Neutral Citation Number: [2023] EWCA Civ 1338

Case No: AC-2023-LON-000193

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17 November 2023

Before :

LORD JUSTICE WILLIAM DAVIS
and
MRS JUSTICE STACEY

- -

Between :

PRADEEP MORJARIA **SANGITA MORJARIA**	**Claimants**
- and -	
WESTMINSTER MAGISTRATES COURT	**Defendant**
CAMRAN MIRZA **SAIRA MIRZA** **AMEER MIRZA** **TYDWELL LTD**	**Interested Parties**

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- -

David Perry KC, Victoria Ailes and Henry Hughes (instructed by **Edmonds Marshall McMahon**) for the **Claimants**
Adrian Darbishire KC and Tom Doble (instructed by **Candey**) for the **Interested Party**

Hearing dates: 7 November 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on [date] by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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LORD JUSTICE WILLIAM DAVIS

LORD JUSTICE WILLIAM DAVIS AND MRS JUSTICE MARY STACEY:

This is the judgment of the court.

Introduction

1. On 15 August 2022 Edmonds Marshall McMahon ("EMM"), a firm of solicitors instructed by Pradeep Morjaria ("PM") and Sangita Morjaria (his wife), applied to the Westminster Magistrates' Court for the issue of summonses against Camran Mirza ("CM"), Saira Mirza (his wife), Ameer Mirza (his son) and Tydwell Limited ("Tydwell"). The application was supported by draft charges alleging one count of conspiracy to defraud and six substantive counts of fraud against the defendants and by a lengthy case summary with attachments. The application was placed before District Judge (Magistrates' Courts) Sternberg ("the judge"). He considered the application on the basis of the documents placed before him. On 23 August 2022 the judge decided to issue the summonses sought. He provided brief written reasons for doing so. The summonses were issued by the court on 30 August 2022.

2. On 20 September 2022 the defendants applied to set aside the summonses. Disclosure requests were made of the prosecutors. Some disclosure was provided voluntarily. Further disclosure resulted from an order of the judge. On 4 January 2023 the judge conducted a hearing of the defendants' application. Both sides were represented by leading and junior counsel. The judge reserved judgment. On 20 January 2023 he handed down his judgment. He set aside the summonses which had been issued on 30 August 2022. He concluded that the criminal proceedings were an abuse of the court's process.

3. PM and his wife applied for permission to apply for judicial review of the decision of the judge to set aside the summonses. They argued that the judge erred in law in finding that the summonses were an abuse of process. Further, they submitted that the judge's factual findings were irrational. Sir Duncan Ouseley adjourned the application for permission to be listed in court as a rolled-up hearing. We heard the application on 7 November 2023. PM and his wife were represented by leading and junior counsel as were CM and the other defendants in the putative criminal proceedings, they being interested parties in respect of the claim for judicial review. As is conventional, Westminster Magistrates' Court, the defendant in the judicial review claim, took no part in the hearing before us.

The factual background to the allegations in the summonses

4. PM is a wealthy businessman resident in Dubai. In the early 1990s he met CM. They became friends. In 2007 CM approached PM with a proposal to develop a property at 22-24 Uxbridge Road in West London. The development involved building an hotel and an office block on the site. The two men agreed to embark on a joint venture to achieve the development. They were each to make a financial contribution. They created a Jersey registered holding company called Otaki which was owned in equal shares by PM and his wife and by CM and his wife. In turn subsidiary companies were formed to hold the long leases of 22 and 24 Uxbridge Road. From 2008 Otaki and its subsidiaries engaged Tydwell to develop the site and thereafter to manage the property. Tydwell is a building company. It is owned jointly by CM and his wife. CM has a 75% interest in that company. His wife has a 25% interest.

5. 22-24 Uxbridge Road was developed. It is now occupied by a Premier Inn and a data centre. Part of the development included the installation of cladding. This was carried out by specialist contractors named Mace. Following the tragic fire at Grenfell Tower, it was discovered that the cladding on the property at 22-24 Uxbridge Road was defective. In March 2020 Mace reached a settlement agreement with Otaki in respect of Mace's liability. Under the agreement Mace paid £2.75 million. At the same time Otaki entered into an agreement with Tydwell to carry out replacement of the cladding. The contract involved an advance fee of £750,000 to be paid to Tydwell. CM represented that this would be the approximate cost of replacing the cladding. The remaining sums paid by Mace were to be shared equally between PM and CM.

6. In the event, Tydwell represented to Otaki (and thereby PM) that just short of £2.7 million had been spent in the replacement exercise. Between August and December 2020 Tydwell provided sequential invoices which totalled this sum. However, according to an internal spreadsheet prepared by Tydwell, only £1,078,689.44 inclusive of VAT had been paid by them to contractors to fulfil the work. This left around £1.6 million which ought to have been shared equally between PM and CM. When challenged about this apparent false invoicing by Tydwell, CM through his lawyers asserted that Tydwell were entitled to the excess sum because they had assumed the risk of a 12 year warranty in respect of cladding combustibility. This assertion was not reflected in the invoices provided by Tydwell. They referred only to the cost of the works, not any insurance/warranty liability.

7. The summonses sought by PM and his wife reflected this alleged fraud. It was said that Tydwell deliberately misled Otaki into believing that the cladding replacement work had cost around £2.7 million. CM as the controlling mind of Tydwell was personally responsible for this fraud. It was further said that his wife and son had supported him in the fraud by creating and providing documents which mirrored the deception.

8. Although the summonses were restricted to the alleged fraud in relation to the cladding replacement, PM's overall allegation against CM was that Tydwell regularly overcharged Otaki for work done on the property at 22-24 Uxbridge Road. Such overcharging benefited CM and his family at the expense of PM and his wife. The total amount involved was around £4.85 million. CM has denied this overall allegation saying that Tydwell were entitled to charge fees when engaging sub-contractors.

The procedural background

9. In August 2020 PM instructed Jones Day with a view to commencing civil proceedings against CM and others. On 23 April 2021 Jones Day sent a detailed letter before action to CM. The letter alleged regular overcharging by Tydwell which benefited CM and his wife and which caused a loss to Otaki, the company in which PM held a 50% share. CM instructed Cameron McKenna. On 18 June 2021 that firm responded to the letter before action in considerable detail. The thrust of the response was that CM and his family and Tydwell had not overcharged Otaki. Rather, all of the invoices submitted by Tydwell were genuine. There had been no loss suffered by Otaki. Civil proceedings were issued on 9 May 2022. Various breaches of fiduciary duty and misrepresentations were alleged against CM, Tydwell and others.

10. In the meantime in early October 2021 PM had instructed Edmonds EMM with a view to a criminal prosecution of CM, his family and Tydwell. EMM is a firm which

specialises in conducting private prosecutions. On 21 December 2021 EMM wrote to CM. They set out the factual position in respect of the cladding replacement as alleged by PM. They said that their investigation was not yet complete. They invited CM to attend for an interview under caution. On 8 February 2022 Cameron McKenna replied on CM's behalf. The factual position as alleged by EMM was denied. CM declined the invitation to be interviewed under caution.

11. As will become apparent when we review the communications between PM and his solicitors (both Jones Day and EMM), PM considered that there was a clear link between the civil claim and the proposed criminal proceedings. In the civil claim there was a mediation exercise which commenced on 2 August 2022. It concluded on 26 August 2022. The intention had been for the criminal summonses to be issued at around the start of the mediation. In the event they were not issued until 30 August 2022.

12. When CM and the others in respect of whom the criminal summonses had been issued applied to set aside the summonses, requests were made of EMM for disclosure of communications between them and PM relating to PM's motives for applying for the summonses and/or to the relationship between the criminal process and the civil proceedings. On 14 October 2022 EMM disclosed the communications they had had with PM in relation to the criminal process. This material indicated that what had passed between PM and Jones Day could be relevant to the issue of motive. Therefore, there was a further disclosure request. It required EMM to obtain and review the material held by Jones Day in order to identify material which touched on motive. EMM declined to make this further disclosure. On 30 November 2022 there was a case management hearing before the judge in the course of which the issue of disclosure was argued. The judge ordered EMM to review the Jones Day material. On 22 December 2022 communications between PM and Jones Day were disclosed.

The disclosed material

13. The case summary provided to the judge at the time of the application for the summonses referred to arguments that might be put by the proposed defendants at [205] and [206] of the summary:

> "205. In response to this, the Defendants in this case would undoubtedly argue that this is no more than a contractual dispute and not a criminal case, indeed they would be likely to submit to the court that:
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> a. Criminal proceedings are wholly inappropriate (and therefore abusive);
>
> b. The Prosecutor's motives are malicious, vexatious or otherwise such that the court should not grant the application;
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> c. The Defendants would likely point to the existence of civil proceeding and submit that if it were justice which should be obtained, that it can be achieved by civil proceedings and therefore, that the Prosecutor's dominant motive must be to exert undue pressure by bringing two sets of proceedings.

> 206. The Prosecution's submissions on these points are:
>
> (i) A mere contractual or commercial dispute is not a matter for the criminal courts.
>
> (ii) The conduct of the Defendants in this case plainly crosses into the criminal. As stated, the Prosecutors….were the object of false representations, dishonestly made by the Defendants, as to the costs and that certain expenses had been incurred, or were due to be incurred, when they had not.
>
> (iii) With regard to the final points, it is not for a defendant to determine the motives of the prosecutor. The Prosecutor is understandably motivated by achieving justice having been subject to a regime of continual, clear, dishonestly-made false statements and being relieved – and remaining relieved – of a very large sums of money. There is no reason, still less a rule, why they are obliged artificially to confine the remedies to those available in the civil courts when, if the Prosecution is correct, criminal conduct has taken place."

None of the material which was disclosed prior to the hearing of the application to set aside the summonses was provided to the judge. It is to that material that we now turn. We do not propose to deal with every communication that passed between PM (and on occasion his son acting on PM's behalf) and his solicitors. In his judgment the judge took the same approach. He has not been and could not be criticised for doing so. We have considered each and every communication as they appear in the disclosure bundles served by EMM, the first without a court order and the second after the judge's order of 30 November 2022. We are satisfied that the material cited by the judge was a fair representation of the entirety of the disclosed material.

14. Shortly before the letter before action in the civil proceedings was sent by Jones Day, PM e-mailed those solicitors in relation to the draft with which he had been provided. He said this:

> "I think the rest looks fine however I still feel we need to stress at the end of the LBA (letter before action) the white collar crime of Fraud and deceit and whatever you can add. Taking money from a JV company into his personal companies owned by Camran [CM] over all these years. Surely there is a threat of jail sentence even if we have to take out a private prosecution and that is what we are determined to do should be the message if our allegations are proved correct. This will wake him up to settle with us."

Thereafter there were exchanges of e-mails between Jones Day and Cameron McKenna ("CMS") in relation to the timetable for the latter firm to respond to the letter before action. Whilst those exchanges were taking place, PM e-mailed a solicitor at Jones Day in which he said:

> "How long can you put up with this situation when Camran is not making CMS fully aware…this meaningless back and forth is wasting time and money. The threat of Jail time directly or indirectly need to be hinted to CMS that is the only way to wake up Camran."

15. After EMM were instructed in October 2021, PM sent a document entitled "Full Final Story" to those solicitors. At one point the document stated "…we need serious fire power and threat of maximum JAIL term to bring him to his knees and make him want to settle and close the chapter." Three days later PM e-mailed EMM in these terms:

> "At what point do you think Camran would want to talk? I know If your message to his lawyer is clear that I am looking for a maximum sentence he might wake up so you have to be very hard on this point. Your message should be clear that the reason to go the criminal route is because my priority is Jail time first and money comes second since we know it will come to us at some point."

The partner at EMM with conduct of the case replied "I know your incentives are justice first and it's good to hear that reinforced."

16. On 3 November 2021 PM's son e-mailed EMM. He said this:

> "We think strategically it is important to mention CM's wife Saira somewhere, whichever way possible, as the more of his family we can attach to this case the stronger our position becomes and the quicker they will come to the table to settle. Ultimately we want him inside but we also want to recover the money too. We do also want a line in there somewhere to say that we are aiming for maximum prison sentence (of x-years). He needs to read this and needs a reality check."

Further correspondence with EMM referred to the need to emphasise to CM that criminal proceedings would happen and that PM was serious about going all the way with the process. That was the only way to shorten "this" i.e. the civil claim. On 13 January 2022 PM messaged Jones Day saying "…As for my speech to CM I think perhaps it won't achieve anything n for once I will give up my right to speak would you believe, less said more effect it might have said a wise man once 😄. What do you think? I was going to say I want justice "if you done the crime you have to serve the time" n for me I don't need the money (a lie), every year he gets inside is worth £2/3M to me…"

17. As we have said, the civil proceedings were issued on 9 May 2022. PM e-mailed EMM the same day:

> "…As you know the matter has dragged on….civil claim is now filed but the real pressure will come once the criminal is filed which I was hoping will be straight away. I hope CMS know asap that this action is also being taken. I will ask Dhanraj [Misra, Jones Day] to forward you the claim we have

> filed…..What I want to know is when exactly CMS will know that Criminal is going ahead and EMM was not bluffing, the matter is serious." In July 2022 CM proposed mediation in the civil claim. PM gave his view about mediation in an e-mail of 4 July 2022 to Jones Day:
>
> "The only time the mediation will have any meaning is when the Criminal is filed and CMS makes it clear to CM that Jail time is possible, something I told you & James in my first meeting and I have repeated this fact a hundred times subsequently."

18. On 8 July 2022 PM discussed the position via e-mail with both EMM and Jones Day. He said to EMM:

> "WE MUST file before the end of the month NO MATTER WHAT….Can you please confirm this to me so I can discuss this with Barney [Stueck, Jones Day]. We think we should agree to our meeting with CMS & CM at the end of the month after you have filed the Criminal Proceedings then it will carry some weight otherwise the meeting will not achieve anything…. The other point is from what we discussed that once filed the case can be withdrawn before the 1st hearing."

In his e-mail to Jones Day he said:

> "…I will say it again Camran will ONLY take notice of these numbers if he knows that the Criminal case is REAL and there is a good chance of him going inside. I feel we can only give the figures face to face when we meet on say 2nd August once the Criminal is filed."

In further e-mails PM emphasised the importance of the criminal proceedings being in train prior to any meeting with CM. He said that, in any meeting, he was not there to listen to CM. Rather, he was there to give him a message. He insisted that the criminal proceedings had to be issued "and then I can do what I want to do…."

19. On 25 July 2022 PM e-mailed EMM. He said that it was very important for him to know that the criminal proceedings would be accepted by the court. He explained that he wanted a one to one meeting with CM to give him one chance to settle the civil proceedings. He referred to the cost of civil proceedings. EMM responded to PM as follows:

> "• We spoke about the fact that if the criminal court considers that a primary motivation of a criminal prosecution is to put pressure on the defendant and to obtain a settlement, then it will take a dim view of that indeed.
>
> • We have discussed that the Court will assess whether your primary motivation is to exert pressure, or money or justice.

> • You have made it clear to me many times that justice is the number 1 priority for you."
>
> Regarding speaking to CM, Ms McMahon advised PM that "If you do, it will make it much easier for him to allege that you are using it as a "tool" - inevitably it has more troubling consequences than civil litigation i.e. potential imprisonment."

PM replied as follows:

> "…I know Justice is number one priority BUT the cost is mounting up at an astronomical rate so the question is how do I see this through…I have to think if there is a possibility of getting what we want from Camran since this could go on for a very long time…Bottom line is how am I going to recover the money because once he is inside things will slow down completely hence my thought on finding a way to recover as much as I can with the threat of the Criminal before it is too late to pull out. Although I do see that he will use the threat as a tool I am using to force a settlement, a difficult situation I suppose…"

20. Subsequently PM discussed the position via e-mail with Jones Day. He said inter alia "…Without a Criminal on him, CM has nothing to lose but fight the case and see what the court decides…" and "…I told Kate (at EMM) we are going ahead with the Criminal which is necessary to get the right result which is what I have said from day one…" The mediation concluded before the service of the summonses. Thus, there was never a one to one meeting of the kind envisaged by PM. Within three weeks of the service of the summonses, their issue was under challenge.

The findings of the judge in January 2023 in relation to the disclosed material

21. The judge had been satisfied on the basis of the material provided to him in August 2022 that there was prima facie evidence of the offences charged in the summonses. He found that nothing had changed since the summonses had been issued. However, on the basis of the e-mail correspondence disclosed since August 2022, the judge concluded that the motive of PM in initiating criminal proceedings was to threaten the defendants in order to extract a settlement from them. He said that the retributive aim of doing justice was not the prosecutor's primary motive. The judge determined that this remained the position once he had instructed EMM. When in October 2021 EMM had said that his priority was "jail time first", that had to be read in the context of his use of the term "threat of maximum jail time to bring (CM) to his knees and make him want to settle". The judge concluded that the response of EMM was a gloss on what PM had said. It did not represent what he actually had said.

22. The judge went on to review the continuing dialogue between PM and his lawyers both civil and criminal. He found that this demonstrated that PM's primary motivation in issuing the criminal summonses was to seek to force CM and the other defendants to settle the civil claim in order to avoid prosecution. He said "I do not find that he was motivated purely or solely by seeking justice in an objective sense" i.e. a reference to the exchanges in October 2021. Rather, so the judge concluded, PM's "overwhelming, primary and dominant motive (in bringing the criminal proceedings) was to seek to

force settlement". The judge relied particularly on the content of the e-mails in July 2022. He noted the exchanges on 25 July 2022. EMM had set out the way in which a court might view PM's motivation for commencing criminal proceedings. PM's response had been to say that he knew that justice was the number one priority. He immediately went on to say "BUT" and to explain his true position which indicated a quite different motive. The judge accepted that the criminal proceedings had continued after the failure of the mediation but that this did not greatly assist in relation to PM's motivation at the time application was made for the summonses.

23. The judge determined that the failure to put before the court the material disclosed after the issue of the summonses was a highly serious and significant breach of the duty of candour.

The legal principles applied by the judge

24. The starting point for the judge was Rule 7.2 of the Criminal Procedure Rules which deals with the issue of a summons by a magistrates' court. He concentrated on those parts of the Rule with particular relevance to private prosecutors which are:

(6) Where this paragraph applies, as well as complying with paragraph (3), and with paragraph (4) if applicable, an application for the issue of a summons or warrant must—

(a) concisely outline the grounds for asserting that the defendant has committed the alleged offence or offences;

(b) disclose—

(i) details of any previous such application by the same applicant in respect of any allegation now made, and

(ii) details of any current or previous proceedings brought by another prosecutor in respect of any allegation now made; and

(c) include a statement that to the best of the applicant's knowledge, information and belief—

(i) the allegations contained in the application are substantially true,

(ii) the evidence on which the applicant relies will be available at the trial,

(iii) the details given by the applicant under paragraph (6)(b) are true, and

(iv) the application discloses all the information that is material to what the court must decide….

(14) The court may decline to issue a summons or warrant if, for example—

(a) a court has previously determined an application by the same prosecutor which alleged the same or substantially the same offence against the same defendant on the same or substantially the same asserted facts;

(b) the prosecutor fails to disclose all the information that is material to what the court must decide;

(c) the prosecutor has—

(i) reached a binding agreement with the defendant not to prosecute, or

(ii) made representations that no prosecution would be brought, on which the defendant has acted to the defendant's detriment;

(d) the prosecutor asserts facts incapable of proof in a criminal court as a matter of law;

(e) the prosecution would constitute an assertion that the decision of another court or authority was wrong where that decision has been, or could have been, or could be, questioned in other proceedings or by other lawful means; or

(f) the prosecutor's dominant motive would render the prosecution an abuse of the process of the court.

CPR 7.2(14) was added by amendment (The Criminal Procedure Rules (Amendment No. 2) Rules 2022) which came into force on 3 October 2022. It was agreed between the parties at the hearing on 4 January 2023 that the amended rules applied to the judge's consideration of whether to set aside the summonses. In his judgment the judge added emphasis to CPR 7.2(14).

25. The judge then considered the authorities which were relevant to his decision. These were authorities cited by the parties. He began with lengthy reference to R (Kay) v Leeds Magistrates' Court [2018] EWHC 1233 (Admin). Kay identified the core principles to be applied when a magistrates' court is faced with an application for a summons by a private prosecutor or is invited to set aside the issue of such a summons. At [22] the court stated that, if the alleged offence prima facie was established and there was no jurisdictional bar to prosecution, then "generally the magistrate ought to issue the summons, unless there are compelling reasons not to do so – most obviously that the application is vexatious (which may involve the presence of an improper ulterior purpose and/or long delay); or is an abuse of process; or is otherwise improper".

26. The judge noted that Kay also considered the duty of candour applicable to the application for issue of a summons. That there is such a duty of candour was well established by a succession of authority beginning with R v Grays Justices ex p Low [1988] 3 All ER 834 which stated "it is now established that the withholding of material information is in itself a critical factor in determining whether a summons should be set aside as an abuse of the process of the court". The judge referred to what Lord Justice Hughes (as he then was) said in Re Stanford International Bank Ltd [2011] Ch 33:

> "…In effect a prosecutor seeking an ex parte order must put on his defence hat and ask himself what, if he were representing the defendant or third party with a relevant interest, he would be saying to the judge, and, having answered that question, that is what he must tell the judge…."

27. The judge went to consider R (Siddique) v Westminster Magistrates' Court (Abbasi) [2021] EWHC 1648 (Admin) where the issue of breach of a duty of candour was central. He set out significant parts of the judgment verbatim. In Siddique the allegation which gave rise to the application for criminal summonses was fraud within a commercial relationship. The fraud had been the subject of civil proceedings which had been settled on terms reduced to writing. On a successful application thereafter for the issue of a criminal summons, the settlement agreement was not disclosed. The defendant applied for the summons to be set aside. The judge in that instance set aside the summons because of the non-disclosure of the settlement agreement. This court stated that the question to be answered was whether the failure to disclose should have made a difference to the judge's decision. It was accepted by this court that the failure to disclose the agreement could be seen as fundamental in the sense that it went to the heart of the duty of candour. But it was not fundamental to the fairness of the proceedings because the defendant had had a copy of it throughout as the prosecutor well knew. The defendant would have been able to deploy it at some later point of the proceedings had he thought it appropriate. This court then turned to the issue of abuse of process. In all of the circumstances of the case including the nature of the non-disclosure, it was determined that there was no abuse. The decision to set aside the summons was quashed.

28. Further authority considered by the judge was Asif v Ditta [2021] EWCA Crim 1091 and R v Taktouk [2022] EWCA Crim 1254. The judge referred to the principle that "it is an exceptional step to stay a prosecution" (Asif v Ditta at [73]) and that "even if one categorises the motive of achieving a settlement as indirect or improper, it would have to render the proceedings 'truly oppressive'…" for abuse of process to be established (Tartouk at [24]).

The conclusions of the judge in relation to abuse of process

29. The judge began what he termed his "analysis and decision" by repeating the essential feature of the abuse jurisdiction, namely that it was "an exceptional step to stay a prosecution". He stated that the factors which had to be established in relation to cases where improper motive was said to create an abuse were as follows:

> "…the defence would….need to show that the motive for settlement was:
>
> a) a primary motive and one which is so unrelated to the proceedings that it renders it a misuse or an abuse of the process….;
>
> b) an oblique motive which is so dominant and so unrelated to the proceedings that it renders them an abuse of process….;
>
> c) even if it were an 'indirect or improper motive' it would have to be one that rendered the conduct 'truly oppressive' or
>
> d) That the 'proceedings [were] tainted by mala fides or spite or some other oblique motive….' "

On the facts he had found, the judge was satisfied that the dominant and primary motive of PM in issuing the summonses was to threaten CM and the other defendants so as to exert leverage over them to settle the civil claim. PM was not motivated by a desire to see justice done. His motive was unconnected to properly constituted criminal proceedings. The judge concluded that this was an abuse of the court's process. The judge determined that the attitude of PM as evidenced by his exchanges with his lawyers whether in the civil proceedings or in relation to the criminal summonses was the key indicator of his motivation.

30. The judge stated that the failure to make proper disclosure and the breach of the duty of candour was "serious and substantial". The case summary submitted when application was made for the summonses did not refer at all to the material subsequently disclosed. The judge considered that the disclosed material went "well beyond what was in the original case summary by a considerable degree". In relation to the non-disclosure the judge said this:

> "I must make it clear that on the basis of the material now presented to me, I do not find that the material was deliberately concealed so as to manipulate the application for a summons. Nor do I make any finding of misconduct against the lawyers acting for the prosecutor in these proceedings."

However, he concluded that the withholding of the material now disclosed was "a grave and weighty factor" in favour of setting aside the summonses.

31. The judge distinguished Siddiqui because, on its facts, the failure to disclose the settlement agreement did not affect the fairness of the proceedings. In this case, PM's improper motive was central to the fairness of the proceedings. It was the reason why the criminal prosecution was being pursued. The material which had not been disclosed when application was made for the issue of the summonses established that improper motive. That was why the failure to disclose in this instance was so significant.

32. The judge acknowledged that he was having to consider whether the case fell into the second category of abuse of process i.e. would it be unfair to try the defendants rather than would the defendants be able to have a fair trial? In those circumstances, the public interest in ensuring that those charged with grave crimes should be tried was a matter to be weighed in the balance. The judge accepted that there was a clear prima facie case of significant fraud on the material before him. He took that into account. But he concluded that PM's motive was improper and that the consequent criminal proceedings were "truly oppressive". He said that "the presence of a dominant motive so unrelated to properly constituted proceedings is in my view wholly decisive of the question of whether an abuse of process is established".

The submissions of the parties

33. On behalf of PM and his wife David Perry KC argued three grounds of challenge. First, he submitted that the judge was wrong in law when he found that it was an abuse of process to bring criminal proceedings against CM and the other defendants. The burden lay on the party seeking a stay of proceedings to establish an abuse of process. That involved showing that the circumstances were sufficiently exceptional to require the court to refuse to exercise its jurisdiction to try a case. Where a court stays what

otherwise are regular proceedings other than in exceptional circumstances, that in itself brings justice into disrepute. One objective of criminal justice is restitution for the victim. That was what PM was seeking in this case. Mr Perry asked rhetorically how restitution could involve an abuse of process. He drew a parallel between the facts of this case and a case in which a regulatory authority such as the Environment Agency might threaten prosecution in order to persuade the polluter to abide by relevant statutory requirements. He accepted that the judge had expressly considered a significant body of relevant authority. However, he had not referred to Maxwell [2010] UKSC 48 or to Warren v Attorney-General of Jersey [2011] UKPC 10. In both cases the investigating authority had behaved in a reprehensible fashion yet in neither instance was it considered appropriate by the Supreme Court or the Privy Council that the proceedings should have been stayed.

34. Mr Perry's second submission was that the judge's findings of fact in respect of motive were irrational. PM and his wife genuinely believed that they were the victims of fraud. The judge accepted that there was a sound prima facie case that the defendants had behaved fraudulently. PM had instructed independent legal professionals both in respect of the civil and the criminal proceedings. The involvement of lawyers was highly significant. Yet at no point in his judgment did the judge refer to their involvement and the fact that they advised on the merits of the case and the procedure to be adopted.

35. Mr Perry developed his submission with the proposition that the bringing of criminal proceedings could be and, in this instance, was part of an overall strategy to achieve justice. The judge fell into error because he did not explain why proceedings in respect of serious wrongdoing could lead to the degradation of the administration of justice. The judge equated the motive – seeking a settlement – with an abuse of process. That was false logic. Moreover, the judge gave no convincing reason why the criminal proceedings were oppressive.

36. In the passage in the judgment which we have set out at [30] above, the judge made two significant findings. First, the material which was not disclosed when application was made for issue of the summonses was not deliberately concealed. Second, there was no misconduct by the lawyers. Notwithstanding those clear findings, the judge concluded that there was a serious breach of the duty of candour and that the failure to disclose material was a weighty factor in the decision to set aside the summonses. Mr Perry argued that this was not a reasonable conclusion given the preceding findings of fact. The involvement of lawyers amounted to a complete answer to the abuse argument.

37. Mr Perry's final argument was linked to the issue of the duty of candour and was an extension of the proposition that the judge's decision was irrational. The case summary provided with the application for the summonses set out the potential arguments for the proposed defendants in the criminal proceedings: see [13] above. That passage adequately identified the issues. Further, the judge was wrong when he distinguished Siddiqui. The defendants in this case would have been able to deploy the previously undisclosed material at a later stage of the proceedings in the way as was envisaged in Siddiqui.

38. For the interested parties Adrian Darbishire KC submitted that the judge had not erred at any stage of his analysis of the case and the relevant legal principles. The issue was

PM's motive. On the material before him when he considered whether to set aside the summonses the judge was wholly justified in concluding that PM's dominant motive in obtaining the issue of criminal summonses was to use the criminal proceedings as a threat in concurrent civil proceedings. Had the judge been aware of this scheme when application was made for the issue of the summonses, he would not have issued them. There is a public interest in prosecuting allegations of serious crime. But that public interest may be outweighed if the true purpose of the prosecution is to serve a private interest.

39. Mr Darbishire argued that the message apparent from the disclosed material was consistent. It revealed a scheme which was the antithesis of justice. He submitted that, in the passage set out at [30] above, the judge refrained from making a finding in relation to the lawyers instructed by PM. The judge did not positively exonerate the lawyers. Mr Darbishire said that it was not necessary for the judge to make any finding as to deliberate concealment or misconduct. The failure to disclose the messages passing between PM and his lawyers was a major error. It led to the judge issuing the summonses on a false basis. Mr Darbishire's argument was that whether there had been a breach of the duty of candour was a side issue. The evidence of improper motive was apparent irrespective of whether the judge had been deprived of that evidence by a breach of the duty of candour. PM's motive was what mattered.

40. Mr Darbishire accepted that the judge had not referred directly to all the authorities cited to us. He noted that the judge had not mentioned Maxwell or Warren. However, both of those cases were discussed in Asif v Ditta to which the judge had referred extensively. The judge acknowledged that to stay an otherwise regular prosecution was an exceptional step. He also noted the need to establish that the proceedings were truly oppressive before a stay could be granted. Mr Darbishire argued that, on their facts, Maxwell and Warren were very different to the circumstances of this case. The judge applied the correct principles and came to the right result.

Discussion

41. The exercise being conducted by the judge was described in S (SP) [2006] EWCA Crim 756 at [20] in these terms:

> "In our judgment, the discretionary decision whether or not to grant a stay as an abuse of process….is an exercise in judicial assessment dependent on judgment rather than on any conclusion as to fact based on evidence."

In that case Lord Justice Rose was concerned with whether delay had led to an abuse of process but the approach he identified is of general application. The judge was carrying out an evaluative process. It was not an exercise of pure discretion. We have to ask whether his decision was wrong.

42. We consider that the judge did not err when he identified the legal principles he had to apply. Improper motive in bringing criminal proceedings can provide the basis for staying those proceedings as an abuse of process. Insofar as authority is required for that proposition it is established by Kay. The test applied by the judge as set out at [29] above was taken from the ruling by the judge at first instance in Taktouk. In its judgment the Court of Appeal Criminal Division approved the terms of that ruling. The

judge said that the motive to settle the civil proceedings had to be either the primary motive for the criminal prosecution or a dominant oblique motive. In either event the motive had to be so unrelated to the criminal proceedings as to render them an abuse of process. In addition, the improper or oblique motive would have to make the criminal proceedings truly oppressive. We are satisfied that the judge was correct in setting out the test as he did.

43. We are satisfied that the judge was correct to distinguish Siddiqui. In Siddiqui the material of which the judge was unaware when he issued the summons was a document, namely a settlement agreement, in the hands of the defendant. The judge in Siddiqui set aside the summons on the basis that the failure of the prosecutor to disclose it when the without notice application for a summons was made constituted a breach of the duty of candour. That amounted to an abuse of process. This court determined that the judge fell into error. The criminal proceedings could not offend the court's sense of justice and propriety. The prosecutor had not kept the defendant from discovering the document. It was a document already in his hands. The defendant was not prejudiced since he could use as he thought fit in the proceedings thereafter. Here, the material not disclosed at the point at which application was made for the issue of the summonses was not in the hands of the defendants. Had it not been for a two stage disclosure exercise, the material would never have been revealed. More to the point, the material demonstrated the motive of PM. It was his motive that had the potential to render the criminal proceedings an abuse. The fact that, once disclosed, the defendants were aware of the position did not make the proceedings any less of an abuse of process. It was for the judge to decide when considering whether to set aside the summonses whether the proceedings constituted an abuse of process. That was a power provided by CPR Part 7.2(14)(f). He was not required to allow the prosecution to proceed simply because the evidence of motive now was apparent and that this was an issue that could be determined by the Crown Court. If improper motive meant that the criminal proceedings were an abuse of process, it was for the judge to determine that question at the point of issue of the proceedings.

44. Nor do we find force in the argument put forward by Mr Perry that the judge placed undue reliance on Asif v Ditta or was wrong not to distinguish it on the facts. It is true that in Asif v Ditta no civil proceedings had been issued and the prosecutor was being used as a proxy. These features were absent from this case. But they were merely two pieces of the factual jigsaw that led Davis LJ to conclude that the criminal proceedings were being used as 'leverage' and were an abuse of the process of the court. On the evidence of motive found in PM's emails with his civil and criminal solicitors in this case, the judge was entitled to find at [92] in his judgment that the prosecutor was using the criminal proceedings, not as a means to obtain "punishment for criminality, but rather as leverage to achieve the recovery of money from the defendants."

45. We do not consider that there is any sensible parallel to be drawn between the approach taken by regulatory bodies seeking to enforce a regulatory regime and the oblique motive of a private prosecutor. Mr Perry relied on Environment Agency v Stanford [1998] Env.L.R. 286 in support of his argument. Mr Stanford carried out waste management activities which required a licence. He did not have a licence. He claimed to come within a statutory exemption from the need for a licence. The Environment Agency advised him as to the works he needed to carry out to bring himself within the statutory exemption. They warned him that prosecution would follow were the works

not done. The detailed basis on which Mr Stanford claimed that the later proceedings were an abuse of process is of no relevance to the argument put by Mr Perry. His proposition is that the Environment Agency was engaged in the same exercise as PM is untenable. The Agency was open and transparent in its dealings with Mr Stanford. It was doing what regulatory bodies commonly do, namely providing a person who was committing an offence with the chance to regularise their position. In such a situation, a subsequent prosecution will not be tainted by any improper motive; rather the reverse.

46. The judge's approach to the lawyers instructed by PM was cautious. He did not make positive findings in respect of their conduct. Rather, he said that he did not find that material had been deliberately concealed so as to manipulate the application for a summons. He did not make any finding of misconduct against the lawyers acting for the prosecutor in these proceedings. Given the messages passing between PM and his lawyers, in particular EMM, we consider that the judge was generous to the lawyers. A matter of weeks prior to the application for the issue of the summonses, EMM had observed in writing that, if the criminal court considers that a primary motivation of a criminal prosecution is to put pressure on the defendant and to obtain a settlement, then it will take a dim view of that. EMM had gone on to say that PM had made it clear many times that justice was his number one priority yet this was not something apparent from the e-mail exchanges between EMM and PM and smacks of disingenuity. Indeed, PM's response to EMM at this point was to qualify the proposition that justice was the number one priority. The significance of EMM's observation is that they were alive to the issue of motive and its impact on the propriety of criminal proceedings. This is not easy to reconcile with [206] of the case summary served in support of the issue of the summonses set out at [13] above. The judge may not have found that the failure to disclose the messages between PM and his lawyers was manipulation of the application for the summonses or that there had been misconduct. In our view the judge did not exculpate the lawyers. There was a failure to disclose highly relevant material. That failure was a serious error irrespective of culpability.

47. Moreover, any lack of gross culpability on the part of the lawyers did not mean that in fact there had not been a breach of the duty of candour. As noted above, the judge found that the breach was both "serious and substantial". The material in question should have been disclosed and it was not. In any event, the crucial issue was whether what was revealed by the material had the effect of rendering the proceedings an abuse rather than whether there had been a culpable breach of the duty of candour.

48. Applying the legal principles as he did, was the judge's decision that the criminal proceedings were an abuse of process irrational? We are satisfied that his conclusion that PM's primary motivation in issuing criminal proceedings was to use those proceedings as a threat in order to force CM to settle the civil claim cannot be open to sensible criticism. As PM put it in the document he entitled "Full and Final Story" which was provided to EMM in October 2021, he intended to use the threat of criminal sanction "to bring (CM) to his knees and make him want to settle and close the chapter". The content of messages over the succeeding months confirmed that this was PM's purpose. This was not a proper use of criminal proceedings. Whilst it is correct that restitution for the victim may be a proper objective of the criminal justice system, this assumes that the criminal process is to be used directly for that reason. In this instance, the criminal proceedings were to be used as a means to an end. The purpose of the criminal process is not to serve the private interests of any individual. The fact that

there was and is prima facie evidence of fraud on the part of CM and others cannot legitimise criminal proceedings when their purpose was to threaten. It was apparent from the exchanges between PM and EMM, in particular the e-mail of 8 July 2022, that PM envisaged the threat carried by the issue of criminal proceedings having the desired effect in which event the summonses would be withdrawn. That shows that the criminal proceedings were not an exercise in criminal justice. Rather, they were a tool being used by PM for his private purposes. In our view, that constituted an improper motive.

49. The judge went on to conclude that the criminal proceedings were truly oppressive. Mr Perry criticised this conclusion on the basis that the judge gave no convincing reason for saying that the proceedings were oppressive. We agree that the judge's "analysis and decision" which we have summarised at [29] to [32] above was discursive. It did not deal with the issue of oppression in a separate section of the judgment. However, the judge set out in some detail the nature of PM's improper motive and the effect thereof on the integrity of the criminal proceedings. The exchanges between PM and his son and both sets of lawyers are evidence of the truly oppressive nature of the criminal proceedings. He identified that criminal proceedings of themselves are burdensome to defendants irrespective of the merits. The totality of the judge's reasoning sufficiently established the element of oppression. To a significant extent this followed from the improper use to which PM intended to make of the criminal proceedings. Where a prosecution lacks any true public interest rationale, the use of the criminal process prima facie will be oppressive.

50. For the reasons we already have given, we do not consider that the judge was wrong when he gave the lack of candour at the point at which application was made for the summonses the prominence he did. The case summary to which we already have referred was clearly misleading at best. The answer given in the Case Summary (see para [13] above) to the possible defence argument that the proceedings are malicious, vexatious or otherwise improper, that it is not for the defendant to determine the motives of the prosecution, is troubling when the material that had been wrongly withheld in breach of the duty of candour demonstrated that PM's dominant motive rendered the prosecution an abuse of the process of the court. The material later disclosed should have been placed before the judge from the outset. But we also agree with the proposition that the question of lack of candour was a side issue. The judge was concerned with whether the criminal proceedings were brought for an improper motive so unrelated to the proceedings that the proceedings were an abuse of process and whether the consequence was truly oppressive. We have already explained why we consider that the judge's conclusions on those issues were correct.

Conclusion

51. When ordering a rolled up hearing, Sir Duncan Ouseley said that he was "not wholly persuaded that the District Judge was arguably wrong" and that "the claim may benefit from oral argument". We heard full oral argument. As a result we are wholly persuaded that the judge was not arguably wrong. In those circumstances, we do not consider that we should even give permission to apply for judicial review. Thus, we refuse permission. Because we have heard full argument, this judgment may be cited as authority notwithstanding the procedural outcome.

52. We were greatly assisted by counsel on both sides for their written and oral arguments. We also commend the judge for the comprehensive nature of his judgment which was

handed down just over two weeks after the hearing of the application to set aside the summonses