



Neutral Citation Number: [2018] EWHC 3591 (Admin)

Case No: CO/1945/2018

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/11/2018

Before:

LORD JUSTICE LEGGATT
and
MRS JUSTICE ANDREWS DBE

Between:

ANTHONY BENNETT **Appellant**
- and -
THE CHIEF CONSTABLE OF MERSEYSIDE **Respondent**
POLICE

Mr T Forte (instructed by **DDE Law**) for the **Appellant**
Ms A Whyte QC and **Mr P Sige** (instructed by the **Merseyside Police Force Solicitor**) for the
Respondent

Hearing date: 29 November 2018

Judgment Approved

LORD JUSTICE LEGGATT:

1. This is an appeal by case stated from a magistrates' court in Liverpool against its decision to make no order for costs after the Chief Constable of Merseyside Police withdrew an application for forfeiture of cash seized from the appellant.
2. The background facts found by the magistrates' court can be summarised as follows. On 2 June 2015, Merseyside Police executed a search warrant at a property in Birkenhead. It was obvious on entering the property that it had been used as a cannabis farm. There was a strong smell of cannabis, the electricity meter had been bypassed and paraphernalia associated with cannabis production such as fans, pumps and lighting were present. Cannabis leaves were found throughout the premises.

3. Present at the property when the warrant was executed were the appellant, his cousin Neil Bennett and an individual called Jason Woods. The appellant was found to be in possession of around £960 in cash which was seized by the police.
4. Later that day, the police searched the appellant's home and found £43,838.36 in cash in a safe in a bedroom. The appellant's partner, who was also his company secretary, denied any knowledge of the safe, or of the cash. This cash was also seized, making the total amount seized £44,789.36.
5. The home of the appellant's cousin, Neil Bennett, was also searched by the police and a substantial cannabis farm was found on the premises.
6. The appellant was arrested and interviewed by the police. In interview he made no comment. He was subsequently charged with an offence of money laundering.
7. On 16 June 2015, the appellant undertook in a letter from his solicitors to explain the origins of the cash seized from him by 30 June 2015. Despite a number of reminders, no explanation had yet been provided when, on 21 August 2015, the Chief Constable issued an application in the magistrates' court under s.295 of the Proceeds of Crime Act 2002 for forfeiture of the cash.
8. The forfeiture proceedings were adjourned by agreement to await the outcome of the criminal proceedings against the appellant. Ultimately, when the criminal proceedings came to trial the prosecution offered no evidence and the charge was formally withdrawn on 16 January 2017.
9. The forfeiture proceedings then resumed and in March 2017 a report from a forensic accountant was served on behalf of the appellant. This report analysed the accounts and the accounting records of the appellant's company, A & B Developments (UK) Limited, and expressed the opinion that those accounting records were consistent with the appellant's contention that the cash seized by the police was generated by his business.
10. The Merseyside Police asked to see various documents referred to in the accountant's report which had not been disclosed with it. The last documents requested were provided on 5 October 2017. On 24 October 2017, the Chief Constable agreed to withdraw the forfeiture application.
11. On 15 January 2018, a hearing took place before District Judge Lloyd, at which the magistrates' court formally ordered the return of the cash seized from the appellant and the appellant sought an order that the Chief Constable pay his costs of the forfeiture proceedings. The district judge declined to make such an order and made no order as to the costs of the proceedings. It is against that decision that this appeal has been brought.
12. By way of legal background, Chapter 3 of Part 5 of the Proceeds of Crime Act 2002 contains a regime which establishes a summary process for the recovery of cash which represents the proceeds of crime through civil proceedings in a magistrates' court.

13. Section 294 confers a power to seize cash which is reasonably suspected to be the proceeds of unlawful conduct or intended for use in such conduct. Pursuant to s.295, cash seized under s.294 may be detained initially for a period of 48 hours but this period may be extended by an order made by a magistrates' court, which may authorise the detention of the cash for up to six months if either of two conditions is satisfied. The condition relevant for present purposes is that:

"(5) there are reasonable grounds for suspecting that the cash is recoverable property and that either —

(a) its continued detention is justified while its derivation is further investigated or consideration is given to bringing proceedings against any person for an offence with which the cash is connected, or

(b) proceedings against any person for an offence with which the cash is connected have been started and have not been concluded."

14. The magistrates' court may make further orders under s.295 continuing the detention of the cash for up to six months at a time subject to an overall maximum of two years.
15. Where cash has been detained under s.295, an application for its forfeiture may be made to the magistrates' court under s.298 of the Act. The court may order forfeiture if it is satisfied that the cash is "recoverable property" or is intended by any person for use in unlawful conduct. Such an order may be made whether or not criminal proceedings have been brought for an offence with which the cash is connected: see s.240(2).
16. Section 304(1) of the Act provides that property obtained through unlawful conduct is "recoverable property". "Unlawful conduct" in this context means conduct which is unlawful under the criminal law, but whether such conduct has occurred is established by applying the civil standard of proof on a balance of probability, rather than the criminal standard of proof: see s.241.
17. The rationale underpinning those provisions is that the possession of a large quantity of cash is inherently suspicious in an age of electronic banking: see *R (Merida Oil Traders Ltd) v Central Criminal Court* [2017] EWHC 747 (Admin), para 57. As Sullivan J said in *R (Director of Assets Recovery Agency) v Green* [2005] EWHC 3168 (Admin) at paras 32-33:

"In today's 'cashless society', the ordinary law-abiding citizen does not normally have any need to keep large numbers of banknotes in his possession. It will almost always be safer (bearing in mind the risk of loss through accident or crime), more profitable (bearing in mind the opportunity to earn interest), and more convenient (bearing in mind the many other ways of paying for lawful goods and services) not to be in possession of a large sum of money in the form of banknotes. The other characteristic shared by all of the forms of cash listed

in [the Act] is that cash is readily negotiable and unless seized promptly has a tendency to disappear without trace.

Just as the law-abiding citizen normally has no need to keep large amounts of banknotes in his possession, so the criminal will find property in that particular form convenient as an untraceable means of funding crime."

18. In the present case, as already mentioned, the Merseyside Police, having seized cash in the sum of over £44,000 found in the possession of the appellant in the circumstances I have described, made an application under s.298 of the 2002 Act for forfeiture of the cash on the ground that it was "recoverable property" or intended for use in unlawful conduct. However, once the appellant had provided an accountant's report and supporting documents which were consistent with his assertion that the cash had been generated through lawful business activity, the application was withdrawn.
19. When it comes to costs, a magistrates' court has a discretionary power under s.64(1) of the Magistrates' Court Act 1980 and s.52(3)(b) of the Courts Act 1971 to make such order as to costs as it thinks just and reasonable. The principles on which the discretion should be exercised in a case of this kind were considered by the Court of Appeal in *R (Perinpanathan) v City of Westminster Magistrates' Court* [2010] EWCA Civ 40; [2010]1 WLR 1508. In that case, like the present case, the police had applied under s.298 of the 2002 Act for the forfeiture of cash seized under the provisions of that Act. Unlike the present case, the forfeiture application in the *Perinpanathan* case was pursued by the police to a hearing in the magistrates' court. At the hearing, the magistrates accepted the explanation given by Mrs Perinpanathan that the cash seized was intended for lawful purposes and dismissed the application for forfeiture. The magistrates' court nevertheless made no order for costs against the police on the basis that the police had acted reasonably in making and pursuing the forfeiture application. A claim for judicial review of that decision was dismissed by a Divisional Court and its decision was affirmed by the Court of Appeal.
20. The Court of Appeal confirmed that in a case of this kind the correct approach is that indicated by the Divisional Court in *City of Bradford Metropolitan District Council v Booth* [2000] 164 JP 485. The Court of Appeal held that there is no presumption that a private party who successfully resists proceedings (such as forfeiture proceedings under s.298 of the Proceeds of Crime Act) brought by a public authority (such as the police) acting in the public interest will be awarded its cost of the proceedings. On the contrary, the starting point is that no order for costs should be made provided that the public authority has acted reasonably and properly. There may, nevertheless, be circumstances in which it is justifiable to make an order for costs, in particular where the successful private party would suffer substantial hardship if no order for costs is made in his favour. Lord Neuberger MR indicated (at para 77) that, although it would be wrong to invoke the wisdom of hindsight or to set too exacting a standard, magistrates should scrutinise the behaviour of the police with care in order to decide whether they acted reasonably and properly.
21. In the present case the district judge applied these principles. She found that the Chief Constable had reasonable grounds to believe that the cash was recoverable property under the 2002 Act, both at the time when the cash was seized

and when the forfeiture application was issued. The district judge also found that, once all the relevant financial material had been disclosed by the appellant, the Chief Constable was swift to act and to confirm that the application for forfeiture would be withdrawn. The district judge has said that she thoroughly scrutinised the behaviour of the police in accordance with the guidance given by Lord Neuberger in the *Perinpanathan* case and found no evidence to suggest that the Chief Constable acted other than reasonably, honestly and properly in the exercise of his public duty. There was also no evidence that the appellant would suffer undue hardship if no costs order was made in his favour. She observed that it was unclear why the necessary financial information was not provided more promptly as the appellant ran a small business which did not, when full disclosure was given of his affairs, reveal any undue complexity. In these circumstances, the district judge declined to make an order for costs.

22. At the appellant's request, the district judge stated five questions formulated by the appellant's legal representatives for the opinion of the High Court. It is those questions which we are invited to answer by the case stated on this appeal.
23. In developing his oral submissions this morning, Mr Forte, counsel representing the appellant, did not pursue most of the grounds raised in the case stated. That is entirely understandable when they include, for example, at Question 2: "Is the *Perinpanathan* case correctly decided?" That question was a futile one to ask in circumstances where the *Perinpanathan* case is a decision of the Court of Appeal which is binding on this court. In those circumstances, whatever this court may think of the merits or otherwise of the decision, it is a decision which we are bound to follow and apply.
24. Of the five questions raised in the case stated, the one which Mr Forte did seek to pursue was Question 3, which asks:

"If *Perinpanathan* is, for now, the state of the law, does it not require some active investigation to supply a proper base for the allegations? See *Muneka v Customs & Excise* [2005] EWHC 495 (Admin) where the Border Force/HMRC investigation disclosed low income, thus providing a clear basis for an allegation of illegality."

Mr Forte submitted that on the facts of the present case there was no active investigation by the police, who were content simply to leave it to the appellant to demonstrate an explanation of how he had come by the amount of cash seized, and that this was an unreasonable approach for the police to adopt.

25. The case of *Muneka*, which is referred to in this question in the case stated, was one in which cash seized from the appellant was found by a magistrates' court in forfeiture proceedings to be recoverable property. An appeal against that decision to this court failed. On the particular facts of the case, the evidence relied on by the Customs and Excise to prove, as they successfully did, that the property was recoverable property included evidence of an accountant which demonstrated that the appellant's living expenses were very low and that there had been large deposits in his bank account for which no proper explanation had been given. But the *Muneka* case does not establish any principle that there must be active investigation by the police, or other public authority, of the financial affairs of the person from whom the

cash was seized in order to provide reasonable grounds for bringing or pursuing forfeiture proceedings.

26. There will be cases where the very fact that an individual was found in possession of a large sum in cash together with the circumstances in which it was seized will call for an explanation and raise an inference that, in the absence of a reasonable explanation, the cash is recoverable property. On the findings made by the district judge, the present case was, in my view, manifestly such a case.
27. Mr Forte indeed accepted in argument that the police acted reasonably in this case in seizing the cash. That seems to me an inevitable concession in circumstances where, not only was there the inherently suspicious circumstance that the appellant was found in possession of a very large sum in cash, but he was also arrested at premises which had until recently been a cannabis farm, in the company of an individual who was his cousin, whose own premises likewise contained a substantial cannabis farm. Furthermore, when interviewed, the appellant chose to make no comment. Those circumstances, on any view, provided reasonable grounds for suspecting that the cash found in the appellant's possession was the proceeds of crime, in particular of drug dealing.
28. In addition, as mentioned earlier, his solicitors undertook to provide an explanation of the provenance of the cash but then failed to do so. In these circumstances, I cannot see how it could credibly be suggested that it was unreasonable for the police to commence forfeiture proceedings when they did. Those proceedings were then adjourned pending the outcome of the criminal proceedings.
29. After the criminal proceedings had concluded, the forensic accountant's report was served. Mr Forte sought to make in argument a criticism about lack of liaison between the police and the Crown Prosecution Service. However, it does not seem to me that such a criticism is open on the facts found in the case stated which set the parameters for the consideration of this court. In any event, I cannot see anything unreasonable in the position of the police in awaiting disclosure of the forensic accountant's report in the civil proceedings before deciding what further action to take.
30. The main focus of Mr Forte's argument about unreasonable conduct was the period between March 2017, when the report was served, until October 2017, when the police withdrew the forfeiture application. During that time what happened was that certain requests were made for further documents referred to in the accountant's report. There is no basis on which to suggest that the police acted unreasonably in asking to see those documents before taking the decision that they did.
31. More fundamentally, the appellant is bound in this court by the facts found in the case stated and, on those facts, it cannot, in my view, properly be argued – let alone with any realistic prospect of success – that the police acted other than reasonably and properly throughout their conduct of the proceedings. The appeal on that aspect of the case is therefore completely hopeless.
32. Mr Forte has sought to advance another argument about financial hardship. That is an argument not raised in the case stated and therefore one which it is not even

open to him to maintain on this appeal, but in any event there is nothing in the point taken.

33. That point, as advanced in Mr Forte's skeleton argument and repeated orally this morning, is that it is said the district judge applied the wrong test of financial hardship because she found that there was no evidence that the appellant would suffer "undue hardship" if no costs order was made in his favour, when the expression used in the *Perinpanathan* case by Stanley Burnton LJ at para 41 was "substantial financial hardship".
34. However, the phrase used by Lord Bingham in the *City of Bradford* case was "financial prejudice". The point that Stanley Burnton LJ was making at para 41 of the *Perinpanathan* case was that the financial prejudice necessarily or normally involved in litigation would not generally justify an order for costs. Something over and above that had to be shown. Later, at para 46, Stanley Burnton LJ himself used the expression "undue financial prejudice" in describing the test.
35. In those circumstances, the district judge cannot, in my view, possibly be said to have made an error of law in using the very same formulation of the test as was endorsed by the Court of Appeal in the *Perinpanathan* case. Nor is there any basis on the facts found in the case stated on which this court could interfere with her assessment that the evidence before her (and which is not before this court) did not demonstrate that the appellant would suffer undue financial prejudice if no order for costs was made in his favour.
36. Mr Forte has in essence invited us to say that the district judge's findings and conclusions in this case were perverse. But that is a wholly untenable submission in circumstances where the basis on which we have to judge the reasonableness of those findings is not the evidence which was before the district judge but those findings themselves, since in the case stated by the magistrate's court for this court no attempt has been made to go behind them.
37. It is impossible to say that, on the facts found by the district judge, her conclusion that the Chief Constable acted honestly and reasonably at all times, or her decision in the exercise of her discretion to make no order for costs, was perverse or irrational. In my view, this appeal is entirely without merit and must accordingly be dismissed.

MRS JUSTICE ANDREWS:

38. I agree.

MS WHYTE: My Lord, *Perinpanathan* does not apply to this case in terms of costs and we seek an order that Mr Bennett pay the Chief Constable's costs of the appeal, this being a hearing which has lasted less than a day. Unless it is not reasonably practicable, the rules suggest that the court should deal with the issue of costs. In our view, the somewhat Dickensian consumption of costs in this case to date strongly encourage that approach today, unless it is not reasonably practical and it is adhered to.

MRS JUSTICE ANDREWS: Do we have a schedule from them today?

MS WHYTE: Statements have been in fact filed by both parties. I have copies of our schedule and can certainly explain how they compare to the schedule filed by Mr Bennett.

LORD JUSTICE LEGGATT: Well, I think I have got it, thank you.

MS WHYTE: Signed versions are available, the version that you have is unsigned. If I can, subject to any contrary indication of the court, provide a whistle-stop tour of the principles, unless I am not required to?

LORD JUSTICE LEGGATT: No, you are not required to do that. The question I have about your schedule, with no disrespect to you, is whether it needed two counsel for this matter? I mean, you are perfectly entitled to have two counsel but as to whether the appellant should reasonably have to pay for two counsel, I can't at the moment see that he should.

MS WHYTE: Yes, I anticipated that observation, with respect. The facts are not complicated at all. There is quite a matter of law. But the wider principle is, however lacking in merit as this court has found the submissions made either on paper or in development of oral argument today, the matter is of considerable significance to the police. Because if it should be decided (although the prospects of success were poor, as this court has found) that *Perinpanathan* cannot have any particular application on the facts of this case to forfeiture.

LORD JUSTICE LEGGATT: But realistically, I know, Ms Whyte, that some sort of argument in that direction was made but it is not open to this court to say that *Perinpanathan* was wrong, nor is there any distinction on the facts for this. In *Perinpanathan*, it actually went to a hearing and the police lost.

MS WHYTE: But the police have to act on the basis----

LORD JUSTICE LEGGATT: Well, they do, but they don't necessarily need to come armed with two people to do that.

MS WHYTE: Well, there's no more I think that I can say.

LORD JUSTICE LEGGATT: No.

MS WHYTE: Apart from the wider significance should Mr Bennett succeed.

LORD JUSTICE LEGGATT: Yes, very good.

MS WHYTE: And the police can't assume that he won't prevail, just because the police form an advised view on what the prospects of success are.

LORD JUSTICE LEGGATT: Yes.

MRS JUSTICE ANDREWS: Looking at your fees, actually, it seems that both of you have got them lumped in together, haven't you?

MS WHYTE: They are lumped in together. So far as solicitors are concerned, there is a disparity of approximately £2,000. So far as counsel is concerned, there is a disparity of about £9,000.

LORD JUSTICE LEGGATT: What do you mean by "disparity", I am sorry?

MS WHYTE: Difference in sum total. So, for example, Mr Forte's.

LORD JUSTICE LEGGATT: Oh, I see. Well, we don't, normally at least, engage in comparison of the costs. It is more just a matter of looking at your bill.

MS WHYTE: Looking at it in the round but, well, the courts below certainly do look at what the other party has claimed...

LORD JUSTICE LEGGATT: Well, maybe they do.

MS WHYTE: ...when considering any objection. We are in your hands. It is a belt and braces approach. This court has a perfectly good and robust sense of what the case is about and I don't think there's anything further that we can realistically add.

MRS JUSTICE ANDREWS: Are you able to give us any sort of 'handle' on the breakdown in counsel's fees if my Lord's position is adopted by this court because at the moment we have a brief fee of £15,000 for the two of you?

MS WHYTE: Yes.

LORD JUSTICE LEGGATT: We can just decide otherwise what we are prepared to allow.

MS WHYTE: As reasonable and proportionate.

LORD JUSTICE LEGGATT: Yes.

MS WHYTE: The traditional two-third/one-third but, as my Lady says, it is a matter of what the court considers to be reasonable and proportionate.

LORD JUSTICE LEGGATT: Yes. Mr Forte?

MR FORTE: My Lords went for the first point I was going to make. The second is, so you see the history of what Mr Bennett has lost already and what is reasonable in all the circumstances, I can't really assist my Lord further than that, I don't think.

LORD JUSTICE LEGGATT: (After a pause) Well, we do consider that, whilst we understand why the police have chosen to take the view for their own reasons that it was worthwhile to instruct two counsel, that shouldn't be something that the appellant ought to pay for. In the circumstances, we reduce the amount by approximately £10,000, and award costs in the total of £15,000.

MS WHYTE: Thank you, my Lord. We will draft an order and submit it for approval.

LORD JUSTICE LEGGATT: The next thing we need to raise, Mr Forte, is whether Mr Bennett is going to have to pay those costs out of his own pocket or not in circumstances where we have taken the view that this appeal was totally without merit.

Now, of course, we do not know what advice Mr Bennett has been given. One possibility is he was told, 'This is a hopeless appeal, it will cost you another £25,000 if you lose it', but he insisted it on bringing it anyway. Another possibility is that he was given some

encouragement to believe that the appeal had some prospect of success. It will be up to Mr Bennett to decide whether he wishes to waive privilege because it is his right to do so or not to do so. I don't know if he is sitting behind you in court?

MR FORTE: He is.

LORD JUSTICE LEGGATT: If he chooses to waive privilege, then we will be able to know what advice he did in fact receive, but we consider at the moment that there is going to need to be a further investigation into the question of whether he should bear those costs, and indeed the costs of his own representatives on this appeal, or whether they should in fact come out of the pocket of either his solicitors or his counsel, or both.

I am afraid to say that we also have considered that the costs incurred in the magistrates' court need to be looked at. We find, on the face of it, impossible to see how it could be proportionate, or, for that matter, reasonable, to incur £105,000 on what was a very simple matter of explaining the provenance of £44,000.

Subject to anything that you wish to say now, and we will hear your submissions, our present intention is to direct a further hearing at which cause will need to be shown as to why the legal representatives should not bear some or all of the costs of this litigation as a whole.

MR FORTE: My Lord is talking of the costs incurred by Mr Bennett?

LORD JUSTICE LEGGATT: Yes, I am talking about the costs incurred by Mr Bennett, yes.

MR FORTE: If he does not wish to waive privilege, presumably there is not much that we can go behind that, to investigate?

LORD JUSTICE LEGGATT: No.

MR FORTE: If my Lord and my Lady would rise, I can take brief instructions of his intent and explain. He has heard what my Lord has just said. Explain that that may, if he is content so to do, lead to another hearing, et cetera. If he is not, then there may be little gain from a further hearing. I am in your Lordship's hands.

LORD JUSTICE LEGGATT: Well, let me explain it to Mr Bennett.

MR FORTE: Yes.

LORD JUSTICE LEGGATT: Mr Bennett, we are concerned about the amount of costs that you have paid your legal advisers.

MR BENNETT: Yes, your Honour.

LORD JUSTICE LEGGATT: Now, we do not know what advice you were given and we are not allowed to know what advice you were given unless you give us permission to be told.

MR BENNETT: Okay.

LORD JUSTICE LEGGATT: It is entirely up to you whether you do give permission, you don't have to decide now but you can decide in your own time.

MR BENNETT: Yes.

LORD JUSTICE LEGGATT: If we are able to know what advice you received, we will be able to take a more informed view about whether it was reasonable to incur the amount of costs that have been incurred on your behalf, including the costs of bringing this appeal.

If you were to choose, however, which would be your perfect right, not to let us know the advice you were given, we would probably have to assume that you were given advice that this appeal, for example, would be hopeless; but that you nevertheless chose to plough on nonetheless because we would not know in fact the position. So it's your choice as to whether you waive privilege. Have I explained it clearly enough for you?

MR BENNETT: You have, your Honour. Can I, it's not something I, it's something I'd like to discuss with counsel first, if that was open and you and that was possible?

LORD JUSTICE LEGGATT: Of course it's possible. You don't have to decide now.

MR BENNETT: Okay, that's fine.

LORD JUSTICE LEGGATT: In fact it may be better that you don't just decide on the spot but take your own course about it.

MR BENNETT: Thank you, your Honour.

LORD JUSTICE LEGGATT: You realise that there does at this point emerge a conflict of interest, as you will realise, between you and your counsel?

MR BENNETT: I do understand but I, yeah, I understand that, your Honour.

LORD JUSTICE LEGGATT: As long as you understand the situation, that is all. I'm sure you are perfectly able to make your own decisions.

MR BENNETT: Okay, thank you, your Honour.

MR FORTE: Given that, my Lord, if we notify the court within 7 days and then, dependent on the answer, a further hearing or not.

LORD JUSTICE LEGGATT: Well, I'm afraid there may well need to be a further hearing anyway, because the costs in the magistrates' court don't really depend entirely on what advice was given. They depend on what was reasonably done and incurred. They may be affected by the advice that was given but may not be wholly dependent on that. The costs of this appeal may well depend on that.

MRS JUSTICE ANDREWS: In any event, I don't think it's a bad idea that you should let us know within 7 days what the situation is.

LORD JUSTICE LEGGATT: Yes.

MR FORTE: Of course.

MRS JUSTICE ANDREWS: So that we are better informed for the next hearing.

LORD JUSTICE LEGGATT: Certainly. Certainly, so if you do that, that will be most helpful.

MR FORTE: As far as any hearing in to the hearing into the magistrates' costs incurred by Mr Bennett, how would that, what would my Lord and my Lady may wish to see? Would it be those instructing, defending their bill, in effect?

LORD JUSTICE LEGGATT: Yes, so I think there needs to be an opportunity for them and you, if you wish, and no doubt you will have to notify your insurers about this and so forth, to adduce whatever evidence you wish to rely upon.

MR FORTE: Yes.

LORD JUSTICE LEGGATT: Plus submissions, both as to the costs in the magistrates' court and the costs of the appeal.

MR FORTE: Yes.

LORD JUSTICE LEGGATT: As to whether they were properly incurred.

MR FORTE: Yes.

LORD JUSTICE LEGGATT: That will include a question as to what work was done, whether it was done necessarily, whether Mr Bennett was given advice. All this may depend on his waiving privilege in any advice about what costs were being incurred or were likely to be incurred in order to get back £43,000.

MRS JUSTICE ANDREWS: I think we also need a little bit more in terms of a clear delineation of what work was purely referable to the criminal proceedings and what was referable to magistrates' court forfeiture proceedings.

MR FORTE: Yes, my Lady.

MRS JUSTICE ANDREWS: As speaking for myself, I am not by any means convinced that the schedule is entirely referable to the magistrates' court proceedings, although I appreciate that you believe that to be the case but I think it needs a little bit more fleshing out.

MR FORTE: Of course.

LORD JUSTICE LEGGATT: In terms of timing, I think you will notify us within 7 days about the privilege position.

MR FORTE: Yes.

LORD JUSTICE LEGGATT: Or perhaps I think Mr Bennett ought to notify us.

MR FORTE: Yes, of course.

LORD JUSTICE LEGGATT: Once he has taken whatever advice he wishes to, whether from you or from anybody else.

MR FORTE: Of course.

LORD JUSTICE LEGGATT: Mr Bennett can write to the court to let us know. I think it is unrealistic to have the hearing probably before Christmas, your solicitors will want time to prepare information.

MR FORTE: Yes.

LORD JUSTICE LEGGATT: We will fix it for the earliest date that we can in the New Year.

MR FORTE: Yes.

LORD JUSTICE LEGGATT: Would you like to suggest now a time for evidence?

MR FORTE: He is very difficult at this stage, without knowing how much.

LORD JUSTICE LEGGATT: Of course it is. Well, maybe at the same time as Mr Bennett notifies us as to whether he is waiving privilege, maybe within 7 days you and your solicitors could notify us of what timetable you would wish for each of you.

MR FORTE: Yes.

LORD JUSTICE LEGGATT: Obviously your interests and theirs may not coincide in this.

MR FORTE: Yes.

LORD JUSTICE LEGGATT: Ms Whyte, I think we are minded to stay the order for costs until we know who is going to pay the costs.

MS WHYTE: Yes.

LORD JUSTICE LEGGATT: I don't know whether you want to make any observations about that?

MS WHYTE: No.

LORD JUSTICE LEGGATT: Because if there were to be an order against the legal representatives, it would probably follow that that should be a direct payment and not Mr Bennett having to pay them first.

MS WHYTE: Yes. I am saying no but I have not shown my solicitor first the instructions in that. One final procedure matter, the court, if the court considers an application and therefore dismisses it as being totally without merit, that has to be recorded in the face of the order, which we will actually draft.

MRS JUSTICE ANDREWS: Yes.

MS WHYTE: I am not quite sure that I understood the court to be saying that all of the appeal was totally without merit?

MRS JUSTICE ANDREWS: Yes.

LORD JUSTICE LEGGATT: Yes.

MS WHYTE: Thank you.

LORD JUSTICE LEGGATT: Yes.

MS WHYTE: I will make sure it is recorded.

LORD JUSTICE LEGGATT: Thank you. Is there anything else that needs to be raised?

MS WHYTE: No. Thank you very much, my Lord and my Lady.

LORD JUSTICE LEGGATT: Thank you. We will rise.