

APPROVED RULING ON ABUSE OF PROCESS

Handed down on 6 October 2026

IN THE CROWN COURT AT DERBY

Before His Honour Judge James Carter

Rex (Derby City Council)

-v-

Mark Whitfield and others

RULING ON AN ABUSE OF PROCESS APPLICATION

Introduction

1. This ruling concerns the Defendants' combined application to stay the indictment as an abuse of process. The application is advanced on behalf of all five Defendants. It is made at the close of the Prosecution's case.
2. I have considered the written submissions in a combined submission contributed to by all Defence counsel dated 31 August 2026 of 25 pages and the response from the Prosecution dated 10 September 2026 with a slightly amended version sent via email on 18 September 2026 of 25 pages. There is a combined authorities bundle to which I have been referred containing 304 pages.
3. In addition to those documents I heard extensive oral submissions from 21 September to 23 September 2026, principally from Ms Dashani KC for Mark Whitfield and Mr Atkins KC for the Prosecution. The remaining Defendants' counsel essentially adopted Ms Dashani KC's position. Some further brief submissions were made orally by Ms Clare for Jordan Whitfield and Mr Rose for David Crossley.
4. Ms Dashani KC confirmed at the outset of her oral submissions that this application is confined to limb one abuse only. She did not pursue the written submission in relation to limb two abuse and I do not address limb two.
5. Separate to this application alleging abuse of process, the Defence have submitted applications that there is no case to answer on the majority of the

counts. This ruling deals only with abuse of process to ensure the matters are not conflated. The judgment on the submission of no case to answer will follow this one.

Background

6. The indictment arises principally out of the activities of Motor House UK (Derby) Ltd ("MHUK"), a business engaged in the sale of used motor vehicles. There were previous trading styles and other limited companies operated by Mark Whitfield that preceded MHUK and those are also part of the case: Derby Car Centre (DCC), DCC Derwent Street and Aston Motors. Another company operated by Mark Whitfield, Eaton Investments Derby Limited ("EIDL" or "Eaton") also features.
7. The Prosecution's case alleges MHUK was trading fraudulently (counts 1-3) and that in the sale of the indicted individual vehicles the Defendants charged on each of those counts committed fraud by false representation (counts 4-35). All counts are denied by the Defendants. In essence the global Defence position is this was a used car business selling a large number of cars over a long period of time. Their position is that substantial repairs and expenditure were incurred on vehicles sold through the business and they deny any dishonesty.

Factual background relevant to the application

8. During the course of the evidence, the Prosecution have called a vast amount of evidence, primarily from the individual consumers on counts 4-35. They have also called the Financial Investigator (Ms Joanne White), a number of Trading Standards officers and Ms Helen Gregory, a Forensic Accountant. This application though centres on the evidence of Donna Dowse, who was the Officer in the Case (OiC) in charge of the investigation throughout.
9. The following factual background summary is specific to this abuse of process application.

10. On 9 July 2019 officers of Derby City Council Trading Standards (“Trading Standards”), acting pursuant to warrants, entered MHUK’s premises and seized substantial quantities of documentary material together with electronic devices and business records.
11. The seized material included vehicle files, workshop invoices, garage invoices, MOT documentation, customer records, purchase records, expenditure records, refund documentation, accountancy records and associated business paperwork. A van was needed to transport the seized material from MHUK’s premises. The evidence establishes that these materials were created and retained by MHUK (and the predecessor businesses Derby Car Centre, DCC Derwent Street and Aston Motors) in the ordinary course of business and, *inter alia*, formed the documentary history of vehicle purchases, repairs and sales.
12. The evidence heard demonstrates that the initial intention was that all seized material would be logged and catalogued. However, that process was abandoned. The evidence of Donna Dowse was that concerns arose regarding the volume of material seized and what was believed to be a three-month time limit under the Consumer Rights Act 2015, for the return of business documentation. As a result, the original requirement to log everything seized was not completed and soon abandoned.
13. The evidence of Donna Dowse further established that not all seized material was copied or scanned before review or return. Although facilities existed by which all material could have been copied or scanned, that course was not adopted. Instead, TS officers undertook a selective extraction exercise whilst significant quantities of original material, the Prosecution say, was returned.
14. The evidence established that no comprehensive contemporaneous inventory exists identifying every document seized from MHUK. Although sift logs were produced for certain exhibits, they do not constitute a complete record of all documents seized. Several sift logs use only generic descriptions such as “financial documentation”, “vehicle paperwork” or “lever arch files”. No comprehensive index of contents was created.

15. The evidence also established substantial continuity failures. Donna Dowse accepted that exhibit bags were not consistently sealed using unique exhibit seals. She accepted that continuity irregularities existed throughout the handling of the seized material process. She further accepted that the systems she subsequently created or devised to attempt to reconstruct continuity contained errors and inconsistencies.
16. A number of examples were identified in evidence. For example, exhibit AJK/3 consisted of material including invoices from MOT Place Derby, miscellaneous repair invoices and financial records. The sift log records such material. The original exhibit bag can no longer be located. The Prosecution cannot now identify where that material is or whether it was returned. Donna Dowse accepted that the exhibit bag is missing in her evidence.
17. A further example was exhibit NJL1410090719 which contained, amongst other matters, a letter relating to the stopping of a cheque issued to Michael Smith (count 6). The sift log records the existence of that letter. It was not copied or retained. It does not appear on the returned property register. The Prosecution cannot establish where that letter is now located or what became of it.
18. The evidence demonstrates that records of expenditure and repairs existed in significant quantities. During interview, Sukhvinder (Suki) Rana stated that expenditure incurred on vehicles was evidenced through invoices retained and then sent to MHUK's accountants. During interview, Shane Wilson described a system whereby invoices, MOT documentation, service information and vehicle paperwork were retained in filing systems maintained by MHUK.
19. To support that point, the Defence referred to in their oral reply to two items from the unused material showing the 'packs' Shane Wilson appears to describe in his interview. These shows evidentially that such inbound packs did exist, as Shane Wilson said in his interview.
20. I accept, as Mr Atkins KC submitted, that those 'packs' do not show work MHUK was allegedly doing on vehicles but they do indicate the type of material being received when cars came in. The first example in the pack (reference 16442)

is clearly very close to the July 2019 seizure (dating from June 2019). It is therefore good evidence of the type of material in such packs as described in interview. Such evidence is clearly relevant in my judgment to the knowledge a salesperson would have about the incoming condition of the vehicle. It is also directly reflected of how Suki Rana (independently of Shane Wilson) described his normal sales process in his interview.

21. The seized records reviewed during the evidence and again as part of this application contained examples of invoices from garages, MOT providers, vehicle repairers and suppliers. They demonstrated routine record keeping by the businesses in relation to expenditure incurred on vehicles.
22. The evidence showed that TS intended that substantial quantities of material would be returned to MHUK. The property register extractions show those items that the Prosecution can evidence being returned to MHUK. It also shows some items were in fact returned by TS before any charging decision had been made and before any meaningful disclosure review had occurred. Donna Dowse accepted that disclosure considerations were not part of the return process and that returned material had not been reviewed against disclosure obligations before return.
23. Of particular significance is the evidence concerning Ray Bigg. Ray Bigg was a contractor engaged by TS and he was heavily involved in the investigation and particularly in obtaining the warrants and in their execution. He was a former police officer. The evidence establishes that his employment with TS ended 'under a cloud'. He has not provided any evidence to the court nor any s9 CJA 1967 written statements. Following the termination of his employment original seized documents, original witness exhibits, sift logs and investigation materials were returned from Ray Bigg's personal possession to TS. This included original exhibits for the consumer complainants (including some exhibits used in the trial). There were draft witness statements with handwritten amendments, as well as copies of other statements in the names of other witnesses utilising text from other statements. There were some documents that had come from an individual consumer's own County Court proceedings.

24. This, on its face, is astounding. Donna Dowse accepted she was unaware that he had retained such material personally. She accepted that TS had no record identifying when the material was removed from secure storage, what exhibits were affected or whether all material had ultimately been returned. Some of the material was returned in an unsealed carrier bag from a local Derby store, Brigdens. Donna Dowse accepted that the integrity of the evidential chain had thereby been compromised and that TS could not identify the full extent of what material had been removed, retained or returned.

25. It is against that evidential background that the Defendants contend that a fair trial is no longer possible.

The Defence position

26. The application is only upon limb one abuse and the primary Defence submission is that a fair trial is no longer possible. The Defence accept, for the purpose of this application, that they bear the burden of proof on the civil standard, the balance of probabilities.

27. The Defence further accept that a stay is an exceptional remedy and that in the majority of cases, ordinarily any investigative shortcomings can be accommodated within the trial process. Often, they accept, disclosure failures can be addressed by directions, re-listing, further review or cross-examination. In this case though they submit it has moved beyond those ordinary remedies within the trial process, such that the exceptionality of a stay for abuse of process it met.

28. The Defence say this is not an argument about disclosure failings in isolation, or late disclosure or about delay in the matter coming to trial, rather about the irreversible loss of evidence. The evidence in question was not generated by the Defendants. It was not third-party material. It was material seized by the Prosecution itself during execution of warrants on 9 July 2019. It is material the Prosecution chose not fully to copy, which was not comprehensively logged, not properly reviewed for disclosure purposes, some of which was returned but essentially, they say, it is material which can no longer be identified with

confidence. As a result, they argue, it is material whose evidential integrity has been irretrievably compromised.

The Prosecution position

29. The Prosecution contends that whatever failings occurred, the trial process remains capable of ensuring there is a fair trial and in delivering fairness. They have provided a first draft of a potential direction for the jury to assist in this regard. The Prosecution further submit that the Defence do not have any evidential foundation for their application at this stage. They argue that until the Defence calls any evidence there is no evidential basis for the court to conclude the documents are missing. The Prosecution point to Crim PR 3.28(2)(iii) and (iv) to argue that the Defence could have provided evidence within the scope of this application to support their position but have not done so. Any Defendant could even have given evidence in this application to support the submissions made but the Defence have chosen not to do so. The Prosecution say therefore that the application is premature until there is Defence evidence upon which the evidential foundation can be placed. They accept the application can be renewed, should such evidence materialise and that they could not object to it being renewed. I note here, Crim PR 3.28(2)(iii) allows for an abuse application to be made up to the point the jury retire.

Legal framework

30. The legal framework is not substantially in dispute. The jurisdiction derives from the court's inherent power to prevent abuse of its process. The modern statement of principle is found in *R v Maxwell* [2010] UKSC 48 at paragraph [13] which states:

"It is well established that the court has the power to stay proceedings in two categories of case, namely (i) where it will be impossible to give the accused a fair trial, and (ii) where it offends the court's sense of justice and propriety to be asked to try the accused in the particular circumstances of the case. In the first category of case, if the court concludes that an accused cannot receive a fair trial, it will stay the proceedings without more. No question of the balancing of competing

interests arises. In the second category of case, the court is concerned to protect the integrity of the criminal justice system. Here a stay will be granted where the court concludes that in all the circumstances a trial will “offend the court’s sense of justice and propriety” (per Lord Lowry in *R v Horseferry Road Magistrates’ Court, Ex p Bennett* [1994] 1 AC 42, 74G) or will “undermine public confidence in the criminal justice system and bring it into disrepute” (per Lord Steyn in *R v Latif and Shahzad* [1996] 1 WLR 104, 112F).”

31. There are two recognised categories of abuse but as I have indicated this application is predicated only on the first type, limb one. Limb one abuse arises where a fair trial is no longer possible. Once the court concludes a fair trial is impossible there is no balancing exercise to perform as any balancing exercise is only performed under limb two. Therefore, once the conclusion is reached that a fair trial is no longer possible a stay **must** follow.

32. In relation to an application concerning missing evidence, the principal case is *R (Ebrahim) v Feltham Magistrates’ Court* [2001] EWHC Admin 130. From that authority the court must determine:

- a. what duty existed;
- b. whether that duty was breached;
- c. what prejudice resulted;
- d. whether that prejudice can be accommodated within the trial process.

33. In paragraph [25] of *Ebrahim* the court stated:

“The ultimate objective of this discretionary power is to ensure that there should be a fair trial according to law.”

and

“The trial process itself is equipped to deal with the bulk of the complaints on which applications for a stay are founded.”

34. In paragraph [74] of *Ebrahim* the court stated that the first question is:

“what was the nature and extent of the investigating authorities’ and the prosecutors’ duty, if any, to obtain and/or retain the video tape evidence in question?”

35. The same structure was approved in *R v Dobson* [2001] EWCA Crim 1606 by Potter LJ at paragraph [34]. The following questions in cases under limb 1 fall to be asked:

- “(1) What was the duty of the police in the circumstances?
- (2) Did the police fail in their duty in not obtaining and retaining the relevant material?
- (3) If so, was the prejudice suffered serious prejudice to the extent that no fair trial could be held in the light of such failure?”

36. In *Dobson* the Court of Appeal identified the central questions as:

- i. What duty existed?
- ii. Was the duty breached?
- iii. What prejudice resulted?
- iv. Only once the existence of the duty has been identified does the court move to questions of breach and prejudice.

37. In *Clay v South Cambridgeshire Justices* [2014] EWHC 321 (Admin) the court held:

“the question of whether the defendant can have a fair trial does not logically depend upon whether anyone was ‘at fault’” (paragraph [46])

and

“If vital evidence has as a matter of fact been lost to the defendant whether occasioned by the fault of the police or not, the issue is whether that disadvantage can be accommodated at his trial so as to ensure that his trial is fair.” (paragraph [47])

38. From that background, I summarise the position thus:

- a. a stay remains exceptional;
- b. the mere existence of any errors is insufficient. It is not criticism for its own sake;
- c. that fault is not the focus but rather prejudice to the defendant is;

- d. the court must consider whether any resulting prejudice can be accommodated in the trial process.

39. When looking at missing or lost evidence, the authorities further distinguish between speculation and demonstrable evidential prejudice. In *R v RD* [2013] EWCA Crim 1592 the Court of Appeal Criminal Division (“CACD”) explained at paragraph [15]:

“...it is necessary to distinguish between mere speculation about what missing documents or witnesses might show, and missing evidence which represents a significant and demonstrable chance of amounting to decisive or strongly supportive evidence emerging on a specific issue in the case. The court will need to consider what evidence directly relevant to the appellant's case has been lost by reason of the passage of time. The court will then need to go on to consider the importance of the missing evidence in the context of the case as a whole and the issues before the jury. Having considered those matters, the court will have to identify what prejudice, if any, has been caused to the appellant by the delay and whether judicial directions would be sufficient to compensate for such prejudice as may have been caused or whether in truth a fair trial could not properly be afforded to a defendant.”

40. That distinction lies at the heart of the present application. The court must therefore determine whether the missing material is truly speculative or demonstrably relevant to a live issue.

41. More recently, in *R v HGF* [2026] EWCA Crim 570, Baroness Carr LCJ stated at paragraph [35]:

“What was critical was not the strength of the remaining prosecution evidence, but the prejudice suffered by the respondent in being denied the means of challenging that evidence.”

42. The issue for me therefore is not whether mistakes in the investigation occurred but whether the consequences of those mistakes are now incapable of remedy through the trial process.

43. If I conclude, on the balance of probabilities, that a fair trial is no longer possible, the proceedings must be stayed; no balancing exercise arises.

Application of the test

i) The duty that existed on Prosecution

44. Before considering breach, prejudice or remedy, it is necessary to identify the nature of the duty that existed in relation to the material seized from MHUK on 9 July 2019. The Prosecution seized substantial quantities of material from MHUK. The evidence demonstrates that the seized material included:

- a. vehicle files;
- b. workshop and garage invoices;
- c. MOT documentation;
- d. Expenditure, sales and refund records;
- e. Wider business correspondence, including with banks and finance companies.

45. The issue of relevance is the essential first stage. If material was not capable of bearing upon an issue arising in the investigation, no duty to retain, review or disclose it could arise. Conversely, once relevance is established, the obligations imposed by the Criminal Procedure and Investigations Act 1996 ("CPIA") and the Attorney General's Guidelines, as in force at the time (being the December 2013 version), which I refer to as "the Guidelines", are engaged.

46. The approach is set out in *Ebrahim* where Brooke LJ held at paragraph [74]:

"We would suggest that in similar cases in future, a court should structure its inquiries in the following way:

- (1) In the circumstances of the particular case, what was the nature and extent of the investigating authorities' and the prosecutors' duty, if any, to obtain and/or retain the videotape evidence in question? Recourse should be had in this context to the contents of the 1997 code and the Attorney-General's guidelines.

(2) If in all the circumstances there was no duty to obtain and/or retain that videotape evidence before the defence first sought its retention, then there can be no question of the subsequent trial being unfair on this ground.

(3) If such evidence is not obtained and/or retained in breach of the obligations set out in the code and/or the guidelines, then the principles set out in paragraphs 25 and 28 of this judgment should generally be applied.”

[(4) not reproduced as not relevant to limb one.]

47. Paragraph 6 of the Guidelines provides that disclosure consideration includes:

“the use that might be made of it in cross-examination”

and

“its capacity to suggest an explanation or partial explanation of the accused’s actions”.

48. Paragraph 15 of the Guidelines provides:

“Investigators and disclosure officers should be familiar with the CPIA Code of Practice, in particular their obligations to retain and record relevant material, to review it and to reveal it to the prosecutor.”

49. Paragraph 17 of the Guidelines provides:

“A fair investigation involves the pursuit of material following all reasonable lines of enquiry, whether they point towards or away from the suspect.”

50. The relevance of the seized records in the present case was, in my judgment, obvious. The indictment alleges fraudulent trading and fraud by false representation. Dishonesty therefore lies at the centre of the case. Records relating to vehicle acquisition, repairs, workshop expenditure, MOT history, parts purchased, customer complaints, refunds and associated business practices were plainly capable of bearing directly upon those issues. They were not collateral documents but concerned the very transactions forming the basis of the Prosecution and being at the centre of the indictment.

51. The significance of the material was obvious from the outset. It was mentioned directly by two of the Defendants, Shane Wilson and Suki Rana, in their interviews after arrest on the day of the seizure. This was before any possible collusion was possible. In those interviews they addressed the matters of repairs, expenditure, MOTs and invoices. This was their independent recollection and at time when they did not know copy documents would not be retained by TS.

52. Suki Rana explained that records of works were retained through invoices and accountants' documentation. Shane Wilson explained that invoices, spreadsheets and supporting paperwork recorded work undertaken to vehicles. Therefore, the issues concerning these documents and their clear relevance was known from the interview stage and before any meaningful review of the seized material occurred. The significance of such material was clearly known to investigators at an early stage.

53. The surviving material independently confirms the descriptions given by those Defendants in interview. The sift logs reveal the existence of workshop invoices, MOT Place Derby invoices, Prime Car invoices, expenditure records and associated business documentation. This is not therefore a case where the existence of such material is speculative. The evidence demonstrates that it existed. The issue is that much of it can no longer be identified, traced or produced.

54. Having concluded that the material was relevant, the retention duty follows.

55. Paragraph 25 of the Guidelines cautions investigators against prematurely concluding that material is incapable of impact because the significance of material may change as an investigation develops.

56. I am unable to accept the Prosecution's submission that the returned material was irrelevant. In circumstances where no comprehensive inventory was created, where substantial quantities of material were not copied, where documents were returned before any proper disclosure review was undertaken, and where continuity failures prevent reliable reconstruction of what was seized,

it is impossible now to assert confidently that the missing material lacked relevance. There is no reliable evidence as there are no records from the initial review that was conducted for 'relevance'.

57. If it was simply that documents/material before a certain date were returned, there is no evidence that these were sifted to ensure all items within them were from that period. The date suggested by Donna Dowse in her evidence for material that was returned wholesale was "up to 2014" and later in her evidence "pre 2014". A precise date within that was not given. That in itself is unclear and further confused as there are sift logs showing items from 2014 being reviewed and copies retained. The sift log that Ray Bigg completed on 3 October 2019 shows invoices from 2014 being reviewed alongside items from 2019. On its face therefore TS were looking at material in the 2014 period and copying items they said were relevant. This undermines the 'wholesale return of items from a certain date' analysis.

58. The submission therefore as to irrelevance is itself speculative. Indeed, as *RD* explains at paragraph [15], the court must distinguish between speculation and material representing a significant and demonstrable chance of supporting a defence issue. Here the existence of the categories of documents is established by the surviving records themselves and evidenced within the more detailed sift logs. Accordingly, it is not speculative.

59. The Companies Act 2006 provides additional context. Sections 386 and 388 require adequate accounting records to be maintained and preserved. The evidence demonstrates that substantial quantities of invoices, expenditure records and associated business documents were routinely retained by these businesses. Their retention goes beyond the statutory retention period. The existence of these documents is therefore entirely unsurprising.

60. Once seized for the purposes of a criminal investigation, however, the Prosecution's retention obligations arose independently under the CPIA regime. The Prosecution could not lawfully rely upon the possibility that copies might remain elsewhere (eg with accountants) as a substitute for compliance with its

own obligations. The Prosecution cannot rely on the potential later 'reconstruction' of the material by the Defence from other sources.

61. Likewise, where documents were returned to MHUK, from where they were seized, the Prosecution cannot say that the company officers at the time were under a duty or obligation to provide any of those document to other Defendants who were not at that time company officers. It is not an obligation on any Defendant to provide documents to another. The officers of the company are not required to, for example, contact the company accountants for records that may have been retained either for themselves or to provide to other Defendants to further their defences.

62. In addition, I have noted already the position under the Companies Act 2006 as to document retention. Beyond the statutory period for retention of three years (s388(4) Companies Act 2006)), MHUK is not under any obligation to retain documents longer, even when proceedings have not concluded. It is not a Defence obligation but one that is a duty of the Prosecution to retain the material (or at least copies thereof).

63. It follows, in my assessment, that any suggested deficiency in the retention of items cannot be cured by placing an obligation on a Defendant to provide documents.

64. I therefore conclude that the categories of material seized on 9 July 2019 constituted relevant material. Their relevance was objectively obvious. Applying *Ebrahim* at paragraph [74], the Guidelines and the approach approved in *Dobson* at paragraph [34], there was a clear and continuing duty to retain, record and review that material before any decision was taken to return it and I find, on the balance of probabilities, that there was such a duty.

ii) Was the duty complied with/was it breached?

65. The next question is whether that duty was complied with. In my judgment plainly it was not.

66. The evidence of Donna Dowse establishes systemic failures. I note:

- a. Not all seized material was copied or scanned.
- b. The original proposal to log everything seized was abandoned.
- c. There was no comprehensive inventory of everything seized.
- d. Material was returned before settled guidance on review and retention had been established from the investigation team.
- e. Material was not reviewed for disclosure purposes (in the terms the Guidelines envisage) before being returned.
- f. The property returned schedules contained errors.
- g. Attempts later by TS, through continuity records and reviews to assess where material had gone, contained errors.
- h. Some exhibit bags are now empty.
- i. At least one exhibit bag is now missing.

As a result, the Prosecution cannot identify with confidence what was seized, what was copied, what was returned and what has been lost.

67. This goes beyond being an allegation from the Defence but arises from Donna Dowse's evidence. In relation to continuity, she accepted there had been "major failings". She accepted failures in the sealing of exhibits and in the logging/sifting process. Those findings alone place the court in a very unusual position.

Ray Bigg

68. I now turn to the evidence relating to Ray Bigg. This aspect of the evidence is startling. To recap, in very brief summary: original seized evidence was kept at his home; neither Donna Dowse, the OiC, nor anyone at TS knew that; no record exists showing when material left the TS secure storage; no record exists showing what exhibits were removed or what, if anything was returned to the store. When Ray Bigg did return items to TS it was in two unsealed boxes with some items in a Brigdens' carrier bag. The boxes being larger, she said than, 'bankers boxes'.

69. TS do not know what else he may have taken or retained for whatever reason. Without knowing why he took material in the first place it cannot be said he must have returned everything. TS made no further enquires with him as to why he

took such material or what further material he may have retained himself or for whatever reason, destroyed. The Prosecution cannot say, and without the further enquires being made, it cannot be inferred that all the material was returned. There may be further material unaccounted for. The result is not merely a continuity concern but a fundamental inability to show, or now reconstruct, the evidential history and locations of parts of the seized material

70. Those findings substantially aggravate the continuity problems already identified. They reinforce my conclusion that the court cannot know the true scale of the evidential loss.

71. I note in particular the following specific quotes from paragraph 6 of the Guidelines:

- a. "the use that might be made of it in cross-examination" (paragraph 6(a));
- b. "its capacity to support submissions that could lead to ... a stay of proceedings" (paragraph 6(b));
- c. "its capacity to suggest an explanation or partial explanation of the accused's actions" (paragraph 6(c)).

72. As paragraph 6 of the Guidelines makes plain, consideration had to be given to the use that might be made of material in cross-examination and to its capacity to suggest an explanation or partial explanation of the accused's actions. That exercise was never performed because the material was returned before any disclosure review occurred. It obviously cannot occur now given the return of those items.

73. From that analysis, on the balance of probabilities, I am driven to the conclusion that the duty was clearly not complied with and was breached.

Speculation and the Prosecution's argument of a lack of evidential foundation

74. I reject the Prosecution submission that the Defendants' argument ultimately rests on speculation. The surviving material demonstrates that documents in the various categories (workshop, garage invoices, MOT, expenditure records

etc.) existed. The issue is therefore not whether such evidence existed but that such evidence existed and is no longer available.

75. The example of exhibit AJK/3 illustrates the point. The sift log, itself a 36 page document, discloses:

- a. MOT Place Derby invoices;
- b. miscellaneous repair invoices;
- c. expenditure records;
- d. Prime Car invoices.

76. Some items are marked as copied but further identification (eg via new exhibit numbers) is not possible as nothing is given to enable tracing of the items.

77. The exhibit bag for AJK/3 itself has disappeared. The copied material cannot be traced with confidence. There is no reliable record of return. The Prosecution cannot say what happened to the material.

78. The issues with AJK/3 demonstrate that the court cannot know what became of potentially important evidence. The sift log identifies repair and MOT documentation. The bag itself has disappeared and documentation marked copied cannot be traced. There is no reliable return record to show the material went back to MHUK. The Prosecution cannot identify whether those documents survive. That is not theoretical prejudice but identifiable evidential loss.

79. Another example is the Michael Smith material (count 6) which demonstrates the same problem. The sift log records: "letter re stopped cheque payee Michael Smith".

80. The stopped cheque forms part of the Prosecution's allegation and the copy of its front and back are in the jury bundle. The reason for stopping the cheque plainly bears upon dishonesty. Yet the document was neither retained nor copied and there is no evidence that it was returned. It has disappeared. No one now knows what it said and it would be speculation to guess its content.

81. However, it is not speculation to say it is missing. That can be inferred from the fact it does not feature on the property return log. This is not speculation but

identified lost evidence. It concerns a central factual issue on this count and is clearly relevant to the Prosecution's case on this count.

82. Applying *RD* at paragraph [15]:

“it is necessary to distinguish between mere speculation about what missing documents or witnesses might show, and missing evidence which represents a significant and demonstrable chance of amounting to decisive or strongly supportive evidence emerging on a specific issue in the case.”

83. Here, the missing documents represent a significant and demonstrable chance of amounting to strongly supportive evidence on issues central to dishonesty, vehicle condition, repairs and refunds.

84. The prejudice to the Defence, Jordan Whitfield in this example, is clear. His case on this point has only been able to be put before the jury because the Defence made further enquires during the currency of the trial with Lloyds Bank to find more information about that cheque. Those were not enquires the Prosecution had made at all. The content of those Defence enquires are now summarised in the evidence in the Agreed Facts at AF 81. Of course, given the passage of time the information available now is limited but had the letter been retained at the time and copied and if it was not now missing, those enquires would not have to be made. Further, the evidence would be primary evidence and complete.

85. In the trial overall, as is trite, the Prosecution have the burden of proof throughout. A Defendant is not required to produce any evidence or call any witness. However, due to the investigative failings, in this count as an example, the Defence are having to make enquires and source material themselves precisely because the investigation failed to retain relevant material. This, in my judgment, epitomises the prejudice they are under. It is therefore precisely the kind of prejudice contemplated in *RD*.

86. I do not therefore accept the Prosecution's submission that the Defence should have provided evidence or called evidence in this application to show that

similar documentary evidence from sales or vehicles purchase post the seizure existed. That does, in my judgment, subvert the burden of proof in the overall trial, which remains with the Prosecution.

87. As concerns this application, the Defence could have called evidence or submitted documents as Crim PR 3.28 allows. They are not obliged however to do so, even when they have the burden of proof, as in this application. I am satisfied, on the balance of probabilities, that there is, from what I have already set out, a sufficient evidential basis for the Defence application.

88. It follows that I also do not accept the Prosecution's submission that this application is premature without the Defence calling any evidence. For the reasons I have just set out, I am satisfied, on the balance of probabilities, that there is a sufficient evidential basis to consider the application now.

Materiality

89. I turn to consider materiality. The Prosecution submit that the missing documents/invoices would not be determinative. The authorities do not require determinative evidence but evidence capable of providing substantial support upon a live issue.

90. In *Sheikh* [2006] EWCA Crim 2625 the Court said at paragraph [45]:

“In our view the missing documents, in particular the staff rota and the personnel records, were likely to be highly relevant to two issues in this case, first, whether the appellant would have come into contact with MG so as to have the opportunity to win his trust as MG alleged that he had; secondly, whether the appellant had the opportunity to commit these offences against MG.”

91. In essence the Court regarded them as potentially crucial because they bore directly upon whether he had the opportunity to commit the offences alleged.

92. Here the missing invoices, workshop records and expenditure records were capable of showing whether work was undertaken on vehicles and whether representations were honestly made.

93. In this case, as in *Sheikh*, the absent records bear directly upon the central factual issue before the jury. They bear directly upon:
- a. whether repairs were undertaken;
 - b. whether expenditure was incurred;
 - c. whether representations were honestly believed by the relevant Defendant;
 - d. whether refunds were due;
 - e. whether trading practices were dishonest.
94. Dishonesty lies at the centre of the indictment and is a key ingredient as the *mens rea* for each offence on the indictment. Records showing repairs undertaken, expenditure incurred, MOT work performed and vehicle condition are capable of resolving that issue. They are not collateral or peripheral but central.
95. Applying the reasoning in *R v Burke* [2005] EWCA Crim 29 at paragraphs [35] and [40], the missing records are central to the factual questions determining guilt or innocence and therefore lie at the centre of the case. They are clearly material to the charges on the indictment.

iii) Prejudice

96. The Defence argue the prejudice here is not distributed equally as the Prosecution retains the evidence it wishes to rely on and it has proceeded, over several months, to call its evidence. It can rely upon its selection of the retained business records, its financial analysis and expert evidence.
97. This allows the Prosecution the ability to invite the jury to draw inferences from that evidence, which they say they will do. The Prosecution's submissions focus upon the evidence from the individual consumers which clearly remains available. The Prosecution's ability to continue to advance its case is not impacted by the missing evidence.

98. Conversely the Defence have lost access to significant categories of contemporaneous records. The Defence cannot challenge allegations in the same way that they could have done had the records been preserved.

99. In my judgment, the Defence have established, on the balance of probabilities, more than investigative imperfection. They have established that records capable of demonstrating repairs, expenditure, MOT work, refund issues and routine trading practices existed. They were seized by the Prosecution, were not comprehensively recorded, were not comprehensively copied, were not reviewed against the disclosure test, were returned through a defective continuity process and can no longer be identified or accounted for. The resulting prejudice is not speculative. It is identifiable, substantial and clearly permanent. The imbalance is therefore obvious and it is of substantial significance.

100. In my judgment, it brings this case very close to the reasoning adopted by the CACD in *HGF* where Baroness Carr LCJ stated at paragraph [35]:

“What was critical was not the strength of the remaining prosecution evidence, but the prejudice suffered by the respondent in being denied the means of challenging that evidence”.

101. In my judgment that sentence perfectly encapsulates the present application. The Defendants have been deprived of the contemporaneous business records by which the Prosecution's allegations could have been challenged.

102. The real question is not whether evidence still exists upon which the Prosecution can rely but whether the Defendants have been denied the means of challenging it. On the balance of probabilities, it is more likely that not that the Defence have been denied that means of challenge.

iv) The trial process and potential remedy

103. The final question is whether the prejudice can be cured through the trial process. The Prosecution submits that it can and it points primarily to judicial

directions and that the Defence could seek material from other sources when they give evidence if they chose to do so. They could, the Prosecution say, go direct to suppliers/garages or their accountants. They could deploy the material that was actually returned, as there is evidence to support that fact that some material was returned to MHUK from the property receipts. Essentially, the Prosecution say the missing evidence could be reconstructed.

104. I have addressed already, by way of example, the issue with this specifically in relation to the Michael Smith cheque and why I say that is not an appropriate approach or a fair one.

105. As to jury directions, the Prosecution have formulated a rough draft of a suggested direction, for which I am grateful. In essence it tells the jury to weigh the issue of the missing documents in their deliberations and consider if there is prejudice. As Ms Dashani KC pointed out in her oral reply, the issue of prejudice is not one for the jury but one squarely for me in determining this application and if I find, on balance, prejudice does exist the stay must follow.

106. I accept the Defence submission on this point. I am supported in that by what the CACD said in *Burke* at paragraph [39]:

“Mr Thomas QC submits that the absence of the documentation was a matter for the jury to weigh up and consider against the background of the direction on delay. We do not agree.”

107. In addition, in *HGF* at paragraph [39] the Court of Appeal observed:

“the prosecution has still not been able to formulate a direction which adequately corrects the unfairness without inviting the jury to speculate impermissibly”.

and the Court continued at paragraph [40]:

“We cannot ourselves identify any corrective direction which does not lead back to the sort of impermissible jury speculation”.

108. Applying that here, a jury direction cannot recreate documents. A direction cannot reveal their contents. It cannot perform a disclosure exercise that never occurred. It cannot restore continuity.

109. The same is true of reconstruction. Reconstruction is not preservation. It is not documentation. Any reconstruction would use secondary evidence, where primary evidence should have been retained. This is clear from the example with the Michael Smith cheque: the evidence that can be reconstructed is not in the same detail that the contemporaneous document would have shown. That arises because the exercise is taking place many years later when the bank no longer has the full records. The letter actually sent, which was the item logged on the sift log cannot be reproduced.

110. I therefore reject the Prosecution's submissions in this regard. There is, in my judgment, clear prejudice and that is permanent. It cannot be accommodated in the trial process and so it cannot be cured.

Application to counts 1-3

111. I have set out already with examples how counts 4-35 are impacted. I set out here how I consider this also impacts counts 1-3.

112. The Prosecution's failures in relation to retention of material do, I accept, impact all counts on the indictment as Ms Dashani KC submitted.

113. The issues concerning the lack of comprehensive records of items seized and retained for disclosure purposes pervade every count as the Prosecution are unable to properly complete disclosure as they did not review all the material seized properly and against their obligations under the CPIA, PACE Code B and the Guidelines. That is not something that can now be rectified as it cannot be done again. The continuing obligation to review material for disclosure purposes as the case has developed has been lost. As was said in *HGF* at paragraph [34]:

"This was a case where the prosecution failed to obtain evidence which might have weakened the prosecution case – and was plainly relevant."

That precisely is the issue here as whilst the evidence was initially obtained it was not retained, it was relevant and it is capable of weakening the Prosecution case.

114. The issue of dishonestly pervades all counts. Where I have concluded missing documents could have assisted the Defendants as regards the dishonestly element, those points are directly transferable to counts 1-3 given the commonality of the *mens rea*.
115. The Prosecution have made clear they seek a cross-admissibility direction and further say that the jury are entitled to consider the counts cumulatively. Clearly findings the jury may make on dishonesty in counts 4-35 could be used to support their findings on counts 1-3. Therefore where, due to the missing documents, there is prejudice to the Defendants on counts 3-35 this pervades count 1-3 creating prejudice to the Defendants that cannot be cured within the trial process.
116. In relation to count 1, the Prosecution point to the terms of the Enforcement Order from the civil proceedings which required Mark Whitfield to disclose documents. They say this was not done which supports him not having these documents. In my judgment that does not follow. There is no evidence that TS ever sought to enforce those provisions of the Enforcement Order in the County Court. It is therefore too much of an inference to draw that the documents do not exist as Mark Whitfield did not provide them and the further inference that it supports he is concealing his role, is not a viable one.
117. As to count 2, expenditure incurred by EIDL and MHUK and the invoices to support that are relevant. Ms White did not accept that the cheque stubs from EIDL alone could fully evidence payments made. She said that she would need to look at the associated invoices and other paperwork to properly assess that by matching cheque transactions with bank statements and invoices. We know copies of the full cheques, aside from the 50 that were sampled, are not available now, given the time that has passed. In any event TS did not seek these at the time as part of the investigation when they most likely would have still been retained by the bank. The sampled 50 cheques all related to auction purchases as opposed to other payments (for example for works on vehicles). As a result, the only other evidence that would support payments by Eaton would be the missing invoices and Ms White said she would need to see them

to reach a conclusion on her analysis of the cheque debits from Eaton, which was a huge sum of money. Such evidence would allow Mark Whitfield, for example, to show that the movements of funds to Eaton was not to stop payments to creditors, as garages would be creditors of MHUK.

118. In addition, auction houses were being paid from Eaton. The wider financial records from incoming auction packs, which from Shane Wilson's interview explanation are highly likely to have existed, would allow Mark Whitefield to argue that he did not have "free access" to Eaton's account as it was paying the auction purchases and other expenses of MHUK. Without those, in light of Prosecution's position from Ms White's evidence, there is clear prejudice to the Defence in addressing count 2.

119. Within the unaccounted for documents, there would, most likely, have been letters from finance companies and A1 warranties addressing complaints or providing payments. This evidence would show the legitimate nature of the trading practices, relevant to assessment of fraudulent purpose and dishonesty.

120. The evidence shows Mark Whitfield was involved in dealing with complaints with A1, for example as the evidence from Count 5 (Michael Myden) shows. His role there was not being concealed. Finance company records or A1 warranty correspondence would likely show Mark Whitfield's involvement in other transactions. This would undermine the Prosecution's case that his involvement was concealed. Such evidence would support the Defence submissions as to fraudulent purpose, which is a matter the jury will need to assess. Without such documents the Defendants' ability to advance those arguments is prejudiced.

121. For Count 3, concerning reviews that are said to be false, the missing records would assist in showing whether these were genuine consumer transactions. The evidence relied upon by the Prosecution in the message logs, (message 296 (p.156)) for example) could refer to consumers completing reviews whilst on MHUK's premises and thereby being genuine reviews. There is not, from the available material, a comprehensive record to show all vehicles sold. It was apparent from Dominic Johson's evidence that Shane Wilson's

spreadsheet did not include all such information. The spreadsheet was shown, on some matters, to be wrong. Use of that document as an alternative to cure the prejudice is therefore not a suitable alternative and is clear subordinate evidence.

122. The lack of overall records of sales of transactions, illustrated by the clear missing evidence on some of the consumer counts, means that a comprehensive analysis of the reviews relied upon by the Prosecution cannot be completed. It is not possible to link reviews to dates of purchase or match names to reviews. To do this all vehicle order forms would be needed from all the records seized from MHUK. There is no singular source to cover the full period. Without that the jury are left with one side of the evidence from the message logs and reviews extract and the Defence do not have the ability to counter it. That is prejudicial to the Defendants and it cannot now be cured. Potentially it could have been if reviewers had been contacted at the time but that was not done. This is again the type of prejudice noted in *HGF* at paragraph [34].

Conclusion

123. Bringing these matters together, I reach the following conclusions:

- i. There was a clear duty upon the Prosecution to retain, record, review and disclose the material seized from MHUK.
- ii. That duty was breached. The missing material was relevant. It was capable of supporting the Defence and undermining the Prosecution case.
- iii. The resulting prejudice is not speculative. It is identifiable, substantial and asymmetrical.
- iv. A jury direction cannot identify the missing material and no other judicial direction can recreate it. No adjournment can restore it as the material has gone nor any case management cure it. No disclosure exercise can now be performed upon it and so no further disclosure review can cure it. No reconstruction from other possible sources or evidence can place the Defendants in the

position they would have been in had the Prosecution complied with its obligations at the time of seizure. It is irremediable.

- v. The issue pervades all counts and there are no remedial steps that can remove the prejudice to the Defendants on any individual count.

124. Applying the authorities I have cited, and most particularly *HGF*, I am satisfied, on the balance of probabilities, that the Defendants have been denied the means of properly challenging the Prosecution case. It follows that a fair trial is no longer possible.

125. As I have reached that conclusion, and this is a limb one abuse argument, once I reach that conclusion no balancing exercise arises. I cannot permit an unfair trial to proceed and the indictment must be stayed.

126. Accordingly, I grant the Defendants' application and the indictment is stayed as an abuse of process.

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