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SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY

THE HONOURABLE CHIEF JUSTICE MCCALLUM

PRE-TRIAL HEARING

SCC 264 of 2021

**THE DIRECTOR OF PUBLIC PROSECUTIONS
and
BRUCE LEHRMANN**

CANBERRA

10.03 AM, FRIDAY, 16 SEPTEMBER 2022

MR S. DRUMGOLD SC, Director of Public Prosecutions, appeared on an issue.

MR A. BERGER QC appeared on behalf of the Accused on an issue.

MR K. LEE appeared on behalf of the DPP on the Application.

MR S. WHYBROW with MS K. MUSGROVE appeared on behalf of the Accused on the Application.

- MR DRUMGOLD: Your Honour, it's probably more expedient, I think, to deal with the order sought under 1(a). I briefed Mr Lee in relation to that and I understand that there may be some more time sought but I'll allow my colleague to address your Honour on that.
- 5 HER HONOUR: I'm just wondering what the procedure will be. Yes, Mr Lee.
- MR LEE: May it please the court, your Honour, I appear for the director on that aspect of application.
- 10 HER HONOUR: I probably should let everyone else announce their appearances.
- MR WHYBROW: Yes, your Honour. Whybrow for Mr Lehrmann in relation to order 1(a).
- 15 HER HONOUR: Yes.
- MR BERGER: May it please, your Honour, my name is Berger. I appear for Mr Lehrmann in relation to the legal professional privilege dispute.
- 20 HER HONOUR: So you're appearing for Mr Lehrmann?
- MR BERGER: Yes, your Honour.
- 25 HER HONOUR: In relation to the privilege claim by the director concerning one of the documents sought in the application?
- MR BERGER: Yes, your Honour.
- 30 HER HONOUR: All right.
- MS MUSGROVE: May it please the court, Musgrove for Mr Lehrmann generally.
- 35 MR WHYBROW: I should have mend Ms Musgrove's appearance with me, your Honour.
- 40 HER HONOUR: So you're together except that you forgot about Ms Musgrove in relation to 1(a)?
- MR WHYBROW: Yes. I apologise both to her and the court.
- 45 HER HONOUR: And - - -

MR WHYBROW: And for Mr Lehmann at the trial more generally. It's only in relation to this specific aspect.

5 HER HONOUR: All right. And there's a third category, or is that no longer in dispute? So (a) is the phone; (b) is the client legal privilege argument; (c), we agreed last time that there was nothing to produce.

MR WHYBROW: There was nothing to produce, yes.

10 HER HONOUR: Thank you. And you accept that, Mr Whybrow.

MR WHYBROW: We accept that, your Honour.

15 HER HONOUR: And as I understood, the reason it was necessary for the director to brief separately was because there will be matters disclosed that you don't want to disclose to the director. So I was rather assuming we might deal with (b) first.

MR WHYBROW: Yes.

20

HER HONOUR: And then let the director go.

MR WHYBROW: And Mr Berger.

25 HER HONOUR: Yes. Is that convenient?

MR DRUMGOLD: That's suitable.

30 HER HONOUR: Yes, all right. There is a dispute however, is there, Mr Berger?

MR BERGER: There is, your Honour. The investigative review document which was initially listed in a disclosure schedule which did not make a claim for privilege over it, the document is described as a document outlines version of events as supplied by Ms Higgins during the course of her engagements with police in 2019 against the available evidence and subsequent discrepancies and it says, 'Available upon request in consultation with the DPP.' The DPP have now claimed that it was not subject to a claim for privilege inadvertently and a claim is maintained. We contest that.

40

HER HONOUR: So you accept that it was inadvertent?

MR BERGER: Yes, your Honour.

45 HER HONOUR: What's your position then?

5 MR BERGER: And we don't make anything of the initial non-claim, but nevertheless maintain that it's not properly a document that attracts legal professional privilege because the dominant purpose for its creation as opposed to whatever purpose there may have been of the director in receiving it or indeed the AFP in providing it to the director, is not the same as the purpose for the creation of the document.

10 We say the most appropriate way to crystallise this dispute would be for us to issue a subpoena to the AFP in relation to that document. If there is a privilege it's the AFP's privilege, not the director's, and the AFP can decide whether it wishes to maintain a claim for privilege over that document and if so, put on evidence to justify that claim and that can be considered by us and then either accepted or not. If it's not, then we would probably need maybe in the order of an hour before your Honour to deal with that.

15 HER HONOUR: Do you accept that's an appropriate way to proceed?

20 MR DRUMGOLD: I'm content that that is a way forward. I agree that it is the AFP's privilege. I think that I may run into some problems that my friend Mr Whybrow has, that I would effectively become a witness in the purposes for the creation of that document, so - - -

25 HER HONOUR: That might be able to avoided if the - if a subpoena is issued and it's the client's privilege, the client will have to verify - - -

MR DRUMGOLD: Yes.

30 HER HONOUR: Don't answer this, but unless you're telling me you created it - but your office created it but that's - that doesn't seem - - -

MR DRUMGOLD: I was told it was being created for a particular purpose, yes.

35 HER HONOUR: Well, whatever you were told wouldn't be admissible. I can't see you being a necessary witness, Mr Prosecutor.

MR DRUMGOLD: Yes. Well, in any event, I agree with my friend's - - -

40 HER HONOUR: But you flag that as a potential issue.

MR DRUMGOLD: Yes. I agree with my friend's way forward.

45 HER HONOUR: And I need to be careful to think about these issues carefully and listen to you rather than railing with every fibre in my body against anything that might kibosh the hearing date, but it doesn't sound as though you are a witness.

MR DRUMGOLD: No. Yes, I'm content with - - -

HER HONOUR: But in any event, the subpoena will flush that out.

5 Do you have a subpoena, Mr Berger?

MR BERGER: We do, your Honour. I can hand that up to your Honour, together with the supporting affidavit of Rachel Elizabeth Fisher affirmed today, seeking short service of that subpoena. We have previously
10 approached the AFP and they've suggested we deal with the director in relation to this, but for the reasons I've outlined we don't think that's the way to go and we need to - - -

HER HONOUR: I'm sorry, would you mind saying that again? You've
15 approached the AFP?

MR BERGER: We have approached them and asked them about this document and their response was to the effect of because there's proceedings on foot, please direct all correspondence to the director about this.
20

HER HONOUR: No, that's right. You say you want to issue a summons and that will flush out an appropriate framework within which to determine the privilege dispute.

MR BERGER: Yes, your Honour. What I said just goes to the shortness of the service and the fact that we've tried to avoid issuing - - -
25

HER HONOUR: Well, the document - there's no issue. I mean, the document has effectively already been identified and I think in effect produced in a way but not formally produced to the court.
30

MR BERGER: Quite so, your Honour.

HER HONOUR: Let me just look at that, please.
35

MR BERGER: Your Honour, we don't press currently what's in paragraph 1 of the schedule of the subpoena, so it's just 2.

HER HONOUR: Because you accept that that can probably be dealt with within the rubric of the present application?
40

MR BERGER: Yes, your Honour.

HER HONOUR: So can I cross out schedule 1 and initial it?
45

MR BERGER: You can.

5 HER HONOUR: Have you chosen 9.00 am on a Thursday because that's the registrar's usual subpoena list? Your instructor says yes. It's all right. I have the answer, Mr Berger. I'm just wondering whether it wouldn't be more sensible to bring it straight back before me and perhaps you could write to the AFP and say I'm seized of the issue and we just want to flush out any claim for privilege.

MR BERGER: Yes, your Honour.

10 HER HONOUR: But what am I doing next Thursday morning?

MR BERGER: You might be having a public holiday, your Honour.

15 HER HONOUR: I might be having a public holiday. Yes. I'm going to mourn the death of the Queen by spending more time reading up upon the implications of her demise for the administration of criminal justice in the Australian Capital Territory. It's not easy. Could we make it the Wednesday at 9.00? No, we could not. The purpose for which it was created will be the subject of evidence hopefully, or perhaps it will just be for mention then and we'll deal with it. I do want to keep it moving because I want your client to have any material that he is entitled to as quickly as possible.

20 MR BERGER: And we do too, your Honour, clearly. It may be, depending on what the AFP's approach is and what evidence they put forward, they might need a little bit of time to do that. We accept that but - - -

25 HER HONOUR: I will make it returnable a week from today, on the 23rd at 9.00 am, and may I suggest, this is not by way of direction by me because there is no-one here to represent the AFP, but when you serve the subpoena, write to them and say it's a short issue and that I'm hoping it can be dealt with at 9.00 am next Friday.

30 MR BERGER: I am unfortunately not available next Friday, your Honour.

35 HER HONOUR: You are not.

MR BERGER: Is the only thing. If it was just for mention, I'm sure that's manageable.

40 HER HONOUR: No. Well, why don't we find time in case they can argue it. When are you free, Mr Berger?

MR BERGER: I am free - - -

45 HER HONOUR: I am in court all week, so we are talking at 9 o'clock or 4 o'clock any day.

MR BERGER: Yes, your Honour. I can do next Tuesday, next Wednesday, perhaps Thursday. I will have to – Friday is no good and then the following week - - -

5 HER HONOUR: Well, why don't we just make it returnable Wednesday for mention and then we will find a time when someone from the AFP – so on the Wednesday, I can make directions to have it argued early the following week.

10 MR BERGER: Thank you, your Honour.

HER HONOUR: So I will just list the subpoena – I will amend the return date of the subpoena. I don't need to – well, I do need to list it, I suppose. So I will just change '22' to '21' on the subpoena. In the subpoena, the last
15 date for service, I will put 5.00 pm before 16 September.

MR BERGER: Thank you, your Honour.

HER HONOUR: So that subpoena is issued. And I grant leave to the
20 accused to file in court the affidavit of Rachel Elizabeth Fisher in support of the application for that subpoena. I abridge the time for service to 5.00 pm today. And the subpoena will be returnable at 9.00 am next Wednesday.

MR BERGER: If it please the court.

25 HER HONOUR: Well, returnable and I will just make – if you could let the AFP know when it is served that that is for mention only. Thank you, Mr Berger. Does that conclude your involvement in the proceedings?

30 MR BERGER: It does. Might I be excused, your Honour.

HER HONOUR: Yes, certainly.

MR BERGER: Thank you.

35 MR DRUMGOLD: Just before he goes, your Honour, can I just confirm; that leaves up in the air now orders sought 1(b) against my office.

HER HONOUR: Yes. Can you relieve the Director of order 1(b) in the
40 application?

MR BERGER: We can, your Honour.

MR DRUMGOLD: And would that also apply to order 1(c)?

45 HER HONOUR: Yes, I think that's been confirmed. So I think that concludes your involvement today.

MR DRUMGOLD: It does.

HER HONOUR: Thank you, Director.

5

MR DRUMGOLD: Thank you, your Honour.

THE DIRECTOR AND MR BERGER WITHDREW [10.19 am]

10

HER HONOUR: What I will do, just while you are here, is indicate that I anticipate there will be an application for a non-publication order in respect of the exchange that is about to follow in relation to the Cellebrite phone?

15

MR WHYBROW: Yes, your Honour. So Mr Director, I think anything – you will need to take steps within your own office to isolate or insulate yourself from what transpires in the hearing that is about to follow.

20

MR DRUMGOLD: Yes. Will your Honour just give me a moment. I will just have a quick discussion.

HER HONOUR: Yes, certainly.

25

MR DRUMGOLD: Your Honour, I will brief, because that would rise and fall on the content of the information that I don't have.

HER HONOUR: Yes.

30

MR DRUMGOLD: So my colleague is fully instructed, both on that application - - -

HER HONOUR: So you will brief Mr Lee to appear on any application for a non-publication order.

35

MR DRUMGOLD: Yes.

HER HONOUR: I will just indicate for the benefit of any journalists in court, so that we are not speaking in code, it has been indicated on behalf of the accused that part of the basis for his seeking the material that is about to be argued will involve revealing tactical matters that the accused does not wish to and should not be required to reveal prior to the trial. It follows that in the discussion that is about to proceed, there will be references to matters which are being deliberately kept from the Director so as to give the accused a fair opportunity to run the trial in the way he sees fit without having show his hand beforehand.

40

45

That is an ordinary aspect of the criminal justice system. An accused person is never required to show their hand before the trial as to how they propose to conduct it, and for that reason, I will in a minute, when I hear from Mr Lee and Mr Whybrow, make a non-publication order in relation to those matters.
5 I appreciate that that will constrain reporting of today's application. I will endeavour to be as clear as I can about what can and cannot be published.

MR DRUMGOLD: If it please the court.

10 HER HONOUR: Thank you, Mr Director.

Yes, Mr Lee.

MR LEE: Yes, thank you, your Honour. I had proposed to tell your Honour where I am up to in terms of what I understand my role to be, and I wanted to put effectively on the record what I understand my role to be so that if there is any misunderstanding on my behalf, it can be corrected. At the moment, I have been briefed to effectively examine the Cellebrite extraction from the complainant's phone in light of the affidavit of Ms Rachel Fisher, affirmed
15 on 13 September 2022, to determine whether or not there is, or there are documents or categories of documents or the full extraction is disclosable.
20

Now, the Director has already put on submissions with respect to what the test is. I do not wish to say anything about that.
25

HER HONOUR: I think that is right. Is that your understanding, Mr Whybrow?

MR WHYBROW: There is no dispute as to what the test is, your Honour, no.
30

MR LEE: And I have now been provided with Ms Fisher's affidavit and I have asked some further questions in order to inform myself as to the supposed or claimed relevance of particular categories of documents and I have started my review of the Cellebrite material that I have been provided.
35 But one of the difficulties is I have only been provided at this stage what is referred to as a Cellebrite report, so it is a 56,000 page PDF document, but I have not been provided with the full Cellebrite extraction from the complainant's phone.
40

And so the report refers to items or documents - - -

HER HONOUR: So do you only have the static, the same static document that is the subject of complaint?
45

MR LEE: That's right.

HER HONOUR: I see.

5 MR LEE: Now, in my view that limits what I can do, and I have asked the Director to provide me with the full Cellebrite extraction. I am told that it is some huge amount of material and it was being copied yesterday and by the end of the day, it still had not been copied and I still have not been provided with it.

10 HER HONOUR: I see. So you are not in a position to address the matter, but you are briefed to argue.

15 MR LEE: That's so. But the other matter that I wish to raise is that it seems to me that there are different categories of documents the defence seek. I understand that the primary position is that they seek the full Cellebrite extraction.

20 HER HONOUR: Yes. I am not sure whether that position is maintained, but I will note that since the application in proceedings was filed, there has been some explanation from the Director and it seems at least parts of the redacted material plainly are not relevant, but I'll hear Mr Whybrow about that. I was hoping that the request would be refined as a result of Ms Fisher's careful affidavit which does delineate exactly what is sought and why.

25 MR LEE: Yes. And the affidavit your Honour is referring to from the Director's office, of Ms Pitney, I have been provided with that and I have attempted to narrow the issues, to refine the issues by corresponding with my learned friend to say, 'Well, having regard now to the reasons why, or the information that has been redacted in these parts, do you press for those items?' And so I am certainly trying to narrow some of these issue.

30 What I have done, your Honour, is prepare a - it's aide-memoire effectively, but it would be helpful if I could go through what I understand to be the categories of documents. I can do that by reference to the aide-memoire as opposed to identifying the documents or describing the documents, but that may assist me in my role to further narrow the issues.

35 HER HONOUR: Could I first understand then what you're proposing for today? Are you proposing that there be some argument about the categories?

40 MR LEE: Yes, there might be.

HER HONOUR: All right.

45 MR LEE: And it might simply be that my learned friend provides further information and he could that either now or - - -

HER HONOUR: Are those things best done in open court or can you have a conversation about it?

5 MR LEE: Perhaps I could just have a conversation with my learned friend.

HER HONOUR: Okay. That sounds sensible, because if we're embarking on some argument proper then Mr Whybrow hasn't read his evidence yet but it sounds as though there is - - -

10 MR LEE: I see, yes.

HER HONOUR: It sounds as though we're not ready to complete the argument today and also as though it might be narrowed if you gentlemen and Ms Musgrove have some time to have some discussions.

15

MR WHYBROW: Yes, and so that there don't have to be other orders about affidavits being read or unread or redacted or unredacted, my preference is - - -

20 HER HONOUR: Would be to take the discussion offline.

MR WHYBROW: Mr Lee has come in at very short - - -

HER HONOUR: All right.

25

MR WHYBROW: To have conversations. It might be by agreement before your Honour doesn't have to determine anything.

HER HONOUR: No.

30

MR WHYBROW: I'm hopeful that that might be the case.

HER HONOUR: That is plainly the ideal outcome. I've got a sentence matter at two but I otherwise had this time set aside for this matter until 1.00. Do you want me to stand it in the list and then come back if you have any matters to need to argue, or do you want to go over to another date?

35

MR WHYBROW: Could we perhaps leave it in the list with the possibility of - because we don't know the answer to that question at this stage, your Honour.

40

HER HONOUR: Yes, and so leave it in the list and then if we don't hear from you by 1.00, we'll take the matter to be effectively stood over to next Wednesday when the subpoena is returnable and we can then fix - I won't have time to hear any argument next Wednesday because I've also got an application at 9.30 in another matter, but we can then at least fix time for determining any outstanding issue.

45

5 MR WHYBROW: Yes. Can I make it clear, your Honour, that this material, even if it's provided late, it's not going to lead to any application to delay the trial or anything of that nature. It's not something that we're seeking to do at all. We share your Honour's concern that this trial goes ahead.

10 HER HONOUR: Yes, all right. Thank you. That's helpful. Thank you, Mr Whybrow. The week after next I've got a sporting chance of having a bit of availability because the trial I'm starting on Monday originally had an estimate of 10 days but that's been - I've been told it will and well and truly finish in that time, so I should have some availability that week, not next week but the week after.

15 MR WHYBROW: Not surprisingly, your Honour, my friend's and my own diary is effectively preparation for this trial that week, so we'll be available when your Honour can be.

HER HONOUR: All right. Night court, Mr Whybrow.

20 MR WHYBROW: Yes.

25 HER HONOUR: Anything else that you want today then other than that I will simply stand the matter in the list and if we haven't reconvened by 1.00 pm, stand this part of the argument over together with the other part of the argument next Wednesday at 9 o'clock?

30 MR LEE: I do wish to raise one matter just in relation to my role, or what the possible outcome of this application could be as far as I see it, to ensure that I do properly understand it, but that is that I could form a view that there are certain specific documents that are disclosable or categories of documents that are disclosable or the entire extraction report that is disclosable. That's what I see as being the ultimate outcomes of this application.

35 HER HONOUR: Is that consistent with your idea?

40 MR WHYBROW: Yes, and I could just indicate, and I've had this discussion with my learned friend and I think he's on the same page, that in relation to the tests set out by the director in relation to disclosure, particularly Farquarson and that policy, there's no - your Honour is not going to have to make new law. It's agreed between the parties that the test is whether it is a sensible appraisal, et cetera. The affidavit that has been provided is not an exhaustive list of everything that may or may not be in there. It's an indication of - - -

45 HER HONOUR: Okay. I misunderstood that. I thought - - -

MR WHYBROW: No. It's an indication as to why, on a sensible appraisal of that document, there is, to use the words of the test, material that could possibly be relevant to issues in the case, and we've identified about five or six.

5

HER HONOUR: How then or when are we going to get the full catalogue, or is this all still in support of your saying why you should have the whole thing?

10 MR WHYBROW: Yes. We're in an ongoing discussion with my learned friend as to the various types of material in the short period we've had being able to get together those examples, five or six of them, of specific areas that might be sufficient to justify disclosure of that report.

15 We are having conversations about things that clearly we do not need and would not be relevant, but as to why a larger quantity of material could be relevant because of a whole of range of issues, I've discussed with my friend that we haven't set out in the affidavit due to time considerations, and I don't wish to specifically identify to your Honour in open court at this stage when
20 my friend - I think my friend understands the disclosure obligations are this document might possibly be relevant on a sensible appraisal and we're having discussions with him about not seeking everything just because of prurient interest but as to why some things which might on their face appear to not necessarily have relevance in a case of this nature do or possibly will in this
25 specific prosecution.

HER HONOUR: Sure. Could I in response to that indicate a concern I have, which is that the breadth of the task if you maintain the position that you want the whole thing - and to give an example of my concern about what I in
30 this matter call proportionality, I'm going to explain something to you, Mr Whybrow, just for your consideration. Paragraph 10 of Ms Fisher's affidavit of 13 September and the material that follows.

35 MR WHYBROW: Yes.

HER HONOUR: So I understand the issue.

MR WHYBROW: Yes.

40 HER HONOUR: Paragraph 13(a) explains the trigger, if I could put it that way.

MR WHYBROW: Yes.

45 HER HONOUR: But if you go to the affidavit of Mitchell Gregg of 13 September - hang on, I think I've got the wrong - let me see if I can find it again. No, it's - - -

MR LEE: Is it of Ms Sarah Pitney?

HER HONOUR: So it's in the exhibit RF19.

5

MR WHYBROW: Yes, the case note.

HER HONOUR: So the bound - - -

10

MR WHYBROW: Yes.

HER HONOUR: RF19 at page 40. You'll need to turn it up, Mr Whybrow. Do you want me to put it in front of you?

15

MR WHYBROW: I've got an electronic copy here, your Honour. I know the document, but - - -

MR LEE: Could your Honour please do that if it can be put up onto the - - -

20

HER HONOUR: You don't have it?

MR LEE: I don't have it. I can share my learned friend's.

25

MR WHYBROW: Yes. We've got that document, your Honour, and it's page 40, yes.

HER HONOUR: The bottom line, the sentence that begins after the word 'incident'.

30

MR WHYBROW: Yes?

HER HONOUR: Now, that seems to me to take a lot of the sting out of that point. It becomes a fairly minor credit point. When I first read it I thought it sounded like a big point, but when I read those words I thought, well, no, that's a little point actually.

35

MR WHYBROW: Well, it's the last two words that we are focusing on.

HER HONOUR: Yes, I understand that, but the last two words without the previous words is a much bigger and more exciting issue than with the acknowledgment of the words before the last two words. Because it just becomes a credit point, like any other credit point, 'Was the car blue, was the car red.' It really takes a lot of the sting out, and that's what concerns me. If a lot of these points are chasing cross-examination rabbits down credit holes, we are going to have a very long trial on our hands.

40
45

MR WHYBROW: No, no, we understand that. This is one that we do, with respect, take a different issue as to its significance because of – haven't put the entire body of evidence in that relates to this issue, but there is some more.

5

HER HONOUR: Sure, sure. I use that as an example of a concern that developed in the course of my preparing for today as to the breadth of this exercise.

10 MR WHYBROW: Yes. We are doing it in the - - -

HER HONOUR: And probably used the example of rabbits because you can see them as you're waiting in the annexe, waiting to come into court.

15 MR WHYBROW: Exactly, and it's a matter of – and we do appreciate - - -

HER HONOUR: There are lots of rabbits in the middle of London Circuit.

20 MR WHYBROW: And there are a lot of issues that could be raised that potentially meet the test of relevance.

HER HONOUR: Yes, that's correct.

25 MR WHYBROW: The 103 test, and we would be here forever, and we are not intending to do that.

HER HONOUR: And can I make it clear that on the one hand, it is my, I think, primary function is to ensure that Mr Lehrmann and the Crown – and the Director have a fair trial.

30

MR WHYBROW: Yes.

HER HONOUR: But secondarily, I am not going to let cross-examination to go up hill and down dale for weeks upon weeks.

35

MR WHYBROW: That's not our intention, but there is a body of material that we need to examine the complainant about that goes to fundamental questions.

40 HER HONOUR: Sure, sure. I mean, I guess to put it a different way, if the last two words on page 40 that I just took you to are your best credit points, then - - -

45 MR WHYBROW: No, no, no, no. There's a lot, but they are all intertwined in relation to other things.

HER HONOUR: Sure.

- 5 MR WHYBROW: And that's why we are not – we are seeking disclosure of a document in many cases which is no problem, you just get it, and it is subject to the usual ethical and Harman obligations and indeed we have indicate to the court - - -
- HER HONOUR: But this must be the biggest Cellebrite report – I mean, you wouldn't normally expect such a lengthy report.
- 10 MR WHYBROW: Well, I don't know what they are like nowadays. It's obviously not every page, but for example, simply the timeline. I'm speaking to my friend. There's no explanation other than overlooking it as to why that part has been redacted when the rest is not.
- 15 HER HONOUR: Sure.
- MR WHYBROW: And so we are hoping, for example, that that can be - - -
- HER HONOUR: That's helpful, thank you.
- 20 MR WHYBROW: And that might resolve a lot of it. But clearly, links to certain items there – your Honour, we have got to identify the rabbits to determine whether or not we need to go down the holes, if I can put it that way.
- 25 HER HONOUR: Yes.
- MR WHYBROW: Thank you.
- 30 MR LEE: Your Honour, can I - following on from what your Honour has said, this is part of - - -
- HER HONOUR: Your concern.
- 35 MR LEE: My concern, and the reason why I have - - -
- HER HONOUR: Yes, because you have been put in a position of making a forensic decision - - -
- 40 MR LEE: That's right.
- HER HONOUR: - - - when you're deliberately insulated from the prosecuting team.
- 45 MR LEE: That's right. And if in order to make that forensic decision, not only do I need to understand what my learned friend says the possible use of

this information is, but I've needed to try to get my head around the prosecution case broadly, and any evidence - - -

5 HER HONOUR: I don't know that that is going to be terribly complex, Mr Lee. It's going to be difficult.

MR LEE: Yes.

10 HER HONOUR: I have the impression that a lot of this stuff is credit stuff, and that means they are hard evaluative judgments, but I don't think they are legally particularly complex. It would just be a question of you getting a sense of what seems reasonable and what isn't. And I think that's why I made that point perhaps to give a benchmark.

15 MR LEE: Yes.

20 HER HONOUR: But that said, given the difficulty of your position, I think I would accept that one would err on – well, it's hard. One would err on the side of disclosure if there seems like a potential credit point that is not a minor stupid point, if I could put it that way, not saying that one was, I am just saying there are going to be some points that are just going to be really – but – so you'd probably err on the side of accepting if the accused's legal team regard this as an important credit point, then we should accept that.

25 MR LEE: I – I – yes.

HER HONOUR: Subject to balancing with privacy interests, obviously.

30 MR LEE: Yes, yes. With respect, your Honour, that will be the approach that I take.

35 HER HONOUR: I think we are probably all on the same page and we might have some differences of opinion about where you would fall on any particular issue in that context and with those parameters, could I urge you to do your best to have a discussion about it.

MR LEE: Yes.

40 HER HONOUR: And you could have a category of 'definitely yes,' 'definitely no.'

MR LEE: Yes.

45 HER HONOUR: And ones on which you want me to make the call.

MR LEE: Effectively that is what I am doing. Can I give your Honour two examples that I just want to raise for your Honour's benefit, and my learned friend.

5 HER HONOUR: Are you about to give examples which I will need to make an order about or can you do it - - -

MR LEE: No.

10 HER HONOUR: Yes, right.

MR LEE: But if your Honour has that affidavit of Ms Fisher.

HER HONOUR: Yes.

15 MR LEE: If I can take your Honour to paragraph 42.

HER HONOUR: 42?

20 MR LEE: Yes.

HER HONOUR: Yes. I have that underlined. That's why I was asking whether Mr Whybrow was yet going to read his evidence, because if he didn't object to it I was going to reject it anyway. It's not – that's not admissible in that form.

MR LEE: No, but what it does, it shows his purpose in getting the whole - - -

30 HER HONOUR: Well, that's why I asked whether the scope of the application had been narrowed, and I would take some persuading to accede to a disclosure order of the whole of the material on the strength of that paragraph.

35 MR LEE: But certainly there are matters that are raised in here that I can see are disclosable and I will have disclosed. The other matter that I will just take your Honour to is at page – the same page, at paragraph 40.

HER HONOUR: Yes, I don't think that tells you anything on its own.

40 MR LEE: No, no, it doesn't. And there is - can your Honour see the first word of the second-last line of paragraph 40.

HER HONOUR: Yes. You can't - - -

45 MR LEE: That, to me, seems entirely speculative and even on a sensible appraisal, it doesn't hold out.

HER HONOUR: And you can't possibly - - -

MR LEE: Yes, that's right, I can't possibly listen - - -

5 HER HONOUR: But on the other hand, if you go to Ms Fisher's previous affidavit, which I do not know if you have been briefed with that, of 7 September.

10 MR LEE: I have been – I asked for that.

HER HONOUR: The last page.

MR LEE: Yes.

15 HER HONOUR: It's the – Mr Whybrow, it's the one that attaches old audio.

MR WHYBROW: Yes.

20 HER HONOUR: You might want an assurance from the Director about that one.

MR WHYBROW: Yes.

25 MR LEE: Yes.

HER HONOUR: I mean, the content of the text is completely equivocal. It could be cats meowing, which I thought I would just save, or it could be something else.

30 MR WHYBROW: Absolutely, but the document that we do have, and we didn't include it so the affidavit was not that big, it includes dates of a number of those things which are crucial dates when certain assertions are being made about people and they may be voicemails from those people.

35 HER HONOUR: Or not.

MR WHYBROW: About these issues, or not.

40 HER HONOUR: Or not, yes. I understand the problem.

MR WHYBROW: But that's why we say it meets the test of 'it possibly could.'

45 MR LEE: With respect, if that - - -

HER HONOUR: Can I ask - - -

MR LEE: Yes.

HER HONOUR: Sorry, can I ask, Mr Lee, do you the capacity in the next week to undertake a reasonably large task of this kind?

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MR LEE: Effectively I have, yes, a few days to do this.

HER HONOUR: A few days. Well, I think if there is goodwill on both sides hopefully you should be able to make some very good progress.

10

MR LEE: Certainly, your Honour. Certainly, your Honour. Yes, perhaps I will raise the other issue with my learned friend directly.

HER HONOUR: It sounds as though its unlikely that you will get to a point of needing any assistance from me today, but there is absolutely no difficulty if you decide you do, and you can re-list it. But I think I will just work on the assumption that you will all keep working on these issues until next Wednesday at 9.00 am, and if at that point you have managed to isolate categories or bundles of documents that are in dispute.

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20

MR LEE: Yes.

HER HONOUR: Could I ask this, Mr Whybrow; the legal system proceeds on the assumption that judges can exclude things from their minds. Are you happy with me ruling on those matters and dealing with them?

25

MR WHYBROW: The matters that you have seen?

HER HONOUR: Yes. Any matters that are where you can't agree, are you happy for me to rule on those. I could, in theory, get another judge to look at them if - - -

30

MR WHYBROW: No, no, no. No, there is no need for that, your Honour. No, no. And one of the advantages of this process, your Honour, is that I can have full and frank conversations with my friend as to why we say it could be relevant, which would not necessarily be apparent to somebody looking at it from the prosecution's point of view.

35

HER HONOUR: Exactly, yes. It just put – I'm grateful to Mr Lee for outlining his understanding of his position because it does flush out the fact that he, to some extent, is in a bit of a difficult position. But that's why I say I think with goodwill on your part and mine, we – and probably a sort of erring on the side of disclosure. I am very concerned about the privacy issues, obviously, but we should be able to reach agreement.

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MR WHYBROW: Yes, well, as we have already indicated, that is balancing fair trial and any undertakings that need to be given and we will have full and

frank discussions with my friend and try and limit the issues as much as possible.

5 HER HONOUR: Thank you, that's very helpful. Now, I think we have managed to succeed in having a cryptic exchange without the need for any non-publication order.

MR WHYBROW: No. That's correct, your Honour.

10 MR LEE: Yes, your Honour, that's correct.

MR WHYBROW: To the extent that anyone can - - -

15 HER HONOUR: To the extent that anything that has just been said in the last 20 minutes made sense to anybody who didn't have the material in front of them, it can be reported. All right. Anything else?

MR LEE: No, thank you, your Honour.

20 HER HONOUR: I will adjourn unless I hear from you.

ADJOURNED

[10.44 am]

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