr Cohen, Mr Morris and Mr Orde for the Lord Chancellor, for their very thorough submissions on the grounds of appeal that fell to be determined by me, and for their successful negotiation of those that have been resolved by agreement.

Primary Legislation and Policy

3. Section 17 of the 1985 Act reads, insofar as pertinent:

> "**17.— Prosecution costs.**
>
> (1) Subject to subsections (2) and (2A) below, the court may… in any proceedings in respect of an indictable offence… order the payment out of central funds of such amount as the court considers reasonably sufficient to compensate the prosecutor for any expenses properly incurred by him in the proceedings…
>
> (2A) Where the court considers that there are circumstances that make it inappropriate for the prosecution to recover the full amount mentioned in subsection (1), an order under this section must be for the payment out of central funds of such lesser amount as the court considers just and reasonable.
>
> (2B) When making an order under this section, the court must fix the amount to be paid out of central funds in the order if it considers it appropriate to do so and—
>
> (a) the prosecutor agrees the amount, or
>
> (b) subsection (2A) applies.
>
> (2C) Where the court does not fix the amount to be paid out of central funds in the order—
>
> (a) it must describe in the order any reduction required under subsection (2A), and
>
> (b) the amount must be fixed by means of a determination made by or on behalf of the court in accordance with procedures specified in regulations made by the Lord Chancellor."

4. Section 16 of the 1985 Act provides for the payment of defence costs out of central funds. Like section 17, it provides (at section 16(6)) for payment to be limited to such amount as the court considers reasonably sufficient to compensate the defendant for any expenses properly incurred by him in the proceedings, and (at section 16(6A), and before 1 October 2012 at section 16(7)) for the court, in appropriate circumstances, to order payment of such lesser amount as the court considers just and reasonable.

5. Section 20 of the 1985 Act empowers the Lord Chancellor to limit the costs recoverable under section 16 orders. Before section 20 was amended with effect from 1 October 2012, that power

also extended to section 17.

6. In *R (Law Society) v Lord Chancellor* [2010] EWHC 1406 (Admin) Elias LJ and Keith J heard a challenge to regulations introduced by the Lord Chancellor in 2009 under section 20, restricting the amounts recoverable under section 16 orders to Legal Aid rates. The court found the regulations to be unlawful by reference to the provisions of section 16 for compensation to be "reasonably sufficient".

7. At paragraphs 48 and 52 of his judgment Elias LJ said:

> "…The s 20 power has to be exercised "to carry into effect" the principles enunciated in Part II of the Act, and that includes the principles set out in s 16(6)… That provision requires that the compensation must be "reasonably sufficient". It should be such amount as is reasonably incurred for work properly undertaken. In my view, one can only sensibly ask whether the cost has been reasonably incurred by having regard to the prevailing market. The individual defendant seeking legal representation is a consumer in that market. The amount he or she will have to pay to secure the services of a lawyer will be determined by that market…
>
> … The obligation is to provide a sum of money which is reasonably sufficient to compensate the successful defendant. The word "sufficient" pre-supposes that there is some measure to determine whether the amount paid satisfies that criterion of sufficiency or not. It must be sufficient by reference to some particular criterion or criteria. In this case the relevant measure is the principle of compensation, albeit one which is constrained by considerations of what is reasonable and proper expenditure…"

8. The amendments made to section 20 with effect from 1 October 2012 included provision to the effect that the Lord Chancellor may restrict by regulations the amount recoverable under section 16, whether or not that results in the fixing of an amount that the court considers reasonably sufficient or necessary to compensate the defendant.

9. No such provision has been made in respect of orders made under section 17. That appears to embody a policy referred to by Elias LJ at paragraph 65 of his judgment in *R (Law Society) v Lord Chancellor*:

> "… Ms Albon in her witness statement has identified a number of reasons why the Secretary of State has chosen not to cap private prosecutors' costs in the same way as defendants' costs. The Lord Chancellor took the view that it might deter private prosecutions if the claimants were to be so limited and that would be against the public interest. Some private prosecutors conduct prosecutions on a fairly regular basis. This will include a number of charities, such as the RSPCA. They will need to recover expenditure close to actual levels, otherwise they would be out of pocket, and that in turn would deter them from bringing such prosecutions.…"

10. Lane J put those observations into a wider context at paragraph 79 of his judgment in *Fuseon Ltd v Senior Courts Costs Office* [2020] EWHC 126 (Admin):

> "… the compensatory nature of section 17 needs to be recognised in the context of the importance afforded to private prosecutions. That importance explains why, despite the similarities between sections 16 and 17 of the 1985 Act, the Lord

Chancellor was held in *R (Law Society of England and Wales)* to be entitled to decide not to cap private prosecutors' costs in the same way as defendants' costs. Paragraph 65 of Elias LJ's judgment, although describing private prosecutors (such as the RSPCA) who act in that capacity on a fairly regular basis, falls to be read as having a more general application; particularly where he highlighted the fact that, unless private prosecutors can "recover expenditure close to actual levels… they would be out of pocket, and that in turn would deter them from bringing such prosecutions…"

Secondary Legislation and Guidance

11. The determination under section 17(2C)(b) above of the amount of costs payable from central funds is governed by Part III of the Costs in Criminal Cases (General) Regulations 1986 ("the 1986 Regulations").

12. Regulation 5 sets out the mechanism for the assessment of the costs awarded:

> "(1) Costs shall be determined by the appropriate authority in accordance with these Regulations.
>
> (2) Subject to paragraph (3), the appropriate authority shall be…an officer appointed by the Lord Chancellor in the case of proceedings in the Crown Court…
>
> (3) The appropriate authority may appoint or authorise the appointment of determining officers to act on its behalf under these Regulations in accordance with directions given by it or on its behalf."

13. The officers referred to at regulation 5(3) are the Legal Aid Agency ("LAA")'s Determining Officers.

14. Criteria for the assessment of costs awarded out of central funds are set out at Regulation 7, which insofar as pertinent reads:

> "(1) The appropriate authority shall consider the claim and any further particulars, information or documents submitted by the applicant… and shall allow costs in respect of—
>
> (a) such work as appears to it to have been actually and reasonably done; and
>
> (b) such disbursements as appear to it to have been actually and reasonably incurred.
>
> (2) In calculating costs under paragraph (1) the appropriate authority shall take into account all the relevant circumstances of the case including the nature, importance, complexity and difficulty of the work and the time involved.
>
> (3) Any doubts which the appropriate authority may have as to whether the costs were reasonably incurred or were reasonable in amount shall be resolved against the applicant.
>
> (4) The costs awarded shall not exceed the costs actually incurred.
>
> (5) … the appropriate authority shall allow such legal costs as it considers

reasonably sufficient to compensate the applicant for any expenses properly incurred by him in the proceedings…"

15. Rule 45.2(7) of the Criminal Procedure Rules provides:

"On an assessment of the amount of costs, relevant factors include—

(a) the conduct of all the parties;
(b) the particular complexity of the matter or the difficulty or novelty of the questions raised;
(c) the skill, effort, specialised knowledge and responsibility involved;
(d) the time spent on the case;
(e) the place where and the circumstances in which work or any part of it was done; and
(f) any direction or observations by the court that made the costs order.…"

16. Factors to be taken into account on assessment are also listed at paragraphs 1.11 and 1.12 of the 1995 Taxing Officers' Notes for Guidance ("TONG"):

"(a) the importance of the case, including consequences to reputation and Livelihood

(b) the complexity of the matter

(c) the skill, labour, specialised knowledge and responsibility involved,

(d) the number of documents prepared or perused, with regard to difficulty and length

(e) the time expended; and,

(f) all other relevant circumstances…

… (a) regional variations in the expense to solicitors of conducting litigation, and

(b) the assessment of the weight of the case by the Judge who tried it or those who participated in it."

17. Regulation 9 of the 1986 Regulations provides that a prosecutor who is dissatisfied with a Determining Officer's decision may apply for redetermination. Sub-paragraphs (1), (5) and (6) provide:

"(1) An applicant who is dissatisfied with the costs determined under these Regulations by an appropriate authority in respect of proceedings other than proceedings before a magistrates' court may apply to the appropriate authority to redetermine them….

(5) The appropriate authority shall redetermine the costs, whether by way of increase, decrease or at the level previously determined, in the light of the objections made by the applicant or on his behalf and shall notify the applicant of its decision.

(6) The applicant may request the appropriate authority to give reasons in writing for its decision and, if so requested, the appropriate authority shall comply with the request."

18. Regulation 10 provides for an appeal from the appropriate authority to a costs judge. Sub-paragraphs (1) and (11)-(14) provide:

> (1) Where the appropriate authority has given its reasons for its decision on a redetermination under regulation 9, an applicant who is dissatisfied with that decision may appeal to a costs judge…
>
> (11) The costs judge may consult the presiding judge, and the appropriate authority or the determining officer who redetermined the costs on its behalf as the case may be, and may require the appellant to provide any further information which he requires for the purpose of the appeal and, unless the costs judge otherwise directs, no further evidence shall be received on the hearing of the appeal and no ground of objection shall be valid which was not raised on the redetermination under regulation 9.
>
> (12) The costs judge shall have the same powers as the appropriate authority under these Regulations and, in the exercise of such powers, may alter the redetermination of the appropriate authority in respect of any sum allowed, whether by increase or decrease, as he thinks fit.
>
> (13) The costs judge shall communicate his decision and the reasons for it in writing to the appellant, the Lord Chancellor, and the appropriate authority or the determining officer who redetermined the costs on its behalf as the case may be.
>
> (14) Save where he confirms or decreases the sums redetermined under regulation 9, the costs judge may allow the appellant a sum in respect of part or all of any reasonable costs (including any fee payable in respect of an appeal) incurred by him in connection with the appeal."

The Guideline Hourly Rates

19. In May 2014 the Ministry of Justice issued this guidance in respect of determining the costs of private prosecutors:

> "… National Taxing Team determining officers will be guided as to the reasonableness of hourly rates claimed, by the composite rates set out in the Senior Court Costs Office Guide to the Summary Assessment of Costs… These rates usually apply to the location of solicitors' office and not to where the matter is tried. However, where a solicitor not local to the court of trial has been instructed, the determining officer may apply a test of reasonableness as to which rate may be considered as relevant. Where the rate claimed is in excess of the guidance rate indicated in the Senior Court Costs Office guide, further explanation should be provided in the narrative of the claim."

20. The rates referred to in that guidance are generally known as the "Guideline Hourly Rates", and shall be referred to in this judgment as the "GHRs". The GHRs were designed as broad approximations with a view to assisting judges across the country undertaking the summary assessment of costs in civil cases, normally a relatively brief exercise conducted at the conclusion of a short hearing. Accompanying guidance describes them as a starting point for summary assessment and they may be a possible starting point for detailed assessment, but it has been recognised from their introduction that there may be good reason for departing from them in substantial and complex litigation (see for example *Harlow DC v Powerrapid* [2023]

EWHC 586 (KB) and the Guide to the Summary Assessment of Costs 2005 and 2021).

21. The GHRs are set by reference to geographical location and four grades of seniority, from Grade A (a qualified person with at least 8 years' relevant post-qualification experience) to Grade D (an unqualified person such as a trainee solicitor or paralegal).

22. The GHRs were not updated between 2010 and 2021.

The History of this Case

23. The Appellant is a company based in the Netherlands and registered in Switzerland. In 2010 the Appellant had €100m to invest and was drawn into a fraudulent investment scheme by a number of individuals including Paul Sultana ("the Defendant").

24. In the latter part of 2011, the Appellant was persuaded, at a series of meetings in Malta, that monies could be invested for the purposes of trading in highly confidential, discounted Medium Term Notes ("MTNs") under the auspices of and with the approval of the US Federal Reserve Board ("FRB") in Washington DC and with the sanction and approval of the United Nations.

25. The trading in MTNs would purportedly be conducted by a trader authorised by the FRB, and facilitated and arranged by one Marek Rejniak, as an agent of or otherwise authorised by the FRB. The Defendant was a main point of contact with the Appellant's senior corporate officers and was the link between the Appellant and the individuals or companies said to be involved more directly with the "investment opportunity", from which he personally stood to gain €8 million.

26. The Appellant formed a subsidiary company, Allseas Group Ltd (subsequently renamed Group Seven Ltd and referred to in this judgment as Group Seven) in order to make the relevant investment. The Appellant transferred €100 million to Group Seven.

27. On 15 October 2011 Group Seven entered into a loan agreement under which Allied Investment Corporation Ltd ("AIC"), a company which had been incorporated in Malta on 4 October 2011 for the purpose of the fraud, would borrow the Appellant's €100 million. Marek Rejniak was registered as a director, and sole shareholder, of AIC.

28. In November and December 2011, AIC set about removing the funds from the control of Group Seven. AIC transferred the funds to the client account of a firm of London solicitors, Notable Services LLP ("Notable"). Notable held that money in its client account for the benefit of Larn Ltd ("Larn"). Larn was controlled by Luis Nobre, who on behalf of Larn instructed Notable to make a large number of payments out of its client account in what was effectively a money laundering operation. Acting on his instructions, Notable paid out €15 million.

29. Notable's client account was with Barclays Bank, who reported suspicious activity to the Metropolitan Police Service ("MPS"), triggering a freeze on any further transactions involving the Group Seven funds. Ultimately, around €88 million was returned to Allseas.

30. The facts behind the fraud were not straightforward: about 20 individuals were, following investigations, brought to the attention of the Crown Prosecution Service ("CPS"), and the Appellant appears subsequently to have identified a pool of 25 people for potential prosecution.

31. Amongst those arrested and interviewed by the Metropolitan Police at this time were Luis Nobre and the Defendant. Prior to his arrest, Mr Nobre had instructed Mishcon de Reya LLP ("Mishcon") to assist him in unfreezing the funds held on behalf of Larn in its client account at Notable. At that time, the Appellant still believed that Mr Nobre was acting in its interests and on a joint retainer with Mr Nobre, instructed Mishcon with the aim of unfreezing the funds. When however the CPS served an application for a restraint order it became evident to the Appellant that Mr Nobre had lied about his intentions. Mishcon terminated its retainer with Nobre and continued to act for the Appellant.

32. As the police investigation continued, the Appellant instructed Mishcon to bring a civil claim in the Chancery Division against AIC, Mr Rejniak, Mr Nobre and the Defendant. The claim was for the lost €15 million, with damages and expenses. That claim was tried between 13 February and 4 April 2014 and concluded on 26 June 2014, when Peter Smith J handed down an 85-page judgment: *Group Seven Ltd & Anor v Allied Investment Corporation Ltd & Ors* [2014] EWHC 2046 (Ch). Peter Smith J found that Group Seven had established a claim of fraud and that Group Seven was entitled to rescission of the Loan Agreement, return of the monies plus interest and damages.

33. At the conclusion of the civil trial but before the judgment of Peter Smith J had been handed down, the Appellant learned that the CPS had made a decision to charge Mr Nobre (and two others associated with him) but not Mr Rejniak, a number of others resident outside the UK or the Defendant, who is a UK resident. The Appellant took issue with the decision not to prosecute the Defendant, but the CPS did not accept that the Appellant could avail itself of the Victims' Right of Review scheme given its decision to charge Mr Nobre and two others (a position which the CPS was entitled to adopt).

34. In the light of that, the Appellant decided to embark upon a private prosecution of the Defendant. The reasoning behind that decision may be understood from a 50-page advice of 16 December 2014 in which Mishcon carefully and thoroughly set out the legal and evidential considerations attendant on a private prosecution of the Defendant and which also served as an introduction to the issues attendant on the potential private prosecution of a pool of 24 other potential candidates.

35. On 1 May 2015, following an application by the Appellant pursuant to section 1(1)(a) of the Magistrates' Court Act 1980 and Part 7 of the 2014 Criminal Procedure Rules to the Westminster Magistrates' Court, a summons was issued against the Defendant. Mishcon acted for the Appellant throughout the course of the prosecution.

36. In parallel to the criminal proceedings, further civil proceedings in the Chancery Division were brought by Group Seven against individuals including Ali Nasir, Jong- Kang Yi, Notable, Othman Louanjli and Sebastien Elbied. Mishcon acted for Group Seven.

37. Those proceedings were conjoined with a claim brought by Larn (in liquidation and under a new name, Equity Trading Systems Ltd) against Notable, Othman Louanjli and Sebastien Elbied. Materials obtained in the conjoined proceedings were the cause of some difficulty both in respect of disclosure obligations in the Sultana criminal trial and arising from the fact of parallel trials with certain matters of fact in common. Specific applications therefore had to be made by the criminal team at Mishcon to address those problems.

38. Trial took place before Sir Paul Morgan J over eight weeks between February and April 2017.

Judgment was handed down on 6 October 2017. Some idea of the factual complexity of the civil case, which applies equally to the criminal proceedings, can be gleaned from the opening observations at paragraph 3-5 of the judgment of the Court of Appeal in *Group Seven Limited & Ors v Notable Services LLP & Ors* [2019] EWCA Civ 614, on a number of appeals from the judgment of Morgan J:

> "… The appeals are from the order of Morgan J dated 6 October 2017. He heard two actions which were tried together at a hearing lasting eight weeks. The citation for his meticulous judgment, which runs to 151 pages, is [2017] EWHC 2466 (Ch). The two actions are referred to in his order as the "Group Seven Proceedings" and the "ETS Proceedings" although in his judgment he referred to the latter as the "Larn" proceedings, Larn Ltd. being the former name of Equity Trading Systems Limited ("ETS")…
>
> The backdrop for both sets of proceedings was a brazen fraud by which Allseas Group SA, a company registered in Switzerland, ("Allseas") was defrauded of €100 million. The fraud was followed by an attempt to launder the proceeds using the client account of a London firm of solicitors Notable Services LLP ("Notable"). Notable was a multi-disciplinary partnership, whose members included Mr Martin Landman, an accountant, and Mr Francesco Meduri and Ms Cristina Ciserani, both solicitors. The money laundering was partly successful but as a result of police intervention €88 million was returned to Allseas. The present proceedings concern attempts to recover the unreturned balance from Notable and others, including from a bank employee (Mr Othman Louanjli), who dishonestly provided information to Notable in support of one of the main fraudsters, and from the bank that employed him, LLB Verwaltung (Switzerland) AG, formerly known as Liechtensteinische Landesbank (Switzerland) Ltd ("LLB" or "the Bank")…
>
> The complex events that led up to the transfer of the €100 million to Notable's client account and the circumstances surrounding the payments from that account are set out in full detail in Morgan J's judgment and it will be necessary to pick out some of his more important factual findings when considering the issues to which they relate…"

39. The Defendant was tried at the Crown Court at Southwark between January and April 2017. The information I have on the length of trial and the court's sitting days is not entirely clear. The Determining Officer's original determination refers to a 52 day trial, which I do not think can be right. In the redetermination there is a reference to 72 days, which seems to be inaccurate. Mr Bacon's skeleton refers to a trial which ran between 6 February 2017 and 21 April 2017, for which 62 refreshers are claimed, including 10 days' out-of-court work. As far as I can see from the materials provided, the trial effectively started (applying established principles) with bad character and abuse of process applications on 23 January 2017, which would mean that it ran over a period of three months. In any event, the jury was unable to reach a verdict and was discharged. A re-trial was set down for April 2018, again at Southwark.

40. On 23 June 2017, the Defendant applied to the CPS to take over conduct of the prosecution. In March 2018 (a month before the start of the re-trial) the CPS wrote to both parties and the Crown Court to say that although there was sufficient evidence for a realistic prospect of convicting the Defendant, and his prosecution was in the public interest, there was no "particular need" for the CPS to intervene and that it would not be intervening in the

proceedings. The Appellant duly retained conduct of the proceedings.

41. The retrial commenced on 23 April 2018 before HHJ Loraine-Smith. It took place (again, according to the initial determination) over 31 days, and concluded on 11 June 2018 with the conviction of the Defendant, who was sentenced to 8 years' imprisonment.

42. On 18 June 2018, Jonathan Laidlaw KC on behalf of the Appellant applied to HHJ Loraine-Smith for an order, under section 17 of the 1985 Act, that its costs be met from central funds. An attendance note of the hearing produced by Mishcon de Reya indicates that HHJ Loraine-Smith had seen a summary of the Appellant's costs at what he described as a "vast" sum, and that, bearing in mind *R (Virgin Media Ltd) v Zinga* [2014] EWCA 1823 (discussed below) he wanted to know, with a view to giving a short ruling, what efforts had been made to "shop around" and obtain tenders from both solicitors and counsel. HHJ Loraine-Smith also wanted to know more about the numbers and the seniority of the solicitors involved. He listed a further hearing on 10 and 11 September 2018, for those issues to be addressed. It is evident that HHJ Loraine-Smith was considering whether he should make an order under section 17(2A) of the 1985 Act limiting the amount recoverable by the Appellant.

43. Mr Laidlaw produced a note addressing those issues, and the matter came back before HHJ Loraine-Smith not in a two-day hearing but in a short hearing on 17 September, in which he indicated that he would make the order sought and leave the quantification of costs to the Legal Aid Agency ("LAA")'s determining officers. Mishcon De Reya's attendance note of the hearing, however, records him as observing that it was "sensible and practical" for the Appellant to instruct Mishcon de Reya because of the pre-existing relationship, and that even if the Defendant had not been convicted he would have considered the proceedings "very properly brought".

44. HHJ Loraine-Smith's order of 17 September 2018 reads:

> "The Court orders that a payment be made to the prosecution out of central funds in respect of prosecution costs, including the costs of investigation, and that the sum to be paid shall be determined."

45. The Appellant submitted a claim for costs of £5,033,012.33. On re-determination under the 1986 Regulations, the Determining Officer assessed the costs at (by the Appellant's calculation; the figures do not appear to be entirely clear) £2,392,210.12, a reduction of over 50%.

Hourly Rates

46. The first issue I must determine is the hourly rates to be allowed for the work undertaken by the Appellant's solicitors, Mishcon. The claim is based upon the hourly rate actually charged for the work done by Mishcon's fee earners, which are lower than the "headline" rates chargeable in accordance with the terms of Mishcon's retainer. It is not necessary to reproduce the full list of hourly rates, but for those who led the work on the case they are as follows.

47. Alison Levitt KC, a Grade A fee earner, oversaw the prosecution of the Defendant. Ms Levitt is a former Crown prosecutor and former principal legal adviser to the Director of Public Prosecutions. She was a partner in Mishcon throughout the proceedings, and has particular expertise in relation to the "Victims' Right to Review" Scheme (having been central to its

creation) and in relation to judicial reviews of decisions not to prosecute. Ms Levitt was also the author of the CPS Legal Guidance on private prosecutions. For a long period, every private prosecution which was referred to the CPS was personally reviewed by Ms Levitt. Ms Levitt, who made significant contributions to written legal arguments and submissions, recorded a total of 427.5 hours on the case. Her hourly charge out rate averages out at £559.52.

48. Gareth Minty, another Grade A fee earner, is another former Crown prosecutor, having been a Senior Lawyer within the Central Fraud Division and latterly the Organised Crime Division. He is (and was throughout the proceedings) authorised to conduct litigation by the Bar Standards Board. Mr Minty undertook the key day-to-day management of the case, recording 1,993 hours at an average rate of £404.09 per hour. During both trials Mr Minty took responsibility for a number of contentious issues relating to disclosure, witnesses and legal arguments.

49. Mr Minty delegated work as appropriate to a support team, predominantly to Mr Sam Ruback, a Grade C fee earner who coordinated the management and structure of the trials. Mr Ruback recorded some 2,193.9 hours in the case at an average hourly rate of £242.07.

50. Some of the fee earners in the civil proceedings assisted the criminal team, for example in locating evidence and information. Given that they recorded time in the criminal proceedings, it seems to me at the right approach is to assess their hourly rates as if they were members of the criminal team.

51. The Determining Officer allowed hourly rates for grade A, B, C and D fee earners at what she described as “the maximum Supreme Court Costs Office Guideline Hourly Rates”, by which she meant the GHRs as last updated in 2010.

52. Accepting that it was reasonable for the Appellant to instruct Mishcon, a central London firm, the Determining Officer allowed 2010 London 2 (central London, as opposed to City of London) rates, which provide for a Grade A rate of 317 per hour; Grade B £242 per hour; Grade C of £196 per hour; and Grade D at £126 per hour. She did however depart from the strict application of the GHRs in making no allowance for increasing seniority, as where for example a Grade C fee earner gained more than 4 years’ relevant post-qualification experience and so became a Grade B fee earner.

Authorities Referred to by the Parties in Relation to Hourly Rates

53. The authorities to which I have been referred in the context of the hourly rates issue (and other judgments that are not binding on me, but which are persuasive) include, apart from *R (Law Society) v Lord Chancellor*, *Zinga*, *Fuseon Ltd v Senior Courts Costs Office* and *Harlow DC v Powerrapid Ltd*, the following. *R v Dudley Magistrates Court Ex p. Power City Stores Ltd* (1990) 154 J.P. 654; *Wraith v Sheffield Forgemasters Ltd and Truscott v Truscott* [1996] 1 WLR 617; *McEwan v National Taxing Team* [2014] EWHC 2308 (Admin); *Kazakhstan Kagazy Plc v Zhunus* [2015] EWHC 404 (Comm); *Evans v Serious Fraud Office* [2015] EWHC 1525 (QB); *Ohpen Operations UK Ltd v Invesco Fund Managers Ltd* [2019] EWHC 2504 (TCC); *Fuseon Ltd, R (On the Application Of) v Shinners* [2020] EWHC B18 (Costs); *PLK (COP: Costs), Re* [2020] Costs L.R. 1349; *ABS Company Ltd v Pantaenius UK Ltd & Ors* [2020] EWHC 3720 (Comm); *Cohen v Fine & Ors* [2020] EWHC 3278 (Ch); *R (on the application of TM Eye Ltd) v Southampton Crown Court* [2021] EWHC 2624 (Admin); *Samsung Electronics Co Ltd v LG Display Co Ltd (Costs)* [2022] EWCA Civ 466.

54. If only for the sake of relative brevity, I will refer only to those judgments that I believe to be key to the hourly rates issue in this case, but I have borne in mind all of the judgments to which I have been referred.

55. Several of the authorities mentioned above refer to section 16 of the 1985 Act rather than section 17, but (as confirmed by the Court of Appeal in *Zinga*) the relevant principles, for the purposes of this judgment, are the same.

56. *R v Dudley Magistrates' Court* concerned an order made in the Magistrates' court for defence costs to be paid out of central funds under section 16. On assessing the amount to be paid under the order, the justices' clerk disallowed a claim for leading counsel's fees, being of the opinion that the matters alleged against the defendants could adequately have been dealt with by a senior solicitor or junior counsel.

57. Woolf LJ and Pill LJ, in the Divisional Court, quashed that order, finding that the clerk had applied the wrong test. The appropriate question was whether the defendant had acted reasonably in instructing leading counsel (as, the court found, he had) and not whether more junior counsel or a solicitor could have adequately dealt with the case.

58. Woolf LJ, in his judgment, said:

> "It appears to me that subs (6) and subs (7) presuppose that, in properly assessing the amount of costs which are to be allowed in respect of a defendant's cost order, the appropriate taxing authority will carry out a two-stage exercise, first of all, consider what amount will be reasonably sufficient to compensate the defendant for any expenses properly incurred by him in the proceedings. That is stage one. In order to fulfil the requirements of stage one he has to ask himself, first of all, whether the expenses are ones which are properly incurred by the defendant.
>
> Looking at the situation in this case the cost of instruction leading counsel, in my view, could not be described as other than expenses properly incurred, subject to the amount of those costs being reasonable. Having regard to the nature of the case, which I have already described, it is quite impossible for it to be said that the defendants were acting improperly in instructing leading counsel.
>
> Having come to the conclusion that the expenses are properly incurred the court's next task is to consider the amount which is reasonably sufficient to compensate the defendants for those costs. That is a question of quantum. If there are no untoward circumstances that is the end of the task of the taxing authority under the provisions of s 16. However, there can be a situation where subs (7) comes into play. That is a situation where the court is of the opinion that there are circumstances which make it inappropriate that the person, in whose favour the order is made, should recover the full amount mentioned in subs (6). Subsection (7) is dealing with a situation where there is something which causes the court to consider that what would normally be the result of taxation would not apply to this particular case."

59. *McEwan v National Taxing Team* concerned another application for judicial review of the assessment of costs awarded under section 16. The court dismissed the application. At paragraph 19 of his judgment Cranston J distilled from the statutory provisions, *R (Law Society)*

v Lord Chancellor, *R v Dudley Magistrates Court Ex p. Power City Stores Ltd* other authorities, the following principles:

> "(1) The statutory test is one of compensation but subject to the amount being considered reasonably sufficient to cover expenses properly incurred…
>
> (2) Compensation in an amount considered reasonably sufficient to cover expenses for work properly incurred must have regard to prevailing market rates and is not limited by the size of the public purse...
>
> (3) The test is an objective one, necessity plays no part and there is no indemnity for costs actually incurred…
>
> (4) In determining compensation in an amount considered reasonably sufficient to cover expenses for work properly incurred, the taxing authority must have regard to all the relevant circumstances, including the nature, importance, complexity or difficulty of the work and time involved…
>
> (5) In the special circumstances of a particular case it may be considered inappropriate for there to be recovery according to the above principles and the taxing authority can then fix a lesser amount considered just and reasonable…"

60. In *Zinga* the Court of Appeal considered the costs of a private prosecution arising out of intellectual property infringement. The court's judgment referred to the observations of Elias LJ in *R (Law Society) v Lord Chancellor* and to *R v Dudley Magistrates Court* and continued (at paragraphs 21 and 22):

> "…The market in legal services continues to undergo significant change, particularly as a result of the Legal Services Act 2007 which has affected the scope of regulation and the type of entity which can provide legal services.
>
> …The type of fee agreement and the rates charged will be influenced by the particular market in which legal services are required; fees vary significantly as between different segments of the market. Competition is greater. For example, firms which specialise in private prosecutions of cases arising out of intellectual property infringements advertise their services and the fact that legal and investigative costs can be recovered from central government.
>
> …It is now commonplace for commercial clients to seek quotations or tenders and to negotiate the basis on which fees are charged.
>
> …Thus in relation to the test in *Dudley Magistrates*:

i) In determining the first question, namely whether a person, whether it be a corporate body or private individual, has acted reasonably and properly in instructing the solicitors and advocates instructed, the court will consider what steps were taken to ensure that the terms on which the solicitors and advocates were engaged were reasonable. It was submitted on behalf of the Interveners that they do not pursue private prosecutions lightly, but only where state prosecuting authorities are unwilling to

prosecute or where the nature of the case makes it inappropriate; as this is the position of highly responsible industry bodies, a court may also have regard to the steps taken to involve State prosecuting authorities.

ii) In any significant prosecution the private prosecutor would be expected properly and reasonably to examine the competition in the relevant market, test it and seek tenders or quotations before selecting the solicitor and advocate instructed.

iii) We must emphasise that it will rarely, if ever, be reasonable in any such case, given the changes in the legal market to which we have referred, to instruct the solicitors and advocates without taking such steps. Although for the reasons we give at paras 23 and 24 below that issue does not arise in this matter, it will be highly material on all future applications.

iv) In determining whether the costs which are charged are proper and reasonable in a criminal case, the court will also have regard to the relevant market and the much greater flexibility in the way in which work is done.

v) The court will also have regard to the Guidance given by the Ministry of Justice."

61. Applying this approach to the facts of the case, the court noted that the reasonableness of retaining the solicitors and counsel instructed in the proceedings leading up to the appeal was not before the court. As for the appeal itself, as it was the usual practice to instruct on an appeal the legal representatives who had acted at trial, it was reasonable to instruct them for the appeal.

62. That addressed the first stage of the two-stage test. As for the second stage, the court observed (at paragraph 25 of its judgment):

> "However, the reasonableness of the costs incurred must be judged by reference (1) to the proceedings in question – that is to say the conduct of an appeal before the Criminal Division of the Court of Appeal, (2) the nature of the issues before the court – issues of law relating to confiscation proceedings and (3) comparable market rates charged for similar work.."

63. Applying that approach to the facts of the case, the court, bearing in mind that the GHRs required adjustment for the passage of time since they had been last updated in 2010, assessed hourly rates at the rates applicable to a partner in a "West End" (central London) firm, adjusted to £320 per hour (as opposed to £317 in the 2010 GHRs) for a trainee of £125 per hour (as opposed to £126 in the GHRs).

64. In *Zinga* judgment was handed down on 11 September 2014. The court's conclusions were founded, to an extent, upon an emerging market as at that time for private prosecution services, in particular in relation to intellectual property infringement. Such market as there may have been for private prosecution services in relation to financial fraud does not appear to have extended nationwide, at least by the end of 2015.

65. That is evident from the judgment of Lane J in *Fuseon Ltd v Senior Courts Costs Office*. *Fuseon* concerned a small company based in Lancashire. The company had two directors, one of whom was a Mr Shinners. Over a period of years, Mr Shinners had engaged in fraudulent activity which led to the company accruing liabilities in excess of £100,000. Following the discovery

of the fraud his co-director, Mr Laycock, informed the police, who declined to investigate.

66. Mr Laycock, between November and December 2015, attempted to find a local law firm which would provide private prosecution services. His own solicitors undertook criminal defence work, but advised him that they were not in a position to undertake a private prosecution (as Lane LJ observed at paragraph 85 of his judgment, “The duties on prosecutors are, in significant respects, different from and more onerous than those placed on defence teams”). Being unable to find a firm outside London that was both willing and qualified to undertake a private prosecution, in January 2016 he instructed a central London firm, Edmonds, Marshall McMahon Ltd (”EMM”), and ultimately secured a conviction.

67. Lane J accepted that Mr Laycock had been unable to find suitable solicitors outside London. He also found that a Costs Judge had erred in having used, as a comparator for a private prosecutor’s costs, the costs which the CPS would have incurred, had it undertaken the prosecution. Since the correct test to have applied was whether it had been reasonable to instruct London solicitors, there had been an error of law and substantial prejudice to the prosecuting company.

68. Lane J quashed the decision of the Costs Judge and remitted the case to the SCCO for assessment. The assessment was then undertaken by the Senior Costs Judge. His findings are recorded in his judgment in *R (Fuseon Ltd) v Shinners* [2020] EWHC B18 (Costs) and his conclusions on hourly rates (which had been charged at between £350 for a Grade A solicitor and between £225 and £70 for Grade D fee earners) are at paragraphs 24 to 33 of that judgment:

> “… If, as Lane J. found, Mr Laycock could not find a firm more local than EMM, it must have been reasonable for him to instruct EMM. The issue then is whether the rates charged by EMM were reasonable for a central London firm…
>
> The guideline hourly rates for central London (where EMM were then based) for 2010 were: A £317, B £242, C £196, D 126.
>
> The use of the guideline rates in the determination of criminal costs appears to derive from guidance given by the Ministry of Justice to determining officers…
>
> The guideline rates are of course just that. They are fairly blunt instruments designed to assist judges in the summary assessment of costs. The passage of time since 2010 means that they tend now to be used as a starting position rather than as carved in stone.
>
> Part 45 of the Criminal Procedure Rules 2015 applies where the court makes an order for costs under Part II of the 1985 Act…
>
> It seems to me that this was not a particularly complex case. It was however conducted by specialist solicitors and, for the reasons found by Lane J., the work was properly done in London. Given the amount of time spent by the solicitors, over 1,000 hours, I do not think that it can be said that the matter was handled with despatch.
>
> The only factors which it seems to me elevate this matter above the guideline rates are the specialism of the solicitors instructed and the passage of time...”

69. Having made those findings, the Senior Costs Judge allowed the recovery of hourly rates at £350 for Grade A, £210 for Grade C and £140 for Grade D. This represented a significant uplift on the 2010 GHRs. (Other rates awarded were limited by the operation of the indemnity principle, and do not serve to illustrate his general approach.)

The Jurisdiction of This Court

70. Before turning to the parties' specific submissions in relation to hourly rates, I should address four points in relation to the jurisdiction of this court and the appropriate approach to the appeal.

71. The Appellant complains that on the appeal, the Lord Chancellor has raised issues and advanced arguments that (apart from a tendency to evolve in the course of the appeal) are not consistent with the findings of the Determining Officer. By way of example, the Appellant prepared for this appeal on the basis of the Determining Officer's finding that it was reasonable for the Appellant to have instructed Mr Jonathan Laidlaw KC. In submissions, the Lord Chancellor however took issue with the tendering process through which Mr Laidlaw was retained as a leading counsel for the Appellant.

72. The Appellant argues that the limits placed by regulation 10 of the 1986 Regulations upon grounds of objection which were not raised in the course of the redetermination process, prevents the Lord Chancellor from raising such an argument.

73. I am unable to agree. I do not accept that the Lord Chancellor's case on appeal must be in any way limited by the Determining Officer's reasoning or conclusions. Whilst (subject to the court's permission) regulation 10 of the 1986 Regulations limits the evidence and the arguments that the Appellant can advance on appeal to those put before the Determining Officer, it places no equivalent restrictions on what the Lord Chancellor may say in response.

74. Regulation 10 also confers upon the Costs Judge hearing the appeal, jurisdiction to approach the determination completely afresh, whether that increases or reduces what has been allowed by the Determining Officer. (For the same reason, I do not find it necessary to address in any detail the Determining Officer's reasoning: I am applying my own).

75. It seems to me that any apparent unfairness arising from the way in which regulation 10 works, can be addressed by appropriate case management and the exercise of the court's discretion. I believe that that has been done, insofar as the Appellant required it.

76. The second jurisdictional point is that Mr Cohen argues that it is open both to a Determining Officer and to this court to limit the costs recoverable by the Appellant under section 17(2A) of the 1985 Act (not, necessarily, that I should do so, but only that I could do so if I thought that appropriate).

77. I disagree. Mr Cohen's argument rests upon references in *R v Dudley Magistrates' Court* and *McEwan v National Taxing Team* to the jurisdiction exercised by the "taxing authority", but taken in context that term seems to me to refer to those situations in which the court making the costs order will also quantify the costs: in other words, where the court making the section 17 order is itself the "taxing authority".

78. The section 17(2A) jurisdiction can, expressly, only be exercised by a court. The quantification

of the costs awarded by the court may be undertaken by a Determining Officer on behalf of the court under section 17(2C)(b), but that determination, in accordance with the provisions of that subsection, is governed by the 1986 Regulations, as is the Determining Officer's jurisdiction. The 1986 Regulations do not confer upon the Determining Officer any jurisdiction to make any kind of order, much less an order limiting costs under section 17(2A).

79. The Costs Judge's jurisdiction on appeal from the Determining Officer is, similarly, a statutory jurisdiction governed entirely by the provisions of the 1986 Regulations, which, by virtue of regulation 10(12), limit the Costs Judge's jurisdiction to that of the Determining Officer.

80. Even if this court had any section 17(2A) jurisdiction, it would be inappropriate for me to exercise it. That is not just because the court, in the person of HHJ Loraine-Smith, has already decided that this is not a case for a section 17(2A) order. It is also for the reasons set out at paragraph 56 of the judgment of the court in *R (on the application of TM Eye Ltd) v Southampton Crown Court*:

> "It is for the court which has actually heard the case presented by the private prosecutor to determine how to exercise those statutory powers. A DO is well-qualified to assess the reasonably sufficient sum, and will no doubt be punctilious in doing so. But the DO will proceed on the basis of the antecedent decision by the court as to whether that sum is to be paid in full or subject to some limitation. As Ms Cumberland put it in her skeleton argument, the factors to be considered by a DO in accordance with the 1986 Regulations "do not align precisely" with those which a court may consider under s.17."

81. The third point is not one of jurisdiction but of approach. Mr Cohen argues (as I understand it) that it is within my discretion, on determining hourly rates, to make a *Singh* reduction (*R v Supreme Court Taxing Office ex parte John Singh and Co* [1997] 1 Costs LR 49) if that seems to me to be appropriate.

82. Again, I cannot agree. The appropriate application of a *Singh* discount involves the classification of work into categories; stepping back and looking at the totality of the time claimed in relation to each type of activity; considering if, taken as a whole, the time claimed for that activity was reasonable; and if not, making an appropriate overall reduction. That was the approach endorsed by Henry LJ in *Singh*.

83. At paragraph 91 of his judgment in *Fuseon Ltd v Senior Courts Costs Office* Lane J emphasised the importance of the categorisation exercise, and at paragraph 39 of his judgment in *R (Fuseon Ltd) v Shinners* the Senior Costs Judge, having referred to paragraph 91 of Lane J's judgment, said:

> "What the determining officer did in *Singh*… was to reduce the overall time allowed for certain classes of work, so that a reasonable total was allowed for those particular tasks. The *Singh* principle cannot be used to reduce the reasonable hourly rate that has been allowed."

84. That is a view with which I respectfully agree.

85. The fourth point is that I understood Mr Cohen to say that the exercise of the Determining Officer's or Cost Judge's judgment under regulation 7(2) of the 1986 Regulations entails the exercise of

hindsight. That seems to me to go directly contrary to the conclusions of Lane J at paragraph 104 of his judgment in *Fuseon v Senior Courts Costs Office,* when he stated that the application of hindsight is not permitted on the assessment of costs awarded under section 17 of the 1985 Act. One must assess the reasonableness of decisions made or work done in the context of matters as they stood at the time that the decision was made or the work was done.

The Appellant's Submissions on Hourly Rates

86. The Appellant's case in relation to hourly rates is straightforward. The GHRs have never been "maximum" rates. No allowance has been made by the Determining Officer for the passage of time between 2010 and 2018, nor for the matters such as complexity, difficulty and skill referred to at regulation 7 of the 1986, Rule 45.2(7) of the Criminal Procedure Rules and TONG. Nor, argues Mr Bacon, is it appropriate to allow the same rate for, say, all Grade A fee earners because that does not recognise the particular contribution made by particular fee earners to the case. Bespoke rates are more appropriate in a case of this nature.

87. The Determining Officer's rigid adherence to the 2010 GHRs does not, accordingly, achieve reasonably sufficient compensation for the Appellant's expenditure, as required by section 17 (1) of the 1985 Act.

The Lord Chancellor's Submissions on Hourly Rates

88. The Lord Chancellor's submissions, as I have mentioned, have tended to evolve. In written submissions offered by the Lord Chancellor in accordance with a timetable set by the court, Mr Morris referred to advice given by Mishcon to the Appellant in October 2014 to the effect that private prosecutors are expected to review the legal market and seek tenders from different firms before selecting solicitors and advocates, failing which, as Mishcon put it by reference to *Zinga*, "it will usually mean that costs have not been 'reasonably' incurred." There was, nonetheless, no tendering process for solicitors. Accordingly, the court could not be sure that the hourly rates charged by Mishcon were proper and reasonable, which must be determined by reference to the prevailing market. Absent the certainty that would have been brought about by an appropriate tendering process, the court would be obliged, in accordance with regulation 7(3) of the 1986 Regulations, to resolve the element of doubt against the Appellant by applying the 2010 GHRs, adjusted for inflation.

89. A "position statement" filed by the Lord Chancellor shortly before the hearing of the hourly rates issue, along with Mr Cohen's oral submissions, developed a rather different argument.

90. Before me, Mr Cohen made it clear that he did not take issue with the objective reasonableness of the choice of Mishcon to conduct a private prosecution against the Defendant. This did not, he submitted, dispose of the need to consider market rates. That is because the measure of what is reasonably sufficient to compensate the prosecutor in accordance with section 17(1) of the 1985 Act must, in accordance with *Zinga*, be determined by the market.

91. The question of whether the compensation sought by a private prosecutor is a function of the market will be answered (*Zinga* again) by the private prosecutor having examined the competition in the relevant market, tested and sought tenders or quotations before selecting legal representatives.

92. If a private prosecutor does not test the market then the claim for compensation faces an

evidential obstacle, given that the rates charged by its legal representatives are not *prima facie* evidence of the market. In that situation a Determining Officer has to identify what the market would charge, resolving any doubt, in accordance with regulation 7(3), against the private prosecutor. The Determining Officer will be guided by the guideline hourly rates. Where an applicant's solicitors (however objectively reasonable the choice of those solicitors might have been) were not chosen by market tender, the Determining Officer has no other evidence other than the guideline hourly rates.

93. Given that the GHRs are set by reference to location as well as seniority, the Determining Officer has to ask which location is appropriate for the case in question. He or she will look at all the relevant circumstances of the case including the nature, importance, complexity and difficulty of the work and the time involved and identify an appropriate location.

94. If no tendering has taken place, the Determining Officer will have doubt that the charges rendered by the private prosecutor's legal representatives are representative of the market. The DO will then have to identify the least expensive location in which the work could have been undertaken because he or she will have doubt that the more expensive geographical bands represent the "prevailing market", and in accordance with the observations of Leggat J (as he was then) at paragraph 13 of his judgment in *Kazakhstan Kagazy Plc and others v Zhunus and others*:

> "The touchstone is not the amount of costs which it was in a party's best interests to incur but the lowest amount which it could reasonably have been expected to spend in order to have its case conducted and presented proficiently, having regard to all the relevant circumstances".

95. The distance between the private prosecutor and the "lowest" geographical band within the GHRs is irrelevant to the identification of the appropriate location, though it could arguably justify a small increase in the amount of the band for necessary travel time.

96. On this appeal, the Court will have to decide which band represents the "lowest" location within the GHRs of solicitors (the bands being the "prevailing market") which could cater to this specific prosecution (for example, a firm in Colchester might not have been able to do it but it is open to the Court to conclude that one in Manchester could).

97. In oral submissions Mr Cohen argued that Section 17(1) mandates a two-stage test on assessment. First, one must identify whether the costs have been properly incurred. Then one must identify a sum sufficient reasonably to compensate the private prosecutor. This is not just (as in civil proceedings) a test of whether costs were reasonably incurred and reasonable in amount.

98. Even where the choice of solicitor is, objectively speaking, reasonable (and the Lord Chancellor accepts that, in this case, the choice of Mishcon was reasonable) that only meets the first test. The court, when considering reasonably sufficient compensation, must consider the market and should not be limited to the market local to the solicitors reasonably chosen, insofar as available, rely upon its own knowledge of the market.

99. If, for example, solicitors in Manchester rather than London could have undertaken the work, then Manchester market rates should inform the court's decision, whether or not the choice of solicitors in London was reasonable. Equally, if the London market seemed to be appropriate,

one might take account of the rates charged by EMM as a prominent firm of London solicitors undertaking private prosecution work, as recorded in the judgment of the Senior Costs Judge in *Fuseon Ltd v Shinners*, and bearing in mind that those rates were likely to be standard, rather than tailored to the particular case.

100. Section 17(2A) creates a third-stage test, in that it may be appropriate to limit costs by reference to that section, and *Singh* a fourth, in that it may be appropriate to make a *Singh* reduction.

101. In considering all of these matters the court must, in accordance with regulation 7(3) of the 1986 Regulations, resolve any doubt against the private prosecutor.

Conclusions: Whether the Appellant's Choice of Solicitor was Reasonable

102. It is not necessary for me to address this point at any length, because the Lord Chancellor has conceded that the Appellant's choice of Mishcon as it solicitors for the purposes of the prosecution of the Defendant was, objectively, a reasonable choice. I should however make some observations.

103. It seems evident that HHJ Loraine-Smith's decision not to make any order limiting the cost recoverable by the Appellant under section 17(2A) of the 1985 Act was informed by his conclusion that it was reasonable for the Appellant to instruct Mishcon. It does not necessarily follow that I am bound to take that view, but for the avoidance of doubt I should say that, having had the benefit of reviewing the written submissions made to him for the purposes of this decision, I would respectfully agree (as, evidently, did the Determining Officer). I do not doubt that the choice of Mishcon was a reasonable one.

104. I could (and if the necessity were to arise, would) explain my reasons for that conclusion in more detail, but as the point is conceded I will move on to the matters that remain in issue.

Conclusions on the Appropriate Approach to Assessing Solicitors' Hourly Rates

105. I have already given my reasons for concluding that it is not open to me either to make a 17(2A) order or, in any other context than the consideration of the total time claimed for undertaking given categories of work, to apply a *Singh* reduction.

106. This leaves me to address Mr Cohen's other arguments, which I would summarise as follows. First, applying section 17(1) of the 1985 Act, the questions of whether expenses were reasonably and properly incurred and the identification of an amount sufficient reasonably to compensate the prosecutor for those expenses, are two quite separate questions. Even where (as here) it was reasonable to instruct central London Solicitors, that only addresses the first question. The second question requires consideration of the market. The fact that the market has not been tested by tendering creates an element of doubt that must be resolved against the Appellant, so that I must apply the GHRs by reference to the least expensive locality in which the work could have been done.

107. I am unable to accept that analysis, for these reasons.

108. The authorities to which I have referred do not seem to me to support the proposition that the question of whether costs were reasonably and properly incurred, and the identification of a

sum reasonably sufficient to compensate the person who has reasonably and properly incurred them, are entirely separate questions. The answer to the first question must necessarily inform the answer to the second.

109. That is why, at paragraph 19 of its judgment in *Zinga*, the Court of Appeal was able to summarise the principles to be derived from *R v Dudley Magistrates Court* in this way:

> "… there were two questions.
>
> vi) Whether it was proper and reasonable to instruct the solicitors and/or advocates actually instructed. It did not matter whether the work could have been done adequately by someone less experienced, provided it was proper and reasonable to instruct those instructed.
>
> vii) If it was proper and reasonable, then the costs were recoverable, provided the costs were reasonable."

110. The court went on, at paragraphs 23 to 25 of its judgment in *Zinga*, to consider separately the question of whether it was reasonable to instruct the solicitors and counsel who appeared on the appeal (finding that, insofar as the issue was before that court, it was), and then whether the costs were reasonable. That stood to be judged by reference to a number of criteria, including "comparable market rates charged for similar work".

111. The identification of "comparable" rates must necessarily be informed by the location of the solicitors reasonably chosen. Manchester hourly rates are not comparable with central London rates, any more than Manchester property prices are comparable with central London property prices.

112. That would seem to be why, despite noting that there was in fact an emerging market in private prosecutions for intellectual property infringements, once satisfied that the choice of central London solicitors was reasonable the Court of Appeal in *Zinga* awarded (as adjusted for the passage of time) the GHRs for central London, without finding any need to look further afield. The Senior Costs Judge employed a similar approach five years later, in *R (Fuseon Ltd) v Shinners*. Although it was the absence of suitable solicitors outside London that led him to conclude that the instruction of London solicitors was reasonable, it was the conclusion that the choice of London solicitors was reasonable that made it appropriate to base his assessment of costs on (suitably adjusted) central London GHRs.

113. *Wraith v Sheffield Forgemasters Ltd* is the most important authority, in civil cases, on the importance of choosing solicitors in an appropriate location. *Wraith* established, for the purposes of the recovery of costs, that a litigant who makes a "luxury choice" by instructing solicitors in an expensive location, when in the circumstances of the particular case less expensive solicitors in another location would have been the reasonable choice, may expect to recover only a level of costs attendant upon the reasonable choice. In practice, that usually entails awarding hourly rates commensurate with solicitors in an appropriate location, for example substituting Manchester rates for London rates.

114. The other side of that coin is that if, in the circumstances of the case, the more expensive

solicitors were the reasonable choice, then the client (as in *Truscott v Truscott*) may expect to recover costs accordingly.

115. That principle, in my view, applies equally to the recovery of costs under section 17(1) of the 1985 Act. So much seems evident from the 2014 Ministry of Justice guidance to which I have referred; from the fact that the Court of Appeal, in *Wraith v Sheffield Forgemasters Ltd* applied *R v Dudley Magistrates Court*; and from the fact that Lane J, in *Fuseon Ltd v Senior Courts Costs Office*, applied *Wraith.*

116. Given that the Appellant's choice of solicitors in Central London was a reasonable one, it follows that the decision not to undertake a tendering process was also a reasonable one (as Mr Bacon puts it, putting this case squarely within the exceptions to the general rule contemplated by the court in *Zinga*). Mishcon prudently advised the Appellant in October 2014 of the risks, in the light of *Zinga*, attendant on not undertaking such a process. Bearing in mind that *Zinga* had been decided the previous month, they would have been open to criticism if they did not, but given that Mishcon was the reasonable choice a tendering process would have been an empty gesture.

117. In those circumstances, the absence of a tendering process cannot in itself create any element of doubt, as Mr Cohen suggests, as to the appropriate measure of compensation. Nor could it be right to identify the appropriate measure of compensation by reference to that part of the country in which the work might have been done at least expense. As Woolf LJ *R v Dudley Magistrates Court* explain, that is the wrong test. The question is whether the instruction of Mishcon was reasonable.

118. In summary, one cannot separate the question of whether the Appellant's choice of solicitors was a reasonable one from the exercise of identifying a sum reasonably sufficient to compensate the Appellant for the expense attendant on instructing those solicitors. The two are inextricably linked. To adopt the approach advocated by the Lord Chancellor would be to depart from this court's task of identifying an amount reasonably sufficient to compensate the Appellant as required by section 17(1) of the 1985 Act.

119. If I am wrong about any of that, there is to my mind another good reason to conclude that it cannot be right to adopt the Manchester rates mooted by the Lord Chancellor as a possible basis for calculating a reasonably sufficient sum to compensate the Appellant. Given the dearth of market evidence in this case I wondered why Manchester was mentioned at all, but I understand it to be accepted on behalf of the Lord Chancellor that although private prosecution services suitable for this case cannot be found nationwide, they may be found in Manchester.

120. Whether or not such services can be found in Manchester now, it seems clear from the conclusions of Lane J in *Fuseon Ltd v Senior Courts Costs Office* that they were not to be found in 2014, when the Appellant instructed Mishcon. Lane J accepted Mr Laycock's evidence that despite his best efforts, he could not, in late 2015, find outside London a solicitor willing to and capable of undertake the prosecution of a relatively straightforward UK fraud involving about £100,000. In the light of Lane J's findings I can find no basis for supposing, much less assuming, that there would in 2014 have been any kind of market outside London for the prosecution of a complex international fraud involving €100 million.

Conclusions: Hourly Rates

121. Mr Cohen suggests that the rates charged to Mr Laycock by EMM, as recorded in the judgment of the Senior Costs Judge in *R (Fuseon Ltd) v Shinners,* offers at least an indication of the market in central London in 2014, being the rates charged by perhaps a prominent firm willing and able, at that time, to undertake private prosecutions.

122. I do not think that that can be right. One firm cannot, to my mind, represent a market. Given the limited range of options apparently available in 2014, Mishcon's hourly rates could reflect as well, if not better, such "market" as can be said to have existed for private prosecution services for a fraud of this complexity and on this scale. Nor can it be right to award less than what would be a reasonable hourly rate for Mishcon's work on the assumption that another firm might have charged less (a variation on the error identified by Woolf LJ in *R v Dudley Magistrates Court*).

123. Nor do I know whether the rates charged by EMM in *R (Fuseon Ltd) v Shinners,* were their standard rates. The fact that several of the hourly rates awarded by the Senior Costs Judge were limited by the indemnity principle suggests that there may have been a concessionary element: Mr Laycock, as Lane J noted, had been left in a very difficult financial position following his co-director's fraud.

124. Mr Bacon has suggested that no firm of solicitors would have undertaken a case of this nature other than at similar rates to those claimed by Mishcon, but I have no evidence to support that proposition either.

125. Bearing all that in mind, I do not think that it can be right to accord to what either Mishcon charged for this case or EMM is known to have charged for another (not really comparable) case, more weight than the factors identified in the 1986 Regulations, Rule 45.2(7) of the Criminal Procedure Rules and TONG.

126. In the face of such limited evidence, it seems to me that I must of necessity refer to the GHRs, making an adjustment appropriate for the passage of time and for those factors. Because the choice of central London solicitors was reasonable, my starting point must be the GHRs for central London.

127. Mr Bacon has referred me to a number of judicial decisions from late 2019 into late 2020 offering various bases for adjusting the 2010 GHRs by reference to inflation, but apart from a judicial consensus that the GHRs were out of date they do not seem to me to offer a uniform approach. I also bear in mind that Lord Dyson MR, when considering a review of the rates in 2014, took the view that an inflation-based adjustment of the 2010 GHRs would be arbitrary. Thanks to the updating of the GHRs in 2021, I have better information to hand than did those judges struggling with outdated GHRs in 2019 and 2020.

128. The approach I have taken has been to average out, year by year, the increase in the GHRs between 2010 and their eventual updating in 2021, and to identify (without attempting to be overly precise) a median figure for the period between 2014, when the Appellant instructed Mishcon to undertake the prosecution, and 2018, when the Defendant was convicted. The resultant figures, rounded to the nearest £5, are for Grade A £350; Grade B £270; Grade C £220; and Grade D £135. That represents an increase on the 2010 rates, for the Grade A and Grade B fee earners, of about 10% and 11% respectively; for Grade C 12%: and Grade D, 7%.

129. Taking those as the central London GHRs suitably adjusted for the passage of time, the next question is the extent to which they should be further adjusted to take into account the factors identified in the 1986 Regulations, Rule 45.2(7) of the Criminal Procedure Rules and TONG.

130. Mr Bacon points out, with some justification, that the work done in this case bears comparison with the sort of heavy commercial litigation that might, under the GHRs as updated in 2021, have justified City of London rates (regardless of postcode). These are not, however, civil proceedings. As observed by Hickinbottom J (as he then was) at paragraph 25 of his judgment in *Evans v Serious Fraud Office*, those practising in criminal work can reasonably expect to receive less for their work than their civil counterparts. That observation was made in the context of counsel's fees, but I believe must equally be applicable to the costs of solicitors.

131. On the other side of the equation, I bear in mind that this was a much heavier, more complex and more difficult case than that considered by the Senior Costs Judge in *R (Fuseon Ltd) v Shinners.* I bear in mind not only the amounts of money involved and the factual complexity of the fraud, but the difficulties attendant on proving beyond reasonable doubt that the Defendant, who claimed to be an innocent attempting to arrange the Appellant's involvement in what he thought a perfectly legitimate investment opportunity, in fact knew that the investment scheme he was advocating was a fraudulent one. That entailed a close analysis of his words and actions through a complex series of meetings, commission arrangements and business deals and extended to his involvement with previous such schemes and the introduction of extensive bad character evidence covering his conduct over more than two years. It seems to me that the Defendant's criminal conduct would have been significantly more difficult to pin down than, say, Mr Nobre's, convicted as Mr Nobre was of money laundering offences following his dissipation of funds purportedly meant for investment.

132. I also bear in mind that the prosecution, which went to two full trials, was hard fought and complex, involving a vast amount of evidential material and much contentious procedural work. There were for example two applications by the Defendant to stay the case as an abuse of process, primarily on the ground that it was wrong for the prosecution to be undertaken by the Appellant; an application by the Defendant to dismiss one of the counts on the re-trial on indictment; an application by the Defendant to have the case taken over by the CPS; and substantial arguments relating for example to the structure of the indictment, the admissibility of the evidence of a prosecution witness incarcerated abroad, whether the jury should be made aware of the fact the prosecution, was a private prosecution. The Appellant's duties of disclosure, bearing in mind in particular that the prosecution ran in tandem with civil proceedings, were onerous.

133. These matters put this case in a quite different bracket to *R (Fuseon Ltd) v Shinners*. In considering how the recoverable hourly rates should reflect that, I have resolved any element of doubt, as I must under regulation 7(3) of the 1986 Regulations, against the Appellant.

134. The conclusion I have come to is that I should allow for Grade A, throughout the case, an hourly rate of £400; for Grade B, £300; for Grade C, £250; and for Grade D (given a lower level of responsibility) £150. Where lower rates have been claimed, they will be allowed at the claimed rate.

135. I do not think it appropriate to award higher rates for individual fee earners such as Ms Levitt, despite her impressive credentials. I believe that it must be right to award no more than the

appropriate hourly rate for a Grade A fee earner with the capacity to manage the litigation, Mr Minty being an example. Nor would I regard it as a realistic or proportionate exercise to differentiate between different fee earners of the same seniority (as categorised in the GHRs) when identifying the recoverable hourly rates.

136. I have recognised the exceptional responsibility taken on by all Mishcon's Grade A, B and C fee earners in allowing an appropriate uplift from the GHRs, as adjusted for the passage of time. Some fee earners (as mentioned above) will, as they gained experience, have moved from one category to another, as from Grade C to Grade B.

137. The Determining Officer did not adjust the rates awarded to take account of increasing experience. The logic of that decision was that the rate paid should be appropriate to the job being done, and if a job can be done by a Grade C fee earner, then that is the appropriate rate to pay, whether or not that fee earner subsequently becomes a Grade B.

138. As Mr Bacon points out, that is not necessarily consistent with her rigid application of the GHRs. Arguably, it may also fail to recognise the value of the additional experience the relevant fee earners will have brought to the case as time went on.

139. My own approach is based on the GHRs, but I have not applied them rigidly. I have departed from them in adding a significant uplift to reflect the factors I have mentioned. According to the Determining Officer's written reasons, the responsibility accorded to each of the relevant fee earners did not change as they gained experience. Nor is it possible for me to quantify how the increasing seniority of the fee earners concerned may have added to the value they brought to the case. For those reasons, resolving the element of doubt against the Appellant, I would agree with the Determining Officer's approach and award rates appropriate to each fee earner's seniority as at the date of their initial involvement in the case.

Counsel's Fees: Principles

140. Many of the authorities to which I have already referred apply to the assessment of counsel's fees in this case just as they do to the fees of their instructing solicitors. Other key authorities specific to the assessment of counsel's fees have been helpfully summarised in the Lord Chancellor's written submissions.

141. The touchstone for any assessment of a fee charged by counsel is the 'hypothetical counsel' test, articulated by Pennycuick J in *Simpsons Motor Sales (London) v Hendon Borough Council* [1965] 1 WLR 112, at 117 (and referred to at paragraph 24 of the judgment of Hickinbottom J in *Evans v Serious Fraud Office*):

> "One must envisage a hypothetical counsel capable of conducting the particular case effectively but unable or unwilling to insist on the particularly high fee sometimes demanded by counsel of pre-eminent reputation. Then one must estimate what fee this hypothetical character would be content to take on the brief… There is, in the nature of things, no precise standard of measurement. The taxing master, employing his knowledge and experience, determines what he considers the right figure."

142. In *Loveday v Renton (No. 2)* [1997] Costs LR (Core Vol) 204, a Legal Aid case, Hobhouse J (as he then was) addressed a claim by counsel for remuneration, above and beyond the brief

fee and refreshers, for work undertaken between the delivery of the brief and the end of trial. He said (at 209, 211, and 215):

> "In assessing a brief fee it is always relevant to take into account what that fee, together with the refreshers, has to cover. The brief fee covers all the work done by way of preparation for representation at the trial and attendance on the first day of the trial. But in heavy litigation, particularly where there is a team of barristers and experts, additional work is involved in ensuring that the client is properly represented and his case fully developed beyond simply appearing in court. In this litigation, counsel had to meet together to consider their strategy and tactics and prepare material. They also had to have meetings with their experts, including meetings with experts from abroad prior to their going into the witness box to give evidence. Some of these meetings were lengthy and took place at weekends. Then there was the work involved in the preparation of final submissions. …
>
> … Having regard to… the general principle… that in allowing fees the taxing officer should have regard to any other fees and allowances payable to counsel in respect of other items in the same case where the work done in relation to those items has reduced the work which would have otherwise been necessary in relation to the item in question, I should as the first step identify what items of work are to be treated as covered by the brief fee and refreshers and to what extent fees already allowed overlap with the brief fee…
>
> In assessing the brief fee one also has cards to take into account what will be earned by way of refreshers and what will be the totality of the work that will be required from counsel in the proper discharge of their obligations to protect the interests of their client and the extent to which that work will not be separately remunerated."

143. *XYZ v Schering Health Care: Oral Contraceptive Litigation [2004] 3 WLUK 875* was another legal aid case in which the court had to determine a reasonable brief fee, and which stated the established principle that although it is not appropriate to determine the reasonableness of a brief fee solely on the basis of the time spent, time is a factor to be taken into account.

144. Cooke J, giving judgment, referred to *Loveday and Renton* and said (at paragraphs 15 and 17):

> "It is plain from this decision that there is no basis for charging as separate items meetings with experts which are part of the preparation for trial after delivery of a brief. No matter what limited opportunity there has been beforehand to meet with experts and to understand the contents of their reports, this is preparation for the trial which should be included in the brief, which itself should be fixed at a sum which is sufficient to include all such matters. It is only in a very exceptional case that there would be scope to depart from this principle. If the whole shape of a case were to change by reason of an amendment to pleadings or a fresh expert report was adduced which fundamentally changed the nature of the dispute, then it may be possible to say that there is work which falls outside the ambit of the original brief… there is no basis for allowing fees for meetings with experts after delivery of the brief".

145. The Lord Chancellor relies upon these authorities in submitting that when considering the reasonableness of a brief fee, the extent to which work had already separately been undertaken

and paid for is relevant. I would not disagree with that: all the circumstances are relevant when considering the reasonableness of a brief fee. In some cases, it may be appropriate to disallow part of a claimed brief fee where counsel had, at the time of delivery of the brief, been recently and heavily involved in the case to the extent that some of the preparation that would otherwise account for part of the brief fee had already been undertaken and charged for separately.

146. That said, a brief fee (as Hobhouse J said) covers preparation for, and the first day of, the trial. Counsel has a right to expect a brief to be delivered in good time to prepare for the trial, and to receive a brief fee that takes into account the amount of time needed to prepare for trial.

147. It is not only commonplace, but quite standard for counsel briefed for trial in substantial, complex litigation to have undertaken a significant amount of work on the case before the brief has been delivered. It does not necessarily follow that the brief fee stands to be reduced. Everything turns on the facts of the case.

Counsel's Fees: Mr Jonathan Laidlaw KC

148. Mr Jonathan Laidlaw KC was called in 1982 and took silk in 2008. It is common ground that he is a preeminent criminal KC: in fact Mr Morris cited the fact in support of the proposition that Mr Laidlaw's fees must, accordingly, exceed those of the hypothetical counsel envisaged in *Simpsons Motor Sales* (an argument which, for reasons I shall give, does not in my view bear examination).

149. Mr Laidlaw was instructed as leading prosecution counsel in mid - July 2015. He was selected after a list of potentially suitable leading counsel was sent to the Appellant, from which three candidates were short-listed and interviewed. His usual hourly rate for advice, documentary and written work was given by his clerk as £600 with a daily refresher free of £5,000. This was negotiated down to an hourly rate of £450 and refresher fees of £4,500.

150. From initial instructions to 1 August 2016, Mr Laidlaw's fees on an hourly rate basis totalled £212,700. Thereafter he was paid a brief fee for trial of £125,000 in four instalments of £31,250, from September through to December 2016, along with two separate brief fees of £4,500 each for mention hearings on 25 August and 8 December 2016 (on which the trial date was pushed back slightly, to reflect the judge's preceding trial overrunning, and revised arrangements made for the pre-trial legal arguments to be heard in the meantime).

151. In 2017, a brief fee for the retrial of £275,000 (again payable in four instalments) was agreed in lieu of any hourly fees, with daily refreshers again at £4,500. The Appellant says that both brief fees were negotiated with a view to achieving the most cost-efficient basis of payment for the Appellant. I accept that: I have seen by way of example a file record that shows that Mr Minty carefully considered both counsel's brief fees for the first trial, weighed them against estimated and incurred costs and found them to be to the Appellant's advantage.

152. Mr Laidlaw's post-trial fees covered preparation for and attendance at the costs hearings on 18 June and 17 September 2018, for which his total fees were £24,000. This broke down into £4,500 for preparation on 14 June 2018, another £4,500 for the 17 June hearing and a comprehensive brief fee of £15,000 for preparing for and attending the September hearing.

153. The Determining Officer allowed for all work up to the first trial (accepting the brief fee as reasonable, and allowing an additional £75,000 for all preceding work) £200,000; refreshers at

£2,000 per day for both trials, including ten non-sitting days in the first and four in the second; a brief fee of £150,000 for the retrial and £3,000 for work undertaken in support of the costs application. Nothing was allowed for attendance at the costs hearings themselves because the Determining Officer concluded, by reference to the judgment of Kennedy J in *Morris v Lord Chancellor* [2000] 1 Costs L.R. 88, that they were irrecoverable in principle. Nor was any additional fee allowed for the two mention hearings in August and December 2016.

Counsel's Fees: Mr Ben Smitten

154. Mr Ben Smitten was called in 1999 and is described by the Appellant as, at the time of this instruction, a highly regarded, prominent and very senior junior who is now himself leading counsel. Mr Smitten was instructed as junior prosecution counsel at the beginning of July 2015, meeting Mr Minty for an initial conference on 3 July. His fees were, consistently, set at two thirds of Mr Laidlaw's. An hourly rate of £300 was agreed for his advice and documentary and written work. It would appear that Mr Smitten was selected as counsel without any form of tendering process.

155. Between 3 July 2015 and 25 August 2016, Mr Smitten recorded 744.17 hours' work on the case, for which he rendered fees of £223,250 and in respect of which he has produced a daily work log. The fact that his pre-brief fees exceed those of Mr Laidlaw reflects the fact that he and Mr Laidlaw undertook different tasks, Mr Smitten being extensively involved in particular with the disclosure process.

156. As with Mr Laidlaw, Mr Smitten's fee arrangement changed from an hourly rate to a fixed trial brief fee, but there is a difference in timing. Mr Laidlaw did not render a separate fee for any work undertaken after 2 August 2016 and his brief fee included a two-day consultation with leading and junior counsel on 23 and 24 August 2016. Mr Smitten continued to charge at his hourly rate up to the conclusion of that consultation. Thereafter he was remunerated for the first trial with a brief fee of £90,000, payable in four instalments of £22,500 between September and December 2016, in addition to which Mr Smitten rendered a brief fee of £1500 for the mention hearing on 8 December 2016.

157. Almost all of Mr Smitten's work in preparation for the retrial was covered by a single brief fee of £183,332, payable in four instalments between 30 June 2017 and 29 March 2018. There were two exceptions: two hearings on 19 February and 27 March 2018 for each of which Mr Smitten's brief fee was £1,500.

158. The Determining Officer accepted that Mr Smitten's fees should be set at two thirds of those of Mr Laidlaw. According to her written reasons, this was based on detailed representations demonstrating that Mr Smitten had, during given periods, undertaken more work on the case than had Mr Laidlaw, although his experience was presumably also a factor.

159. On that basis the Determining Officer allowed a brief fee for the first trial of £133,333 (to include all of Mr Smitten's pre-brief work) and for the retrial, of £100,000. Daily refreshers were allowed at £1,333 per day and allowed for every day claimed by Mr Smitten. As with Mr Laidlaw, no additional allowance was made for the mention hearing on 8 December 2016. Nor does anything appear to have been allowed for the two hearings on 19 February and 27 March 2018.

Whether the Choice of Mr Laidlaw Was a Reasonable One

160. The Determining Officer accepted that the Appellant's choice of leading counsel was reasonable. That was not the position of the Lord Chancellor on the appeal. Given the submissions I have heard in relation to *Zinga*, I have to look at the matter afresh, bearing in mind that the particular facts that made the choice of Mishcon, as solicitors, a reasonable one, have no bearing on the choice of counsel. I must, accordingly, consider the extent to which it was incumbent upon the Appellant to test the market, the extent to which the Appellant actually did so, and the consequences of any failure to do so adequately.

161. Mr Morris for the Lord Chancellor again relies upon *Zinga* in arguing that (in Mr Laidlaw's case) an inadequate tendering process and (in Mr Smitten's case) no tendering process, creates an element of doubt which must be resolved against the Appellant. In those circumstances, his primary submission is that what amounts to reasonably sufficient compensation in respect of the fees of counsel should he argues be determined by reference to CPS rates, which (based on information obtained from a defence advocate's special preparation claim and applying CPS guidance) the Lord Chancellor puts at, for leading counsel, about £57,000 for the first trial and £36,000 for the retrial. For a junior the fees would be about £29,000 for conducting the trial and £18,000 for the retrial (the figures offered by Mr Morris were actually specific to the penny, but as they were said to be approximate, I have rounded them).

162. I will consider Mr Morris's specific criticisms of the tendering process, and his alternative submissions, below. Even assuming, however, that no adequate tendering process was undertaken for either leading or junior counsel, I do not think that his primary argument can be a viable one. That is because, as Hickinbottom J stated at paragraph 25(i) of his judgment in *Evans v Serious Fraud Office*, it is not appropriate to use publicly funded comparators when assessing privately funded costs. Lane J addressed the same point in some detail at paragraphs 100 to 105 of his judgment in *Fuseon v The Senior Courts Costs Office*:

> "I consider that the Court of Appeal authorities of *R (Law Society)* and *Zinga* are incompatible with the designated officer's decision in the present case (upheld by the Master) to introduce the CPS as a comparator for the purposes of applying the *Singh* discount. In particular, the Lord Chief Justice's judgment in *Zinga* cannot in any sense be read as justifying use of the CPS in determining what is the relevant market for private prosecutions. On the contrary, as has been seen, the whole thrust of the judgment is to the opposite effect…
>
> The point of Lord Thomas's observations was to highlight the fact that the then inability of the CPS to undertake prosecutions for particular kinds of fraud was unnecessarily costing the public purse, since it was having to compensate private prosecutors using private firms that were more expensive than the CPS would be, if it were to be in a position to do the work…
>
> In both *Zinga* and the present case, there is no suggestion that the private prosecution was trivial. Although the designated officer and the Master were of the view that the mechanics of the prosecution of Mr Shinners were straightforward, it was, on any view, a serious matter. The trial lasted eleven days and Mr Shinners received an immediate sentence of three years' imprisonment. There was, in sort, a substantial public interest in seeing him brought to justice…
>
> The fact that the designated officer employed *Zinga* to bring about some amelioration

in the claimant's position is, accordingly, nothing to the point. On the facts of this case, the relevant market could not be said to involve any comparison with the CPS….

As I have already noted, the claimant rightly does not contend that the *Singh* reduction can play no part in the assessment of costs of private prosecutors. I also do not consider it can be said, as a matter of law, that it will always necessarily be wrong to look at CPS costs, when determining the amount of costs to be awarded to a private prosecutor. If an individual resolves to embark on a private prosecution with no regard to whether the state is willing and able to prosecute, a comparison with the CPS might be legitimate. That, however, was not the position in the present case."

163. Much the same applies here. The Appellant wanted the CPS to undertake the prosecution of the Defendant, but the CPS declined to do so. The choice for the Appellant was then to allow the Defendant to escape the responsibility for a very substantial fraud from which he hoped to receive some €8 million of the Appellant's money, or undertake the prosecution itself. As the CPS ultimately accepted, the prosecution was very much in the public interest.

164. All that aside, based upon my own experience of assessing costs, I do not find it credible that counsel competent to undertake a private prosecution of this complexity and on this scale would do so for fees at anything like the level suggested by the Lord Chancellor. Whatever the market might have had to offer in respect of the case of this kind will not bear comparison with the CPS rates to which Mr Morris refers. To allow counsel's fees at those rates would come nowhere close to offering reasonably sufficient compensation for the expenditure undertaken by the Appellant in undertaking the prosecution.

165. This still leaves a question of principle to be addressed. In the absence of any or any adequate tendering process on selecting of prosecuting counsel, precisely how is the element of doubt created by the lack of market evidence (which must, by reference to regulation 7(3) of the 1986 Regulations, be resolved against the Appellant) to be resolved?

166. I would observe that a tendering exercise is not simply a matter of identifying and choosing the cheapest available option. The cheapest option may not be the most suitable one. It was incumbent upon the Appellant only to make a reasonable choice in all the circumstances. The point of the tendering process is that it helps to establish that that was done. To assume that the Appellant should have chosen the least expensive option, and to award costs accordingly, would be to repeat the error identified by Woolf LJ in *R v Dudley Magistrates' Court*.

167. *Zinga*, at paragraph 19, makes it clear that if the choice of legal representative is reasonable, then that legal representative's costs will be recoverable, in so far as reasonable. Where the choice of legal representative is not reasonable, or there is doubt as to whether the choice of legal representative is reasonable, then in my view the correct approach must (bearing in mind *Wraith* and the other authorities to which I have referred) be to identify the level of cost that would have been attendant upon a reasonable choice, and to assess reasonable costs accordingly, by reference to the work actually done.

168. There are no GHRs for counsel, but guidance in assessing the level of cost attendant upon a reasonable choice may be found in *Evans v Serious Fraud Office*, in which Hickinbottom J, applying *Simpsons Motor Sales*, identified "top end" out-of-court hourly rates for privately funded counsel, acting in criminal fraud proceedings, at £480 for a KC and for a junior at £240. (*Simpsons Motor Sales* concerned an order under section 19 of the 1985 Act rather than section

17, but that makes no material difference for present purposes).

169. It seems to me, accordingly, that any element of doubt created by an inadequate tendering process can, as far as hourly rates are concerned, be resolved by having due regard to the authoritative guidance offered by Hickinbottom J in *Evans v Serious Fraud Office*. This is exactly the sort of major, complex criminal litigation he had in mind when he identified the hourly rates to which I have referred. It is common ground that I must apply the *Simpsons Motor Sales* approach. To allow anything less than Hickenbottom J did would in my view be to depart from that approach.

170. I have considered whether I should attempt to adjust Hickinbottom J's figures by reference to the passage of time, given that all outstanding issues in the litigation considered in *Evans v Serious Fraud Office* had been resolved by mid-2015, as opposed to late 2018 in this case, but I do not have any evidence upon which to make such an adjustment, and again I must resolve any element of doubt against the Appellant.

171. Hickinbottom J's general guidance in *Evans v Serious Fraud Office* of necessity could not extend to refreshers or brief fees, the assessment of which must be case-specific. He did however make it clear (see for example paragraph 25(v) of his judgment) that, as with hourly rates, he thought it appropriate to follow the established general rule of allowing a junior's fee at half of leading Counsel's.

172. It seems to me however that the guidance offered by *Evans v Serious Fraud Office* does nonetheless offer a sound basis for identifying reasonable brief fees and refreshers, because having identified an appropriate hourly rate for counsel, one can assess reasonable refresher and brief fees by reference to that hourly rate. Brief and refresher fees can, accordingly, be calculated by reference to that hourly rate, the amount of time reasonably needed to prepare for and appear on the first day of the trial and other pertinent factors such as the responsibility undertaken by counsel, the weight and complexity of the case, the volume of evidence and the criteria set out in the 1986 Regulations, Rule 45.2(7) of the Criminal Procedure Rules, and TONG.

173. In short, the element of doubt created by any failure to undertake an adequate tendering process for a private prosecution can be resolved not by the unrealistic adaptation of non-market rates, nor by attempting to identify the cheapest alternative option, but by reference to the guidance in *Evans v Serious Fraud Office*.

Tendering and the Choice of Mr Laidlaw as Leading Counsel

174. Mr Morris submits that the limited information available does not establish that the tendering process undertaken by the Appellant in choosing Mr Laidlaw was adequate. We do not know how the list of potential counsel was compiled, or who was on it. Apart from Mr Laidlaw, we do not know who was interviewed (other than that there were only three interviews) or what fees were discussed.

175. In any event, the tendering process does not appear to have encompassed a brief fee. That, says Mr Morris, should have been part of the process at the outset, and there should have been a fresh tendering process for the retrial. Again, this creates an element of doubt which must be resolved against the Appellant.

176. As an alternative to adopting the CPS rates referred to above, Mr Morris argues that counsel's fees should not be allowed in excess of those already allowed by the Determining Officer. In fact, all of the work undertaken by counsel up to the first trial should be incorporated within the brief fee, or at the very least the brief fee should be reduced by reference to the cost of work done previously.

177. I can find no logic in the suggestion that I should not allow counsel's fees in excess of those already allowed by the Determining Officer. The whole point of the appeal process is that if I think it appropriate, I should do so. The proposition is rather at odds with the position correctly taken by the Lord Chancellor to the effect that I can depart from the Determining Officer's findings, whether in favour of the Appellant or otherwise, as appropriate. Quite apart from that, Mr Bacon has demonstrated that the Determining Officer's overall assessment of counsel's fees was (for reasons upon which I do not need to elaborate for present purposes) demonstrably erroneous in several respects.

178. As for tendering, there is some room for discussion as to whether, in what would appear in 2015 to have been a quite limited market for major fraud private prosecutions, the selection process undertaken by the Appellant in choosing Mr Laidlaw meets the requirements of *Zinga*.

179. Mr Minty says that through a careful selection exercise, suitable candidates were identified who were seen as able to undertake the responsibilities attendant upon conducting the private prosecution of a case on behalf of the victim of a fraud. From that list three candidates were selected and interviewed to ascertain their views on how the case should be conducted.

180. What is missing from that process is the element of comparison of cost, as envisaged in *Zinga*. The selection method undertaken by Mishcon was to identify a list of counsel who appeared to be suitable, to select from that list the person who appeared to be the best candidate, and then to negotiate fees. It may well be that, if fees could not be negotiated to the Appellant's satisfaction, that the Appellant would have gone back to the pool of candidates to reconsider, but I do not think that the selection process undertaken by the Appellant can be said fully to meet the requirements of *Zinga*. That does create an element of doubt, which can be resolved by having regard to *Evans v Serious Fraud Office* in the way that I have outlined, and allowing reasonable fees accordingly.

181. Given that I have identified an element of doubt from the outset, Mr Morris's submissions in relation to the alleged obligation to negotiate a brief fee at the outset and to go through a fresh tendering process for the retrial, may be somewhat academic but I should address them.

182. I can attach no weight to the argument that a brief fee should have been negotiated with Mr Laidlaw's clerk at the outset, as part of the tendering process, for these reasons.

183. Counsel's hourly rates and refreshers were negotiated in mid-June 2015. At that point, it will have been evident that as an essential part of the general preparation of the prosecution case, not least with regard to the prosecution's duties of disclosure within a tight timetable, it would be necessary to instruct leading and junior counsel.

184. Neither Mishcon nor counsel would have been in a position to agree a brief fee in mid-June 2015. Such an exercise would have been premature. The case only just had been sent to the Crown Court. Neither the prosecution case nor the defence statement had been finalised, nor would be for months. The ground upon which the case would be tried had not yet been

identified, and the trial listing was some 18 months away. Mishcon on behalf of the Appellant agreed hourly rates and refresher fees. At that stage, they could have done no more.

185. Nor, had it been established that the choice of Mr Laidlaw was a reasonable one from the outset, would I have accepted that it would have been incumbent upon the Appellant to re-test the market when negotiating a brief fee for the retrial (or, applying the same logic, for the first trial). There is nothing in *Zinga*, or in the other authorities to which I have referred, to support the proposition that the obligation to test the market is an open-ended one, to be repeated every time a brief fee has to be agreed. On the contrary, the court in *Zinga* accepted readily that it was appropriate, in the usual way, to instruct the same legal team for an appeal as had been instructed below. On the Lord Chancellor's case, it would have been incumbent upon the prosecutor in *Zinga* to test the market afresh for the appeal.

186. It is equally appropriate, absent good reason to the contrary, to retain counsel for a retrial. The disruption, additional cost, duplicated work and other potential difficulties attendant upon changing counsel for a retrial (especially a retrial on this scale) make that the obvious first choice. Mr Bacon has drawn my attention to the guidance at paragraph 2.37 of TONG to the effect that a change of counsel between trials must be reasonable and proper, which seems to me to reflect that.

187. Mr Morris' submissions seem to me to rest on the proposition that, even if a choice of counsel is demonstrably reasonable from the outset, a prosecutor is under a continuing obligation to check from time to time to see if different counsel might be available at a lower cost. That is, again, a variation of the error identified by Woolf LJ in *R v Dudley Magistrates' Court*.

Conclusions: Mr Laidlaw's Hourly Rates, Brief Fees and Refreshers

188. The out-of-court hourly rate agreed with Mr Laidlaw's clerk in June 2015 was £450. The Appellant, accordingly, secured the services of pre-eminent counsel at below the *Simpsons Motor Sales* hourly rate identified by Hickenbottom J in *Evans v Serious Fraud Office*. That resolves any element of doubt about the reasonableness of Mr Laidlaw's hourly rate, which was patently a reasonable one.

189. At the same time, a refresher rate of £4,500 was agreed. Mr Morris points out rightly, that TONG provides for a refresher fee based upon a court day of about five hours, so as a simple multiplier of the hourly rate that seems high. Applying the approach I have outlined, I will consider the circumstances in which Mr Laidlaw's refreshers were incurred and whether they can, on each such occasion, be justified by reference to an hourly rate of £450.

190. The remaining questions for me are, accordingly, whether Mr Laidlaw's brief fees, refreshers and itemised fees were reasonably incurred and reasonable in amount, and (in the case of his fees for the costs hearings in June and September 2018) whether they are recoverable in principle.

Conclusions: Mr Laidlaw's First Brief Fee

191. My conclusion is that Mr Laidlaw's brief fee of £125,000 for the first trial, covering as it did all of his work from 2 August 2016 to the first day of trial in April 2017, is self-evidently reasonable for the prosecution of a complex and very substantial fraud case that was to be tried over three months. Assuming an eight-hour day, on the basis that busy solicitors and counsel

on a major case are rarely likely to enjoy a shorter one, Mr Laidlaw's brief fee would represent 35 days' work. In the light of that, it seems to be entirely clear that the brief fee is a reasonable one for the work necessary to prepare for such a major and lengthy trial, not least when one takes into account the elements of complexity, necessary scale and specialised knowledge, responsibility, volume of evidence and the other criteria to which I have referred. The documentation I have seen (one example being Mr Laidlaw's 98-page notes for cross-examination of the Defendant) supports that conclusion.

192. I do not accept that Mr Laidlaw's brief fee for the first trial, being reasonable on its own terms, stands to be reduced by reference to any of the pre-brief work for which he charged separately. Mr Bacon makes some cogent points about the extent to which Mr Laidlaw's pre-brief and brief fees, considered together, could constitute a perfectly reasonable brief fee for a three month trial but my understanding of the appropriate approach is to separate itemised fees from brief fees, balancing them if appropriate, and that is the approach I am taking.

193. I do not believe that I have ever before heard a submission to the effect that work undertaken by counsel from the very outset of a case, some 17 months before trial, should fall within a brief fee agreed over 12 months after first instruction. The proposition is insupportable. As I have observed, there may well be a sound basis for reducing a brief fee if work that would normally fall within the trial preparation covered by the brief fee has already been done and charged for, but insofar as such was the case here, it seems to me that it is already catered for in the level of fee agreed.

194. As the Appellant points out, Mr Laidlaw was engaged with the case on an almost daily basis on this case in September and the first half of October 2015, the second half of January and all of February 2016 and the second half of July 2016, as well as on multiple other dates up to July 2016. There was a very substantial amount of work to be done during that period on matters such as disclosure, the review of materials from the civil proceedings and interviews with the Defendant, and the preparation of the prosecution opening and case summary.

195. From the evidence I have seen, Mr Laidlaw's brief fee for the first trial was agreed only after careful consideration had been given to estimates of fees given at the outset, a review of fees to date (which fell within those estimates) and a careful comparison of the advantages and disadvantages of agreeing the brief fee, which Mishcon (specifically, Mr Minty) considered to be to the Appellant's advantage. There was, in effect, a continuity of work during which Mr Laidlaw's fee arrangement changed from an itemised basis to a fixed brief fee, which I have already found to be a reasonable one on its own terms, for the work likely to be undertaken during the period covered by the brief.

196. The fee notes of Mr Laidlaw set out the pre-brief work he undertook to 1 August 2016, in respect of which I have also been supplied with a detailed spreadsheet which includes that work along with some background information. Another spreadsheet has been prepared for Mr Smitten, and two substantial files of papers produced by Mishcon to put both counsel's work, as itemised in the spreadsheets, into context.

197. The Lord Chancellor's objections to the itemised pre-brief work charged for by Mr Laidlaw and Mr Smitten are set out in an amended version of those spreadsheets. Even excluding a repeated blanket objection to every fee on the basis that it should be included within the brief fee, which I have already rejected for the reasons I have given, they are repetitive and formulaic, effectively leaving it to the Appellant to justify almost every entry. They were

supplemented by relatively ad hoc submissions made by Mr Morris, in relation to the fees of both counsel, over the course of two days. It would be both disproportionate and impracticable to set out here all the competing arguments and my conclusions upon them, but I have, as an appendix to this judgment, set out the reasoning behind my allowances, which are summarised in amended versions of the spreadsheets themselves. The spreadsheets do not lend themselves to printing, but the parties have received copies with this judgment.

198. Against 472.67 hours claimed for Mr Laidlaw's pre-brief work, I have allowed 380.55 hours. Mr Smitten's pre-brief work is addressed below.

Conclusions: Mr Laidlaw's Retrial Brief Fee

199. Mr Laidlaw's £275,000 brief fee for the retrial encompassed all of the work done by Mr Laidlaw in the 12-month period between the end of the first trial and the beginning of the second. That is why, although the second trial was shorter, his brief fee is significantly higher; it might more usefully be compared to Mr Laidlaw's combined brief and pre-brief fees for the first trial of £337,700.

200. Mr Bacon points out that the re-trial was not by any means a re-run of the first trial, offering the following illustrations. In the light of the jury's inability to agree on a verdict the prosecution team reviewed the case afresh, with the benefit of having seen at the first trial what had worked well and what had not. As a result, for example, the bad character evidence was reduced significantly to a more focused body of material.

201. Given the way in which some evidence had emerged during the first trial, it was necessary to undertake further enquiries of the Metropolitan Police and of its witnesses which resulted in, amongst other things, the preparation of another count on the indictment. Strenuous but ultimately unsuccessful efforts were made to contact a key witness who had been in custody in Abu Dhabi since midway through the first trial, making it necessary for the prosecution to apply for permission to rely on the witness's evidence under the criminal hearsay provisions. It was necessary to prepare a response to the Defendant's request that the Crown Prosecution Service ('CPS') intervene and take over conduct of the proceedings. Given that the CPS had previously concluded that there was insufficient evidence against Mr Sultana at the pre-charge stage of the police's investigation, the outcome of the CPS's review was by no means a foregone conclusion, and the prosecution's submissions and supporting material had to reflect that.

202. The Appellant has also listed some of the work undertaken by Mr Laidlaw in the 12 months between the first and second trials, of which the following is a brief summary. Mr Laidlaw reviewed transcripts from the first trial; advised in consultation on at least six occasions; undertook multiple telephone discussions and email exchanges with his instructing solicitors and Mr Smitten, and liaised with Defence Counsel. He appeared at a Pre-Trial review on 5 May 2017 and a Mention on 22 September 2017. He produced at least seven skeleton arguments in relation to different issues and applications. He advised on matters such as the Defendant's attempt to transfer the prosecution to the CPS; issues arising from further civil proceedings; six more notices of additional evidence covering 6,700 pages; the refinement of the case against the Defendant so as to secure a conviction; the revision of the jury bundle; and bad character evidence. He will also, of course, have prepared for the trial itself.

203. Notably, as late as 26 April 2018 HHJ Loraine-Smith had to rule on contentious disclosure

and evidential issues, and with an application to stay the proceedings as an abuse of process on the basis that a prosecution "controlled" by legal representatives for the victim of a fraud was a "fundamentally flawed" process, one of the two such applications I have mentioned. That the retrial was every bit as hard-fought and complex as the first, is evident from Mr Laidlaw's 84-page opening note.

204. A brief fee of £275,000 represents 61 working days at £4,500 per day, or 76 8-hour working days at £450 per hour (15 working weeks). That seems to me to be consistent with the amount of work necessarily undertaken by Mr Laidlaw during the12-month period covered by the retrial brief fee, and I bear in mind the appropriate additional pertinent factors such as counsel's skill, specialised knowledge and responsibility, the complexity of the case and the volume of evidence.

205. Whilst it would have been helpful to have a more detailed record from Mr Laidlaw of the work undertaken by him on a day to day basis for those periods covered by his retrial brief fee, Mishcon has done a comprehensive job of supplying background information so as to put the work into context. In all the circumstances, based upon what I have seen, I have come to the conclusion that Mr Laidlaw's brief fee for the retrial is within a reasonable range and can be allowed without deduction.

Conclusions: Mr Laidlaw's Refresher Fees

206. Mr Bacon has pointed out that the Determining Officer's allowance of refreshers of £2,000 for Mr Laidlaw on each day of trial is inconsistent with her acceptance that an hourly rate of £450 was reasonable for the work undertaken by Mr Laidlaw. That, in my view, must be right.

207. The Appellant has explained that the prosecution was allocated a room within the court building to store materials and to provide a workspace for work undertaken before, during and after court sittings.

208. Mr Laidlaw and Mr Smitten have both confirmed that they generally arrived at court at 8am and rarely left before 6pm. They held frequent conferences after the jury was discharged for the day and frequently worked late into the night. I have no reason to doubt what counsel says. Whilst some sitting days may, for counsel, have been shorter than 10 hours, others will have been longer. It seems to me that Mr Laidlaw's refresher fee of £4,500 reflects that, and should be payable for each sitting day during each trial.

209. It would appear that Mr Laidlaw's daily refresher fee of £4,500 was paid for other hearings, regardless of their length, on the basis that it had effectively been agreed as a daily rate. Whilst, as I have observed, that seems perfectly appropriate for sitting days during the trial, I do not believe that it can extend to every hearing. I will address the relevant hearings below.

Conclusions: Mr Laidlaw's Non-Sitting Days, Pre-Trial Hearings and Costs Hearings

210. The Appellant argues that the total fees of £45,000 charged by Mr Laidlaw for 10 non-sitting days, described as 10 working days in the lead up to and during the first trial, should either be added to the brief fee or allowed as refreshers. Given that the trial effectively started on 23 January 2017 it seems to me that any out-of-court work undertaken between 2 August 2016 and that date should fall within the brief fee. I appreciate that much of this work concerned matters such as the Defendant's abuse of process and other applications, but it still seems to

me properly to fall within the brief fee.

211. Thereafter, a day's work spent by Mr Laidlaw during the course of the trial, whether in court or out of it, should be remunerated by way of a daily refresher. I am aware that *Loveday v Renton* can be cited as authority to the contrary, but to my mind the observations of Hobhouse J in that case (at page 210) are based upon the provisions of the old RSC Order 62, which have no application to this case. Similarly, TONG as Part II (see in particular paragraph 2.46) contemplates that non-sitting days should be added to a "basic fee" rather than remunerated by way of refreshers, but the relevant passages appear to relate to the calculation of publicly funded fees (see for example the reference to *R v Ghadhim Gerhards* [1997] Costs L.R. (Core Vol.) 463. The general guidance in TONG is still very pertinent, but it must be borne in mind that TONG is not in itself binding, and that its detailed guidance has not been revised since 1995.

212. In short, if in the course of the trial Mr Laidlaw undertook a day's work for the purposes of the trial, then in my view he should be paid for that work, whether the court was sitting or not. The same applies to the retrial.

213. It would appear from Mr Bacon's skeleton and the records supplied by Mishcon (which confirm that Mr Laidlaw did a full day's work on each of the days in question) that five of the 10 non-sitting refreshers claimed for the first trial are due to Mr Laidlaw on that basis. My only concern is that I do not have any record of the time actually spent by Mr Laidlaw on those non-sitting days. A refresher fee is not in my view simply derived from applying an hourly rate to time spent, but this is a working day out of court. I can allow for each non-sitting day a refresher of £3,600, which represents an eight-hour day.

214. I will leave it to the parties to agree exactly how many refreshers are due; if there is any remaining difference of opinion, I can no doubt resolve it.

215. Mr Laidlaw has, as I have said, rendered fees of £4,500 for each of the Mention hearings of 25 August and 8 December 2016, which appear to have been charged as a daily rate, regardless of the actual length of hearing. The spreadsheet prepared by Mishcon has an entry of 10 hours against each of those hearings but that does not appear to have come from any record produced by Mr Laidlaw. It seems rather to be the result of Mishcon's entering into the spreadsheet a time entry, calculated at £450 per hour, against each fee shown in Mr Laidlaw's fee notes, fixed or otherwise. So, for example, each £31,250 tranche of the brief fee for the first trial is matched in the spreadsheet by a time entry of 69.44 hours. In the spreadsheet it would appear that Mr Laidlaw's fees are generating the time entries rather than vice versa, which is less than helpful.

216. Mention hearings are usually short. I have been unable to identify any reliable time record for Mr Laidlaw's preparation for attendance at the hearings of 25 August and 8 December 2016. I think that it must be right to allow something for those hearings, given that they fall outside the general scope of preparation for trial (and therefore, the brief fee) but they will have been undertaken during the course of trial preparation and should not have taken a huge amount of additional time to prepare for. Resolving as I must the element of doubt against the Appellant, I can allow a fee of £1,000 for each of those hearings..

217. With regard to Mr Laidlaw's fees for appearing in the costs hearings on 18 June and 17 September 2018, Mr Morris has accepted that the Determining Officer was mistaken in believing that they are, in principle, irrecoverable. The relevant rules and procedures have

changed substantially since *R v Morris* was decided.

218. With regard to the amount of those fees, I have no difficulty with Mr Laidlaw's fee of £4,500 for preparing for the section 17 application on 18 June 2018. It was an important application, and the court had to be provided with the requisite information. I am, however, unable to accept the fee of £4,500 for appearing at the hearing itself, which from the record I have seen lasted less than 15 minutes. Again this appears to have been fixed as a daily fee rather than based upon the length of the hearing itself. I appreciate that Mr Laidlaw may have felt obliged to set aside about half a day to deal with the hearing, and on that basis I can allow a brief fee of £1,000 in addition to his preparation fee.

219. With regard to Mr Laidlaw's comprehensive fee of £15,000 for preparing for and appearing on the 17 September hearing, I have seen the detailed 12-page note of 14 September prepared by Mr Laidlaw for HHJ Loraine-Smith, and the bundle of over 600 pages produced for that hearing. Evidently Mr Laidlaw prepared for a two-day full hearing, which HHJ Loraine-Smith cut short, in the light of a previous indication that the court was concerned about the overall level of costs and might be minded to make an order under section 17(2A) of the 1985 Act limiting the amount recoverable, and the court's right to all information relevant to the decision as to whether to make an order under section 17. Even so, a fee of £15,000 does seem to be on the high side. I would allow £10,000.

Conclusions: Mr Smitten's Fees

220. There is a significant difference between my conclusions in relation to Mr Laidlaw KC's fees and Mr Smitten's. It arises from the fact that Mr Laidlaw's fees, as leading counsel, are demonstrably reasonable notwithstanding what would appear to have been a limited tendering process. In Mr Smitten's case, the lack of any tendering process, combined with the substantial difference between Mr Smitten's hourly charging rate and the *Simpsons Motor Spares* rate of £240 per hour and the departure from the standard approach of allowing a junior one half of leading Counsel's brief and professional fees, lead to a different conclusion

221. As I have said, the Determining Officer was persuaded that it was appropriate to allow Mr Smitten's brief and refresher fees at two thirds of those of Mr Laidlaw. Given Mr Smitten's seniority and experience, the level of responsibility allocated to him and the work undertaken by him, I might well have been able to agree with that if his instruction had been preceded by any testing of the market on *Zinga* principles, Mr Smitten then emerging as the reasonable choice in all the circumstances.

222. As it is I do not know whether, if a *Zinga* approach had been adopted, someone equally suitable would have been identified who was willing to undertake the prosecution at less than the £300 per hour paid to Mr Smitten for work out of court, and for half of the brief and refresher fees paid to Mr Laidlaw rather than two thirds. In fact, *Evans v Serious Fraud Office* offers a strong indication that it should have been.

223. Under those circumstances, it seems to me that I can only resolve the attendant element of doubt by allowing Mr Smitten's brief and refresher fees at half of those I have assessed for Mr Laidlaw, which is to say £62,500 for the first trial; £137,500 for the retrial; and refreshers at £2,250 per day. I note that, according to the Appellant, the Determining Officer miscounted the number of refreshers for the first trial at 57 rather than 65. Again, if there remains any difference of opinion between the parties as to the number of refreshers to be allowed, I will

resolve it.

224. I would take the same approach to non-sitting days as I have with Mr Laidlaw, and (again lacking any reliable time record for preparation for attendance at the relevant hearings) I would, resolving the element of doubt against the Appellant, allow £500 for each hearing on 8 December 2016, 19 February and 27 March 2018.

225. Having reached those conclusions, I have no difficulty in accepting that Mr Smitten (for the same reasons I have given for Mr Laidlaw) should be paid for pre-brief out of court work as undertaken by him from July 2015, but the appropriate hourly rate for that work would be the *Evans v Serious Fraud Office* rate of £240. I appreciate that this is more than half of Mr Laidlaw's hourly rate, but I see no reason to suppose that both leading and junior counsel would have agreed to undertake work out of court at less than the *Evans v Serious Fraud Office* hourly rate. I also appreciate that this might seem inconsistent with my allowance of half of Mr Laidlaw's brief fees and refreshers, but as I have said, in my view refreshers are not simply derived from multiplying an hourly rate, and the standard practice is still that a led junior will receive half the leader's rate.

226. I considered whether it would be right to limit the period over which Mr Smitten's pre-brief fees are payable to the same period as Mr Laidlaw, given that one might reasonably expect that leading and junior counsel's briefs would be delivered at the same time. It is however evident from counsel's fee notes and the schedules to which I have been referred that Mr Smitten undertook a great deal of work in the lead up to the two-day conference held on 23 and 24 August 2016, whereas Mr Laidlaw did not. I have, accordingly, made an appropriate allowance for that work. I must however include the conference itself within Mr Smitten's brief fee, as it was included within Mr Laidlaw's.

227. The Lord Chancellor's objections to the pre-25 August 2016 work, as with Mr Laidlaw, are set out in a separate spreadsheet and have been addressed in the spreadsheet and the appendix to this judgment. Against 744.17 hours' work claimed for Mr Smitten, I have allowed 595.05 hours.

228. I should add that none of my conclusions on hourly rates, brief fees and refreshers are intended to reflect on Mr Smitten's ability, experience or contribution to the prosecution case. They reflect rather the element of doubt attendant on a failure to test the market.

Counsel's Fees: Ms Katherine Lloyd

229. In the course of preparation for the retrial, the Appellant made an application for a witness summons against the MPS. The purpose of the application was to obtain documents in the possession of the MPS, relating to the investigation the MPS had carried out into the Defendant's activities. At the mention hearing on Monday 19 February 2018 HHJ Gledhill QC made an order in relation to different categories of materials in the MPS' possession or under its control.

230. This extended to part of a collection of hard copy documents extracted from four folders on a laptop from the Defendant's home on his arrest in December 2011.

231. The MPS was concerned that simply offering those papers for inspection would provide to the Appellant access to papers that fell outside the scope of the court's order and which could

properly be described as irrelevant, confidential or privileged. The agreed solution was the appointment of an independent barrister to review the documents and identify those that should come to the Appellant. Ms Lloyd was chosen.

232. Miss Lloyd was called in 2011, and specialises in complex corporate crime. Between 26 and 27 February 2018 she undertook a review of the documents held by the MPS, dividing them into three files of relevant and one file of the relevant material, preparing a schedule of the relevant documents. At 5:05 PM on 27 February Ms Lloyd confirmed to Mishcon that the exercise was complete, subject to review by MPS' solicitors.

233. Ms Lloyd's fee note is short. It simply records a review of the materials over two days at a daily charge of £1,250, totalling £2,500. The Determining Officer, noting the absence of a worklog, allowed £1,500.

234. A detailed worklog probably would not add much, as there is only so much one can say about going through a collection of documents. It would however have been helpful to have an exact record of the time spent, preferably at a given hourly rate. I note nonetheless that Ms Lloyd received instructions accompanied by a copy of a jury bundle, leading Counsel's opening note and the defence statement of June 2016. All that in itself would have taken some time to review and absorb.

235. The £1,500 allowed by the Determining Officer, at an *Evans* rate of £240 per hour, would provide for 6.25 hours: less than a day's work. It seems reasonably self-evident that Ms Lloyd spent, and would have had to spend, longer than that. To eliminate the element of doubt arising from the lack of precise time record, I can allow £2,000.

Research

236. The Determining Officer has disallowed 12.6 hours of Mishcon's time for the work undertaken by various fee earners in conducting research.

237. The Appellant says that as a matter of principle, where solicitors conducting a private prosecution are required to research legal principles of some complexity, the time claimed ought to be recoverable. Checks were made of the law in relation to particular issues or questions arising from the facts of the case.

238. The Appellant has helpfully prepared a spreadsheet identifying the work disallowed. Having reviewed it, I am almost entirely in agreement with the Determining Officer. As a general principle, costs are not recoverable for undertaking research on matters which are considered to be within the general area of expertise of a solicitor competent to manage the work in hand. As a matter of normal day to day normal practice, solicitors will in fact undertake research on such matters, because no one has a comprehensive grasp of every detail of the law and any good practitioner will check their understanding by reference to textbooks and other resources, on a regular basis, as and when appropriate.

239. That, however, is properly regarded as an overhead of day to day practice (*R v Legal Aid Board, ex p Bruce* [1991] 1 WLR 1231). I agree that an exception should be made for unusual or novel matters of law, and it may be appropriate where it is necessary to consider the application of general principles to the facts of a particular case. It has to be borne in mind however that I have allowed hourly rates that are commensurate with Mishcon, as solicitors,

offering the necessary expertise to undertake an exceptionally complex and weighty private prosecution.

240. There is nothing in the schedule that seems to me to fall outside that general expertise except one hour spent by Alison Levitt KC on 17 April 2014 considering whether the Appellant might be in a position to apply for a review of the CPS decision not to prosecute the Defendant. I can allow that at the hourly rate I have assessed. Everything else seems to me either too broadly described to justify any additional allowance, or to fall squarely within the areas of day-to-day expertise offered by Mishcon.

Noting Briefs

241. The Appellant arranged for various junior counsel to attend the trial of Luis Nobre, and to produce a note of the proceedings. The Determining Officer did not take issue with the reasonableness of that cost in principle, and nor do I.

242. The appeal concerns the fees of two barristers: Laura Collier (called 2013) and Nicholas Murphy (called 2015), who attended each day of the hearing at an agreed rate of £250. The Determining Officer allowed a daily rate of £200 and £100 per half day.

243. The appeal concerns the fees of barristers Laura Collier (called in 2013) and Nicholas Murphy (called in 2015), who attended each day of the hearing at an agreed rate of £250. The Determining Officer allowed a daily rate of £200, with £100 each for two half days.

244. The Appellant said that this is inconsistent with an allowance of £250 per day accepted for other juniors who undertook the task. How this may have come about is not quite clear to me, but the main point is fairly straightforward.

245. £250 is, in my view, a modest total fee for any barrister competent to attend and take an adequate note of half a day of a major fraud trial which might yield valuable information for the purposes of the complex prosecution undertaken by the Appellant. Mishcon appears to have agreed, with each of the juniors who undertook the task, a fee of £250 per attendance without quibbling over half days, an approach which seems to me to be eminently reasonable, if not (bearing in mind that almost all the daily fees are £250 were paid for a full day's attendance) something of a bargain. The fees should be allowed in full.

Mishcon's Internal Disbursements

246. The Appellant seeks repayment of £21,665.25 charged by Mishcon for in-house photocopying. £4,379.75 has been allowed by the Determining Officer.

247. The authorities to which I have been referred are largely civil authorities: *Johnson and Others v Reed Corrugated Cases Ltd* [1997] Costs L.R. (Core Vol.) 180 in particular. The general rule in civil cases is that, on assessment, photocopying will be regarded as an overhead, and not recoverable as a separate cost unless there are unusual circumstances or where the documents copied are unusually numerous in relation to the nature of the case.

248. Precisely the same principle is applicable in criminal proceedings: see *R v Zemb* [1985] Costs LR (Core) 442. The Appellant's complaint is that the Determining Officer did not allow internal photocopying costs at a commercial rate: in my view she would have been entitled to

allow nothing at all.

249. I have allowed hourly rates commensurate with Mishcon managing a very complex, very high value fraud case with a very substantial volume of documentation. I have seen nothing to substantiate the proposition that the volume of internal photocopying undertaken by Mishcon was exceptional for a case of this nature. In my view, this head of costs not recoverable in principle and I must disallow it.

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Case No: T20157243

SCCO Reference: SC-2022-CRI-000070

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

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

Date: 31 October 2023

Before:

COSTS JUDGE LEONARD

R (ALLSEAS GROUP SA)
v
PAUL SULTANA

Judgment on Appeal under Regulation 10 of the Costs in Criminal Cases (General) Regulations 1986

Appellant: **Allseas Group SA**

APPENDIX

1. This is a brief overview of the reasoning behind the time I have allowed for Mr Laidlaw KC's and Mr Smitten's pre-brief fees, as set out in each case in a separate spreadsheet.

2. My allowances are set out in red in columns E (Mr Laidlaw, against time claimed in column D) and F (Mr Smitten, against time claimed in column E). Some of them are cumulative figures for a given body of work, allowed at a total which I find to be reasonable. Where cells in columns E and F are blank, either nothing has been allowed for the time claimed in column D or E (as the case may be) or it has been taken into account in a cumulative total.

3. Having taken that approach, I find no basis for any further *Singh* adjustment.

4. I have, in the main body of my judgment, given my reasons for rejecting the submission that nothing should be allowed for work undertaken before the delivery of counsel's brief fees for the first trial. I also pointed out that most of the Lord Chancellor's objections, as set out in the spreadsheet, are formulaic, leaving it to the Appellant to justify almost every entry in the light of largely ad hoc submissions made by Mr Morris over two days.

5. I do not believe that that would be a permissible approach on a civil assessment. I accept however that under the 1986 Regulations it is my task to investigate the time claimed and come to a conclusion on it, whether or not any specific objection is raised by the Lord Chancellor, and the Appellant has been given a reasonable chance to respond.

6. To be clear, I have no doubt that counsel's records reflect work actually undertaken, although I have had to resolve an element of doubt against the Appellant where some round figures have been used (for example, exactly 1 hour reviewing emails). It is unfortunate that the timed entries in Mr Laidlaw's spreadsheet appeared to have been generated from his fees, but I have no reason to suppose that the fees themselves have not, equally, been generated from Mr Laidlaw's own record of time spent.

7. An element of doubt also arises where sufficiently specific records are lacking. For example, where a substantial conference takes place between solicitors and counsel I would normally expect to see a detailed record of the conference itself. Without such a record an element of doubt inevitably arises, not so much as to the time actually spent but as to whether it can fully be justified. In such circumstances, it is necessary to take a conservative approach, as it is where it is unclear exactly what work is being done or what the outcome might have been (for example, over six hours by Mr Laidlaw on 25 August 2015 "reading papers"). Much time has however been rescued by Mishcon's efforts to put counsel's work into context, which have largely been successful.

8. Those efforts have demonstrated just how much work had to be done by counsel on a complex and document-heavy case. My findings reflect that, and also that there appears to have been an appropriate division of labour between counsel, with Mr Smitten for example doing the bulk of the work on the crucial bad character application. I also bear in mind that as the person primarily responsible for the proper conduct of a prosecution, Mr Laidlaw had to be closely involved from the outset (for example, with disclosure) and throughout.

9. I am aware that much of counsel's pre-brief fees had been estimated in advance and that counsel stayed within that estimate, demonstrating a methodical approach to the division of labour and a clear understanding from an early stage of how much work have to be undertaken, by Mr Laidlaw and Mr Smitten respectively, to manage the prosecution.

10. As a footnote I should add that I heard a submission to the effect that work on, for example, estimating future costs is not recoverable under section 17 of the 1985 Act. I disagree. Control and management of costs is an essential litigation skill which, in a case of this kind, benefits the public purse.