Neutral Citation Number: [2021] EWCA Crim 1879

Case Nos: 202001870 B1, 202002164 B1 and 20210745 B1

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM SOUTHWARK CROWN COURT
HHJ BEDDOE

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/12/2021

Before:

LORD JUSTICE HOLROYDE
MR JUSTICE JEREMY BAKER
and
MR JUSTICE JAY

- -

Between :

ZIAD AKLE and PAUL BOND	**Appellants**
- and –	
THE CROWN	**Respondent**

- -
- -

Adrian Darbishire QC, Mark Aldred and Duncan Jones (instructed by **Paul Hastings**) for **Ziad Akle**
Howard Godfrey QC (acting *pro bono*) and **Robert Fitt** (assigned by **Registrar of Criminal Appeals**) for **Paul Bond**
Michael Brompton QC, Gillian Jones QC and Faras Baloch (instructed by **the SFO**) for **the Crown**

Hearing dates: 1st July, 20th and 21st October 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be 10 December 2021 at 11.00 a.m.

LORD JUSTICE HOLROYDE:

1. Ziad Akle and Paul Bond stood trial, together with Stephen Whiteley, on an indictment containing four counts alleging conspiracy to give corrupt payments, contrary to s. 1 of the Prevention of Corruption Act 1906. Count 1 (against Akle alone), count 2 (against all three accused) and count 3 (against Akle and Whiteley) alleged conspiracies to give corrupt payments to Oday Al Quoraishi ("Oday"), an agent of the South Oil Company ("SOC"). Count 4 (against Bond alone) alleged conspiracy to give corrupt payments to public officials. In each of the counts, the persons named as co-conspirators included Ata Ahsani, Cyrus Ahsani, Saman Ahsani (collectively, "the Ahsanis") and Basil Al Jarah ("BAJ"). The charges were brought against the accused by the Serious Fraud Office ("SFO").

2. On 19th June 2020, after a trial lasting sixty-six days in the Crown Court at Southwark, Akle was convicted of the offences charged in counts 1 and 2. The jury could not agree on count 3, which was left to lie on the file against him. On 23rd July 2020 he was sentenced to concurrent terms of five years' imprisonment.

3. Whiteley was convicted of the offence charged in count 2 and was subsequently sentenced to 3 years' imprisonment.

4. The jury could not agree on any verdicts in relation to Bond, and were discharged. On 24th February 2021, following a retrial, Bond was convicted of the offences charged in counts 2 and 4. On 1st March 2021 he was sentenced to concurrent terms of three years six months' imprisonment.

5. Akle applied for leave to appeal against conviction on a number of grounds. The single judge referred two of those grounds to the full court, but refused leave on the other grounds. The application in relation to one of the refused grounds has been renewed before us. Akle also appeals, with the leave of the single judge, against his total sentence.

6. Bond applied for leave to appeal against his total sentence. His application was referred to the full court by the Registrar.

7. We express at the outset our gratitude to all counsel for their detailed written and oral submissions. We will do no more than give brief summaries of their arguments, but we have considered all the many points made.

8. We shall first summarise the relevant facts and the proceedings at trial, and then address Akle's application for leave to appeal against conviction and appeal against sentence. Thereafter we shall address Bond's appeal against sentence. For convenience only, and intending no disrespect, we shall for the most part refer to persons by their surnames only, or by the initials and abbreviations which have been used during these proceedings.

Summary of the key facts:

9. In the years following the fall of Saddam Hussein in 2003, the Government of Iraq sought to rebuild the country's infrastructure. Increasing Iraq's crude oil exports was a

key objective and included the Iraq Crude Oil Export Expansion Project ("ICOEEP"). Nine potential projects were conceived, with a value of $1.9 billion.

10. The first project ("the SPM project") involved the installation in the Persian Gulf of Single Point Moorings. These are floating buoys which allow tankers to load oil offshore. The second project ("the pipeline project") involved the installation and commissioning of two on-shore and off-shore pipelines. In respect of both projects, a competitive tendering process was used to select the companies to which contracts were to be awarded.

11. The South Oil Company ("SOC"), an Iraqi state-run company which was responsible for oil in the south of Iraq, engaged Foster Wheeler ("FW"), a UK-based global engineering company, to compile a detailed specification for the tenders, evaluate the bids from interested companies on technical and commercial aspects, and then recommend the most technically and commercially compliant bid to SOC. That recommendation would then be passed to Iraq's Ministry of Oil for final approval. The prosecution case against all the accused was that they had been involved in bribing decision-makers in order to win ICOEEP contracts.

12. Ata Ahsani and his sons Cyrus and Saman Ahsani owned and controlled the Unaoil group of companies. They held the offices of Chairman, Chief Executive Officer and Chief Operating Officer respectively. Both Akle and Whiteley were employed by Unaoil. BAJ, a friend of the Ahsanis, was Unaoil's Iraqi partner based in Iraq. It was alleged that Unaoil paid Oday a total of $608,000 for his personal benefit, in order to influence the terms and allocation of contracts to the advantage of Unaoil and its clients.

13. Count 1 alleged that Akle, between June 2005 and May 2009, conspired with the Ahsanis, BAJ and others, to give corrupt payments to Oday as inducements or rewards in relation to the affairs of the business of Oday's principal, the SOC, namely in obtaining confidential information regarding oil projects to be undertaken for the SOC. From April 2009 Oday was put on a monthly retainer – said to be a bribe – so that he could provide sensitive information about projects to the benefit of Unaoil.

14. Count 2 concerned the manipulation of the tender process for the SPM project. It was alleged that between March 2009 and February 2010 Akle, Bond and Whiteley conspired with the Ahsanis, BAJ and others to give corrupt payments to Oday in relation to the recommendation and award of the contract for the SPM project to a company called Single Buoy Moorings Inc ("SBM"). Bond was an employee of SBM. BAJ was working to cement relationships and position Unaoil. By April 2009 SBM were expressing an interest in working with Unaoil and thereafter it was agreed that Unaoil would work on SBM's behalf to secure the project in return for a commission. Oday was deployed to obtain confidential information about FW's draft specification. Unaoil then used Oday to influence the specification in favour of their client, SBM. In January 2010 SBM were informed that FW would recommend them to SOC as the only technically and commercially compliant bidder.

15. Count 4 concerned corruption at the Ministry of Oil in relation to the SPM project between March 2010 and August 2011. It was alleged that, having corruptly secured SOC's recommendation, SBM – through Bond – sought information from Unaoil as to the progress of the bid at the Ministry. Bribes were paid by Unaoil executives to senior

officials in the Ministry of Oil in efforts to ensure that the Ministry approved the bid and that the contract was awarded to Unaoil's client SBM.

Arrests and investigations:

16. On 22 March 2016 BAJ was arrested in Manchester. When interviewed under caution, he denied any involvement in bribery or corruption. His home was subsequently searched and documents and digital devices seized.

17. On 29 March 2016 the three Ahsanis were arrested in Monaco by the Monegasque police. Their respective homes, and the office of Unaoil in Monaco, were searched and documents and electronic devices were seized.

18. On 5 October 2016 Akle was arrested at Heathrow airport. Digital devices were taken from him, and further devices were seized when his home was searched. When interviewed under caution he put forward a prepared statement explaining his role at Unaoil and thereafter made no comment. He was interviewed again in July 2017. He put forward a prepared statement denying any part in any agreement to make corrupt payments, and thereafter made no comment.

19. On 30 August 2017 Bond was arrested at Heathrow airport. Digital devices were seized from him. When interviewed under caution, he made no comment.

20. The three Ahsanis were the subject of an SFO investigation. The SFO obtained first instance warrants against all three, and sought to extradite Saman Ahsani from Monaco by means of a European Arrest Warrant. That investigation was however abandoned when the case against the Ahsanis was taken over by the US Department of Justice ("DOJ") following the extradition of Saman Ahsani from Italy by the US authorities. In due course, a deal was done between the Ahsanis and the DOJ. Ata Ahsani paid a penalty of $2.25 million and faced no further action. His sons Cyrus and Saman Ahsani negotiated plea agreements with the DOJ, under which it is expected they will serve no more than five years' imprisonment. By letter dated 26 April 2019, the SFO informed the lawyer acting for Cyrus and Saman Ahsani that the SFO would discontinue its investigation in respect of matters covered by the US plea agreements they had entered into on 25 March 2019. By letter dated 12 September 2019, the SFO informed the lawyer acting for Ata Ahsani that it was no longer in the public interest for the SFO to proceed with a prosecution of him in light of his agreement with the DOJ.

21. On 15 July 2019 BAJ pleaded guilty to five counts of conspiracy to give corrupt payments. Other offences, involving bribery in relation to other contracts, were taken into consideration. He subsequently entered into an agreement with the SFO pursuant to the Serious Organised Crime and Police Act 2005 ("SOCPA"), and on 8 October 2020 was sentenced to a total term of imprisonment of three years' six months, reduced from ten years by reason of his guilty pleas and co-operation. He has not applied for leave to appeal against sentence.

Disclosure:

22. The SFO carried out a substantial disclosure exercise, to which the provisions of the Criminal Procedure and Investigations Act 1996 ("CPIA") applied. A number of Disclosure Management Documents were served. Disclosure of unused material was

made in tranches, in the form of schedules summarising the nature and content of the items listed. Despite requests from Akle's legal representatives, the SFO declined to provide copies of any of the documents summarised in the schedules.

23. Some of the entries in the schedules referred to contacts between the SFO and David Tinsley. Tinsley, a US citizen, runs 5 Stones Intelligence, which is based in Florida and is described in its published material as "a leading intelligence and investigative company". He is not a lawyer, but he was actively involved in assisting the Ahsanis and their US attorney Rachel Talay.

24. The SFO indicated at an early stage that they would seek, at trial, to adduce evidence of BAJ's convictions. They relied in this regard on section 74 of the Police and Criminal Evidence Act 1984 ("PACE") which, so far as material for present purposes, provides:

> "**Conviction as evidence of commission of offence**
>
> (1) In any proceedings the fact that a person other than the accused has been convicted of an offence by or before any court in the United Kingdom …shall be admissible in evidence for the purpose of proving that that person committed that offence, where evidence of his having done so is admissible, whether or not any other evidence of his having committed that offence is given.
>
> (2) In any proceedings in which by virtue of this section a person other than the accused is proved to have been convicted of an offence by or before any court in the United Kingdom …, he shall be taken to have committed that offence unless the contrary is proved."

25. Akle indicated that he would oppose the introduction of such evidence. In this regard, he served, pursuant to section 8 of CPIA ("section 8"), a request for specific disclosure dated 24 September 2019. The request referred to the SFO's wish to adduce evidence of BAJ's guilty pleas. It said that the conduct of Tinsley had been such as to render BAJ's guilty pleas unreliable evidence of the existence of a conspiracy, and its admission unfair. It went on to say:

> "The defence will argue that the plea should not be admitted under section 74 of PACE because the plea was brought about through improper means and its admission will result in unfairness. Any material going to support this argument falls to be disclosed."

It was submitted that BAJ's plea, and possibly the decision by the SFO not to pursue any charges against the Ahsanis, appeared to have been improperly influenced and facilitated by Tinsley. Tinsley was described as "a 'fixer' seeking to negotiate between the Ahsanis, the US authorities and the UK authorities" and it was said that BAJ had entered his pleas as a result of being placed under improper pressure, and misled, by Tinsley.

26. In its response to that request, served on 31 October 2019, the SFO said that they were aware that Tinsley had acted, and continued to act, as an adviser to the Ahsanis; that he wished to encourage other defendants to plead guilty and to cooperate with the authorities; and that he had been in contact with BAJ. The SFO, however, "was not a party to any such discussions Mr Tinsley has had with Mr Al Jarah". The SFO said that they held no material capable of supporting the proposition that BAJ's pleas of guilty did not amount to a true acknowledgement of his guilt freely made with full understanding of the ingredients of the charges preferred against him or that, in relation to those pleas, he was misled by Tinsley or that his pleas were in any way unreliable as evidence of his guilt.

27. Also on 31 October 2019, the SFO served their Tranche 5 schedule of unused material. Most of the items listed referred to the activities of Tinsley. Some items were mistakenly omitted, an error which was corrected in an addendum schedule served on 7 November 2019. The entries in that addendum schedule again related principally to Tinsley.

28. On 5 November 2019 Akle served a further section 8 request for disclosure, and a skeleton argument relating to Tinsley and the admissibility of BAJ's pleas. The SFO responded with a skeleton argument two days later

29. On 8 November 2019 the judge heard oral argument on the section 8 application, which he refused.

30. On 3 December 2019 Akle served an "addendum defence statement" dated 29 November. In its reply dated 12 December 2019 the SFO said that this document merely repeated earlier requests and that there was nothing further to be disclosed.

31. The trial was listed to begin on 20 January 2020. As that date approached, Akle served a skeleton argument on 14 January indicating that he would apply to stay the prosecution on both the grounds under the familiar test for abuse of the process, namely that Akle could not have a fair trial ("limb 1") and that it was unfair to try him ("limb 2"). He contended that the SFO had acted with Tinsley in a way which flouted legal and regulatory safeguards and breached Akle's right to a fair trial. He again sought disclosure of all material that might reasonably be considered capable of assisting his argument.

32. On 17 January the SFO served their Tranche 6 schedule, which included expanded summaries of some of the items listed in the Tranche 5 schedule.

33. Also on 17 January, those representing Akle served a statement by a solicitor exhibiting transcripts of recordings of conversations on the following dates:

    i) 7 December 2018: Akle, Tinsley and Saman Ahsani;

    ii) 16 January 2019: Akle, Tinsley, Rachel Talay and her colleague Brown;

    iii) 1 February 2019: Akle and BAJ;

    iv) 6 March 2019: Akle and BAJ;

    v) 31 May 2019: Akle and BAJ.

34. On 20 January 2020, the first day of the trial, the SFO served its response to the abuse of process application. Oral argument on that application was heard on the following day, 21 January.

The trial:

35. We summarise first the broad nature of the cases for the prosecution and for Akle, and the issues which the jury had to decide in his trial. We then refer to applications which were made on Akle's behalf to the trial judge. It is unnecessary to refer to the case against Bond, who does not challenge his conviction.

36. The prosecution case against Akle was based primarily on documentary evidence. Over a period of nine days, the case officer read out a schedule of events, of which the jury had copies. The schedule listed approximately 1,600 emails and other documents, most of which came from Unaoil's servers.

37. In addition, a financial investigator read out various financial documents. An expert witness was called to explain the structure and mechanics of an oil industry tender process.

38. The prosecution adduced evidence of BAJ's guilty pleas to prove the existence of the conspiracies.

39. Akle's defence was that he did not admit that there were conspiracies as alleged, but if there were, he was not party to any of them. His evidence was that as far as he had been made aware by BAJ, any payments to Oday – and he was only aware of the first few – were made pursuant to an agreement with SOC. He understood them to be for personal protection for Oday, bearing in mind that Iraq was a very dangerous place. In support of this aspect of his case, and in relation to his state of mind at that time, he called an expert witness who gave evidence as to the political and economic situation in Iraq.

40. In addition, Akle asserted that payment had been made to Oday as compensation for his remaining in his job at SOC; to encourage Oday to go the extra mile; and because it was necessary to conceal Unaoil's role from FW in order to prevent it from becoming known to Deputy Minister Al-Shamma at the Ministry of Oil, which would have caused Oday to be removed from his position to the detriment of the ICOEEP. His case was that Al-Shamma had his own corrupt agenda which SOC sought to guard against; the relationship with Oday was authorised by the Director General of SOC, who had sought to work with Unaoil in SOC's interests; and SOC was suspicious of FW because FW was imposed on them to administer the tender.

41. The issues for the jury on each count against Akle were as follows:

(1) had the prosecution made them sure that there was a conspiracy, as set out in the count in question in the indictment? If so,

(2) had the prosecution made them sure that at some stage during the life of that conspiracy, Akle was a part of that conspiracy in the sense that (i) he knew of its existence, (ii) he played a deliberate and knowing part in it, and (iii) he intended thereby to promote some or all of its objectives? If the answer to all those questions

was yes, Akle would be guilty of the count in question. If the answer to any of them was no, he would be not guilty.

42. The jury were directed that they could consider whether to draw an adverse inference from Akle's failure to mention facts in interview which he relied on in evidence, and from alleged deficiencies in his defence statement.

Rulings relevant to Akle's grounds of appeal: (1) abuse of process:

43. The judge, as we have indicated, heard the application to stay the proceedings as an abuse of the process on 21 January 2020. He refused it. In order not to delay the trial, he gave his reasons in a written ruling at a later date.

44. The judge noted that most of Akle's complaints, about the way in which the SFO had dealt with the case, had focused on the activities of Tinsley. He referred to the fact that Tinsley, who had no official title or status but had acted as an agent or broker on the instructions of and in the interests of the Ahsanis, had had contact with Ms Osofsky, the Director of the SFO ("the DSFO"), though it was not clear how Tinsley had established that contact. He said that Tinsley had represented himself to be committed to "mending the relationship between the SFO and the FBI and build something great". He had exchanged messages with the DSFO which indicated that Tinsley "was much more schooled in the art of the deal rather than in a legal process that should concern itself not only with justice being done but being seen to be done". The judge added, in parenthesis:

> "[It is important that I acknowledge, however, that I do not [have] the whole picture, have not examined every communique or note and I am only dealing as best I can with the material I have. Nonetheless it seems to me that when this case is finally concluded a review of the contact with DT should be comprehensively reviewed to see what lessons can be learned from it.]"

45. The judge said that Tinsley had suggested to the DSFO and to others in the SFO that he would be able not only to secure the fullest cooperation of the Ahsanis but also to deliver pleas of guilty from BAJ and Akle, which he suggested would lead to consequential convictions of others. He said that the DSFO and others "took the bait". He continued:

> "They should have had nothing to do with someone who had no official status, who was not employed by any US government agency, who was not the Ahsanis' lawyer (not a lawyer, at all), but a freelance agent who was patently acting only in the interests of the Ahsanis (whose interests could obviously potentially conflict with those of BAJ and ZA); and they should not have countenanced, let alone encouraged (if only tacitly) his contact with either BAR or ZA, who were throughout under investigation by the SFO, represented by UK lawyers, and formal proceedings for the offences set out in this indictment had begun with requisitions issued on the 15th November 2017 which

> were followed by their first court appearance on the 7th December 2017."

46. The judge noted that prosecution counsel Mr Brompton QC had not sought to defend this contact, which had properly been called into question by others at the SFO when they became aware of it, though their advice was ignored. Tinsley indicated to the SFO that he had contacted BAJ and Akle and was "confident he could get them to plead", then later reported that BAJ was now minded to plead. The SFO knew of the contact and of the fruits of Tinsley's efforts. The SFO should have been engaging only with the legal representatives of BAJ and Akle and should have had nothing to do with DT.

47. The judge found, however, that there was no evidence that the SFO gave Tinsley any sensitive information and no evidence that Akle acted against his own interests as a result of his contact with Tinsley or acted to his own prejudice as a result of anything Tinsley said to him.

48. The defence had submitted that the SFO's involvement with Tinsley involved the flouting of all legal and regulatory safeguards; that Tinsley was perverting or attempting to pervert the course of justice and encouraged to do so by the SFO; that the SFO were using him as a covert human intelligence source ("CHIS") within the meaning of section 26 of the Regulation of Investigatory Powers Act 2000 ("RIPA") and related Codes; and that what was being undertaken and encouraged by the SFO was a plea negotiation in the absence of and behind the backs of BAJ's and Akle's lawyers, in breach of the relevant guidelines. These complaints were said to amount to egregious conduct circumventing the rules to secure an advantage over Akle (and BAJ) such that it was unconscionable to proceed.

49. The judge found that the "ill advised" contact did not engage the Attorney General's Guidance on "Plea Discussions in Cases of Serious or Complex Fraud" and he could find no sufficient support for the submission that Tinsley's actions had a tendency to, or that he intended to, pervert the course of justice. He was also unpersuaded by the submission that Tinsley could be described as a CHIS within the meaning of RIPA.

50. The judge concluded that, even if he had accepted all of the complaints advanced, he would not on the evidence have found that "limb 2" abuse of process was made out. Insofar as "limb 1" abuse of process had been put forward as a separate issue, he saw nothing to support the contention that Akle could not have a fair trial.

Rulings relevant to Akle's grounds of appeal: (2) admissibility of BAJ's guilty pleas:

51. Also on 21 January, the judge granted the SFO's application pursuant to section 74 of PACE to put BAJ's guilty pleas before the jury. He ruled that Akle had not satisfied the test under section 74(2), even on the balance of probabilities.

52. As to the alternative submission, that the evidence should be excluded on grounds of fairness pursuant to section 78 of PACE, the judge was satisfied that BAJ's guilty pleas were freely and properly entered into and were a true reflection of his guilt. BAJ had been represented by experienced counsel and his pleas were consistent with the evidence against him. There was no other basis for suggesting that BAJ was not guilty of the offences to which he had pleaded.

Rulings relevant to Akle's grounds of appeal: (3) evidence relating to Tinsley:

53. Later in the trial, counsel then representing Akle sought leave to introduce, by cross-examination of the officer in charge of the case, evidence of the involvement of Tinsley with the Ahsanis, the SFO, BAJ and Akle. The basis upon which he sought to do so was that the material was relevant to Akle's belief that BAJ's pleas to the conspiracy counts were not genuine pleas of guilty and had been secured by improper means. The evidence of the activities of Tinsley, and what he and others had recorded of what BAJ had variously said before entering his pleas of guilty, was said to be capable of supporting Akle's case concerning the unreliability of the evidence of BAJ's pleas.

54. The application was rejected by the judge on the following grounds. First, such evidence would not demonstrate or bolster Akle's claim to innocence; it was an entirely collateral matter which would give the jury no assistance as to whether he was involved in the corruption of which he was accused or not. Secondly, none of the material went anywhere near calling into question the validity of BAJ's pleas. Thirdly, the starting point for establishing the unreliability of a conviction of a person other than a defendant was evidence from the person concerned or at least some direct evidence demonstrating that he could not have committed the offence in question; it was impermissible to introduce hearsay evidence of conversations which demonstrated some (predictable) reluctance by someone to plead guilty before actually doing so, and to ask the jury to speculate as to whether BAJ really meant to admit what he had done. Fourthly, Akle's defence was a denial of his own complicity but did not seem to be a denial that there was or may have been corruption of Oday and others: his case was that he was aware that payments were being made to Oday but only for the purpose of ensuring his personal security. Attempting to raise an issue by the means identified had no real bearing or materiality on the issues as between the prosecution and defence.

55. For those reasons the judge refused to permit the proposed cross-examination, and insisted that any hearsay to be relied on by Akle in his case should be the subject of proper application under the hearsay provisions.

56. Those three rulings, and the associated issues of disclosure, are the subject of the three grounds of appeal against conviction which Mr Darbishire QC argued before us.

Akle's grounds of appeal against conviction:

57. Ground 1 is that the judge misdirected himself in law in rejecting the application to stay proceedings as an abuse of process. The basis of the application, which relied on the material which had been disclosed at that stage, was that the SFO were party to an improper and unlawful attempt by an unregulated operative, Tinsley, to approach defendants including Akle before trial in the absence of their lawyers and attempt to persuade them to change their pleas to guilty. His approaches were sanctioned and encouraged at the highest level of the SFO, against the advice of its own lawyers. The conduct of the SFO, as both investigator and prosecutor, amounted to "malpractice" so bad as to "undermine public confidence in the criminal justice system and bring it into disrepute" (see *R v Latif* [1996] UKHL 16; [1996] 2 Cr App R 92). This ground of appeal alleged that there had been improper communications between Tinsley and senior officials within the SFO, including the DSFO and the Chief Investigator Mr Kevin Davis, during the period September 2018 to July 2019. It was submitted that the SFO well knew that Tinsley was working in the interests of the Ahsanis and was seeking

to put improper pressure on Akle and BAJ to change their pleas. Tinsley had made numerous approaches to BAJ and to Akle, and ultimately BAJ did change his plea, succumbing (on Akle's case) to this improper pressure. It was submitted that the SFO had been guilty of conduct which threatened the integrity of the criminal justice process, and that the judge should have recognised it as such by holding that the prosecution was, therefore, an abuse of process: see *R v Latif; R v Horseferry Road Magistrates' Court, ex parte Bennett* [1994] 1 AC 42; *R v Paul Maxwell* [2011] 1 WLR 1837 and *Warren v AG for Jersey* [2012] 1 AC 22.

58. It may be noted that some elements of this proposition were not seriously disputed by the SFO, though the alleged impropriety was said to have been overstated, and it was not accepted that the SFO was aware that Tinsley would be putting *improper* pressure on his targets.

59. In the alternative, Ground 2 is that the prosecution failed fundamentally to comply with its disclosure obligations in relation to material capable of supporting the abuse of process application which is the subject of Ground 1. The judge erred in refusing to order further disclosure relating to the SFO's conduct and its dealings with Tinsley and in refusing to hold a *voir dire* on this issue. Compliant disclosure would have provided the court with evidence which should have led to a stay of proceedings.

60. Ground 3, in respect of which the application for leave to appeal is renewed, is that the judge admitted BAJ's guilty pleas to prove the existence of the conspiracies but erred in law by refusing to permit the defence to adduce evidence "*to prove the contrary*", i.e. evidence which might have proved that BAJ was not guilty. The judge, as we have said, had noted that the picture before him was incomplete. It was submitted that the SFO had failed to complete the picture, because they had merely summarised relevant material in a schedule of unused material and had not disclosed the underlying documentation. Akle had made detailed applications for further disclosure and further and better particulars, but the judge had accepted the SFO's assurance that there was nothing further to disclose. It was submitted that the judge should not have accepted that assurance when it was apparent from the schedules that there must be further unused material which should have been disclosed.

Akle's grounds of appeal against sentence:

61. Having heard the evidence at the trial, the judge in clear and detailed sentencing remarks stated that he had no doubt that the way Unaoil sought to position itself, which was by corruption, was something that Akle was aware of at an early stage. Counts 1 and 2 related to the joint efforts of Akle, BAJ and others to foster a relationship with Oday and to secure for Unaoil a dishonest advantage in respect of any contracts with which SOC might be concerned. It was clear from the emails that at an early stage Akle knew what was going on with Oday and was happily prepared to play his part in that. The judge had no doubt that Akle was as much a part of the inner circle at Unaoil as BAJ: in terms of culpability, they acted as partners and there was little to distinguish between them.

62. The Sentencing Council has published a definitive guideline relating to offences under the Bribery Act 2010 where the maximum penalty was 10 years' imprisonment. By contrast, the offences covered by counts 1 and 2 under predecessor legislation attracted a maximum penalty of seven years. However, it was agreed that the guideline was a

useful guide to the proper approach to sentencing in cases such as this. Applying the guideline, appropriately tailored, the judge found that the offending fell within category A for culpability and category 1 for harm on both counts. Akle had played a leading role in relation to the two conspiracies. Both conspiracies were sophisticated in nature, and both involved the direct and sustained corruption of a senior official performing a public function. The corruption seriously undermined the proper function of national business and public services.

63. The aggravating factors were that the offences were committed across borders, over a long period, and were utterly exploitative at a time when the political and economic situation in Iraq was fragile. They undermined the integrity of the tendering process for high value national infrastructure projects. The mitigating factors were Akle's previous good character and his health conditions.

64. The judge stated that his sentences would have been six years' imprisonment on each count concurrent but, because of issues relating to Akle's health and to the anxieties over Covid-19, he reduced them to five years concurrent.

65. The grounds of appeal against sentence are that the judge erred in applying too high a starting point, and in applying the Bribery Act guideline which was not appropriate for this offence; erred in his approach to assessing the seriousness of count 1; erred in his assessment of Akle's role, which was contrary to the evidence; gave insufficient reduction for Akle's positive good character and "exemplary conduct"; made insufficient reduction for Akle's poor health and vulnerability when being sentenced during the Covid-19 pandemic (see *R v Manning* [2020] EWCA Crim 592); and failed to reflect the conduct of the SFO or the sentences imposed on the Ahsanis, who were the principal beneficiaries of the offending.

The initial appeal hearing:

66. The appeal was listed to be heard on 1 July 2021. It did not, however, proceed on that date, because the court (differently constituted), having heard detailed argument on both sides, accepted the submission of Mr Darbishire that there had been inadequate disclosure of the underlying material relating to contact between Tinsley and the SFO.

67. The court gave directions requiring the SFO to disclose the underlying material which was the source of the Tinsley entries in the Tranche 5, 5A and 6 schedules, to make appropriate enquiries in relation to any contact between Tinsley and the SFO in respect of which there was an absence of documentary material, and to provide a chronological schedule of contact with Tinsley. As a result of those directions, copies of about 650 pages of documentation were for the first time provided by the SFO to Akle's representatives.

The documents provided pursuant to the court's direction:

68. At the hearing of the appeal on 20 and 21 October 2021, Mr Darbishire referred us in detail to much of this newly-provided material. It is unnecessary to refer to every feature to which he invited our attention, or to every detail of the SFO's response to the points made, but we mention the following.

69. On 21 September 2018 Tinsley sent a text message to the DSFO in which he introduced himself as a friend of one of her former colleagues in her previous employment and asked to meet her "privately first to provide some background and follow on with official meeting". His request was granted: the DSFO replied that she was "super honoured that you're coming my way" and arrangements were made for them to have "a solid hour together just us". No note was made of that meeting, which it seems was joined after a time by Ms Talay. Tinsley and Ms Talay thereafter met Davis. The DSFO, in response to a request made after directions were given on 1 July 2021, has explained that she knew Tinsley was a former agent of the US DEA and had lectured at the FBI training academy, and she was prepared to meet him because she understood he had evidence of crime in the UK of which the SFO may be unaware. She took no notes of their meeting because it was only a preliminary meeting, and she expected notes to be made when Tinsley subsequently met Davis and Thompson.

70. The DSFO has also stated that apart from one brief telephone call, in which she told Tinsley that he should deal with Davis rather than her, and one "courtesy meeting" with Tinsley on 17 January 2019, she had no further telephone contact or meeting with Tinsley. As will be seen, that is not what Tinsley told others.

71. Tinsley subsequently had a number of contacts with SFO officials, including Davis. Initially, the case team declined to have any contact with him, but that was to change.

72. From the start, Tinsley was asserting that the Ahsanis could do "proactive things" to help the SFO and that he believed they could "bring in" BAJ and Akle.

73. The SFO initially intended that the Ahsanis would if possible be prosecuted both in the UK and the US. However, a file note of a telephone conversation on 12 December 2018 records Tinsley saying that, as a result of his conversations with Davis, Marc Thompson (another SFO official) and the DSFO, he understood that the SFO were prepared to allow the DoJ to deal with the Ahsanis' conduct entirely, in return for assistance from Saman Ahsani and probably also Cyrus Ahsani.

74. On 7 December 2018 Tinsley had spoken on the phone to Akle and Saman Ahsani. He told them that he thought "we are in very good shape" and he thought they would "like the results" of his recent meetings with the DSFO. He enthused about how fair the DSFO was, and claimed

> "I have probably had nine conversations with her and four meetings, one of which went three hours, and I am dealing now with her number 2 and 3 on some things. Collectively, I think it's going to benefit everyone …"

75. On 16 January 2019, Akle had dinner with Tinsley, Ms Talay and her colleague Brown. Akle recorded the conversation. A redacted transcript of the recording was one of the documents served on the SFO on 17 January 2020. Tinsley and Ms Talay were clearly conscious that they did not act for Akle, and Tinsley more than once emphasised that they were only talking "theoretically". Tinsley spoke about the great success he and Ms Talay were having in dealing with the Ahsanis' cases. He said that he and Ms Talay were meeting the DSFO the next day, that they had constant conversations with her and a great relationship, and that she and the head investigator were "giving us everything

we've asked for". He said that BAJ wanted to arrange to take his case to the US and to get the UK to drop it, but this was "super confidential" because –

> "… officially we can't talk to him because he's represented by another attorney, you understand? And so I'm officially not talking to you about this, I'm telling you theoretically what we're looking at for Sami which I would like to try to get for you."

Akle pointed out that there was already a trial in the UK, to which Tinsley replied that there were ways to get round that: "we've done it before". He suggested he could meet the DSFO alone and ask hypothetically "if these guys came to the table in the US, can we get their cases dismissed here?"

76. On 6 February 2019 Tinsley emailed Thompson to say that the FBI had drafted a plea which required Cyrus and Saman Ahsani to cooperate and assist the SFO. In a further email to Thompson on 15 February, Tinsley said that the DSFO, Davis and Thompson had agreed to transfer the Ahsanis cases to the US with the understanding that they were available for case assistance and as prosecution witnesses in furtherance of SFO cases. He also said they had discussed BAJ and Akle "within the same package", which would "require more work to move [them]" but made sense and "in the long term benefits SFO". He said that the upside was that they could secure the movement of BAJ and Akle to the US and secure a US plea and cooperation with both the US and the UK. The downside was that if BAJ and Akle were tried in the UK, his intelligence was that they would raise the issue of Martin (formerly the SFO's case officer in the Unaoil investigation, who was pursuing a claim against the SFO in the Employment Tribunal) and would make an abuse of process claim in relation to Martin's behaviour which "could prove very embarrassing reputationally to SFO".

77. In order to see matters in their correct sequence, it should be noted that on 1 February and 6 March 2019 Akle spoke to BAJ by telephone. In the first of those conversations, BAJ reported that he had been told by Tinsley that the CPS had thrown a spanner in the works by saying that the trial (of Akle and BAJ) should be held in this country, not handed over to the DoJ. Tinsley was however taking steps to appoint "a lawyer for us" and was going to approach the DoJ "and ask for us to go over". Akle expressed concern and said he did not understand what was being proposed. In the second conversation, there was further discussion of BAJ's belief that he would be able to go to the US, speak to the authorities there, and then be free of any charges.

78. Tinsley made a further reference to Martin when he spoke on the phone to an SFO official Brown on 27 March 2019. Tinsley wanted to speak directly to the case team, but was told that they were content to deal directly with the DoJ. Brown rightly advised Tinsley that BAJ and Akle were represented in the UK and it was proper that dealings with other charged suspects should go through their legal representatives. Tinsley again professed concern that a trial in the UK may drag up issues relating to Martin, and he wanted the DSFO to know that he was "trying to mitigate any risks as well as build up cooperating suspects as promised".

79. On 9 May 2019 Tinsley and Ms Talay had a one-hour telephone conversation with Ms Isaac and two other SFO officials. Ms Isaac explained that because the Ahsani brothers had been charged in the US, the law relating to double jeopardy meant that the SFO could not prosecute them "even if we wanted to". Ata Ahsani, however, was in a

different position: he was not going to be prosecuted in the US, and double jeopardy was therefore not a bar to the SFO prosecuting him in the UK. Warrants had previously been authorised by the Attorney General on the basis that the SFO had decided there was sufficient evidence to charge Ata Ahsani. It would require the further consent of the Attorney General if the SFO were now to change their decision and say that prosecution of Ata Ahsani would no longer be in the public interest having regard to his age and poor health and to the fact that "there is an NPA and financial penalty, we are not able to prosecute his sons". Tinsley replied that "in the early days" he had spoken to the DSFO about Ata Ahsani and "she was very like 'why are we messing with him?' and 'we can make this work'". We observe that either that assertion was incorrect, or it was a reference to a relevant discussion in respect of which there has been no disclosure.

80. On 21 May 2019 Davis and Ms Isaac exchanged emails referring to the need to exercise caution that they acted properly with BAJ and Akle and did nothing that could look like an inducement to plead guilty.

81. On the very next day, however, Ms Isaac appeared to take a different approach. In a telephone conversation also involving Ms Talay and others, Tinsley said that the Ahsani brothers were "trying to get people to come" and had even sent a message to Akle. He said he was "trying to make it better for all of us" and he thought it was "a real possibility". Ms Issac's response was that she looked forward to "hearing if progress can be made". That response was not recorded in the summary at item J7188 in the Tranche 5 schedule. Nor was it recorded in the additional summary at item J7292 in the Tranche 6 schedule.

82. In a telephone call on 28 May 2019 Tinsley informed Ms Isaac and others that he was "interested in leveraging information with people especially [BAJ]". He said he had talked to BAJ and there was a 95% chance he could "get this done". He said that BAJ "hasn't had anyone talk to him in the spirit of cooperation properly": BAJ had a typical attorney who told him not to speak to anyone. He spoke of cutting a hypothetical deal with the SFO, to which Ms Isaac replied that any guilty plea would have to come from BAJ himself and the SFO could not jeopardise the trial. Tinsley observed that if BAJ were to plead, Akle would not have many options: Ms Collery (one of the case controllers) agreed that a guilty plea "would have an impact on us evidentially". A note of this conversation records that Tinsley also said that he would be with BAJ all week, and added "I'm controlling who he speaks to". There is nothing in the notes to suggest that any SFO official discouraged Tinsley from that course. It may be noted that the entry in the Tranche 5 schedule relating to this telephone call, J7191, was very short and did not indicate the date of the conversation. It was expanded in entry J7293 in the Tranche 6 schedule served on 17 January 2020, but still did not contain all that we have noted in this paragraph.

83. On 30 May 2019 Tinsley told Ms Isaac that there was a 90% chance he could "get [BAJ] in". Ms Issac made a note that she replied that "the deal with [BAJ] could potentially be about plea to indictment but then we may be able to take a view regarding other matters which we are investigating".

84. On the following day, 31 May, Tinsley rang to say that he had just spoken to BAJ, who wanted to plead and would help. The only note of this conversation ends with the words "won't charge with other matters". The relevant entry in the Tranche 5 schedule,

however, item J7196, ends with the words "DT says he doesn't want BAJ to be charged with other matters".

85. Also on 31 May, BAJ spoke to Akle on the phone. He reported that the Ahsani brothers were "out" and "free" and said he himself "might take that route with guarantees that they're not going to bother with me". Akle said that he could not admit something he had not done. BAJ said that Tinsley had "managed to get those brothers off", and that from what Tinsley said "they got more indictments coming. I don't know if its against me or who but they've got more coming". Akle warned BAJ that Tinsley was not BAJ's lawyer.

86. Davis has produced few notes of his contacts with Tinsley. He has explained that Tinsley was prone to exaggeration and vague about what he could do to help, and there was therefore little substance worth recording. In November 2018 a file note had been sent to Davis and the case team emphasising that full records of all contacts with 5 Stones Intelligence would need to be made. In May 2019 Ms Isaac had asked Davis and others for material relating to contacts with Tinsley and 5 Stones Intelligence. On 11 July 2019 Davis was specifically asked for any relevant material which would be needed for disclosure in these proceedings. On 16 July, however, Davis brought about the wiping of data from his SFO-issued mobile phone, as a result of which the SFO have said that the phone had to be rebuilt and they have been unable to recover any of the text messages it is accepted Davis exchanged with Tinsley. The explanation which has been put forward is that Davis repeatedly entered an incorrect code, which caused data to be wiped from his phone. If that explanation is correct, it appears to have been the second time in less than a year that Davis had caused a mobile phone to be wiped and in need of rebuilding. Moreover, it would have involved his not only entering the wrong password five times, but doing so despite a specific warning on the phone to contact the service desk. The relevant entry in the Tranche 5 schedule, J7228, refers to an email which Davis sent to the case team –

> "… listing meeting dates for contact with DT and explaining unsuccessful efforts to recover his texts with DT prior to 29/07/2019. Further email in respect of same 21/10/2019. Phone rebuilt and data unobtainable from service provider."

That entry was not added to or expanded upon in the Tranche 6 schedule, and so Akle's representatives were not informed of the circumstances in which the phone was rebuilt.

The submissions on appeal:

87. Mr Darbishire submits that the documents now available allow an understanding of what had previously been obscure. The SFO agreed to Tinsley's trade: intelligence from Saman Ahsani and pleas from BAJ and Akle, in return for the abandoning of any proceedings in the UK against the Ahsanis or their companies. Tinsley was unhappy when it was explained to him that the SOCPA process could only operate if Saman Ahsani came to the UK and pleaded guilty: he expressed the hope that by "bringing in" BAJ and Akle it would show what Saman Ahsani could do. The SFO's conduct was consistent with their agreeing to that plan, and in particular accepting that Tinsley would try to persuade defendants whom he did not represent, and with whom his clients were in conflict, to abandon their not guilty pleas. The discussions between SFO officials and Tinsley have not been fully or properly recorded: it is not alleged that was

the result of a deliberate policy, but rather an issue of neglect. Tinsley tried to use the senior management of the SFO to facilitate his having direct access to the case team, who were initially unwilling to meet him but who ultimately engaged with him in relation to the prospect of BAJ and Akle pleading guilty. Ms Isaac's comment on 22 May 2019[1], that she looked forward to hearing if progress can be made, was an explicit tasking of Tinsley to persuade BAJ and Akle to plead guilty: it is significant that that comment was not disclosed at all until the documents were provided in September 2021. Tinsley did secure guilty pleas by BAJ, having been told by the SFO that they would need pleas from BAJ in relation to both contracts: a message which the SFO empowered Tinsley to convey to BAJ behind the backs of BAJ's lawyers. In that way, the SFO obtained evidence which assisted their case against Akle. The documents underlying the entries in the Tranches 5 and 6 schedules were plainly highly relevant to the abuse argument, but the SFO resisted all requests and applications for disclosure of those documents. Nor did they reveal the circumstances in which data from Davis' phone, including the text messages he had exchanged with Tinsley, had been rendered irretrievable. The SFO deliberately did not disclose material which was embarrassing to them.

88. Mr Brompton accepts that some of the disclosure decisions "may not have been well-judged" and that the SFO was in error in not "shutting Tinsley down", but submits that there was no bad faith, no deliberate failure to make proper disclosure and no conduct which would have justified the judge granting the exceptional remedy of a stay of the criminal proceedings. Whatever Tinsley may have said or done, Akle was not persuaded to change his not guilty pleas. The strength of the evidence against BAJ was such that his change of pleas was in his own interests, and the material inducement for him to plead guilty was the reduction in his total sentence, not anything said by Tinsley. In those circumstances, the judge was correct to find that Akle had suffered no unfair prejudice. In the skeleton argument filed in support of Akle's application to exclude BAJ's guilty pleas, it was conceded that it would "realistically be impossible to get to the bottom of the circumstances of [BAJ's] plea and therefore for the defence to discharge the burden of proving that he was not guilty of the conspiracies alleged". That concession was "the death knell" of the application to exclude the evidence of BAJ's pleas and the associated disclosure application. The SFO's contacts with Tinsley were "little more than listening to him", and he was not actively encouraged to take any steps in relation to BAJ or Akle. Tinsley was not doing the SFO's bidding, and the SFO were not doing his. A defendant is entitled to discuss his case, and his intended pleas, with whomsoever he chooses, and Akle chose to discuss his case with Tinsley, knowing full well that Tinsley acted for the Ahsanis.

Akle's appeal against conviction – discussion:

89. We can deal briefly with the first ground of appeal. A stay of proceedings is always an exceptional remedy. On the evidence and information available to the judge at the time of the trial, we find it impossible to say that he erred in law in rejecting the application for a stay. For the reasons which he gave in his ruling, he was entitled to refuse the application.

[1] See [81] above

90. We see much greater force, however, in the second and third grounds of appeal. They are closely interlinked, and we consider them together.

91. As to disclosure, the relevant law is not in dispute between the parties. The SFO is bound by the provisions of the CPIA and the Code of Practice made under that Act. Investigators are required to pursue all reasonable lines of inquiry, whether they point towards or away from a suspect (see the Code, paragraph 3.5). They are required to retain and record all material (which includes not only documents but also information) which may be relevant to an investigation (see the Code, paragraphs 2.1 and 4-5). All non-sensitive relevant material retained by the prosecution must be described in a schedule of unused material (see the Code, paragraph 6.2) and must be reviewed for disclosure. By section 3 of CPIA, the disclosure test will be satisfied where material might reasonably be considered capable of undermining the case for the prosecution against the accused, or of assisting the case for the accused. For the purposes of disclosure, "the parties' respective cases should not be restrictively analysed" (see *R v H and C* [2004] 2 AC 134 at paragraph 35 *per* Lord Bingham); and prosecutors should resolve any doubts in favour of disclosure.

92. Mr Brompton rightly accepts that the purpose of disclosure is to enable an accused person to present a tenable case in its best light. In *Gohil* [2018] 1 WLR 3967 this court, at paragraph 134, stated that disclosure should not be approached solely from the vantage point of the prosecutor: the fact that the prosecutor does not accept the defence case, or believes that it can rebut any inferences which might otherwise be drawn from material capable of undermining the prosecution case or assisting the defence case, does not mean that the test for disclosure has not been passed. That principle is particularly important in relation to Mr Brompton's submission that the disclosure was appropriate in response to the precise terms of the section 8 requests.

93. The SFO's Operational Handbook explains that

> "Disclosure refers to providing the defence with copies of, or access to, any material which might reasonably be considered capable of meeting the test for disclosure."

94. The Operational Handbook goes on to quote the following from the Attorney General's Guidelines on disclosure:

> "6. In deciding whether material satisfies the disclosure test, consideration should be given amongst other things to:
>
> (a) the use that might be made of it in cross-examination;
>
> (b) its capacity to support submissions that could lead to:
>
> (i) the exclusion of evidence;
>
> (ii) a stay of proceedings, where the material is required to allow a proper application to be made;
>
> (iii) a court or tribunal finding that any public authority had acted incompatibly with the accused's rights under the ECHR.

> …
>
> 7. It should also be borne in mind that while items of material viewed in isolation may not be reasonably considered to be capable of undermining the prosecution case or assisting the accused, several items together can have that effect."

95. It is important to note that there is in this case no issue as to whether any of the documents belatedly provided to the defence fell to be withheld from disclosure on public interest immunity grounds or on grounds of legal professional privilege. Nor does any issue arise from the fact that a number of the documents have been redacted by the SFO. Nor was there any substantial logistical or practical obstacle to making available to the defence copies of, or access to, the documents (redacted where necessary). In short, nothing has been put forward by the SFO to justify their refusal to provide the defence with copies of, or access to, the underlying documents.

96. Those documents are now accepted to have been relevant to the issue of abuse of process. In our view, they were also relevant to the issues relating to the admission or exclusion of evidence of BAJ's guilty pleas. When copies were requested by the defence, they should have been provided. The refusal to provide them was a serious failure by the SFO to comply with their duty. It cannot be justified by reference to the precise terms of the section 8 request when that request specifically raised Tinsley's conduct as the basis on which the admission of the evidence would be challenged.[2]

97. That failure was particularly regrettable given that some of the documents had a clear potential to embarrass the SFO in their prosecution of this case. We do not suggest that any individual official of the SFO deliberately sought to cover anything up. We are however entirely satisfied that the result of limiting disclosure to the summaries in the schedules was that neither the defence nor the judge had anything like the full picture which is now available to this court. We accept Mr Darbishire's submission that a reading of the underlying documents provides a clearer picture of what happened than can be gleaned from a perusal of the comparatively brief entries in the schedules.

98. We also accept that if the documents now available had been provided to the defence before or at the start of the trial, counsel then appearing for Akle would have had significantly stronger arguments available to him on the issues relating to BAJ's guilty pleas. In reaching that conclusion, we regard the following factors as important.

99. First, the underlying documents illustrate very clearly why it was wholly inappropriate for the SFO to have any dealings with Tinsley in relation to the pleas of BAJ and Akle, and why Mr Brompton's concession that the SFO should at a later stage have "shut Tinsley down" is insufficient. We can understand why the DSFO, acting upon the recommendation of a mutual friend, may have been willing to have an initial meeting with Tinsley; and Tinsley was at least entitled to speak to the SFO about the Ahsanis, though we would have expected the SFO to prefer to deal with the Ahsanis' lawyers rather than their "fixer". But Tinsley did not act for either BAJ or Akle, each of whom was legally represented in this country; and there was a clear conflict between their respective interests and the interests of the Ahsanis. The case team quite rightly declined, for a considerable time, to have any dealings with Tinsley in relation to the

[2] See [25] above.

cases against BAJ and Akle. We simply do not understand how any of their SFO colleagues could have thought it appropriate to take any other approach, or why the stance taken by the case team later changed. It is significant that, throughout the trial and appeal proceedings, Mr Brompton has rightly not sought to defend the SFO's conduct in dealing with Tinsley as they did. Why, then, did the SFO engage with Tinsley at all? For all his talk of wanting to achieve an outcome which would be beneficial to everyone, Tinsley was obviously focused on pursuing a course which was in the best interests of the Ahsanis, including by delivering a package of pleas from others which would encourage the SFO to abandon any thought of prosecuting any of the Ahsanis in this country. It was plainly never part of his plan that any of the Ahsanis would be prosecuted in the UK. Mr Brompton's submission, that the SFO had no choice but to concede jurisdiction to the US once the Ahsanis were in the US, might provide an explanation in the cases of the two brothers, but it cannot explain the decision not to prosecute Ata Ahsani, alleged to be not only the head of the family but also the head of the conspiracies.

100. We would add, in this regard, that the provision of copies of the underlying documents has also strengthened the defence case by revealing discrepancies which may well be innocent errors, but which are nonetheless capable of being significant. The most striking example is the contrast between the disclosed note, and the schedule entry, in relation to what was said on 31 May 2019 as to whether BAJ would be charged with other offences.[3] Mr Brompton's submission, that the note records what Tinsley said rather than what any SFO officer said, may or may not be correct. Even if it is correct, it raises the question of why the SFO would be countenancing Tinsley expressing a view as to whether or not BAJ should be charged. But be that as it may, the important point for present purposes is that there was an evident discrepancy between the original note and the summary in the schedule, and the defence were entitled to see it and to explore it as they thought appropriate

101. Secondly, the documents are clearly capable of lending significant force to the defence argument that the SFO went beyond the "tacit encouragement" to which the judge referred,[4] and far beyond the "little more than listening" to which Mr Brompton referred in his submissions to us. In this regard, the notes of the telephone conversations with Tinsley in late May 2019[5] are important. They are capable of being viewed as showing an abrupt change from the previous recognition of the need for caution to a recognition that Tinsley would be actively trying to persuade BAJ and Akle to plead guilty, and an acceptance of the advantage that guilty pleas by BAJ would give to the SFO's prosecution of Akle. The reasons for that change have not been recorded in any document disclosed by the SFO, and were not explained in the submissions to us. The disclosed notes contain nothing to suggest any attempt to discourage Tinsley from interfering in the cases of accused persons for whom he did not act: on the contrary, Tinsley was certainly enabled, and arguably encouraged, to convey to BAJ – behind the backs of his legal representatives - an indication that if he pleaded guilty to the charges on the indictment the SFO might "take a view" about other potential charges.

102. Armed with those documents, rather than the summaries contained in the schedules, the defence would have been able to present their case in its best light. We do not accept

[3] See [84] above.
[4] See [45] above.
[5] See [81]-[85] above.

that the rules of hearsay would have prevented them from making any meaningful use of the documents. The defence would at the very least have been entitled to request the attendance of the SFO officials concerned, so that they could be cross-examined about their conversations with Tinsley: not with a view to proving the truth of anything Tinsley said, but rather to seek a detailed account of the SFO's role in the events which led to BAJ pleading guilty to the indictment (and being allowed to have more serious charges taken into consideration), and the SFO thereby being enabled to rely on his convictions to prove a substantial part of their case against Akle. The defence would also have had a stronger basis on which to seek to adduce hearsay evidence of things said by BAJ.

103. Thirdly, Davis' recent explanation for not making notes of many of his conversations with Tinsley is that Tinsley was obviously prone to exaggeration and vague assertions as to what he could achieve. In the light of all that we have now read, that is not a surprising proposition. But it is capable of supporting the argument that Tinsley was the last person whom the SFO should have allowed, or caused, to undertake the role of trying to persuade BAJ and Akle to plead guilty (and thereby to benefit the Ahsanis in their dealings with the SFO). The same is true of the striking contrast between the DSFO's account of her limited contact with Tinsley and Tinsley's assertions to Akle about the extent and success of his dealings with her.[6] That contrast was evident to the SFO at latest when the transcripts were disclosed by the defence on 17 January 2020.[7] We think it strongly arguable that at that stage, if not before, the SFO's continuing duty of disclosure required them to disclose full details of the DSFO's contact with Tinsley.

104. Fourthly, we accept Mr Darbishire's submission that there was inadequate disclosure of the circumstances in which Davis' text message exchanges with Tinsley are said to have been lost. We have no doubt that entry J7228 in the Tranche 5 schedule[8] was insufficient to discharge the SFO's duty of disclosure in relation to an issue which was obviously highly relevant to the contacts between Tinsley and the SFO. It served to conceal the position now asserted by the SFO. If proper disclosure had been made, the defence would have had a basis for requesting that Davis be available for cross-examination so that Akle's case could be presented in its best light.

105. In summary, we are satisfied that there was a material failure of disclosure which significantly handicapped the defence in arguing that the evidence of BAJ's convictions should be excluded pursuant to section 78 of PACE. We think it striking that in resisting the application to exclude such evidence, the SFO relied on the fact that BAJ was legally represented when he decided to plead guilty to the charges against him, and on the concession by defence counsel [9] that it was not possible to discharge the burden imposed on the defence by section 74 of PACE. Had the documents been disclosed, neither of those arguments would have been available to the SFO: the documents would have shown, much more clearly than appeared from the summaries in the schedules, that the SFO knew that Tinsley was deliberately operating behind the backs of BAJ's lawyers, and that Tinsley wanted to control whom BAJ spoke to; and we think it wholly

[6] See [74], [75] above.
[7] See [33] above.
[8] See [86] above.
[9] See [88] above.

unlikely that the concession, which was made on the basis of the schedule entries alone, would have been made.

106. As we have noted[10], the judge expressly recorded that he did not have "the full picture"; and even without the full picture, he rightly held that the SFO should have had nothing to do with Tinsley.[11] If the documents which have belatedly been provided had been available to the defence at trial, both they and the judge would have had a much fuller picture. The defence would have been better equipped to submit that the SFO should not be permitted to rely on BAJ's guilty pleas to prove the existence of the precise conspiracies with which Akle was charged, and thereby to gain the evidential advantage which they had mentioned to Tinsley.[12] As it was, the defence were denied the stronger position to which they were entitled. In consequence, through no fault of the judge, Akle did not have a fair trial. We find it impossible to say that the judge, if addressed by counsel in possession of all relevant information, would inevitably have made the same decision on the application to exclude evidence of BAJ's guilty pleas.

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

108. For those reasons, we are satisfied that the convictions of Akle are not safe. He was prevented from presenting his case in its best light. We grant leave to appeal on grounds 2 and 3, and allow the appeal on those grounds. His convictions must therefore be quashed.

Retrial?

109. A draft of this judgment was provided to counsel so that they could assist the court by making written submissions on any consequential matters. We are grateful for the submissions which were made, which related to two issues: the SFO's application for an order that Akle be retried; and Akle's application for an order for costs. We are satisfied that the first of those issues can properly be determined on the basis of the

[10] See [44] above.
[11] See [45] above.
[12] See [82] above.

written submissions. In relation to the latter, we will hear oral submissions at a later date.

110. By section 7(1) of the Criminal Appeal Act 1968:

> "Where the Court of Appeal allow an appeal against conviction and it appears to the Court that the interests of justice so require, they may order the appellant to be retried."

111. In *R v Graham and others* [1997] 1 Cr App R 302 Lord Bingham CJ summarised the principles which this court should apply when considering whether to exercise that power:

> "It is apparent that the conditions which permit the court to order a retrial are twofold: the court must allow the appeal and consider that the interests of justice require a retrial. The first condition is either satisfied or it is not. The second requires an exercise of judgement, and will involve consideration of the public interest and the legitimate interests of the defendant. The public interest is generally served by the prosecution of those reasonably suspected on available evidence of serious crime, if such prosecution can be conducted without unfairness to or oppression of the defendant. The legitimate interests of the defendant will often call for consideration of the time which has passed since the alleged offence, and any penalty the defendant may already have paid before the quashing of the conviction."

112. A balance must therefore be struck between the public interest in favour of a retrial and Akle's legitimate interests. The SFO submit that the former should prevail, in particular having regard to the seriousness of the charges; the largely documentary nature of the prosecution's evidence, which means that the passage of further time will not have any adverse impact on the quality of the evidence; the fact that the strength of that evidence has been "largely unaffected" by this court's reasons for allowing the appeal; and the fact that part of the sentence (just under half of the expected time in custody) remains to be served. The SFO therefore invite the court to order a retrial and to admit Akle to bail, subject to conditions, pending that retrial.

113. On behalf of Akle it is submitted that there is a powerful combination of features militating against a retrial, including the fact that the convictions are being quashed because of the misconduct of the SFO, which it is submitted was knowing misconduct; the very long period of time which has already passed since the relevant events, which began in 2005 and ended (at latest) in early 2010; the burden of anxiety borne by Akle and his family in the years since his arrest in October 2016; the further anxieties suffered as a result of the outbreak of the Covid pandemic (to which he is vulnerable) during the proceedings; the ruinous legal costs which he has incurred; the very difficult time he has experienced in serving his sentence at a time when prisons are adversely affected by the pandemic; the serious deterioration in his health whilst in prison; and the prospect that any retrial would be unlikely to start for at least another year.

114. We have considered the competing arguments. We have well in mind the general public interest in the prosecution of what are undoubtedly serious allegations. We remind

ourselves that the discretion to order or refuse to order a retrial is to be exercised in the interests of justice and not to be used as a form of disciplinary sanction for any prosecutorial misconduct. We have nonetheless concluded that in the particular circumstances of this case the general public interest is outweighed by the legitimate interests of Akle. We accept the submission that the interests of justice do not require a retrial, having regard to the combination of features summarised above. The key considerations, in our view, are that the application for a retrial is made in the context of the appeal against conviction being allowed on grounds relating to fault on the part of the prosecutor, and that a retrial would inevitably involve substantial further delay for a man in poor health who has already spent a significant time in prison in unusually difficult circumstances. We think that the significance of the context of prosecutorial fault extends to the likely period of delay: it would be difficult, in the circumstances of this case, for the SFO to argue in favour of an expedited trial date, to the prejudice of other cases waiting to be heard. We therefore decline to order a retrial.

Akle's appeal against sentence:

115. In those circumstances the appeal against sentence falls away. We think it right, however, to record that we did not find the grounds of appeal against sentence persuasive. The judge was entitled to make the findings he did as to the seriousness of the offending. We do not accept that he adopted a wrong approach or fell into any error of principle. The total sentence was stiff, but it was not manifestly excessive. We would therefore have dismissed the appeal.

116. We turn finally to the application by Bond.

Bond's Appeal against Sentence

117. The prosecution case against Bond was that he was the Sales Manager for the Middle East for SBM. He had worked for the company in various roles between 1982 and 2015 whilst based at its Monaco office. SBM was one of three companies which were invited to tender for the SPM contract. SBM entered into an agency agreement with Unaoil under which Unaoil would seek to obtain the SPM contract for SBM.

118. On count 2, it was alleged that Bond was aware that the agency agreement between Unaoil and SBM was a front for a conspiracy to bribe an official at SOC to manipulate the tendering process to the advantage of SBM. Bond's role in the conspiracy was to provide technical data that promoted SBM's products and denigrated the buoys manufactured by the two rival companies. In particular, Oday provided internal SOC documents to Unaoil including the technical specification and basis of design documents for the buoys. These were sent to Bond who revised them so as to favour SBM's products and returned them, via Unaoil, to Oday. He was also involved in the preparation of a weighting table to be supplied to FW via the bribed SOC official to be used as the marking criteria for the bids from the three competitors. The table was drawn up in such a way as to give SBM a clear advantage in the tendering process.

119. On count 4, it was alleged that Bond was knowingly involved in negotiating an amendment to the agency agreement between Unaoil and SBM to provide a fund of $275,000 to be used to bribe officials at the Ministry of Oil to approve SOC's recommendation that the contract for the SPMs be awarded to SBM.

120. In his sentencing remarks, the judge said that Bond's offences would fall into category A culpability, and category I harm, of the guideline for offences under the Bribery Act 2010. Bond had played a leading role in the count 2 conspiracy: he had willingly fronted the corruption for SBM and was the almost exclusive contact for Unaoil. This count concerned the direct and sustained corruption of a senior official in the SOC which was to all intents and purposes a public institution. The offending was sophisticated in nature, involving coordination and planning and the coaching of Oday so that he knew what to say to FW. What was important was not the personal financial gain for Bond but the damage done to the people of Iraq by the offending.

121. Count 4 aggravated the picture because it involved the carefully thought out corruption of politicians or senior civil servants, although the role Bond played was much smaller.

122. The aggravating factors were that the offences were committed across borders and were utterly exploitative, at a time when the situation in Iraq was fragile.

123. Having heard him give evidence, the judge found that Bond tried his dishonest best to create a false narrative to answer the evidence against him. In terms of mitigation he had no previous convictions. Delay was not a mitigating factor as he could have admitted his wrongdoing back in August 2017 but chose not to. His age and health were also not mitigating factors. The best that could be said in his favour was that these offences were not of his making and he was not as culpable as Akle or BAJ. The judge approached sentencing on the basis that the two counts reflected a continuous course of offending. He would have imposed a total sentence of 4 years, 6 months' imprisonment; but taking into account the hardship caused by the Covid-19 pandemic and by the fact that the applicant's family lived in France, the sentences would be 3 years, 6 months' imprisonment on each count, concurrent.

Bond's grounds of appeal against sentence:

124. Bond's grounds of appeal against sentence are that the overall sentence was manifestly excessive, in particular because the judge: (1) sentenced by reference to the guidelines for offences under the Bribery Act 2010 (with its higher maximum sentence) and wrongly categorised both culpability and harm; (2) failed to sentence Bond for his own role in the conspiracies and to distinguish his input from the more serious involvement of his co-defendants; (3) failed properly to take into account Bond's personal mitigation – in particular his age, health and positive good character; (4) failed to take into consideration the toll that the delay and very lengthy proceedings had taken on him; (5) wrongly increased Paul Bond's sentence because of the manner in which he had contested the trial.

125. In support of those grounds of appeal, Mr Godfrey QC places emphasis on the submission that Bond made no personal profit from the bribery: he was selling a proper product at a proper price, and at worst used unlawful means to sell that product, whereas Unaoil was engaged in the business of corruption. Moreover, Bond acted on instructions from his superiors, some of whom were not charged with any offence. He had been with his employers since 1982, had previously been engaged in the writing of safety manuals, and was now engaged in his first sale to a new customer since being promoted to the sales department. Realistically, he had no choice but to obey the orders of others. It was wrong of the judge to sentence him on the basis that the monies paid out in bribes could instead have been used to assist an impoverished country.

126. Mr Godfrey further submits that the sentence on Bond was excessive when compared with that imposed on Whiteley, and that the judge wrongly increased the sentence because Bond had contested the trial.

127. No pre-sentence report was considered necessary before Bond was sentenced, and none is necessary now.

128. We have reflected on Mr Godfrey's submissions, but are unable to accept them. We are not persuaded that the judge fell into any error of principle. In particular, the judge was entitled to have regard to the guideline for sentencing offences under the Bribery Act 2010, and he rightly took into account the differing maximum sentences for those offences. As to the suggested failings, the insuperable obstacle which Mr Godfrey faces is that the judge had presided over a lengthy trial and was in the best position to assess the seriousness of the offending by Bond and others. Mr Godfrey's submissions amount in reality to a challenge to the judge's findings, but we can see no basis on which this court could go behind those findings. Nor is there any basis on which we could go behind his assessment of the weight to be given to the aggravating and mitigating factors. It was in the context of the weight (if any) to be given to the long period of time between arrest and conviction that the judge made the comments which are relied on as indicating that the sentence was increased because Bond had contested the trial. We do not accept that that is what the judge said or did: the relevant passage could, with respect, have been rather more clearly expressed, but the judge was in our view doing no more than making the point that the passage of time had to be seen in the context of the continuing denial of guilt and the consequent need for a trial.

129. We conclude that the sentence can fairly be regarded as stiff, but that there is no ground on which it could be said to be manifestly excessive. Grateful though we are to Mr Godfrey, the application for leave to appeal against sentence accordingly fails and is refused.

Conclusion:

130. For those reasons -

i) We grant Akle's application for leave to appeal against conviction on grounds 2 and 3. We allow the appeal on those grounds and quash the convictions.

ii) We decline to order a retrial.

iii) We adjourn Akle's application for costs. We direct that Akle must by 4pm on 7 January 2022 file further written submissions in the light of this judgment; the SFO must by 4pm on 21 January 2022 file further written submissions in response; and the parties must by 4pm on 28 January 2022 file an agreed bundle of any relevant documents and an agreed time estimate. Oral submissions on the issue of costs will be heard at the earliest convenient date after 28 January 2022.

iv) We refuse Bond's renewed application for leave to appeal against sentence.