Luke Whittam, Royston Mason, Jac Ludlow – 6th August 2012

Each defendant has pleaded guilty to an offence contrary to s.46 of the Serious Crime Act 2007, of assisting in the supply of controlled drugs of class A or B.

On 3 June, W was stopped driving a transit van at the inbound Dover Eastern Docks controls.
On questioning he stated that he had been to France and then to Amsterdam on a trip that had lasted 2 days.
He explained that the purpose of his trip was to buy an engine for his car, but that it was ultimately unsuccessful. However, in compensation for his wasted trip, the seller of the engine gave him 5 bags of fertiliser – and Mr W explained that he was a gardener.
In fact, those bags contained a total of 125kg of a cutting agent, colloquially known as “bash” comprising caffeine and paracetamol baked brown, and which would commonly be used to cut heroin, although can also be used to cut amphetamine.

On 19 June, M and L were stopped at the same controls in a different transit van. They stated that they had been to Calais to buy agricultural equipment.
In the back of their van were 13 bags of brown powder that the men claimed was fertiliser.
In the cab of the van, was a piece of paper with directions to Eindhoven, and indeed other enquiries demonstrated that the van had travelled to Holland rather than just outside Calais as the men had claimed.
Just as with the bags of powder claimed to be fertiliser by W, so too the bags in the rear of the van driven by M and L contained not fertiliser, but bash with a gross weight of 143kg.

Not only did the defendants each carry out similar trips, return with the same material, and give similar explanations for the powder when stopped, but

telephone analysis showed that there was telephone connections between W and L.

Thus it is therefore that the Crown's case is that all 3 defendants, though separately charged, were knowingly involved in the same enterprise, and that when W failed to get his consignment through, L and M carried out a repeat offence 2 weeks later.

I am given to understand that "bash" would be used as a cutting agent for heroin at a ratio of 1:1; in other words, 125kg of bash would be used to cut the same quantity of heroin resulting in 250kg of cut heroin with an estimated value of £4,750,000
143kg of bash would generate 286kg cut heroin with an estimated value of £5,434,000.

Although it is the Crown's case that the substance was indeed for heroin, both because of it's composition but also its colour, it is accepted by them that it could also have been used as a cutting agent for amphetamine, a class B drug.
It is because the Crown could not prove whether the cutting agent was for heroin or amphetamine, or perhaps more importantly, could not prove whether the defendants knew that it was for heroin rather than amphetamine that I understand that on the final form of the indictment a charge was laid contrary to s.46 of the Serious Crime Act.

I requested, and the Crown sought, comparative details of the cutting ratio and consequent value of the drugs if, as the defendants contended, the agent was to be used to cut amphetamine. Unfortunately, that has not been supplied.

It is accepted that the sentencing guidelines for drug offences apply although certain caveats have been raised as to how and to what extent those

guidelines should be followed in a case of this sort where there has been a plea to s.46 rather than to a substantive offence of supply.

I am further given to understand that researches undertaken to find a sentencing authority in which the facts of the case come anywhere close to the facts in this case have been largely unsuccessful, although I have had my attention drawn to the case of R. v Marron. In that case, the defendant was convicted of an offence of conspiracy to supply cocaine, where the defendant's role was to import 44kg of a cutting agent. In that case it was stated that, …… [*final 2 paragraphs of the judgment*]
The Court of Appeal reduced the sentence to one of 7 ½ years imprisonment. Whilst of some assistance, I observe firstly that the case appears to be a fact specific one in which a central consideration in fixing the appropriate sentence was the extent of the defendant's knowledge; secondly, the case pre-dated the publication of the sentencing guidelines that now apply.

By their pleas, the defendants have each admitted that they knew that their actions would encourage or assist the supply of drugs.
As the Crown have accepted pleas of not guilty to similar charges under s.45 of the same Act of assisting in the supply of diamorphine, and as the Crown have also accepted that they cannot prove that the defendants knew that the drugs the supply of which their actions would have encouraged or assisted were class A drugs, I agree and accept that I should sentence the defendants on the lesser basis of encouraging or assisting the supply of Class B drugs which, on the facts of this case, are agreed to be amphetamine. The maximum sentence is therefore 14 years.

It is common ground that the quantity of the cutting agent, and therefore inferentially, the quantity of the drugs to be cut and supplied, places each offence within Category 1, and in my view, given the extremely large quantities involved, at the highest end of it.
Even if the defendants did not know the ratio for which this cutting agent would be used with the drugs, the end quantity self-evidently could not have

been any less than the quantity of the cutting agent itself which in each case was over 100kg. On any view therefore, this was a huge enterprise.

Assigning a role to the defendants is more difficult.
It has been urged upon me that the defendants are each of them in the role of a courier. In addition, I have been referred to the recent case of R v Healey [2012] EWCA Crim 1005, a case concerning the application of the guidelines to the cultivation or production of drugs, but one which nevertheless provides helpful guidance on the approach to the guidelines. In that authority, at para.15, the Vice President gives as an example of an offender who plays a "lesser role", the delivery man who takes from A to B a batch of cutting agent for the producer who is bulking up quantities of heroin for sale.

It seems to me however, that just as there may be a difference in culpability between those who supply, depending upon the quantities, motivation and expectation of reward, so equally there may be a difference between couriers or – as the analogy is drawn here – delivery agents. In my view, neither the guidelines nor case-law suggest that where a defendant's role is that of a courier or a delivery agent, that they must always therefore be considered to be someone who played a lesser role.

Defendants who, as here, have imported into this country vast quantities of cutting agent, knowing that that is to be used to facilitate the supply of drugs in the type of quantities as here, can not in my view be properly described as offenders who have only played a lesser role.
I accept and respectfully agree with the observations in the case of Healey that the features set out in the sentencing guidelines are indicative not exhaustive, but there is a significant difference between the type of offender envisaged as a lesser player who performs a limited function, who acts through coercion, naivety or exploitation, or who has no or limited understanding of the scale of the operation – and the type of role played by these defendants.

In my view, they each fall within the significant category.

This therefore provides for a starting point of 5 yrs 6 months, with a sentencing range of 5-7 years. As already indicated, in my view the quantities here put the offence at the top of the range.

The final consideration in fixing a starting point is whether any reduction should be made for the fact that what was handled by these defendants was the cutting agent, not the drugs themselves.

A defendant's involvement in the supply of drugs may be occasioned in many different ways; he may be the initial supplier, the provider of the safe house, or the provider of the cutting agent - but each plays a necessary part in the offence ultimately carried out.

In my view the fact that what was imported was the cutting agent and not the drug is a relevant factor to be taken into account, and which I have taken into account when considering and fixing the role to be ascribed to the defendants participation, and any additional reduction should therefore be limited.

Mr Forbes urged that this was a lawful substance that was imported. It was, but one to be used, and knowingly to be used for an inherently *un*lawful purpose.

Taking all of those matters into consideration, in my view the appropriate starting point is 6 ½ years.

I give full credit for guilty pleas = 52 months (4yrs, 4 months)

Further credit for: good character (previous offences ignored in the case of Whittam and Ludlow), age, testimonials

Sentence = 3 years, 8 months

Heather Norton