



Neutral Citation Number: [2019] EWCA Crim 804

Case No: 201700804/C4; 201700806/C4; 201700831/C4

IN THE COURT OF APPEAL (CRIMINAL DIVISION)

ON APPEAL FROM CROWN COURT at CENTRAL CRIMINAL COURT (HHJ

LUCAS QC)

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 19th February 2019

Before :

LORD JUSTICE GREEN

MR JUSTICE HOLGATE

HHJ PAUL THOMAS

Between :

KATHERYN ADEDEJI

Appellants

BLESSING ADEDEJI

- and -

REGINA

Respondent

Ms Jumoke Hughes for the Appellant

Edward J.Fitzpatrick for the Respondent

Hearing date: 19th February 2019

Approved Judgment

Lord Justice Green:

A. The facts

1. On the 23rd January 2017 at the Central Criminal Court Katheryn Adedeji (“K”) and Blessing Adedeji (“B”) were convicted of unlawfully subletting a dwelling house contrary to 2(2) Prevention of Social Housing Fraud Act 2013. K was sentenced to a fine of £10,000 in default of which she would be subject to imprisonment for 35 days. B was sentenced to a conditional discharge of 2 years.
2. With regard to K the single judge granted permission to appeal on certain grounds but not others. K now pursues her appeal but also applies on a renewed basis for permission to appeal for the refused grounds. B was refused permission to appeal by the single judge on all grounds and now renews her application.
3. The core facts may be summarised in the following way.
4. On the 30th November 1998 K was granted a tenancy of 29 Granville Square, London, WC1. This is a property owned by Circle Housing. The rent was initially £68 per week but over time rose to £141.01 per week. The property is social housing and is available only to eligible persons who use it as their sole and principal home. On 21st March 2006 K purchased 120 Rochester Road, Gravesend, Kent for £142,000. On 27th July 2007 she purchased 67 Grove Lane, Ipswich for £141,000. On 21st February 2014 K purchased 44 Dickson Road, London for £325,000.
5. On 24th November 2008 B was granted a tenancy of Flat 7, 62 Glasshouse Fields, London E1 by Newlon Housing Association. The initial rent was £115.37 per week rising over time to £153.15 per week. This property is also social housing available only to eligible persons who use it as their sole and principal home.
6. On 26th March 2014 Ms Diane Thompson of Circle Housing conducted a tenancy audit at 29 Granville Square. K confirmed to Ms Thompson that she still occupied the property as her sole and principal home. However, as a result of an anonymous complaint in July 2015 an investigation was initiated. In November 2015 observations indicated that K was living at 44 Dickson Road, not 29 Granville Square.
7. Enquiries also revealed that the sole account holder for the supply of gas and electricity at 29 Granville Square had, since September 2014, been B. A number of text messages recovered from the work mobile phone of K established that she was living at 44 Dickson Road. They also indicated that she was receiving rental payments from B who, herself, appeared to have been collecting rent from a third-party tenant. Analysis of the bank account of K indicated that regular transfers to her account had been made by B. An analysis of the bank account of B revealed regular cash deposits were made to it and regular transfers from it were also made to the account of K.
8. K was arrested on the 7th December 2015 at 44 Dickson Road. In reply to caution she said: *“I know what I have done. It was for my sister, I have made no personal gain from it.”* She was interviewed that same day without a solicitor. She admitted that following her acquisition of 44 Dickson Road she had sublet 29 Granville Square to

- B. She had continued to pay the rent to Circle Housing and her sister had in turn made cash payments or transfers to her. She also admitted that shortly after moving out of 29 Granville Square she had signed a tenancy audit document declaring that she was still living there on a permanent basis. As at the date of interview K was employed in a very senior position in the Local Authorities housing department. She had responsibility for commissioning new houses and for their maintenance and repair.
9. B was arrested on the 7th December 2015 at 29 Granville Square. She made no reply to caution. Found at the address were a Tesco delivery note, a letter from HMRC, and a driving licence in her name. She was interviewed the same day with a solicitor. She made no comment to all questions asked.
 10. Officers visited 62 Glasshouse Fields on the 7th December 2015. They discovered a Mr Ajibola Lawal living there. He confirmed that he had been living at the address since December 2014. He paid £200 rent in cash every 2 weeks to B. He was shown a photograph of the registered tenant attached to the Newlon Housing Association tenancy agreement and confirmed that this was B, to whom he made the cash payment. An inspection of the property indicated that B was not living at that address.
 11. On 18th March 2016 B was re-interviewed, again with a solicitor. Upon this occasion she submitted a prepared statement to the effect that money paid into her bank account were from her sister Francesca, members of her family or her brother-in-law Wahid, and were not, therefore, rental payments. Thereafter she made no comment in response to all questions posed to her.
 12. Certain other facts are relevant to the issues before this court. In late January, early February 2014 K made an application for a mutual exchange of properties with her sister, B. The application was, apparently, approved in principle in April 2014 but due to an administrative error never completed. The sole account holder for the supply of gas and electricity since September 2014 at 29 Granville Square had been B. Next, an inspection was carried out at 62 Glasshouse Fields in October 2016 and the resulting report concluded that the property was unfit for habitation due to noise, a lack of hot water and mould. It is also relevant that B had been diagnosed with a number of medical conditions including IBS, narcolepsy and depression.
 13. The prosecution case at trial was that the K and B had retained the homes that they leased from their respective housing associations in circumstances where the tenancies would have been terminated had the landlords known the true facts and circumstances. The sisters had unlawfully sublet each property benefiting financially from the arrangements. In large measure the core facts were agreed between the parties at trial. These included, documents relevant to the tenancy agreements and supply of utilities, communications between the sisters by text message, bank account records showing payments in and out, comments made by the sisters upon arrest in their police interviews, and evidence from covert observation showing, for instance, that K was living at Dickson Road and not Granville Square.
 14. The nub of the defence case for both K and B was a denial that they had ceased to occupy the properties as their principal place of residence. It followed that they could not be guilty of unlawfully subletting those premises. K gave evidence that she had moved into Granville Square in 1998. She applied for a mutual exchange in early

2014 to Glasshouse Fields. She had purchased 44 Dickson Road taking it on as her principal home in September 2014 but she denied that she had moved out of Granville Square. She had merely moved some of her belongings to Dickson Road. B had started staying at Granville Square. She was not a lodger. She merely had an informal arrangement with her sister which did not amount to a sub-tenancy. With regard to the mutual exchange she had never intended to take up the tenancy at Glasshouse Street but the mutual exchange had gone awry. She accepted that she was obtaining rent as from October 2014 as her own home was uninhabitable and they had spent 6 months trying to get the move legitimised. She had thought that by charging B rent this would nudge B gently to proceed with the process as she was mentally and physically vulnerable. She denied that she had given up control of the property or that her sister had exclusive possession of the property. She still used part of the property for her own purposes.

15. B gave evidence of her medical ailments. This included narcolepsy whereby she would suddenly fall asleep. There were many problems with the flat at Glasshouse Fields and life had become unbearable. That was the reason for the mutual exchange but it fell through. She denied that she had moved into her sister's property. She accepted that on occasion she took a suitcase with her and sometimes her children would stay with her at Granville Square. She had paid the utilities to reduce the burden upon her sister. She was having difficulty persuading her landlord to resolve the problems at Glasshouse Fields. It had been her intention return there once the problems were resolved. She denied that anyone else was living in the flat at Glasshouse Fields. But friends and family did have access to the property.
16. The central issue for the jury was whether the properties rented to the applicants had ceased to be their principal place of residence whether they had sub-let the whole of each property or whether other people staying in those properties were in fact lodgers or guests and whether they had acted dishonestly. The jury found both defendants "guilty".

B. Misdirection in law in relation to the definition of sub-letting and the constituent requirements of the offence

The directions given to the jury and the jury's question

17. K was charged under section 2(2) of the Prevention of Social Housing Fraud Act 2013. This provides, *inter alia*, that a tenant of a dwelling house commits an offence if: (a) dishonestly and in breach of an express or implied term of the tenancy the tenant sub-lets or parts with possession of the whole or part of the dwelling-house; and (b) the tenant ceases to occupy the dwelling house as the tenant's only or principal home.
18. Written directions were prepared for the jury by the Judge. These were agreed with counsel in the case. The relevant portion of the directions was in the following terms:

"1 A person may stay at a property as a guest meaning without having to pay any form of rent.

2. Lodgers and sub-letters pay rent. The distinction in law between a property which a person has been permitted to lodge is that whereas a lodger does not have the right to exclude the landlord from the part of the property he occupies, in a sub-let property, the person sub-letting the property has “exclusive possession” meaning the right to exclude anyone else from the property *subject to any express or implied agreement to the contrary*.

3. People close to each other or not knowledgeable in law may create either a sub-let or a lodging without necessarily giving the matter any prior thought. It is the arrangement which is ultimately arrived at which determines whether it is a sub-let or a lodging.

4. Where one is dealing with friends or as here, siblings, the position can be complicated by the relationship between the parties. Moreover, it may be agreed either directly or by implication that a person will continue to have access to a property even after it is sub-let. It is for you to determine the actual nature of the arrangements arrived at in this case.

5. In this case, it is for you to determine, applying your common-sense knowledge of the world to the evidence you have heard and considering that evidence in the round, whether you are sure.”¹

(Italics added)

19. Subsequently, in the course of their deliberations, the jury posed a question to the Judge. It was in the following terms:

“Regarding the terms used to describe sub-letting, exclusive possession meaning a right to exclude anyone else from the property subject to any express or implied agreement to the contrary, is the Prosecution required to provide evidence/proof of any express or implied agreement to the contrary, as underlined on page 13 of the judge’s direction, or should we rely on our collective common sense and knowledge of the world to infer such an agreement between the parties?”

20. Following discussion with counsel, and with their concurrence, the Judge essentially reiterated the directions already given.

Exclusive possession

21. In his summing up the Judge rehearsed the main part of the evidence of K and B. He reminded the jury that it was K’s case that she retained control over 29 Granville Square and that B had no control over it at all never mind exclusive possession. He

¹ The numbers have been added to assist cross-referencing.

also reminded the jury of the evidence of B that she occupied Glasshouse Fields and K had possession of Granville Square. It was common ground in the trial that there was a prohibition in the tenancy on sub-letting without consent and upon the taking in of lodgers without prior notification to the landlord. There was, however, no definition in the agreement as to the meaning of either term. Equally there was no definition of such terms in the Prevention of Social Housing Fraud Act 2013.

22. It is common ground that the distinction between sub-letting and lodging, and indeed other arrangements falling short of a tenancy, boils down to the question of whether or not the person in possession has “*exclusive possession*” of the premises. The leading authority upon the point is *Street v Mountford* 17 HLR 402. It was held there that the grant of a tenancy may be express or may be inferred where the owner accepts weekly or other periodic payments of rent from the occupier. It was held that exclusive possession is of the first importance in considering whether an occupier is a tenant. The label placed upon the arrangement by the parties is not determinative of whether or not there is a tenancy, licence or lodging arrangement. Lord Scarman adopted the rationale provided by Windeyer J in *Radhich v Smith* [1959] 101 CLR 209, to the following effect:

“...What then is the fundamental right which a tenant has that distinguishes his position from that of a licensee? It is an interest in land as distinct from a personal permission to enter the land and use it for some stipulated purpose or purposes. And how is it to be ascertained whether such an interest in land has been given? By seeing whether the grantee was given a legal right of exclusive possession of the land for a term or from year to year or for a life or lives. If he was, he is a tenant. And he cannot be other than a tenant, because a legal right of exclusive possession is a tenancy and the creation of such a right is a demise. To say that a man who has, by agreement with a landlord, a right of exclusive possession of land for a term is not a tenant is simply to contradict the first proposition by the second. A right of exclusive possession is secured by the right of a lessee to maintain ejectment and, after his entry, trespass. A reservation to the landlord, either by contract or statute, of a limited right of entry, as for example to view or repair, is, of course, not inconsistent with the grant of exclusive possession. Subject to such reservations, a tenant for a term or from year to year or for a life or lives can exclude his landlord as well as strangers from the demised premises. All this is long-established law...”

In detailed and careful written submissions counsel for K has set out other authorities and texts which elaborate upon the test. It is not necessary for us to recite them in this judgment.

Application of legal principles to facts of the case: The expression “subject to any express or implied agreement to the contrary”

23. We turn now to apply the law to the facts of the case. It is said that the burden upon the prosecution was to prove that K granted B a sub-tenancy of the premises. Two of

the main hallmarks of a tenancy are, it is conceded, established, namely payment of a periodic rent and the taking of possession with K ceasing to use the place as her principal home. The issue for the Jury revolved around whether B had “*exclusive possession*”.

24. It is argued, in this respect, that the Judge erred when in explaining to the jury in paragraph (2) of the directions (see paragraph [18] above) that the test was one of exclusive possession he added the phrase “*subject to any express or implied agreement to the contrary*”. It is argued that this added phrase was wrong in law and confusing. If the judge had directed the jury that they had to be satisfied that “*exclusive possession*” had been granted subject to the usual situation for a family member who might call at the property unannounced, that would have been uncontroversial. But where, as here, the evidence was, *inter alia*, that on occasion K visited and stayed at the premises as and when she wanted to, and that her son visited and stayed at the premises as and when he wanted to, then B was not granted “*exclusive possession*”.
25. We do not accept these submissions. The words which are objected to as an unprincipled bolt-on to the proper definition derive from *Street v Mountford (ibid)*. They refer to the fact that in many tenancy agreements there are express reservations permitting, for instance, the landlord to enter the premises to carry out repairs. They also refer to the explanation given by the Judge in his directions (see paragraph (4) set out at paragraph [18] above) that a person may formally sublet a property even though they still have access to it ie granting such access is not necessarily inconsistent with a tenancy. The words thus reflect the fact that a true tenancy might exist even if there is a reservation, whether express or implied, in favour of a third party and such a state of affairs is not necessarily inconsistent with “*exclusive possession*”. We do not consider that, in the circumstances of this case, the use of these words was wrong in law or unprincipled.
26. We would add that the wording used in the direction “*subject to*” and “*the contrary*” was perhaps unfortunate since the sorts of reservations to which we have referred are not antithetical to a grant of exclusive possession (or subletting); on the contrary they are compatible with it. But the submissions made are overly legalistic. To a property lawyer, the words used by the judge, read strictly, are not correct but in truth they are merely a somewhat clumsy way of expressing the point about express or implied reservations in favour of a landlord. At worst there is an infelicity of language.
27. In our view the tenancy agreements in this case did not raise any point about reservations of this kind, and no one else had raised the point as going to the central question. We have real doubts as to why the direction needed to go into this matter at all. We are not aware of any significant point which truly turned upon the wording which is, now, made the subject of complaint. Prosecutions of this kind ought to be relatively straightforward. The legal direction should be tailored to the actual context to the case and to the “*real*” issues in dispute. It seems to us that in many if not most cases this additional language could be avoided. Whether this will be so will of course be for the judge to determine by reference to the facts of the case. We are not seeking to lay down any firm rule of law or practice.

28. Next, when one stands back and looks at the evidence in the round the jury can have been in no realistic doubt about the relevant facts and the position of K. There are several reasons for this. In her interview K admitted that she had sublet the premises. At the time K was the head of housing for the prosecuting authority. The Crown, in the Respondent's notice states: "*It is fanciful to suggest that the Appellant, who was at the time a head of housing for the prosecuting authority, was misled by the interviewing officer as to the meaning of "sub-let" and thereafter made a whole series of mistaken admissions as a consequence*". Further, K had accepted under cross-examination that she had for several years earlier consulted her landlord about the possibility of sub-letting and had been informed that only a lodger would be permitted and the Crown argued that, as such, K was aware of the distinction between a tenant and a lodger because she had discussed the distinction with the housing authority. Moreover, K made no mention in her interview of B being a lodger. These were all facts and matters which the jury was entitled to, and no doubt did, consider in the course of their deliberations.
29. For all of these reasons we do not accept that the Judge erred in any material way in the directions he gave to the jury in the case of K.
30. We turn now to the discrete sub-letting point as advanced on behalf of B. The main issue in her case was whether throughout the indictment period, when she no longer slept daily at her flat, she had ceased to occupy the premises as her only or principal home. It is argued on her behalf that the Judge erred by giving an unfair and inaccurate description of B's case and the issues that it raised. We do not agree. As we have already observed in the case of K, the direction given was in some respects generous to the defendants. But the position of B is also contradicted by the evidence which includes the letter she wrote to the housing association following her arrest informing them that she had left the property in December 2014. It was also contradicted by her reference in text messages sent to K to being paid by "*the tenant*". It also contradicted by the fact that B only returned to her property when K's property became unavailable to her. In our judgment when the directions are considered in the round they were fair and accurate and the jury would not have been misled by anything said. We reject the arguments in relation to B.

C. Admission of the statement of Ajibola Lawal: The admission into evidence of inadmissible material

31. We turn now to the separate arguments advanced by B. We start with the dispute about the evidence of Mr Lawal who had produced a statement. This evidence was, however, treated as inadmissible hearsay. He had disappeared prior to the trial and enquiries suggested that he had used a false name when spoken to by officers. An application to read his statement under the hearsay provisions was withdrawn by the prosecution. It had, however, already been agreed that it could be put to B that someone calling himself "Ajibola Lawal" was at her flat when officers visited upon the day of her arrest. This was recorded as an agreed fact. In the course of the cross-examination of B several details contained within the statement were put to B including assertions that he had been paid money to provide false evidence. B denied this allegation and the statement was not sought to be used in rebuttal.

32. An application was made to discharge the jury upon the basis that prejudicial material had been wrongly placed before the jury. The judge declined to discharge the jury. He concluded that he could give an adequate direction to the jury to address what had happened. It is plain from the transcript of the hearing that he gave an explicit direction to the jury that there was absolutely no evidence to support the basis upon which the disputed questions were asked which suggested wrong doing by “Ajibola Lawal”. The judge elaborated upon this clear and unequivocal direction by reference to those parts of the evidence which were, and were not, relevant. In our view the evidence was peripheral to the real issues of the case. Moreover, the risk that any prejudice might have eventuated was squarely addressed by the judge’s direction. In our judgment this issue falls squarely within the case management discretion of the Judge and we would not interfere with this in the absence of a clear error and a material risk of injustice. We detect neither.

D. B’s narcolepsy: The exclusion of parts of the interview during which the defendant fell asleep

33. We turn now to arguments based upon B’s medical condition.

34. The Judge excluded all those parts of one of the interviews (see paragraph [11] above) which took place between B and the police during which it appears that B, due to her narcolepsy, had fallen asleep. It appears from the evidence that as the interview progressed B was unable to remain awake. B had, however, by that point in time, already indicated that she would make no comment to any question put to her upon advice. The matters relied upon by the Prosecution in relation to this interview were matters already put to her interview or dealt with in the prepared statement she had put forward in an earlier, second, interview.

35. It is argued that the Judge erred. It is said that had B woken up she might have decided, contrary to her earlier indication, to give answers to questions and this might have included exculpatory material. She therefore lost the chance to give evidence advantageous to her case. The judge directed the jury upon this. In our view there was no unfairness which could conceivably have arisen. We have reviewed the interview evidence and in our judgment this is an entirely hypothetical objection.

E. The evidence of Ms Dina Abdoluaye: The wrongful inclusion in the jury bundle of inadmissible material

36. The next issue concerns the evidence of a Ms Abdoluaye and arose in the following way. She had been a friend of B but they had fallen out. It was the case of the defence that evidence that Ms Abdoluaye gave for the prosecution would be unfair to B. Proposed agreed facts were emailed by the Prosecution to the defence team the night before the trial. These made no reference to Ms Abdoluaye. However, at the commencement of the trial it was noted that information relating to Ms Abdoluaye had, in fact, been included in the jury bundle. The Prosecution refused to remove that information upon the basis that it was a part of their case. Defence counsel decided, on balance, not to draw attention to the matter and to let matters lie without objection. To counter the possible adverse effects of the inclusion of that evidence in the jury bundle the defendant adduced certain missing and contextual evidence. Subsequently,

there was a change of strategy on the part of the defence and an application to discharge the jury was made. The application was rejected. There then followed a renewed application to withdraw the case from the jury on the basis that the material was prejudicial and related to facts and matters outside the indictment period. The judge declined to discharge the jury. He did, however, direct the jury to remove the evidence from their bundle. The judge also directed the jury to disregard any evidence relating to Ms Abdoluaye.

37. It is now argued that the approach taken by the judge was materially unfair and renders the conviction unsafe. It is said that the facts now speak for themselves. The position adopted by the Judge in directing the removal of the material, in and of itself, establishes that the evidence would have been so significant that the jury might have relied upon it as evidence of past misconduct by B. Were this not so then there would have been no need for the judge to direct removal of the material from the jury bundle.
38. We do not accept this submission. No criticism is made of the directions given by the Judge to the jury in relation to this matter. This was *par excellence* a case management decision taken by an experienced trial judge who fully understood what was, and what was not, prejudicial. The Judge acted in a precautionary manner and it is not possible to infer from his decision to direct removal of the material that he thought either that the material was prejudicial or that, if it was, it could not be adequately countered by appropriate directions. This was, in our judgment, quintessentially, a matter for the judge and we can identify no error on his part.

F. The case management measures taken by the judge to deal with the defendant's narcolepsy

39. It is next alleged that the Judge acted unfairly in his treatment of B. It is said that she lost concentration during the trial and fell asleep, including in the witness box. We deal with this point briefly. An application was made by the defence for regular breaks in the conduct of the trial. The judge accepted that due to B's medical condition she would indeed need regular breaks. He did not agree on 30-minute breaks with 30-minute intervals as sought by the defence, but he did decide that a 10-minute break every hour would be sufficient. It is now said that the breaks were inadequate and on occasion the trial had to be stopped because B had fallen asleep. It is said that B tended to answer questions in the witness box which conveyed an appearance that she was lucid, even after she had entered a sleep mode. We do not accept that the Judge conducted an unfair trial. He was conscious of B's limitations. He made adjustments to cater for those limitations. It is plain from the transcripts that he was astute during the trial to modify the adjustments to ensure that B was able to give fair evidence. He was able to form a view, on an ongoing basis, about the steps to be taken to enable B to give her evidence fairly. Once again, we conclude that this was quintessentially a case management matter and there is no evidence that the Judge failed properly to take B's condition into account. We reject this ground of challenge.

G. Costs

The issue

40. We turn now to an issue of quite a different nature. In the course of sentencing the prosecution sought costs in the sum of £30,959.50 by way of prosecution costs and £48,805.90 to cover investigation costs incurred by the relevant Councils, a total of nearly £80,000. The defence objected that the sum was excessive and the costs schedule submitted tardily by the Prosecution insufficiently particularised. The judge considered that there was force in the criticisms. Applying a broad brush, the judge reduced recoverable costs to £46,000. He then held that K should pay 50% of these costs ie £23,000. There was no costs order against B.
41. The single judge granted permission to appeal on costs based upon concerns as to the approach of the judge towards the costs exercise. The relevant local authorities were ordered to place all relevant evidence and information before the Court of Appeal.
42. The Prosecution told the judge that there were no guidelines relevant to costs and the defence did not correct this submission. The judge proceeded therefore upon the basis that there were no guidelines. In fact, guidelines do exist as set out in paragraph 3.7 of the Practice Direction (Costs in Criminal Proceedings) 2015. It is now said that the Judge failed properly to apply those guidelines. There are three particular aspects of the principles that are of relevance which we summarise as follows.
43. First, the Prosecution is under an obligation to serve upon the defence, at the earliest time, full details of its costs in order to give the defendant a proper opportunity to make representations upon them, if appropriate.
44. Second, costs awarded should not ordinarily be greatly at variance with any fine imposed. We take this as imposing a general obligation to ensure that costs are broadly proportionate to the financial sanctions imposed. In *R v North Allerton Magistrates Court ex parte Dove* [1999] 163 JB 657 Lord Bingham CJ emphasised that an order for costs should never exceed the sum which the prosecutors actually and reasonably incurred. Lord Bingham also acknowledged that whilst there was no requirement that a sum ordered should stand in any “*arithmetical relationship to any fine imposed*” but, nonetheless, the order should not be grossly disproportionate to the fine.
45. Third, when setting costs, a judge should take into account that the Prosecution might be seeking to defray costs incurred by the officers of a third party (such as a Council) which might be said to be “*routine*” and would have to be incurred in any event, in the normal way.

Appellant’s arguments

46. It has been argued before us that, despite the best efforts of the judge to reduce, using a very broad brush, the costs to take account of criticisms made by the defence, the judge *still* erred because he did not address the matters which under the Practice Direction he should have addressed and he thereby failed to impose a sufficient discount on the sums claimed by the Prosecution. In particular it is argued that the Judge: (i) failed to consider the nature and extent of the relevant Council officers’

normal “*routine*” duties and he thereby allowed too many of the claimed hours to be treated as recoverable; (ii) failed to enquire as to the hourly rates of pay of such officers and thereby applied an excessive multiplier; and (iii), applied an arbitrary reduction to reflect the judge’s acceptance of the argument that the number of hours claimed was excessive failing to take account of proportionality in relation to the fine that he imposed.

Analysis

47. In our judgment there is force in these criticisms. Mr Fitzpatrick, counsel for K, in his helpful and detailed written and oral submissions started by making some broad policy points about costs in cases such as this. He argued that a consequence of failing to conduct a full and proper inquiry is that the costs awarded for an investigation performed by a local authority risk exceeding the costs awarded for an investigation by a police force funded by central government. This would, it is said, be punitive and contrary to guidance given by the Court of Appeal in *R v Kesteven* [2012] EWCA Crim 2029 to the effect that the purpose of a costs order is to compensate the prosecutor but not punish a defendant. Mr Fitzpatrick also argued out that the proper approach to be taken in cases such as the present is of wide public significance given that it is estimated that 25% of all prosecutions in this jurisdiction are now performed by agencies other than the police and the CPS. He argued that in this growing number of cases, if unchecked, there risks being an incentive for the prosecution to seek to cover the administrative (pre-charge) costs of investigators who are simply performing their contracts of employment.
48. Closer to the facts of the case Mr Fitzpatrick argued that the Judge was led into error by the Prosecution failing to draw the attention of the judge to the relevant principles and in the tardiness of the submission of the costs schedules. Because of these failings the Judge did not enquire whether the activities performed by the in-house Council legal team or by the Council fraud officers were “*routine*” duties. According to the Prosecution’s own public records the Council recovered 63 properties between April 2014 and March 2016 as a result of fraud investigations demonstrating that this type of investigation was “*routine*”. Even if, to test the argument, it was proper for the Council to recover some portion of what would otherwise be “*routine*” costs there was nonetheless an allocation of costs exercise to be performed as between different investigations to avoid the risk of improper cross-subsidies. There was no evidence in this case that such an allocation exercise had been properly conducted. Had the Judge been put in a position whereby he could pose searching questions he might well have been led to reduce the costs on a better informed and more logical basis.
49. Mr Fitzpatrick also argued that the hourly rates advanced in the schedules appeared substantially to exceed the actual costs incurred by the relevant local authority. For example, in relation to two officers a cost of £70 per hour was provided. However, based upon a working week of 37.5 hours this was equivalent to an annual salary of £127,400 each. In relation to another officer for whom a cost of £40/hour was claimed, based upon the same working week this was equivalent to an annual salary of £72,800. The Council’s own annual accounts reveal all salaried positions remunerated in excess of £60,000. When “*on costs*” (e.g. pension, employers NI etc) were taken into account this would equate to all positions which cost the council in

excess of £75,000. None of the individuals whose costs were sought to be recovered were however listed in the council's annual accounts in the category of higher-earning employees. Mr Fitzpatrick also made the point, which we agree with, that no identification or analysis of such possible inconsistencies or inaccuracies was possible given that the prosecution tendered its costs schedule less than 24 hours before the sentencing hearing. We note that the costs schedules are exceedingly broadly drafted. For instance, it is simply asserted without proof that the investigation took 930 hours and there was "24/7" surveillance. We find both surprising, but we cannot test the accuracy of these assertions because no evidence was adduced before this court by the authorities in question. Against this we note that disclosure, which elsewhere in the documents was described as being an important part of the case against the Defendants, took only 27.9 hours.

50. Mr Fitzpatrick thus made the point that the number of hours claimed by the prosecution seemed excessive. Indeed, the judge appears to have shared this view. However, the judge adopted what was, essentially, an arbitrary downward adjustment to take account of his doubts. Mr Fitzpatrick contended that the degree to which the original number of hours had been overstated could not be established because insufficient detail was provided by the Prosecution. He pointed out that according to the transcript, counsel for the Prosecution had asserted to the judge that the costs presented to the court related only to the charges in court. However, the detail of the legal costs appeared to show that they also included costs which were not in fact related to charges heard in court. The Judge did not attempt to investigate these points nor make allowances for such inaccuracies.
51. As already observed we are persuaded by the thrust of these submissions. We would make five points. First it was the duty of the legal representatives to place before the court the relevant guidelines. It seems that the Judge was misled into believing that there were no guidelines. The Judge was entitled to greater assistance than he received. We do not exonerate the defence who should also have drawn the guidelines to the attention of the Judge. But primary responsibility lies with the local authority *qua* prosecutor and this duty was not complied with. Second, the schedules were served late and risked amounting to a form of ambush. This was unacceptable especially given the scale of the costs being sought and the lack of information contained therein which would not have enabled the accuracy of the schedules to be tested. Third, the Judge was wrongly led, by these failures, to apply an arbitrary and overly broad brush to the costs. Even endeavouring to err on the side of caution any Judge would risk getting the assessment wrong in a case of this level of complexity, and in consequence being over generous to the Prosecution, *if* invited to proceed on what might be an ill-informed basis. Fourth, we consider that because of these procedural defects there can be no confidence in the costs figure ultimately arrived at by the Judge. We are also concerned that no attention appears to have been made to K's means, though counsel for K, properly, does not on the facts of this case take any point about means. It was still a matter that should have been considered unless conceded before the judge. Fifth, we observe, that the costs far outstripped the fine which should have put the judge on notice that there might be something problematic about the costs order. The costs might have been justified nonetheless; but because of the problems we have identified we remain concerned whether any sort of a proportionality assessment has been carried out.

52. For these reasons we set aside the order for costs. The Single Judge, in granting permissions to appeal, indicated that all relevant documentation should be placed before the full court so that we could assess the costs for ourselves on an informed basis. The local authorities have not attended. Relevant information was not before the Court. We were given no explanation for this. We have therefore done the best that we can and have therefore fully taken into account Mr Fitzpatrick's criticisms.
53. We quash the order for costs below and substitute in its place an order for costs of £32,000. K will be liable for half of this, namely £16,000. This is therefore the order for costs made against K. To this extent only the appeal is allowed.