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Archbold Review

Cases in Brief

Appeal—fresh evidence (Criminal Appeal Act 1968 s.23) evidence undermining credibility of witness—frustration of direction by judge to police to conduct enquiry

MEHTA [2019] EWCA Crim 2332; 13 December 2019

M had been convicted of sexual assault. The Court of Appeal admitted as fresh evidence (Criminal Appeal Act 1968 s.23) a statement in the Criminal Justice Act 1967 s.9 form made by the complainant before the trial, in which what she said about a collateral matter (that she had had children by a third party) was in direct contradiction to what she had said in evidence. It was not a fresh evidence case in the conventional sense. The statement existed before the trial took place but it was not available to the defence until some time after (not as a result of any failure of disclosure by the prosecution). Had the statement been available at the time of the trial the defence would have been able to use it to undermine her credibility by producing it in cross-examination when she denied having had children by the third party. The court accepted that there was an important difference between a jury being aware of inconsistencies, and it being possible to demonstrate that a witness had lied. Further, the judge had been deprived of the possibility of exercising her discretion to give a special warning in accordance with the guidance in *Makanjuola* [1995] 1 W.L.R. 1348. In addition, fresh evidence was adduced to the effect that the complainant had given incorrect details of a relative of hers. The judge had, at a pre-trial application for disclosure, "directed" that a certain line of enquiry be pursued by the officer in the case, and the lie about the contact details had stopped those enquiries in their tracks. It mattered not what use might or might not have been made by the defence of the information they should have been provided with as a result of the enquiries. The fact was that they were impeded in the proper preparation of their case and in a way which the trial judge had directed they should have the opportunity to do. The conviction was quashed.

Evidence—bad character—non-defendant's bad character (Criminal Justice Act 2003 s.100)—relevance to credibility—serious sexual offences

MURPHY [2020] EWCA Crim 137; 12 February 2020

At M's trial for rape and other sexual offences, committed shortly after his release from a life sentence for rape, K, who met M in a bail hostel, gave evidence supporting M's defence of consent. There was evidence that M had telephoned K shortly after the offence. The judge allowed the admission, on the application of the Crown, of K's convictions, limited to the description "serious sexual offences" (for convictions for offences against children including familial rape). The convictions were admitted by way of cross-examination under the Criminal Justice Act 2003 s.100(1)(b) as having substantial probative value in relation to a matter in issue of substantial importance, to wit his credibility. Before the judge and on appeal, M argued that being a convicted sex offender did not mean that K was more likely to give untruthful evidence (he had pleaded guilty to the relevant offences), and in making the application, the prosecution were seeking to prejudice the jury against him by introducing an illegitimate line of reasoning: because he was a sex offender, he must have helped another sex offender by lying. The judge had not been wrong to admit the evidence. Although s.100 of the 2003 Act is expressed in terms of the admissibility of evidence, it governs cross-examination about bad character: *Brewster* [2010] EWCA Crim 1194, [2011] 1 W.L.R 601, [17]. A different approach may be required, depending on whether the application

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were made by the prosecution or the defence (*Stephenson (David)* [2006] EWCA Crim 2325, [27]; *Brewster*, [18]), but in the former case, the Police and Criminal Evidence Act 1984 s.78 provided a residual check. The question of substantive probative value was primarily for the judge, given his or her feel for the case. Applying the two questions in *Brewster* – whether creditworthiness was a matter in issue of substantial importance and whether the bad character was of substantial probative value in relation to that issue – the credibility of the evidence given on each side in M's case was of crucial significance. The question then was, whether a jury could regard K's history of sexual crimes as affecting the value of his evidence. The jury might properly take the view that someone who had committed serious sexual crimes in the past might regard the commission of a sexual crime differently to most members of society, and might therefore be susceptible to being approached after the commission of such a crime in order to assist a defendant with false evidence.

Evidence—good character—failure to give good character direction—direction to exercise caution in relation to character witnesses

McCHLEERY [2019] EWCA Crim 2100; 29 November 2019

M was convicted of historic sexual offences in a trial characterised by a straightforward conflict of evidence between the complainant and M in circumstances where there was little independent evidence. M led evidence of positive good character. The judge, while referring to the fact that M had no previous convictions, in contrast to the complainant, did not give a full two-limb good character direction (*Hunter* [2015] EWCA Crim 631, [2015] 1 W.L.R 5367), but rather told the jury to approach the character evidence "with some degree of caution" because it came from M's friends. He gave a similar direction in relation to M's wife, who gave circumstantial evidence as well as character evidence. The direction was regrettable, especially where the prosecution had chosen not to question any of the character witnesses. No member of the court had seen a direction of this nature before. It was obvious that character witnesses would know a defendant well, otherwise their evidence would be valueless. In the absence of any evidence pointing to the guilt of M, other than the complainant's account, credibility was central. The absence of a good character direction led inevitably to the conclusion that the conviction was unsafe. That was all the more so in the context of a positive direction to the jury to be cautious about the good character evidence.

Fraud—Fraud Act 2006 s.6(1)—whether offence capable of being committed when article comes into existence after the fraud charged.

SMITH (ANDREW) [2020] EWCA Crim 38; 21 January 2020

In the Fraud Act 2006 s.6(1) (an offence if D "has in his possession or under his control any article for use in the course of or in connection with any fraud"), the words "in connection with" were broad. They were ordinary words and had no technical or restricted meaning. Further, they must add something to "in the course of". Accordingly, the offence can properly include possession or control of an article which was created after the fraud alleged had been committed. In such circumstances, it could properly be said that the offence had been committed because the article was intended to be used in connection with the fraud (as in S's case, where a false document was created after the alleged fraud was complete which falsely indicated that a customer had received a statutory notice). There was nothing which conflicted with this conclusion in *Ellames* [1974] 1 W.L.R. 1391, considering going equipped contrary to the Theft Act 1968 s.25, which also used "in the course of or in connection with", or *Sakalauskas* [2013] EWCA Crim 2278; [2014] 1 W.L.R. 1204, which applied *Ellames* to s.6(1) of the 2006 Act.

Trial—summing-up—summary of the evidence and parties' cases—purposes and observations

REYNOLDS [2019] EWCA Crim 2145; 5 December 2019

In the context of complaints about the fairness of the account of the facts in the summing up, the Court of Appeal made the following general observations.

(1) A summing up of the facts served two purposes: first, to the extent necessary, it reminded the jury of the salient facts and the prosecution and defence cases; and secondly, since a jury's verdict was not reasoned, it provided an assurance that the verdict was founded on the facts described in the summing-up, albeit that it was not necessary for a summing-up fully to rehearse all the facts and arguments.

(2) Counsel's closing speeches were no substitute for a judge's impartial review of the facts and could not substitute for it (*Amado-Taylor* [2000] 2 Cr.App.R 189, 191D). On the other hand, the summing up need not rehearse all the evidence and arguments (quoting Lord Morris of Borth-y-Gest in *McGreevy v DPP* (1973) HL (NI) 2 Cr.App.R 424, 431). What was helpful would depend on the case. Brevity and a close focus on the issues were to be regarded as virtues and not vices (per Rose LJ in *Farr* (*The Times*, 10 December 1998) cited in *Amado-Taylor*, 192A). A summing-up of the evidence was bound to be selective, and provided the salient points were covered and a proper balance was kept between the case for the prosecution and the defence, the Court of Appeal would not be lightly drawn into criticisms on points of detail.

(3) A succinct and concise summing-up was particularly important in a long and complex trial, so as to assist the jury in a rational consideration of the evidence (*D, Heppenstall and Potter* [2007] EWCA Crim 2485). Generally speaking, the longer a trial lasted the greater would be the jury's need for assistance in relation to the evidence. But this consideration carried less weight in a case where much of the evidence was available electronically. It would be a wholly pointless exercise for a judge to recount the contents of a factual timeline or a schedule relating to the use of mobile phones, which the jury had in front of them and would have in retirement. It may be sensible to recognise that the efficient use of digital material during the trial may result in longer jury retirement (e.g. *Woodward* [2019] EWCA Crim 1002, [2019] 2 Cr.App.R. 28, [80]), and make case management decisions accordingly. The dangers of boring a jury rather than assisting them must have occurred to any judge who had sat in the Crown Court; but it was a danger that it was particularly important to avoid in a case based largely on documents with which the jury were familiar. It was not usually necessary to remind the jury of points made in counsel's speech, unless a defendant had not answered

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questions in interview or had not given evidence (*Lunkulu* [2015] EWCA Crim 1350, [43]; CPD Part 26K.21).
(4) Whatever the historic approach might have been (the court noted the citation in *Curtin* [1996] Crim L R 831 of obiter dicta in *Cocks* (1976) 63 Cr.App.R 79), it was now neither consistent with the Overriding Objective, Pt.1 of the Criminal Procedure Rules, nor likely to be in a defendant's interests, for counsel to not correct what may be mistakes in the summing-up which may result in a conviction being quashed. If counsel remained silent, the Court of Appeal was entitled to proceed on the basis that what was said in a summing up was not regarded as a material error at the time. Subsequent trawls through the transcript searching for infelicities of expression was not an exercise which was likely to prove productive of a successful appeal. Nevertheless, there may be difficulties in raising a point of objection after a matter has been summed up by a judge, and an accumulation of complaints (none of which in isolation might be regarded as material) may properly form the basis of a challenge to the safety of a conviction.
(5) If a judge was considering introducing an issue that has not been canvassed in the course of a trial, he or she should at least warn a defence advocate before final speeches (*Evans (DJ)* (1990) 91 Cr.App R 173).
(6) There was a potential tension between the importance of a judge not usurping the jury's function and a judge's legitimate expression of a view, even a strong view, of the evidence. A judge's personal views must be considered carefully before being expressed; and, if they constituted the appearance of advocacy on behalf of the prosecution, they would not be regarded as appropriate simply by the use of the refrain, "it is entirely a matter for you".

Trial—vulnerable witness—refusal of witness to continue cross-examination—inappropriate questioning—whether fair to continue trial

RT AND STUCHFIELD [2020] EWCA Crim 155; 13 February 2020

F, 16, with diagnosed ADHD and suspected autism, gave evidence via video link of a conspiracy to rob. After her examination in chief, there was an unnecessary delay for legal argument that could have been dealt with earlier. In cross-examination for S, she was asked questions outwith the form agreed at the ground rules meeting. After a series of questions culminating in "are you going to continue to lie whilst giving your evidence to the court?", she said she wanted to go home, and refused to continue with her evidence. The judge had been right to decline an application to discharge the jury, or to stay proceedings as an abuse of process.
(1) The effect of not being able to cross examine because of the death, illness or refusal to continue of a witness was not a new problem for the law (*Doolin* (1832) 1 Jebb CC 123). In some cases, the effect of not being able to cross examine such a witness had meant that a fair trial became impossible, in others it had proved possible to continue the trial and ensure that it was fair. In *Stretton and McCallion* (1988) 86 Cr.App.R 7 a witness who had been cross examined for a period of time became ill and unable to continue. The judge permitted the trial to continue with a clear warning to the jury. It was sometimes permissible to prevent further cross-examination when a witness had become distressed: *Wyatt* [1990] Crim LR 343, although it was also important to remember that not every witness showing distress would be vulnerable: *R v G(S)* [2017] EWCA Crim 617, [2017] 2 Cr.App.R. 20. When considering whether a fair trial was possible when a witness's evidence had been cut short a judge would have regard to the extent to which the defence had been put and explored with the witness, whether previous inconsistent statements could be put into agreed facts, and whether there was other relevant evidence: *Pipe* [2014] EWCA Crim 2570, [2015] 1 Cr.App.R(S) 42.
(2) Fairness in court proceedings extended to complainants and witnesses. The law and practice in relation to the questioning of vulnerable witnesses had developed: see CPD: Division 1 (General Matters) at para.3E.4. Training and the toolkits published on the Advocates' Gateway were also available. Guidance on appropriate cross-examination of vulnerable witnesses was provided in *Wills (Practice Note)* [2011] EWCA Crim 1938, [2012] 1 Cr.App.R 2. In *YGM* [2018] EWCA Crim 2458, [2019] 2 Cr.App.R 5, Hallett LJ, VPQBD set out the need to sort out limitations on cross-examination of vulnerable witnesses before the cross-examination started. The Court of Appeal would support the proper case management of cross-examination: *E* [2011] EWCA Crim 3028, [2012] Crim LR 563 and *Lubemba* [2014] EWCA Crim 2064, [2015] 1 W.L.R 1579.
(3) The trial remained fair for both RT and Mr Stuchfield in the particular circumstances of this case despite the withdrawal of F. The jury had seen F give evidence and be cross examined; at least in part there had been some unfortunate questioning which explained F's refusal to stay (although the judge had found there was no deliberate provocation of the witness); agreed evidence was admitted in relation to the subject matter of the cross-examination which enabled the jury to make a fair assessment of the credibility and reliability of F's evidence; F's evidence could be assessed in the context of substantial other evidence: and the judge gave proper directions to the jury identifying the limitations of F's evidence.

SENTENCING CASE

Young Offender; crossing a significant age threshold

STOKES [2020] EWCA Crim 162, 4 February 2020

The appellant (then aged 20) pleaded guilty to offences of s.20 assault and affray in October 2019. In November 2019 he was sentenced to 27 months' imprisonment for the assault and nine months' concurrent imprisonment for the affray (a sentence which should have been announced as detention given the appellant's age). The offences were committed in February 2017, when he was still 17. The Court of Appeal described the delay between the commission of the offences and the date of sentence as "unexplained and most unfortunate". The appellant submitted that the sentence was manifestly excessive, and that a suspended sentence should have been imposed. It was also submitted that insufficient weight was given to the appellant's youth and immaturity at the time of the offence, in accordance with the Sentencing Council's Definitive Guideline on Children and Youth Sentencing (the Guideline). It was agreed that the assault fell within category 1 of the Sentencing Council's Definitive Guideline on Assault.
Allowing the appeal, the Court of Appeal found that insufficient regard had been given to the appellant's age. He was 17 at the time of the offences but not charged until he was

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18. Paragraphs 6.1 to 6.3 of the Guideline provide guidance regarding offenders who cross a significant age threshold between the commission of the offence and sentence:

> 6.1 There will be occasions when an increase in the age of a child or young person will result in the maximum sentence on the date of the finding of guilt being greater than that available on the date on which the offence was committed (primarily turning 12, 15 or 18 years old).
>
> 6.2 In such situations the court should take as its starting point the sentence likely to have been imposed on the date at which the offence was committed. This includes young people who attain the age of 18 between the commission and the finding of guilt of the offence but when this occurs the purpose of sentencing adult offenders has to be taken into account, which is:
>
> - the punishment of offenders;
> - the reduction of crime (including its reduction by deterrence);
> - the reform and rehabilitation of offenders;
> - the protection of the public; and
> - the making of reparation by offenders to persons affected by their offences.
>
> 6.3 When any significant age threshold is passed it will rarely be appropriate that a more severe sentence than the maximum that the court could have imposed at the time the offence was committed should be imposed. However, a sentence at or close to that maximum may be appropriate.

Had the appellant been sentenced at the Youth Court, the maximum sentence available would have been two years' detention. In the circumstances of the case, it was not appropriate to pass a more severe sentence than that maximum. It was, however, appropriate to pass a sentence of immediate custody; the offences were a serious assault and affray and serious injury was caused to one of the victims. The sentence of imprisonment was quashed and substituted with a sentence of immediate detention of 12 months. The concurrent sentence of nine months' detention for the affray was unchanged.

Features

24 hours in police custody? When should an alleged breach of bail be dealt with?

By Adrian Lower[1]

The law and procedure for dealing with defendants at the magistrates' courts who face allegations of breach of police or court-imposed bail conditions is unsettled as to whether the 24-hour limit to be "brought before a justice of the peace" includes the time taken for the court to reach a decision as to breach, or whether, providing the matter is opened within 24 hours, the decision can be reached after those 24 hours have elapsed.

Following a defendant's arrest or appearance at court, the police or the court respectively may impose conditions on the defendant's bail, requiring that the defendant abide by certain conditions and appear at the police station/court at a certain time on a certain date, or may bail them unconditionally to the same effect.[2]

If a person who has been released on bail in criminal proceedings with conditions attached, they may be arrested without warrant by a constable, if a constable has reasonable grounds, *inter alia*, for suspecting that that person has broken any of those conditions.[3]

Upon such an arrest, that person shall, except when arrested within 24 hours of the time appointed for him to surrender to custody, be brought as soon as is practicable and in any event within 24 hours after his arrest before a justice of the peace for the petty sessions area in which he was arrested.[4]

It is not uncommon for defendants so arrested to be held by the police for a court appearance before or after an applicable court is sitting.

On many occasions, the defendant will be produced from the cells, the alleged breach or anticipated breach put, and the matter will conclude within 24 hours of the qualifying arrest. A finding that the defendant has breached their bail will trigger consideration of whether or not the defendant should be readmitted to bail and therefore the timeliness of a hearing post arrest will be crucial, as if the breach of bail hearing is not heard "in time", then the defendant is entitled to be released.[5]

But when, legally, does the 24-hour "backstop" bite and what does "brought before a justice of the peace" mean?

The case law is not definitive.

In *R (on the application of Culley) v Dorchester Crown Court*,[6] Forbes J held that by applying what he described as "settled principles", the decision of the Circuit Judge, exercising the powers of a district judge (magistrates' court)[7] to remand a defendant overnight, who had been arrested and brought before the court for alleged breach of bail within 24 hours, to enable the defendant to call evidence as to the alleged breach of bail, was *ultra vires*, as the effect

1 District Judge (Magistrates' Court). The views expressed are entirely my own and any errors my responsibility. I am very grateful to Julia Anderson, doctoral student at the University of Nottingham Law School, John Spencer and Tony Edwards for their very helpful comments on an earlier draft.

2 In respect of the Police, s.43 of the Police and Criminal Evidence 1984, in respect of the Court, s.3 of the Bail Act 1976.

3 S.7(3)(a) and (b) Bail Act 1976.

4 S.7(4) of the Bail Act 1976. A Justice of the Peace includes a district or deputy district judge magistrates' court: s 24-25 Courts Act 2003. Petty Sessions areas were replaced by Local Justice Areas by s.8 of the Courts Act 2003.

5 S.7(5) of the Bail Act 1976.

6 [2007] EWHC 109 (Admin).

7 S.66 of the Courts Act 2003 - although whether this was a correct exercise of that power is doubtful: see, for example, *Potter* [2019] EWCA Crim 461 and *Frimpong v CPS (Secretary of State for Justice intervening)* [2015] EWCA Crim 1933. A different view was posited in *Iles* [2012] EWCA Crim 1610.

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was to extend the determination of the breach beyond the 24 hours. Therefore, the hearing the following day and the subsequent decision to remand the defendant into custody to await his trial could not stand.

Forbes J further held that the procedure under s.7(4) and (5) of the Bail Act was subject to a strict time limit of 24 hours following the arrest of the defendant in question and it followed that the judge was required to complete the investigation and make the decision as to whether breach of bail had been established within that 24 hours.

This conclusion was doubted by Richards LJ in *McElkerney v Highbury Corner Magistrates Court*,[8] where the appellant was produced before the respondent court 10 minutes short of the relevant 24-hour period, when he denied the alleged breach of bail. The appellant's advocate noticed, during the course of the hearing, that the 24-hour period had expired and submitted that the court no longer had jurisdiction to deal with the matter. The district judge rejected that submission, found the breach proved and subsequently remanded the appellant into custody.

In comments that were obiter, as his Lordship resolved the appeal on a different point,[9] he commented that he would wish to look at the point more closely if it were essential to do so, as the statutory requirement was that the person be brought before a justice of the peace as soon as is reasonably practicable and in any event within 24 hours after his arrest. This was not, on the face of it, a requirement that the justice's decision be reached within that 24-hour period. Nor was his Lordship satisfied that the cases relied on in *Culley* lead to the conclusion reached by Forbes J in that case.[10] It is submitted that his Lordship was correct and that *Culley* was wrongly decided on that point.

Three cases were cited in *Culley*. Taking them in turn:

R v Governor of Glen Parva Young Offender Institution, ex p G (A minor)[11]

G, a youth, had been arrested on suspicion of breaching his bail conditions and was brought to the magistrates' court cells within 24 hours of that arrest, but not put up before the magistrates until after that period had expired. The magistrates, nevertheless, heard the breach, found it proved and remanded G in custody.

Simon Brown LJ, (as he then was) with whom Mance J (as he then was) agreed, held that s.7(4) of the Bail Act 1976 was plain in its meaning and meant what it said. Section 7 conferred draconian powers on the police. Arrested people *prima facie* entitled to bail – and perhaps even granted bail despite police objection by a Crown Court – are able to be detained without warrant on what may be a hotly disputed basis. His Lordship stated

> It seems to me appropriate, in those circumstances, to afford the police no more than the absolute maximum period of 24 hours stipulated by Parliament to bring [the defendant] back into the presence of a justice of the peace. If they fail in that, it would be quite wrong to overlook that failure and, in effect, allow them to re-arrest the person concerned on the self-same basis and re-detain him for a further significant period of time.[12]

This case, however, was concerned with a defendant who was in the court building within 24 hours of their arrest, but had not, as the statute requires, been brought before a justice of the peace within that period. The case, therefore, did not seek to address a situation where a defendant is produced before the justice of the peace within 24 hours, but the hearing of the alleged breach is not concluded until after 24 hours from the time of arrest have elapsed. In other words, the judgment in this case did not support the ratio in *Culley*.

The second case cited in *Culley* was *R (on the application of Hussain) v Derby Magistrates' Court and the Lord Chancellor's Department*[13]

Mr Hussain had been produced before a lay bench on the morning of the day in question and had denied an alleged breach of bail. The prosecution intended to proceed by way of reading witness statements and making representations. The defence objected, arguing that such a procedure engaged Arts 5 and 6 of the ECHR and that the court needed to assess the credibility of the evidence, particularly in a case which involved one person's word against the other. The justices agreed and put the case back to the afternoon to allow the prosecution to call the relevant witnesses.[14]

As a matter of listing practice, the afternoon list was taken by a district judge. The prosecution had been unable in the time available to secure the attendance of their witnesses. The judge decided that she did not need to hear witnesses and would deal with the matter by way of representations, noting that the case had been put back in the same list on the same day and within the 24 hours allowed by law. She found there had been a breach of bail and remanded the defendant into custody.

On his unsuccessful appeal, Mr Hussain submitted that the lay bench had no power to adjourn the hearing having begun it and neither did the judge have any power to start the hearing again in the afternoon and make the orders that she did. Counsel for the Lord Chancellor's Department submitted that the district judge's actions conformed to a literal interpretation of s.7 as Mr Hussain had been brought before her within the requisite 24-hour period and she made her decision under s.7(5) the same day. Additionally, the decision complied with a purposive interpretation of the Act as Parliament's intention was to ensure that the question of the defendant's continuing detention was placed before a justice or justices within the 24-hour period. There might be, it was submitted, "all sorts of reasons" why the matter might be brought before one court and then transferred to another.[15]

Brooke LJ, giving the judgment of the court, preferred those arguments. The case

> … is not concerned with the trial of a criminal charge or a hearing at which a person's civil rights are to be determined. Speed of determination is of the essence and the defendant ought not to be kept waiting for a court to determine the matter any longer than is strictly necessary. In those circumstances, if procedural rigidities appropriate for a more formal hearing are conducive to delay (and it must be remembered that the determination must be made that day) then we should not interpret

8 [2009] EWHC 2621 (Admin).

9 His Lordship held (at [11]-[13]) that, following the District Judge finding the breach of bail established and subsequently remanding the defendant into custody, the defendant was entitled to and did make a further application for bail seven days later (Bail Act 1976, Sch.1, Pt.I1A) which was refused; this was held to supersede the original decision and created itself "a perfectly lawful basis for the continued detention" of the defendant. How a subsequent decision following a potentially unlawful earlier decision made good that deficiency was left unexplained.

10 At [10].

11 [1998] 2 All ER 295.

12 At p.299.

13 [2001] EWHC (Admin) 507.

14 *R (on the application of the DPP v Havering Magistrates' Court [*2001] 1 W.L.R. 805. Art. 6 ECHR had no application to a s.7(6) procedure and Art.5 did not require the relevant underlying facts to be proved to a criminal standard in determining s 7.

15 *Hussain*, at [26 and 27].

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> section 7(5) as requiring such rigidity unless we are compelled to do so. If Parliament had used more compelling language in section 7(5) so as to make it clear that, for whatever reason, it was not willing to contemplate permitting what happened in the present case, then in a case where a witness had to be sent for everyone would have to wait around until the original court became free again, and one of the justices on a morning's list might have to come back to resume the matter in the afternoon. In my judgement we are not driven to that conclusion.[16]

Extrapolating from that judgment, it does not support the contention that the hearing has to be concluded by the same tribunal as part of one completed hearing. It does permit a situation whereby a breach of bail hearing can begin within 24 hours of arrest but not concluded until a resumed hearing before another tribunal. The case is silent as to whether that resumed hearing has to conclude within the 24-hour period that follows arrest.

The precise chronology of events in Mr Hussain's case does not appear in the judgment.[17]

Finally, *Liverpool City Magistrates' Court, ex parte Director of Public Prosecutions*[18].

This case concerned an appeal for judicial review by the DPP against the decision of the court, comprising a single justice, to adjourn an alleged and disputed breach of bail hearing to another day, on the basis that the tribunal was composed of less than two justices of the peace,[19] and an appeal against the decision of the newly constituted tribunal not to hear that adjourned breach on the basis that the jurisdiction to hear the matter had already been exercised by the single justice.

Roch J, (as he then was) giving the judgment of the court, allowing the appeal against the first decision, and refusing the appeal so far as the second decision was concerned, held that the procedure under s.7(6) was not a formal hearing by a court consisting of at least two justices, so that s.121(1) of the Magistrates' Courts Act 1980 did not apply. The procedure was not the trial of an information or hearing of a complaint. It specifically provided for a hearing before a single justice.

The procedure, his Lordship held was *sui generis* and required an informal inquiry. This was supported by the decision of the Divisional Court in *Re Moles,*[20] which held that strict rules of evidence were inappropriate when considering an application for bail founded on a change of circumstances. His Lordship went on to state that there was no power to adjourn the breach of bail hearing as ss.5, 18, 30 and 54 of the Magistrates' Court Act 1980, concerning adjournments, did not apply to bail applications.[21]

Of more relevance to the 24-hour issue is the comment of Roch J:

> The prosecution, if they wish a remand in custody or the imposition of more stringent conditions, must make sure that they have within that time period sufficient material to place before the justice to enable the justice to form one of the opinions set out in sub-s (5).[22]

16 *Hussain,* at [30].

17 The judgment only recites that Mr Hussain was arrested on 9 October 2000, appeared before the justices in the morning of 10 October 2000 and reappeared before the judge during the afternoon.

18 [1992] 3 All ER 249.

19 The magistrates having concluded that as the alleged breach was disputed, a minimum of two justices should hear the breach by way of a trial of the issue, which was not possible due to commitments of one of the justices.

20 [1981] Crim LR 170.

21 His Lordship did not consider s.129 of that Act, a power to remand further a defendant who is already remanded in custody where they cannot attend due to illness or accident, but such a power could not apply as a defendant held for court following arrest on suspicion of breaching bail conditions would not have been remanded in custody.

22 [1992] 3 All ER 249 at 256.

But what of a situation where a defendant is brought before a justice of the peace within 24 hours, the justice does not adjourn to another day but the justice puts the matter back in the list, for example, to allow more information to be made available that might affect the course of proceedings? It is submitted that in allowing such a situation, the court would give the wording of s.7(4) of the Bail Act its plain and natural meaning and the intent of Parliament would be given its purposive effect, namely that the arrested defendant would be brought before a Justice of the Peace within 24 hours and yet the proceedings, not capable of adjournment to another day, could be concluded with relative informality before the court rises for the day.

In that scenario, if, following representations and possibly after hearing evidence, the court is not of the opinion that the defendant has breached their bail conditions, then they must release; if the court is of the opinion that bail has been breached, then an application for a remand in custody may be made by the prosecution and resisted by the defence, with the court making the determination.[23] The defendant is caused no prejudice by any breach of bail hearing extending beyond 24 hours after the arrest, so long as they have been put before a justice before that period has expired and the hearing as to breach of bail is concluded within the same court day, however long after the conclusion of a normal sitting time that may be.

If a breach has been found, the court would have the power to remand the defendant into custody until the following day if insufficient information were available for the court to determine an application for bail.[24]

In recent times, the courts have been willing to adopt a more liberal interpretation of what might otherwise be viewed as strict time limits in connection with bail decisions. In certain circumstances, the prosecution may appeal the grant of bail by the magistrates' court following an application for a remand in custody.[25] The prosecution must give oral notice of such an appeal at the conclusion of the proceedings before the court and this must be confirmed by the service of written notice within two hours of the oral notice being given.[26] It has been held that oral notice given to the legal adviser five minutes after proceedings had concluded, where the magistrates had left the court building, complied with legal requirements.[27] Similarly, where written notice was served three minutes after the expiry of the two-hour requirement where the prosecutor had used all due diligence and the delay in service was beyond his control, this did not dispose of the prosecutor's appeal against the grant of bail.[28] The court in the latter case noted that no prejudice was caused to the appellant by the minimal delay. Oral notice of the intention to appeal had already been given, the appellant was not taken by surprise and had done nothing to his detriment.

The court could take a similarly relaxed but principled view where a defendant arrested for breach of bail was put before a justice within 24 hours of their arrest, but where the determination of the breach was concluded after that period had expired.

23 Sch.1 of the Bail Act 1976; Criminal Procedure Rules 2015, pt.14.

24 Sch.1 of the Bail Act 1976, at [5] and [8].

25 Bail (Amendment) Act 1993.

26 Ss.1(4) and (5) of theBail (Amendment) Act 1993.

27 *Isleworth Crown Court ex parte Clark* [1998] 1 Cr.App.R. 257.

28 *R (Jeffrey) v Warwick Crown Court* [2003] Crim L.R. 190.

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Account Freezing Orders: Part 2 – In Practice[1]

By Rachel Barnes and Ryan Dowding[2]

This is the second of two articles in which we analyse the Account Freezing Order (AFrO) and Account Forfeiture Order (AFO) scheme under the Proceeds of Crime Act 2002 (POCA). Here we consider in more detail some of the practical aspects of acting for clients who face applications to freeze and seize the funds in their bank or building society accounts.

Excluding funds to pay living, business and legal expenses

The first challenge for most recipients of an AFrO will be to seek a variation to enable the release, or "exclusion", of monies to cover: (a) reasonable living expenses; (b) legitimate business expenditure; and (c) legal expenses.[3]

The statute requires an application for an exclusion of funds to be made to the magistrates' court whilst funds are frozen. There is no provision for the Crown Court to make an exclusion order pending an appeal of a forfeiture order. The relevant principles are largely common to all forms of property freezing and restraint orders, of which the most important concerns the availability of other assets to meet the expenses in question. It will be prudent, therefore, promptly to obtain a client's instructions on the extent and nature of their assets and their living and business expenses, gather the evidence necessary support the instructions and draft schedule(s) of anticipated expenses, ready for submission to the relevant enforcement agency and court.

Legal expenses

These applications are covered by the POCA 2002 (Legal Expenses in Civil Recovery Proceedings) Regulations 2005 (Expenses Regulations). Contrary to the position relating to restrained assets in criminal restraint and confiscation proceedings,[4] a court deciding whether to grant an exclusion for the purpose of enabling a person to pay legal expenses in respect of the civil recovery proceedings under Pt.5 of POCA must (i) have regard to the desirability of those involved in such proceedings having legal representation and (ii) disregard the possibility of legal aid funding being available to the person.[5] In *NCA v Azam*,[6] three relevant points were identified when considering an analogous application under a POCA Pt.5 property freezing order, in summary:

1. it is for the applicant to show that, in all the circumstances, it is just to permit the use of frozen funds to pay their legal fees;
2. if on the evidence, the court is satisfied there are other available assets which may be used, it will not grant the application;
3. if the court is not so satisfied but is in doubt and has specific grounds for suspecting the applicant has not disclosed the full extent of their assets, it may resolve that doubt against the applicant. Absent those specific grounds for suspicion, even if the court rejects the applicant's evidence as unreliable, it may not have any adequate basis for concluding there are other available assets. Accordingly, it is not the case that if the applicant cannot prove they have no other available assets which could be used, the application must fail.

The rates for legal fees are capped by Reg.17.

Reasonable living expenses and costs of carrying on a business

Courts will expect the parties to have attempted to reach an agreement on the sums to be released. While a suspect account holder is generally entitled to enjoy the standard of life he or she previously experienced, this does not extend to "Rolls Royce" type expenditure.[7] The statute requires a court to exercise its exclusion powers "with a view to ensuring, so far as practicable, that there is not undue prejudice" to the eventual forfeiture of recoverable property or money intended for use in unlawful conduct.[8] As with legal expenses, an application will be refused where other assets are available to meet the expenses and any doubt as to whether the applicant has undisclosed assets may be resolved against them.[9]

Seeking Further Information

The Magistrates' Court (Freezing and Forfeiture of Funds in Bank and Building Society Accounts) Rules 2017 (Rules) require only that the subject of an AFrO be provided with two documents:

(a) the court order; and

(b) a notice to the person affected which provides brief details about the nature of the order and the subject's right to challenge it.[10]

These documents will contain almost no detail as to why the account(s) have been frozen. The Rules contain no express provision requiring the underlying material or application notice be provided to the respondent following a without notice application.

An imperative will be to request a copy of the application notice and the material underpinning it, in order to advise on challenging the order. There is a body of case-law supporting the contention that those subject to orders granted "must ordinarily be provided with a copy of the supporting information". In *NCA v Simkus*, a case concerning without notice property freezing orders granted in POCA Pt.5 civil recovery proceedings, the NCA had refused to serve the underlying evidence on the subject of the orders, relying on a practice of not doing so. The Court was robust in its rejection of that position:

> It was impermissible for the party who obtained the order to refuse to disclose the evidence … For the target of a [property freezing order] Convention rights are plainly engaged. I consider that a provision entitling the NCA to withhold the evidence from such a person is invalid. The evidence must be served at the time when the order comes to the attention of the target … The right to apply to vary or set aside is integral to the fairness and proportionality of such orders and is not a real right

1 Pt.1 appeared in [2020] *Archbold Review* Issue 1.
2 Barristers, Three Raymond Buildings. We are grateful to Professor John Spencer QC for his comments on earlier drafts of this article; any errors remain our own.
3 POCA, ss.286A and 303Z4-303Z5.
4 POCA, s.41(4), (5).
5 POCA, s.303ZA(6)(a); see also s.245C and the comments in *NCA v Azam* [2013] EWCA Civ 970; [2013] 1 W.L.R 3800, 3813 at [60] (Lloyd LJ).
6 [2013] 1 W.L.R 3800, 3815 [66].
7 *Mitchell, Taylor and Talbot on Confiscation and the Proceeds of* Crime (3rd edn) at III.048.
8 POCA s.303z5(8).
9 *NCA v Surin* [2013] EWHC 3784 (QB) at [13] (HHJ Higgins). The same applies in relation to legal expenses: *Azam* (n.3) at [66] (Lloyd LJ).
10 Rule 3 and POCA, ss.303Z4(1)(b) and 303Z9(2).

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> unless the target knows the basis on which the order was made … If the NCA wishes to serve a redacted version of the evidence … those redactions should be approved by the court.
>
> …
>
> … The fundamental rule that a party is entitled to know the evidence against them means that these risks always exist and can only be minimised not eliminated … A power to make an order on the basis of evidence which the target has not seen, and never will see, is wholly exceptional. I am not persuaded either that the need to protect investigative methods is a valid consideration … The investigative methods are not usually highly sensitive and, if they are, consideration can be given to describing them, if at all, in very general terms in the evidence. [11]

The line of authorities relating to search warrants similarly provides that where an individual requests a copy of the information upon which the application was made, it should be provided and, if necessary, redacted following any legitimate claim to PII.[12]

In one of our cases, the applicant police force initially adopted the same position as the NCA in *Simkus* and refused to disclose any of the grounds upon which the without notice AFrO application was made. It then revised its position and served heavily redacted copies of the application and accompanying information. This gave rise to the question whether AFrOs should follow the criminal law PII regime used in search warrant cases or the principle applied in High Court asset freezing cases – that there is an irreducible minimum of disclosure that must be given to the subject of the asset freezing applications.[13] In our case, the issue ultimately fell away for unrelated reasons but the question of which approach should be adopted in AFrOs and AFOs remains open.

In *Haralambous*, the Supreme Court held that there is no requirement to "gist" information withheld for PII in search warrant cases.[14] The rationale underpinning this is that the subject's substantive rights are protected during any criminal trial process in which, if material was withheld on a basis of PII, it would not be available either to the court or to the subject/defendant.[15] In contrast, in the High Court asset freezing cases in which the concept of an irreducible minimum disclosure and "gisting" is applicable, the court is able to rely upon material withheld from the subject through the use of a closed material procedure (CMP). Thus, "conceptually and practically a closed material procedure is different from a PII hearing".[16] In our case referred to above, the applicant suggested that in response to an application to vary or discharge an AFrO, the magistrates' court could adopt a CMP to hear information upon which it relied to resist the application and only at this stage was the concept of an irreducible minimum disclosure and "gisting" engaged. However, there is no provision in either the statute or the Magistrates' Courts Rules for a CMP in applications to vary or discharge AFrOs or for AFOs (in contrast to other POCA proceedings in the Crown Court and the High Court[17]). In *R (B) v Westminster Magistrates Court*, the Supreme Court held that the magistrates' court, which is a creature of statute, has no power to conduct a CMP where none is provided for by statute and therefore declined to recognise a new exception to the principle of open inter partes justice.[18]

It is also worth considering at this stage whether there are other ways in which to obtain information to support a challenge to an AFrO. For example, if it appears that the order was made following the issue of a suspicious activity report (SAR), a subject access request could be made to the relevant institution.[19] In *Lonsdale v National Westminster Bank PLC*[20], it was held that SARs fall within the definition of "personal data"[21] and in that case, where funds have already been frozen, the bald assertion by the defendant bank that disclosing the SAR in response to a subject access request risks prejudicing an investigation (which is an offence[22]) did not bar disclosure.[23]

To challenge or not to challenge

The decision whether to challenge an AFrO or AFO and how to do so will likely be the most significant decision for clients. There may be a number of available options in each case. One option is simply to let the frozen funds investigation take its course and wait to challenge an AFO application if one is made. Another is to apply to vary or set aside the AFrO. This can be done by any person affected by the order.[24] Potential grounds for such an application include: the lack of any reasonable grounds for suspicion; the funds are not recoverable property; the bona fide purchaser for value exception in s.308 applies; or that the order itself is disproportionate in all the circumstances.[25] The "estoppel defence" elsewhere in Pt.5 civil recovery proceedings, namely that property which has been obtained in good faith and in respect of which the recipient has then taken steps to their detriment ceases to be recoverable[26], does not appear in Chapter 3B of POCA. However, the grant of an AFrO or AFO is discretionary and the bona fide recipient's reliance on the funds in question would be relevant to the question of the proportionality of any order.

There may be instances where for strategic reasons it is in the account holder's best interests not to challenge an AFrO, such as where the account holder is a company and only one of its accounts has been frozen and this does not unduly affect its operating capacity. In this type of case,

11 *NCA v Simkus* [2016] EWHC 255; [2016] 1 W.L.R 3481 [50]-[52] (Edis J).

12 *R (on the application of Cronin) v Sheffield Justices* [2002] EWHC 2568 (Admin); [2003] 1 W.L.R 752, 762-763, at [29] (Lord Woolf CJ); *Commissioner of the Police of the Metropolis v Bangs* (2014) 178 JP 158, *R (Haralambous) v St Albans Crown Court* [2018] AC 236.

13 *Mastafa v HM Treasury* [2013] 1 W.L.R 1621; *Bank Mellat v HM Treasury (No 4)* [2016] 1 W.L.R 1187. See also *Haralambous*, at p.272F-G [61].

14 *Haralambous,* p274B [65].

15 *Haralambous,* p273F-H [64].

16 *R (Terra Services Ltd) v NCA, Secretary of State for the Home Dept.* [2019] EWHC 1933 (Admin) [23]. On the distinction, see *Belhaj v DPP* [2018] UKSC 33, [2019] AC 593 (Lord Mance) (at [31]-[33]).

17 For a statutory example, see POCA ss.336A-336B(3)-(5) concerning applications in the Suspicious Activity Reports (SARs) regime to extend the 31-day moratorium period following a refusal of consent to do an act under s.335 of POCA; and Criminal Procedure Rules 2019, r.47.63-47.65). See generally, Civil Procedure Rules, Pt.82. In relation to CMPs in Crown Court and High Court proceedings concerning search warrants, see *Haralambous* (above) and *R (Terra Services Ltd) v The National Crime Agency* [2019] EWHC 3165 (Admin).

18 [2014] UKSC 59, [2015] AC 1195, 1209 [34] per Lord Mance (with whom Lord Neuberger, Lord Reed and Lord Hughes agreed; Lord Toulson dissenting). The court came to this view notwithstanding that the CMP was sought by the subjects of the extradition requests on the grounds that it was necessary to protect their human rights.

19 Data Protection Act 2018, s.45; see also Data Protection Act 1998, s.7.

20 [2018] EWHC 1843 (QB); [2019] Lloyd's LLR 94 (FC); see also *Shah v HSBC Private Bank (UK) Ltd* [2010] EWCA Civ 31; [2010] Bus LR 1514.

21 Ibid., 109, at [103].

22 POCA, ss.333A and 342.

23 *Lonsdale* (n.20) above 113, at [146].

24 POCA, s.303Z4. The enforcement officer may also make such an application.

25 See *Ahmed v Revenue and Customs* [2013] EWHC 2241 (Admin), applying the principle of proportionality in a cash forfeiture case. See also *Waya* [2013] 1 AC 294 in which the Supreme Court held that a disproportionate confiscation order would breach a defendant's right to peaceful enjoyment of property as guaranteed by Art.e1 of Protocol 1 to the ECHR. The principle is expressly incorporated into ch.2 of Pt.5 of POCA (High Court recovery orders) by s.266(3)(b).

26 POCA s.266(3)(a), (4); see, *Serious Fraud Office v Saleh* [2018] EWHC 1012 at [77]; *NCA v Atkinson* [2015] EWHC 1299 at [50]-[56].

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there may be some sense in making plain to the enforcement agency that the allegations underlying order are disputed but that a commercial decision has been taken to allow it to run its course. This strategic approach could be adopted with a view to challenging any future forfeiture application when the higher burden of proof will rest on the applicant enforcement agency. In this connection, those advising should be aware that when funds are not ultimately forfeited the subject is entitled to compensation where they have suffered a loss and the circumstances are "exceptional".[27]

Another potential route by which to reach a resolution is by way of a civil settlement with the authority bringing the proceedings. The NCA acknowledges the importance of settlements in civil proceedings[28] and has entered into at least one significant settlement following the freezing of bank accounts under the AFrO scheme.[29]

An AFO can only be made in respect of that proportion of the monies in an account which are recoverable property or intended to be used in unlawful conduct.[30] If the subject's bank or building society account contains a mixture of funds and the evidence of underlying or intended criminality is strong in relation to some of the funds but weak in respect of others, the pursuit of a settlement agreement carving out the former may constitute a swift means by which to reach a resolution. This route may also be a valuable strategic option where, for example, challenging the order in court would be hopeless or attract unwanted publicity and attention.

An additional layer of complexity arises where there is more than one extant investigation into the same bank or building society account, potentially by different law enforcement agencies. In *Re NCA*,[31] the High Court recently held that the NCA could be granted a disclosure order[32] pursuant to a money laundering investigation in respect of an account which was simultaneously the subject of an AFrO obtained by the City of London Police pursuant to its own, separate, frozen funds investigation. However, Davis LJ cautioned that for an agency to seek a disclosure order ostensibly pursuant to a money laundering investigation, but with the intention of circumventing the lack of a power to seek such an order in a frozen funds investigation "*would* potentially fall foul of [POCA] s.357(2)".[33] It is therefore crucial, despite its notorious complexity,[34] for those acting and advising in such cases to take a global view of POCA and the potential interactions between its component parts and different law enforcement agencies.

Appeals

The AFrO and AFO appellate framework replicates that of cash seizure and forfeiture.[35] The legislation does not provide a route to appeal an AFrO. Therefore, a challenge to the making of an AFrO or in respect of an application for its discharge or variation would be by way of case stated or judicial review proceedings in the High Court. The lack of a direct appeal is akin to the position in relation to cash seizure and forfeiture.

Under the statute, a right of appeal to the Crown Court exists only in respect of an AFO.[36] It is by way of rehearing and on an appeal the Crown Court may make any order it thinks appropriate.[37] When hearing the appeal, the Crown Court is exercising its limited civil jurisdiction. The practical effect of this distinction is that the Crown Court cannot, for example, exclude evidence under s.78 of the Police and Criminal Evidence Act 1984 (PACE).[38] The appellate procedure is governed by the Crown Court Rules 1982/1109. A decision of the Crown Court can be challenged in the High Court by way of case stated or judicial review.

International cooperation

Article 31 of the Proceeds of Crime Act 2002 (External Investigations and External Orders and Requests) (Amendment) Order 2018/1078 (the 2018 Order)[39] inserts a number of provisions into the Proceeds of Crime Act 2002 (External Investigations and External Orders) Order 2005/3181 (the 2005 Order)[40] the effect of which is to permit the Secretary of State to refer an external request to freeze monies held in a bank account in this country to one of the principal domestic law enforcement authorities.[41] If the enforcement officer dealing with the case agrees there are reasonable grounds for suspecting that the funds constitute recoverable property the officer may apply to a magistrates' court to give effect to the external request.[42]

The low threshold of "reasonable suspicion" remains the same and there is no need for proceedings to have been brought in the requesting country in connection with the property in question.[43] We anticipate that one issue the courts will need to resolve in due course is the extent to which the applicant enforcement officer may rely on the suspicions of the foreign law enforcement agency that is seeking the UK's legal assistance, rather than having direct access to the evidence that gives rise to its suspicions.

Conclusion

As mentioned in Part 1, at the time of publication the AFrO/AFO scheme has yet to be subject to detailed scrutiny by the High Court. The use of these potentially draconian orders continues to grow rapidly. We have endeavoured in this two-part series to share our experience of acting for clients who face applications to freeze or forfeit their funds and the analogies which can be drawn with other, similar, powers under POCA. We have heard the current AFrO/AFO landscape in the magistrates' courts described as "the wild west". We anticipate that the sheriffs of the High Court will be riding into town before too long.

27 POCA, ss.303Z18(3) and s.302.

28 "Parties may (and indeed often are encouraged to) settle civil proceedings without coming to court. Generally, parties have a wide degree of freedom as to the terms on which they settle such disputes, including terms which keep certain aspects of the settlement confidential between the parties, the NCA's approach is to be as transparent as possible and keep confidentiality to a minimum". NCA "How we tackle illicit finances" *National Crime Agency*: https://www.nationalcrimeagency.gov.uk/what-we-do/how-we-work/how-we-tackle-illicit-finances.

29 NCA, "NCA agrees £190m settlement after frozen funds investigation" *National Crime Agency* 3 December 2019: https://www.nationalcrimeagency.gov.uk/news/nca-agrees-190m-settlement-after-frozen-funds-investigation-3.

30 POCA ss303Z14(4), 306.

31 *Re National Crime Agency* [2020] EWHC 268 (Admin).

32 POCA s.357.

33 Ibid., [55] (emphasis in original).

34 "[F]earsomely complex" per Davis LJ at [4].

35 POCA, ss.298-299.

36 POCA, s.303Z16(1)(A).

37 POCA, s.303Z16(3).

38 See, e.g., PACE s.82(1): "[p]roceedings means criminal proceedings"; also *R (on the application of Commissioner of HMRC v Pisciotto* [2009] EWHC 1991 (Admin) at [40]-[42].

39 The 2018 Order came into force on 12 November 2019.

40 Both are Orders in Council made pursuant to POCA s.444 ("External Requests and Orders").

41 There are four listed under Article 213Z(a)-(d) – namely, the (a) Chief Constable of the Police; (b) Commissioner for HMRC; (c) Director of the SFO; and (d) Director of the NCA.

42 Art.213Z1(1)(a)-(b).

43 Arts 213Z3(2) and 213X.

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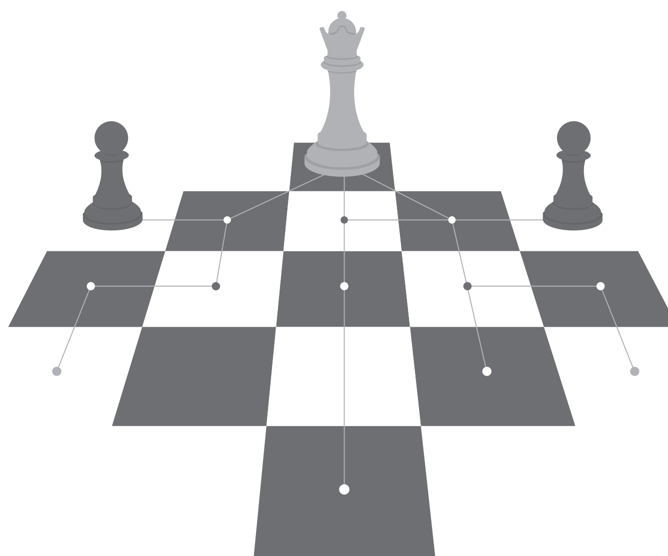
All things considered.



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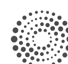

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