Neutral Citation Number: [2018] EWHC 2021 (Admin)

Case No: CO/5201/2017

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/07/2018

Before:

THE RIGHT HONOURABLE THE LORD BURNETT OF MALDON
THE LORD CHIEF JUSTICE
MR JUSTICE MALES

- -

Between:

STUART IRVIN SCOTT	**Appellant**
- and -	
GOVERNMENT OF THE UNITED STATES OF AMERICA	**Respondent**

- -
- -

Jonathan Caplan QC and Clair Dobbin (instructed by **Gunner Cooke, Solicitors**) for the **Claimant**
Mark Summers QC and Daniel Sternberg (instructed by **Crown Prosecution Service**) for the **Defendant**

Hearing date: 4 July 2018

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Approved Judgment

Lord Burnett of Maldon CJ:

1. This is the judgment of the court to which we have both contributed.

Introduction

2. The Government of the United States of America ("the Government") seeks the extradition of the appellant, Stuart Scott, pursuant to an extradition request made on 30 January 2017 ("the request") and certified under section 70 of the Extradition Act 2003 ("the 2003 Act") on 9 March 2017. The United States is a Category 2 territory and accordingly Part 2 of the 2003 Act (as amended) applies.

3. Extradition is sought in order for the appellant to stand trial in the United States in connection with alleged fraudulent foreign exchange trading in December 2011 when his employer, HSBC, acted for Cairn Energy PLC. He faces one count of conspiracy to commit wire fraud and 11 substantive counts of wire fraud, which carry a maximum penalty of 30 years imprisonment. Before the District Judge the appellant resisted extradition on the grounds that:

   i) The request had misrepresented the nature of the relationship between HSBC and Cairn, which had been governed by an agreement which made clear that they were dealing as principals and that HSBC was not acting as an agent of Cairn and did not owe it any fiduciary duty. Accordingly, HSBC had been entitled to deal in the market in whatever way it chose in order to generate maximum profits for itself from the transaction. This misrepresentation was said to constitute an abuse of process because, if the true position had been set out in the request, it would have been clear that no crime under English law had been committed. The requirement of dual criminality in section 137 of the 2003 Act would not therefore have been satisfied.

   ii) The conduct of which he was accused had not occurred "in" the United States for the purpose of section 137(3)(a) and that the requirement of dual criminality was not satisfied for that reason.

   iii) The forum bar in section 83A of the 2003 Act operated to prevent his extradition as it would not be in the interests of justice having regard to the matters specified in section 83A(3).

   iv) His extradition would infringe his and his family's rights under article 8 of the European Convention on Human Rights.

4. By a written judgment handed down on 26 October 2017 District Judge Snow rejected all these arguments and sent the appellant's case to the Secretary of State pursuant to section 87(3) of the 2003 Act. On 6 December 2017 the Secretary of State ordered the appellant's extradition.

5. The appellant now appeals with permission granted by Jeremy Baker J on the issue of forum pursuant to section 83A of the 2003 Act. In addition, he renews his application for permission to appeal on the other grounds for which permission was refused. The principal issue before us is whether the Judge was wrong in rejecting the forum argument.

The request

6. The request alleges that between October and December 2011 the appellant, a banker employed by HSBC in London, participated in a scheme to defraud an oil and gas exploration company, Cairn Energy Plc, a British company based in Scotland, in connection with a currency market transaction.

7. In October 2011 Cairn (which was advised by Rothschild) invited HSBC and other banks to bid for the right to execute a foreign exchange transaction by which it planned to convert approximately US $3.5 billion (the proceeds of sale of an Indian subsidiary company) into sterling. The Request for Proposal stated that "the key criterion for the selection of bank for the role of Execution Bank will be the ability to deliver a seamless process for the currency exchange within a defined timetable whilst providing Cairn with the best execution strategy and pricing". Before providing HSBC with information about this proposed transaction, Cairn required it to enter into a confidentiality agreement by which HSBC agreed to use the information solely for the purposes for which it was provided. Those given access to the information included the appellant and another HSBC banker, Mark Johnson.

8. HSBC was successful in winning the bid to execute the transaction. Its pitch materials to Cairn made representations about confidentiality and about HSBC's ability to execute the transaction at the best possible price and with the lowest possible risk of financial loss for Cairn. The notification that HSBC had been successful explained that it had been selected because (among other things) it had acknowledged that it had an obligation "to deliver best execution".

9. The Government's case is that these facts gave rise to a fiduciary relationship between Cairn and HSBC as a result of which the latter was obliged to act in the former's best interests in connection with the proposed transaction.

10. The allegation against the appellant is that despite this, and despite the obligation of confidence undertaken by HSBC, he and Mark Johnson devised a scheme to benefit HSBC, and (because it would enhance their remuneration) ultimately themselves, at Cairn's expense by:

> "(a) using their insider knowledge of the details of the [transaction] to front-run that transaction, and (b) ramping the price of Sterling/Dollar to the benefit of HSBC, and to the detriment of [Cairn]".

We should explain that, in outline, "front running" involves the use of inside information about an imminent transaction which is likely to move the markets (in this case a substantial purchase of sterling on the foreign exchange market) in order to enter into transactions in advance of that market movement, thereby generating an almost certain profit for the insider dealer; and that "ramping" involves the execution of a transaction in a manner designed to cause the price to spike, thereby maximising the profits generated for the front runner.

11. The request goes on to say that Mr Johnson and the appellant were notified on 28 November 2011 that the transaction might occur soon, that on 5 December they learned that the sale of the Indian subsidiary had received regulatory approval, and that on 7

December they discussed with Cairn the best way to execute the transaction. In the course of that discussion the appellant advised Cairn that the transaction should be executed at "the 3 pm fix" in London as distinct from the "4 pm fix", falsely stating that there would be more liquidity in the market at 3 pm, whereas in fact the contrary was true. In the minutes leading up to 3 pm there is generally less trading in the market than an hour later, which means that it is easier to manipulate the market price at that time. A "fix" comprises a benchmark exchange rate published by WM/Reuters representing the market rate at certain times of day; thus execution at the 3 pm fix meant that Cairn would pay for the sterling at whatever the published rate for that time turned out to be, not necessarily that the transaction would in fact be executed at that time; the published rate would be derived from transactions carried out 30 seconds before and after 3 pm.

12. Following that telephone call the appellant in London and Mr Johnson in New York, who were in communication with each other, began to purchase sterling for HSBC and caused other foreign exchange traders in both cities to do likewise. Recorded telephone conversations between the two of them describe Cairn as "starting to bite" and included the comment by the appellant, on learning that Cairn had authorised the purchase of the full order of £2.25 billion, of "Ohhh, f***ing Christmas". A further conversation included a discussion of how high Mr Johnson and the appellant could ramp the price of sterling before Cairn would "squeal". In the result, by aggressive purchases of sterling in the period leading up to 3 pm London time, the appellant and Mr Johnson succeeded in pushing the price up to a market high for the day, generating significant profits for HSBC when they sold the sterling which they had purchased at the high price to which the market had been driven.

13. Meanwhile Cairn and its advisor Rothschild had been monitoring the price of sterling in the foreign exchange market and had noticed the upward movement in the period leading up to 3 pm. When this was queried by them, a HSBC sales person who had been purchasing sterling under the appellant's and Mr Johnson's direction told them that this was because of purchases in the market by an unidentified Russian purchaser. This, as the appellant knew, was false. There was no such purchaser. These statements were designed to conceal HSBC's role in ramping the market price.

14. The result of these transactions, according to the request, was that HSBC made approximately US $5 million from its execution of the Cairn transaction and generated approximately US $3 million from trading on its own account in London and New York.

15. It is alleged that these facts, many of which are disputed by the appellant, constitute conspiracy to commit wire fraud as well as 11 substantive offences of such fraud. Wire fraud under United States law requires the use of interstate or international wire communications in furtherance of a fraudulent scheme. That particular element is not a part of the equivalent offences under English law, but it was not disputed that the facts described above (at face value and if they stood alone: see below) would, if proved, constitute the common law offence of conspiracy to defraud as well as substantive offences of fraud by abuse of position under section 4 of the Fraud Act 2006.

The trial of Mark Johnson

16. Mark Johnson was arrested in New York and prosecuted there. His trial took place at about the same time as the appellant's extradition hearing in the Westminster

Magistrates' Court. Mr Johnson was convicted and was sentenced to two years' imprisonment, but is currently on bail in this country pending an appeal. We understand that no witnesses of fact based in the United States gave oral evidence at his trial, save a witness from J>P> Morgan to prove the existence of a wire transaction. Expert evidence was called.

The SFO statement

17. As is well known, the Serious Fraud Office carried out an extensive investigation into allegations of fraudulent conduct in the foreign exchange market. However, on 15 March 2016 it published a statement on its website that the investigation had been closed because, based on the material and information obtained, there was insufficient evidence for a realistic prospect of conviction.

18. A letter dated 27 September 2017, produced for the purpose of the appellant's extradition hearing by the head of the SFO's Bribery and Corruption Division explained:

> "I also confirm that Stuart Scott was at no stage considered a suspect in that investigation; moreover, that the trades which are the subject of the US Request were not at any time a part of that investigation. Finally, I can confirm that the SFO does not intend to investigate Stuart Scott for the matters subject to the US Request."

19. One of the issues in this appeal concerns the status and relevance of this letter, which we shall refer to as "the SFO statement". As we shall explain, the judge regarded it as significant. He observed that, while there was a theoretical possibility that domestic prosecutors might begin an investigation leading to a prosecution in the event that extradition was refused, "the practical reality appears to be that no investigation or prosecution is likely in this jurisdiction".

The judgment of the District Judge

20. The judge rejected the appellant's submissions. In summary he held as follows.

Abuse of process/dual criminality

(1) Although it is open to a requested person to challenge his extradition on the grounds that his conduct has not been fairly, properly and accurately described in the request, such a challenge can only be brought by way of a claim for abuse of process and must satisfy the approach set out in *Zakrzewski v Regional Court in Lodz, Poland* [2012] UKSC 2, [2013] 1 WLR 324 at [13], including that "the true facts required to correct the error or omission must be clear and beyond legitimate dispute". That requirement was not satisfied here. The true nature of the relationship between HSBC and Cairn was a matter for the trial court.

Conduct "in" the United States

(2) For the purpose of determining whether the appellant's conduct occurred in the United States, the relevant tests were whether the effects of his action were felt there

or whether the relevant conduct substantially took place there as well as elsewhere (*Office of the King's Prosecutor, Brussels v Cando Armas* [2005] UKHL 67, [2006] 2 AC 1 and *R (Bermingham) v Director of the Serious Fraud Office* [2006] EWHC 200 (Admin), [2007] QB 727. Here those tests were satisfied because part of the impugned trading was carried out in New York under the direction of Mr Johnson who was physically present in HSBC's New York office from where he was in communication with the appellant; because the dollar funds used for the purchase of sterling were initiated from a financial institution in New York; and because the harm caused by this market manipulation included harm to the interests of the United States in protecting the integrity of its financial markets, as well as the detriment of other trading companies in New York.

The forum bar

(3) Having regard to the matters specified in section 83A(3) of the 2003 Act, it was in the interests of justice for extradition to take place. We examine below the judge's treatment of the individual specified matters as well as his overall evaluation of them.

Article 8

(4) Applying the well-established approach in *Norris v Government of the United States of America (No 2)* [2010] UKSC 9, [2010] 2 AC 487, *H(H) v Deputy Prosecutor of the Italian Republic, Genoa* [2012] UKSC 25, [2013] 1 AC 338 and *Polish Judicial Authority v Celinski* [2015] EWHC 1274 (Admin), [2016] 1 WLR 551, extradition was not incompatible with the article 8 rights of the appellant and his family despite their sad personal circumstances.

The issue on appeal

21. As has been explained in *Celinski* at [24] (dealing with Article 8) and more recently in *Love v Government of the United States of America* [2018] EWHC 172 (Admin), [2018] 1 WLR 2889 at [23] to [26] (dealing with the forum bar), the single question for this court is whether or not the judge made the wrong decision. We need not repeat the analysis there set out. It is the approach which we adopt.

The forum bar

22. The forum bar in section 83A was inserted into the 2003 Act by the Crime & Courts Act 2013. It provides (so far as relevant):

> "(1) The extradition of a person ('D') to a category 2 territory is barred by reason of forum if the extradition would not be in the interests of justice.
>
> (2) For the purposes of this section, extradition would not be in the interests of justice if the judge—
>
> (a) decides that a substantial measure of D's relevant activity was performed in the United Kingdom, and

(b) decides, having regard to the specified matters relating to the interests of justice (and only those matters) that the extradition should not take place.

(3) These are the specified matters relating to the interests of justice—

(a) the place where most of the loss or harm resulting from the extradition offence occurred or was intended to occur;

(b) the interests of any victim of the extradition offence;

(c) any belief of a prosecutor that the United Kingdom, or a particular part of the United Kingdom, is not the most appropriate jurisdiction in which to prosecute D in respect of the conduct constituting the extradition offence;

(d) were D to be prosecuted in a part of the United Kingdom for an offence that corresponds to the extradition offence, whether evidence necessary to prove the offence is or could be made available in the United Kingdom;

(e) any delay that might result from proceeding in one jurisdiction rather than another;

(f) the desirability and practicability of all prosecutions relating to the extradition offence taking place in one jurisdiction, having regard (in particular) to—

(i) the jurisdictions in which witnesses, co-defendants and other suspects are located, and

(ii) the practicability of the evidence of such person being given in the United Kingdom or in jurisdictions outside the United Kingdom;

(g) D's connections with the United Kingdom.

(4) …

(5) If, on an application by a prosecutor, it appears to the judge that the prosecutor has considered the offences for which D could be prosecuted in the United Kingdom, or a part of the United Kingdom, in respect of the conduct constituting the extradition offence, the judge must make that prosecutor a party to the proceedings on the question of whether D's extradition is barred by reason of forum.

(6) In this section 'D's relevant activity' means activity which is material to the commission of the extradition offence and is alleged to have been performed by D."

23. *Love* is the leading case on the forum bar. It was decided after the extradition hearing in the present case and accordingly the judge did not have the benefit of its guidance. The approach which section 83A requires was described as follows at [22]:

> "In our judgment, section 83A is clearly intended to provide a safeguard for requested persons, not distinctly to be found in any of the other bars to extradition or grounds for discharge, including section 87 and the wide scope of article 8 of the Convention. The safeguard is not confined to British nationals, but it is to be borne in mind that the United Kingdom is one of those countries which is prepared to extradite its own nationals. Its underlying aim is to prevent extradition where the offences can be fairly and effectively tried here, and it is not in the interests of justice that the requested person should be extradited. But close attention has to be paid to the wording of the statute rather than to short summaries of its purpose or to general parliamentary statements. The forum bar only arises if extradition would not be in the interests of justice: section 83A(2)(b). The matters relevant to an evaluation of 'the interests of justice' for these purposes are found in section 83A(2)(b). They do not leave to the court the task of some vague or broader evaluation of what is just. Nor is the bar a general provision requiring the court to form a view directly on which is the more suitable forum, let alone having regard to sentencing policy or the potential for prisoner transfer, save to the extent that one of the listed factors might in any particular case require consideration of it."

24. It is common ground that a substantial measure of the appellant's activity was performed in the United Kingdom and accordingly that the requirement contained in subsection (2)(a) is satisfied. We need therefore say nothing further about this aspect. The issue is whether, having regard to the specified matters in subsection (3), extradition should not take place. Before turning to each of those matters, we make the following observations.

No predetermined hierarchy

25. Each of the specified matters must be taken into account in the sense of being borne in mind, but the extent (if at all) to which they are relevant and the weight to be accorded to them will vary from case to case. There is no predetermined hierarchy whereby one or more factors will have greater significance than others. This is well established. See *Dibden v Tribunal de Grande Instance de Lille, France* [2014] EWHC 3074 (Admin), referring to the corresponding provisions under Part 1 of the 2003 Act, at [18] and *Shaw v Government of the United States of America* [2014] EWHC 4654 (Admin) at [40].

The views of a domestic prosecutor

26. The 2003 Act makes provision for the domestic prosecution authorities to have input into the question whether a requested person should be extradited. It does so in two ways. The first is the provision in subsection (3)(c) for a prosecutor to express a belief that the United Kingdom is not the most appropriate jurisdiction for a prosecution.

Where such a belief is stated, that will be a factor in favour of extradition. It is not decisive and the weight to be given to that belief will depend on all the circumstances of the case. However, the Act also provides in sections 83B to 83D for a "prosecutor's certificate" to be given where a formal decision has been made not to prosecute the requested person on the grounds that (a) there would be insufficient admissible evidence or the prosecution would not be in the public interest or (b) there are concerns about the disclosure of sensitive material in any prosecution. Where a prosecutor's certificate is given, it is decisive. The court must decide that the extradition is not barred by reason of forum: section 83B(1).

27. The forum bar provisions do not themselves deal with a case where the domestic prosecution authorities form the contrary view, that is to say that the United Kingdom is the most appropriate jurisdiction for a prosecution. It is unnecessary for them to do so because the extradition proceedings will be adjourned if a requested person is charged with an offence here in accordance with sections 76A and 88 of the 2003 Act. If the domestic offences correspond to the extradition offences, extradition will then be barred by double jeopardy under sections 79 and 80.

Where the domestic prosecutor has no belief that the United Kingdom is not the most appropriate Jurisdiction

28. In *Love* at [34] and [35] I expressed the view that the absence of any prosecutor's belief was "a factor which albeit modestly, favoured" the operation of the bar to extradition. In the context of that case the point was at the margins of relevance. Mr Mark Summers QC for the Government submitted that this conclusion in *Love* was *per incuriam*. He referred to *Shaw v Government of the United States of America* [2014] EWHC 4654 (Admin) at [48] (a case cited in *Love* for different purposes) and *Atraskevic v Prosecutor General's Office, Republic of Lithuania* [2015] EWHC 131 (Admin), [2016] 1 WLR 2762 at [39]. In both cases, the conclusion of this court was that in the absence of any belief, there can be no regard to this factor and there the matter must rest, so far as section 83A(3)(c) is concerned.

29. Mr Summers invited us to revisit the position where there is no expression of belief by the domestic prosecution authorities. He pointed out that although it is clearly established that the domestic authorities are under no obligation to investigate the conduct in question or to express a view either way as to where a prosecution should be brought (*Atraskevic* at [38] and [39]; *Love* at [55]), the practical consequence of the *dicta* in *Love* to the effect that the absence of any stated view is a factor telling in favour of the forum bar and against extradition is that the extradition unit of the CPS will feel obliged to seek the views of the domestic prosecution authorities. As Mr Summers explained, whether this is a significant concern depends largely on the extent to which the domestic authorities are required to conduct their own independent investigation before expressing any view. If they are required to do so, the *dicta* in *Love* may have a significant resource implication. On the other hand, if it is legitimate for the domestic prosecution authorities to express a view about the desirability or otherwise of trial in this jurisdiction on the basis of the facts stated in the extradition request without conducting their own independent investigation, the problem is much less acute and may not arise at all.

30. We acknowledge that the domestic prosecuting authorities cannot be required to conduct their own investigation in order to be compelled to express a view one way or

the other. An interpretation of section 83A which in practice compelled them to do so would be undesirable. In principle, it would be legitimate for any belief to be expressed based upon the facts stated in the extradition request, in which case the practical problem identified by Mr Summers may not arise.

31. The question remains whether the *dicta* in *Love* are to be preferred over the conclusions in *Shaw* and *Atraskevic*. The general approach is that a court of concurrent jurisdiction will follow another unless the earlier court was clearly wrong. That is not the case here. *Atraskevic* was not cited in *Love* and, on this point, we overlooked *Shaw*. For the reasons given in both cases in the paragraphs to which we have referred we conclude that they were correct. Section 83A(3)(c) is only in point if the prosecutor has expressed the relevant belief.

32. What remains to be considered is whether a statement of the general sort we have in this case has any bearing on the statutory considerations in section 83A.

The relevance of the SFO statement

33. Is the court entitled to have regard to the SFO statement that it had not investigated the appellant's conduct and did not intend to do so, with the practical consequence that no investigation or prosecution is likely to take place in this jurisdiction? For the appellant Ms Clair Dobbin submitted that this is an extraneous consideration, not mentioned in the closed list of factors relevant to the interests of justice contained in section 83A(3), and must therefore be ignored. We do not accept this. The fact that there is unlikely to be a prosecution in the event the appellant is not extradited is a fact found by the judge, based on evidence in the form of the SFO statement which he was entitled to accept and to which he was entitled to have regard to the extent (but only to the extent) that it had a bearing on one or more of the specified matters. The judge regarded the SFO statement as relevant to paragraph (c) (i.e. the question of a prosecutor's belief). In our view, however, it is not relevant to paragraph (c) but does have a wider significance, as we shall explain.

The position when there will be no prosecution in this jurisdiction

34. That is because consideration of the interests of justice under section 83A(3) is primarily concerned with the question whether a prosecution for the conduct which is the subject of the extradition request (and which *ex hypothesi* satisfies the dual criminality requirement) should take place in this country or in the requesting state. It is not concerned with (or at any rate its primary focus is not) a situation where in practice the choice is between a prosecution in the requesting state and no prosecution at all. That is apparent from the terms of the subsection. It was also the position in *Love*, where the requested person's case was that he should be tried and, if convicted, sentenced here.

35. There is a theoretical possibility that the SFO might change its mind about investigating the appellant's conduct and a prosecution might follow. Nevertheless, the judge was entitled to proceed on the basis that the real choice was between a trial in New York and no trial at all. A number of the factors set out in section 83A(3) invite comparison between the positions arising in the event of a prosecution here, as compared with the requesting state. There would be an air of unreality about making a solemn comparison between two states of affairs, one of which has been discounted as a possibility, without

taking that into account in assessing the weight (if any) to attach to the outcome of the comparison.

The specified matters

36. We address now the factors listed in section 83A(3).

(a) *The place where most of the loss or harm took place*

37. *Love* at [28] indicated that this will usually be "a very weighty factor".

38. The judge did not expressly deal with the question where most of the loss or harm took place. He recorded that significant harm occurred in both the United States and the United Kingdom, referring back to an earlier passage of his judgment in which he had concluded for the purpose of determining whether the appellant's conduct had occurred "in" the United States that the effects of that conduct were felt in the United States. But that was a separate question. Nevertheless, it is apparent that the judge treated this as a neutral factor.

39. In this case the only quantified harm identified in the request was the loss suffered by Cairn as a result of the ramping of the market price of sterling in the period leading up to the 3 pm fix. That was harm suffered by a British company in this country. While we would accept that market manipulation was damaging to the integrity of the United States financial markets, that harm is unquantified and, in any event, there is no reason to doubt that equal or greater harm was suffered to the integrity of the United Kingdom markets where more of the trading in question took place. It may be that, because the transaction involved the sale of dollars, it was necessary for funds to be routed through United States financial institutions, but that is essentially a technicality rather than a matter of substance.

40. Overall, there can be no doubt that the majority of the harm suffered as a result of the appellant's conduct – not necessarily all of it but certainly most of it – was suffered in the United Kingdom. This ought to have been treated as a factor of some weight in the balance against extradition, rather than as being neutral.

(b) *The interests of any victims of the extradition offence*

41. The judge dealt with this factor by saying that, although it would be more convenient for Cairn's witnesses to give evidence in the United Kingdom, there was no evidence that travelling to the United States to give evidence in the Johnson trial was causing significant problems. He appears, therefore, to have treated this as a factor telling marginally against extradition.

42. Convenience of witnesses is one element to be considered in determining where the interests of any victims lie. However, that is only a relevant element when the question is whether the trial should take place in the requesting state or in this country. When, as is this case, "the practical reality is that no investigation or prosecution is likely in this jurisdiction", the relative convenience for witnesses can be of no more than hypothetical interest. It carries no real weight.

43. As indicated in *Love* at [29], victims of crime may have an interest in having the case tried according to their own local laws and procedures, and in any sentence being imposed following conviction reflecting the values of their own legal system, "but their interest in having a trial at all is the more important". Although that was said in the context of a case where the risk was that there might be no trial in the United States in the event of extradition because the requested person might commit suicide (see further at [33]), the point is of more general application. If the choice is between a trial in one jurisdiction and no trial in the other jurisdiction, the interests of victims are likely to favour trial in the jurisdiction where a trial will take place.

44. In the present case the only jurisdiction in which a trial is likely to take place is the United States. But there are two factors which affect the victim's interests in this case. First, as we were informed, Cairn has reached a settlement with HSBC as a result of which HSBC has paid to Cairn the sum of US $8 million. It appears, therefore, that Cairn has been properly compensated for the loss which it has suffered as a result of any wrongful conduct on the part of the appellant. That does not affect the wider damage done to the integrity of the currency exchange market. Secondly, Mr Johnson has been prosecuted to conviction in New York. To the extent that an identifiable victim may take comfort from the prosecution of a wrong-doer, that has been possible as a result of the earlier prosecution.

45. In these circumstances the interests of the victim tend towards a trial in the United States rather than no trial at all, but not with such weight as would attach if the proposed trial in the United States were the only mechanism of redress available.

(c) *Any belief of a prosecutor that the United Kingdom … is not the most appropriate jurisdiction*

46. The judge regarded the SFO statement as a significant factor in considering this matter which supported extradition. As we have already noted, Ms Dobbin for the appellant submitted that he was wrong to do so. We accept that the SFO statement is not relevant for the purpose of this paragraph. It does not address the question of where it would be more appropriate for the appellant to be prosecuted. It is not, therefore, a statement of belief in the terms of paragraph (c). It is a statement of fact rather than belief – the facts being that the appellant has not been investigated and that there is no intention to prosecute him here. However, as we have explained, the SFO statement is relevant to factors other than paragraph (c).

47. The position, therefore, is that there is no relevant statement of belief that the United Kingdom is not the most appropriate jurisdiction for a prosecution and that is the end of the matter for these purposes. The judge was therefore wrong to treat the SFO statement as a significant factor in favour of extradition for the purpose of paragraph (c).

(d) *… whether evidence … is or could be made available in the United Kingdom*

48. The judge accepted that significant parts of the evidence could be made available if the appellant were to be prosecuted here, but accepted also that some of the evidence might not be. He said that he was unable to assess the likely importance of whatever unspecified evidence might not be available.

49. We would make two comments. First, this factor is concerned with "evidence necessary to prove the offence". That is not, or not necessarily, the same as all the evidence which might be available in a prosecution in the requesting state. While it may be that some of the evidence which would be available in the United States prosecution (for example, evidence given by witnesses as a result of non-prosecution agreements with the United States Department of Justice) would not be available in a prosecution in this country, we see no reason to suppose that the evidence necessary to prove the offence would not be. Most of that evidence will be available, namely the documents evidencing the relationship between Cairn and HSBC, the foreign exchange transactions carried out by the appellant or with his participation, other documents available in HSBC's London office, and the tape-recorded conversations in which he took part. To the extent that witness evidence is necessary, we note that almost all of the witnesses of fact in the trial of Mr Johnson were from this country and Ireland (see para 16 above) and none was from the United States. So were this the end of the question raised by section 83A(3)(d), the outcome would not favour extradition even though the witnesses from the United Kingdom and Ireland had already shown themselves willing to travel to New York.

50. But it is not the end of the matter. Our second comment is that this factor requires a comparison between the availability of evidence in this country and in the requesting state. When the practical reality is that there will be no trial in this country it is hard to see that this factor has any part to play in determining where the interests of justice lie pursuant to section 83A. Any comparison could only be hypothetical.

51. Overall the judge considered that the availability of evidence issue weighed in favour of extradition. We would respectfully disagree.

(e) *delay*

52. A similar problem arises in considering the question of delay under paragraph (e). The paragraph requires a comparison between a trial in this country and in the requesting state, in circumstances where in fact there will be no trial here.

53. The judge found that a prosecution here would inevitably involve a substantial delay as no investigation has even begun, while in the United States the case was ready for trial. However, when there is unlikely to be any such investigation here, let alone a prosecution, that is an artificial comparison. In this case, this point adds nothing of substance to the conclusion that the interests of victims point on balance towards a trial; and if there is to be a trial it will be in New York.

(f) *the desirability and practicability of all prosecutions relating to the extradition offence taking place in one jurisdiction*

54. The judge noted that the prosecution of Mr Johnson was continuing in the United States and stated simply that it was desirable for the matter to be prosecuted in one jurisdiction. That is correct.

55. In a case where there is more than one defendant, it is desirable when practicable for prosecution to take place in a single trial. That ensures that all relevant evidence is available, promotes consistency of decision making, and is more efficient. However, the position is less weighty when, even if the prosecutions take place in the same jurisdiction, separate trials are inevitable. In those circumstances there is some saving

in public resources and a gain in efficiency from the fact that a single investigation can be undertaken, but the full advantages of a single trial cannot be achieved. The evidence may be different, as may the approach of the fact-finder (particularly if that is a jury), and there will have to be two trials instead of one. That said, the cases would be tried under the same law and procedure, which promotes consistency of approach. If these are convictions there would also be consistency in sentencing.

56. The judge, entirely appropriately, considered this factor to weigh in favour of extradition, albeit he did not explicitly recognise that it had reduced weight given that a single trial with Mr Johnson in New York was unachievable.

(g) *D's connections with the United Kingdom*

57. The judge correctly stated that the appellant "is a UK national with very strong connections to the UK". There was little discussion of the appellant's circumstances. The conclusion, while true, understates the position. The appellant is a British citizen, resident and domiciled here. He was the sole carer for his children who are also British citizens until he met his current wife, who was widowed with two children. He is the stepfather to children. He and his partner face substantial personal pressures because of family illnesses which it is unnecessary to detail in this judgment. His entire life is and has been in the United Kingdom. He has no links to the United States, save for the fact that at the relevant time (but no longer) he worked for a bank conducting business internationally.

58. This was, therefore, an important factor against extradition.

The overall balance

59. Having set out his view of each of the individual factors, the judge concluded that, having regard to the statutory factors, he was satisfied that it was in the interests of justice for extradition to take place.

60. We have concluded that the judge's approach to some of the individual factors was mistaken. There were two powerful factors against extradition, namely the fact that most of the harm took place in this jurisdiction and the appellant's strong connection with the United Kingdom and absence of any significant connection with the United States. As we have explained, the judge carried over his finding that there was relevant conduct in the United States and did not consider separately where the majority of the harm took place. Moreover, the treatment of the appellant's connections with United Kingdom, the personal family details which we have outlined above, do not appear to have carried much weight below. Conversely, those factors which told in favour of extradition were of significantly less weight. In these circumstances this court is entitled to say that the judge's overall evaluation was wrong. We conclude that, having regard to the specified matters (and only those matters), the appellant's extradition is not in the interests of justice and the appeal should be allowed.

Abuse of process/dual criminality

61. It is therefore unnecessary to deal at any length with the appellant's renewed application for permission to appeal on the abuse of process/dual criminality issue.

62. The position of the Government is that HSBC was obliged to act in Cairn's best interests in connection with the proposed foreign exchange transaction. The front running and ramping in which they allege the appellant took part was a fraudulent misuse of confidential information in breach of that duty. The appellant attempted to conceal his activity by making misrepresentations about the role of the supposed Russian purchaser of sterling in the period leading up to 3 pm. The obligation is said to arise from the circumstances summarised above in which HSBC bid successfully for the right to execute the transaction on behalf of Cairn.

63. On behalf of the appellant Mr Jonathan Caplan QC submitted that the facts stated in the request misrepresent the true relationship between the parties such as to amount to an abuse of process. He relied on the existence of a previously concluded ISDA Master Agreement between HSBC and Cairn together with the terms of the mandate letter dated 24 October 2011 by which Cairn mandated HSBC to execute the transaction. That letter stated that "Any transaction undertaken will be governed by the terms of the ISDA in place between HSBC and Cairn".

64. The ISDA Master Agreement dated 28 June 2010 contained the following standard provision in the Schedule to the Agreement:

> "Relationship Between Parties
>
> Each party will be deemed to represent to the other party on the date on which it enters into a Transaction that (absent a written agreement between the parties that expressly imposes affirmative obligations to the contrary for that Transaction):-
>
> *Non-Reliance.* It is acting for its own account and it has made its own independent decisions to enter into that Transaction and as to whether that Transaction is appropriate or proper for it based on its own judgment and upon advice from such advisers as it has deemed necessary. It is not relying on any communication (written or oral) of the other party as investment advice or as a recommendation to enter into that Transaction; it being understood that Information and explanations related to the terms and conditions of a Transaction shall not be considered investment advice or a recommendation to enter into that Transaction. No communication (written or oral) received from the other party will be deemed to be an assurance or guarantee as to the expected results of that Transaction.
>
> *Assessment and Understanding.* It is capable of assessing the merits of and understanding (on its own behalf or through independent professional advice), and understands and accepts the terms, conditions and risks of that Transaction. It is also capable of assuming, and assumes the risks of that Transaction.
>
> *Status of Parties*. The other party is not acting as fiduciary for or as an adviser to it in respect of that Transaction.

> *Agency.* It is entering into the Agreement, including each Transaction, as principal and not as agent of any person or entity."

65. Mr Caplan relied in particular on the negativing of any fiduciary duty in paragraph (c) and on the provision in paragraph (d) that in entering into each transaction under the Agreement the parties were contracting as principals and not as agents. He submitted that if this Agreement had been referred to and properly characterised in the request, it would have been apparent that the transaction between HSBC and Cairn was essentially a straightforward sale of sterling at the 3 pm fix price, and that HSBC was entitled to purchase the sterling which it would need to perform this transaction in the market in whatever way it chose, including by front running and ramping in order to drive up the price and thereby maximise its profit.

66. We do not accept this submission. We bear in mind that in order for a claim for abuse of process on this basis to succeed, the true facts must be clear and beyond legitimate dispute, as held in *Zakrzewski* at [13]. The position here is not sufficiently clear. We note that the deemed representations provided for by the Schedule to the ISDA Master Agreement are subject to any written agreement to the contrary. Here there were written agreements which, at any rate arguably, contain contrary provisions and indicate that the parties' relationship was or at least may have been more complex than Mr Caplan submitted. Indeed, if that were not so, it is hard to see why HSBC should have thought it necessary to pay compensation to Cairn. If the appellant and his colleagues were acting honestly and even astutely in the trading which they undertook, and if this was something which Cairn should really have understood and even expected, the comments recorded in their taped conversations are hard to understand, as is their reference to the mystery Russian purchaser.

67. If the appellant were to be extradited, these matters would be determined at the trial. We understand these or similar issues were raised in the trial of Mr Johnson. As it is, we need only say that we are not persuaded that there is a sufficient case that the judge made the wrong decision on this issue and we refuse permission to appeal.

Other grounds

68. The appellant renewed his application for permission to appeal on the grounds that his conduct had not occurred in the United States and that his extradition would infringe his and his family's Article 8 rights. Realistically, however, Mr Caplan and Ms Dobbin did not develop these grounds in their submissions. We refuse permission to appeal.

Disposal

69. We refuse permission to appeal on the issues of abuse of process/dual criminality, whether the appellant's conduct occurred in the United States and Article 8. We allow the appeal on the forum issue. The appellant will therefore be discharged.